
Book Review: Studies in Canadian Family Law, by D. Mendes da Costa (ed.)

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STUDIES IN CANADIAN FAMILY LAW. EDITED BY D. MENDES DA COSTA, Q.C. Two Volumes. Toronto: Butterworths. 1972. Pp. X, 1104. (\$79.50).

Those lively publishers, Butterworths, have given us another in their Canadian Legal Studies Series. ("Lively" and "given" are relative terms of art, but let it pass). Canadian law has suffered from a sad lack of doctrinal writing. For a while in the nineteen-sixties, it looked as if Canadian legal studies would make a permanent leap from a cringing reliance on the black-letter law of Halsbury's Laws of England to a total absorption in the sociological functional approach. The Butterworth series is an attempt to provide a stepping-stone across that leap and the experiment has been a success.

These volumes are most handsomely produced. The type-face is attractive. Even the table of cases causes no eye-strain and there is an adequate index (which is all too rare). The quality of writing is a tribute to the editor. I particularly liked Professor Hughes' style. One essay, which will not be identified, lacks this felicity of style. Will that writer, and many other legal writers, please forswear the use of introductory phrases starting with "It is submitted", "It must be perfectly plain", "It might also be thought", "It is interesting to note", "It is a curious fact", "It is not suggested", "It would seem self-evident", etc. It is submitted that they add nothing.

I have not carried out a consumer survey but I would imagine that practitioners will find these volumes useful reference works. Most of the authors have attempted to give a comprehensive summary of the law on their chosen subject. Of necessity, some of these are rather pedestrian because they are glorified casenotes or descriptive catalogues of statutes. The better ones have provided us with a useful summary of the law and yet have not neglected the need or possibilities of reforms. The best example of this approach is Professor Cullity's essay on "Property Rights During the Subsistence of Marriage". (Vol. I pp. 179-281). I have absolutely no experience on this subject and yet, for instance, I found his discussion of community of surplus in resolving problems of matrimonial property most illuminating and very interesting. He states the problems and possibilities of reform in a most engaging way. In discussing criteria for the judicial distribution of property

on the breakdown of marriage, he asks provocatively:— “Does a nagging wife who is largely responsible for the long hours her husband works at his business make more or less of a contribution than a wife whose husband begrudges every minute he is away from her?” (Vol. I at 277).

The editor Professor Mendes da Costa, Q.C., has contributed two lengthy sections on Divorce and Conflicts. Both are very workmanlike efforts which share with Cullity's contribution the advantage of a well-integrated, realistic and constructive discussion of law reform (particularly about the basis of divorce law reform). In some of the inferior essays, there is a routine discussion of the current law and then there is tacked on a short quib on what is wrong with the law. No one is suggesting that these volumes should have been iconoclastic tracts on what is wrong with the law relating to the family. They are presumably meant to be useful to practitioners and it would hardly have been appropriate to have ephemeral or philosophical pieces on what the shape the world should be. Obviously some essays more readily lend themselves to an uncomplicated legal analysis — such as illegitimacy, alimony, custody, *res judicata* and reciprocity. On the other hand, Professor Fodden has the difficult task of describing family and welfare assistance legislation in Canada. He has carried out this exacting task quite adequately but I am sure he would have been much happier if he had been able to address himself to broader issues.

Studies in Canadian Family Law covers a wide variety of topics. So wide, in fact, that one cannot imagine trying to cram all of them into one, or even, two Family Law courses in the law school curriculum. I only taught the subject matter for a short time and I find it rather daunting to discover how little of the contents of this book I managed to cover in any kind of depth. The one vivid recollection I have of the students' reaction to the problems of family law is that by the end of the course they had (notionally) hired several thousand social workers who were to solve the problems which were seemingly insoluble at law. I find little of the flavour of those halcyon days in *Studies in Canadian Family Law* which probably shows how useful this book should be for practitioners and how wrongheaded the teacher must have been. Teaching family law from a sociological viewpoint leaves one with the impression that there is very little law in family law; at least this is true when one leaves those areas where there are definitions which are so clear-cut that the Law is not worth more than a pressing bibliographical mention. I was thinking of these problems on reading what I found to be the most challenging essay in the book — Judge Allard's thoughts on “Family Courts in Canada”. (Vol. I pp. 1-43).

Judge Allard tries to cover too much ground but when he talks about the family court, I think we should take advantage of his years of practical experience. (This book might well be faulted because most of the writers have only limited knowledge of the law in action, although admittedly, many have worked for the various law reform commissions).

Judge Allard raises some basic issues about the family court which should challenge the very forum of family law. His Honour outlines the various models which have been suggested for the family court — courts with

fully comprehensive jurisdiction over the problems of the family, "inferior" courts and "superior" courts sharing the jurisdiction, legalistic courts or family panels which are hardly courts at all.

This experienced judge has great respect for the court's counselling services whose most important function is to make referral to the most appropriate resource in a community which probably has a confusing mass of overlapping, duplicated services. At the same time, he realizes the difficulties in placing too much reliance on these services. There are so many pressures on the family court which are tending to erode the influence and role of the social welfare workers. Lawyers are appearing in the family court with increasing regularity (although Judge Allard has not seen many lawyers in his court yet and perhaps has some reservations about their usefulness in solving family problems). The Law Guardian system of New York (and other places) is gaining support and is likely to change the whole structure of the court. Once again Judge Allard has reservations because the Law Guardian has no clearly identifiable client whose instructions he can put before the court, and because he is in conflict with others in the court administrative structure who shape the Law Guardian's aim of protection of the child. One can easily share the judges agonizing over the role to be played by all the participants in the family court process. He states these dilemmas very well. On the philosophy of family law he asks:

What purposes should society strive for through family law? Who are, in fact, family members? Do people really want the rehabilitative social approaches advocated in a Family Courts, or do they in fact want punitive judgement, the provoked in a Family Court or do they in fact want punitive judgement, the pro-illustration of contradictory philosophy is the premise that the welfare services seek helpful and broad social understanding of family breakdown, but insist on rigid legalistic and punitive procedures, as where husbands appear in default in maintenance obligations. (Vol. I, at 8, 9).

On the difficult question of the role of the counsellor (and whether it should be a voluntary or compulsory service of the court), the judge says:

What is the specific role of the Court officer, does he represent the interests of the children, the husband or the wife? The counsellor is seen to be closely related to the prosecution's function and men cannot help but perceive this close connection. If they reveal themselves honestly to the counsellor they may place themselves in jeopardy. The wife may reveal some reason why she is not entitled to maintenance. Can the counsellor permit the court to continue in ignorance of such basic facts and allow orders to be made where they are not in fact well formulated; does the counsellor and the intake worker in fact unduly 'pre-try' a case, or unduly influence the courts in its findings? (Vol. I, at 19).

Judge Allard asks many questions and provides few answers. He is, however, clearly in favour of career family court judges and I share his enthusiasm for the McRuer Commissioner's suggestions that future family court judges need training and practical experience in law *and* social welfare. On the other hand, I do not have his faith in post-graduate social work education as likely to produce automatically better counselling services.

The judge does not show any clear preference for a particular type of tribunal to replace the present family court. He is sufficiently the realist to know that a Super Family Court is unlikely to solve all our legal problems

or, more importantly, the tragic fact of family breakdown. He also points out that we do not seem to have decided on our aims for the court. (Professor Fraser (Vol. I, at 70) makes a useful examination of this problem in relation to child protection). Do we want it to concentrate on prevention, reconciliation or treatment? Should it be adversary in its process? No-one can blame the judge for leaving us in this quandary of ambiguity. Most of us are only studying *The Family and the Law* from a safe distance. He has to live with it.

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