

INTRODUCTION to the STUDY OF LAW



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## FOREWORD

The publication of this "little book" must bring joy to the heart of anyone interested in legal education in Canada. It fills a long-standing need. Until now, the student contemplating the study of law or, having made the decision, beginning his or her never-to-be-forgotten experience, has been filled with apprehension. Most students in either of these two categories do not, today, come from backgrounds that would give them a good idea of what law, and particularly the study of law, is all about. There is, then, the mystery, if not the fear, of the unfamiliar. Not a few of them entertain doubts about their decision, arising, perhaps, out of a feeling of guilt for having abandoned their undergraduate field of study for a discipline leading to the practice of a profession. "What justification", they may ask themselves, "is there for a professional course in a university?" That question, astonishingly enough, continues to be asked, despite the historic association of the study of law and universities of the world. It is a question which this book should help put to rest. Finally, for our puzzled student, there is the inevitable confusion, and frequently accompanying insecurity, associated with a new way of examining, analyzing and solving difficult intellectual questions affecting the relationships of real human beings in an increasingly complex society.

Professor Waddams tells us that the principal architect of modern Canadian legal education, Dean C.A. Wright, described the study of law as "high adventure". Non-lawyers might be forgiven for wondering how objective that brilliant scholar and teacher could have been about a subject to which he had devoted his life. But high adventure is indeed what studying law is, and no reader can come away from this book without sensing the adventure that awaits him or her. The author not only tells his audience how exciting legal analysis is but, in exceptional simplicity, demonstrates it by his very manner of telling. Along the way he strips away the confusion

and mystery commonly and, it must be admitted, justifiably, associated with many of our Canadian legal institutions.

Perhaps most characteristic of law as an intellectual subject is its concern with the precision of language. To me the chief virtue of this introduction to the study of law is the example shown in the economy and precision of the words chosen by the author to demonstrate the points he makes. Clear thinking requires clarity of communication. Dean Wright's career may, in the eyes of many, raise a suspicion of bias. Two men of letters he was fond of turning to for support may be more acceptable. In *The House of Intellect*, Jacques Barzun, in his chapter on the language of learning and pedantry wrote:

. . . contempt and ingratitude toward the interpreters of law is a grave fault. It shows ignorance of the long, arduous growth and superior merit of an institution to which we owe our ease and privileges as thinking beings. The law is a model of intellectual work, and it is a work of words. It is a profession easy to ridicule by its externals and it is criticizable, like other institutions, for its anachronisms. But as an attempt of the *esprit de finesse* to mold coherent conceptions of the true and the just on the restless multiplicity of human life, it is a triumph of articulateness and exactitude . . . .

The American poet, Archibald MacLeish, speaking of his experience with the Socratic method, described by Professor Waddams, said:

My education such as it is, began . . . in the [Harvard Law] School. I say this not because the occasion demands it (I have said it often and elsewhere), but because it is true. And what was the substance of that education? The Socratic spark which set insatiable fires where no flame was ever seen before. . . . But beyond the spark? Beyond the spark a vision — the vision of the human mind, the great tradition of the intellectual past which knows the bearings of the future. No one, not the most erudite or scholarly man, who has failed to see that vision can truly serve the art of poetry or any other art, and by no study better than the

study of the law can that great sight be seen. The law has one way of seeing it. Poetry has another. But the journey is the same.

The full sight can be had only as the student progresses but, this book will, I am confident, provide a glimpse. I do not know anyone else who could have written it. If one detects an abundance of enthusiasm in what I have written this foreword has served its purpose. Only a few of the readers of this work can expect to have its author as a teacher. By reading his words all others, alas, will have to settle for the next best thing.

Horace Krever

## PREFACE

This little book is written for students beginning or seriously contemplating the study of law in the common law provinces of Canada. It is neither a textbook nor a scholarly treatise. Its aim is to bring home to the reader some of the ideas about law that must be grasped by the student. It is not a book on the Canadian legal system, as such, but it attempts to give the reader enough knowledge about the structure of the legal system in Canada and enough of the ideas of law that are common currency in the professional and academic legal world to enable the student to approach his studies with greater knowledge and, it is hoped, enjoyment than he might otherwise have. For the student who is considering, but has not yet embarked on, a course of legal studies, it is hoped that the book will impart some ideas worth thinking about and something of the flavour of the law.

In writing this book I have drawn from many sources. I am indebted to my own teachers, to my students, and to my colleagues, particularly to Professors Alexander, Prichard and Sharpe who made very helpful suggestions. Among written sources I am indebted particularly to my own introduction to the study of law, Professor Williams' *Learning the Law* and to Sir Robert Megarry's superb collections of legal memorabilia, *Miscellany-at-Law* and *A Second Miscellany-at-Law*.

In the course of the book I have touched rather lightly on difficult and complex matters. Where opinions differ on any question, I have tried to indicate the main outlines of the opposing views, not, of course, because I think that a complex question can be disposed of in a few sentences, but in order to convey to the reader some of the interest and intellectual excitement that attends the study of law. The late C.A. Wright was exaggerating only slightly when, as Dean of the University of Toronto law school, he used to tell the incoming students that the study of law was "high adventure".

Toronto

S.M. Waddams

# TABLE OF CASES

Amdt. of the Constitution of Canada (Nos. 1, 2 & 3), Ref. re (1981) 125 D.L.R. (3d) 1 (S.C.C.) . . . . .	148
Anon. (1631) 2 Dyer. 1886, n., 73 E.R. 416 . . . . .	55
Bachand and Dupuis, Re [1946] 1 W.W.R. 545, 62 B.C.R. 436, [1946] 2 D.L.R. 641 . . . . .	9
Bailey v. Bullock [1950] 2 All E.R. 1167 . . . . .	34
Bakke v. Regents of the University of California, 98 S.Ct. 2733 (1978) . . . . .	45
Ballard v. North British Ry. Co. [1923] S.C. 43 (H.L. Scot.) . . . . .	56
Beaver v. R. [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129 . . . . .	65
Berger v. U.S., 295 U.S. 78 (1935) . . . . .	171
Colt v. Coventry & Lichfield (1617) 80 E.R. 290, ( <i>sub. nom.</i> Colt v. Glover) 1 Roll. Rep. 451 . . . . .	8
Davis Contractors Ltd. v. Fareham Urban Dist. Council [1956] A.C. 696, [1956] 2 All E.R. 145 (H.L.) . . . . .	100
Day v. Savadge (1614) Hob. 85, 80 E.R. 235 . . . . .	131
Demarco v. Ungaro (1979) 95 D.L.R. (3d) 385 (Ont. H.C.) . . . . .	171
Enderby Town Football Club Ltd. v. Football Assn. Ltd. [1971] Ch. 591, [1971] 1 All E.R. 215 (C.A.). Petition for leave to appeal to House of Lords dismissed . . . . .	16
Finkle, Re (1977) 82 D.L.R. (3d) 445 (Man. Q.B.) . . .	50
Gare, Re [1952] Ch. 80, [1951] 2 All E.R. 863, [1951] W.N. 564 . . . . .	142
Groves v. John Wunder Co. (1939) 286 N.W. 235 (Minn. S.C.) . . . . .	30
Hadley v. Baxendale (1854) 9 Exch. 341, 156 E.R. 145 . . . . .	100
Hamlin v. Great Nor. Ry. Co. (1856) 1 H. & N. 408 . . . . .	34
Harrison v. Carswell [1976] 2 S.C.R. 200, [1975] 6 W.W.R. 673, 75 C.L.L.C. 14,286, 5 N.R. 523, 25 C.C.C. (2d) 186, 62 D.L.R. (3d) 68 . . . . .	13, 112

Hinz v. Berry [1970] 2 Q.B. 40, [1970] 1 All E.R. 1074 (C.A.)	50
Hobbs v. London & South Western Ry. Co. (1875) L.R. 10 Q.B. 111	34
Holt v. Markham [1923] 1 K.B. 504 (C.A.)	6
Ingram v. Little [1961] 1 Q.B. 31, [1960] 3 All E.R. 332 (C.A.)	108, 109
Jarvis v. Swans Tours Ltd. [1973] 1 Q.B. 233, [1973] 1 All E.R. 71 (C.A.)	35, 75
Johns v. Smith, 176 F. Supp. 949 (U.S. Dist. Ct., 1959) .....	170
Johnson v. Agnew [1980] A.C. 367 (H.L.)	38
Jones v. Randall (1774) 1 Cowp. 37, 98 E.R. 954 .....	5
Laporte v. Laganère (1972) 18 C.R.N.S. 357, 8 C.C.C. (2d) 343 ( <i>sub nom.</i> Re Laporte and R.), 29 D.L.R. (3d) 651 (Que.)	3, 69
Laporte and R., Re <i>see</i> Laporte v. Lagnière	
Lemy v. Watson [1915] 3 K.B. 731	142
Lewis v. Averay (No. 2) [1973] 1 W.L.R. 510, [1973] 2 All E.R. 229, reversing [1972] 1 Q.B. 198, [1971] 3 All E.R. 907 (C.A.)	109
Lloyds Bank v. Bundy [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.)	50
M'Alister (or Donoghue) v. Stevenson [1932] A.C. 562 (H.L.)	53
McDowell v. Oyer (1853) 21 Pa. Sup. 417	13
Meek v. Fleming [1961] 2 Q.B. 366, [1961] 3 All E.R. 148 (C.A.)	170
Metropolitan Properties Co. v. Purdy [1940] 1 All E.R. 188 (C.A.)	11
Miliangos v. George Frank (Textiles) [1976] A.C. 443, [1975] 3 All E.R. 801 (H.L.)	113
Millar, Re [1936] O.R. 554	16
Min. of Indian Affairs & Nor. Dev. v. Ranville, S.C.C., Sept. 28, 1982 (not yet reported)	115
Moran v. Pyle Nat. (Can.) Ltd. [1975] S.C.R. 393, [1974] 2 W.W.R. 586, 43 D.L.R. (3d) 239, 1 N.R. 122	94



Morgentaler v. R. [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 4 N.R. 277, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161 .....	19
Murdoch v. Murdoch [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367 ..	19
Omychund v. Barker (1744) 1 Atk. 21, 26 E.R. 15 ...	114
Ont. Mushroom Co. v. Learie (1977) 15 O.R. (2d) 639, 77 C.L.L.C. 14,086, 76 D.L.R. (3d) 431 (Div. Ct.) .....	137
Overseas Tankship (U.K.) v. Morts Dock & En- gineering Co. (The Wagon Mound) [1961] A.C. 388, [1961] 1 All E.R. 404 (P.C.) .....	66
Packer v. Packer [1954] P. 15, [1953] 2 All E.R. 127 (C.A.) .....	18
Peevyhouse v. Garland Coal & Mining Co. (1963) 382 P. 2d. 109 (Okla. S.C.) .....	63
Prager v. Blatspiel, Stamp & Heacock Ltd. [1924] 1 K.B. 566, [1924] All E.R. Rep. 524 .....	18
Quinn v. Leathem [1901] A.C. 495 (H.L.) .....	102
Rathwell v. Rathwell [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 83 D.L.R. (3d) 289, 19 N.R. 91 .....	19
R. v. Dudley and Stephens (1884) 14 Q.B.D. 273 ..	4, 64
R. v. Majewski [1977] A.C. 443 (H.L.) .....	102
R. v. Morgentaler (1976) 33 C.R.N.S. 244, 27 C.C.C. (2d) 81, 64 D.L.R. (3d) 718. Leave to appeal to the Supreme Court of Canada refused at 27 C.C.C. (2d) 81n, 64 D.L.R. (3d) 718n (Can.) .....	19
R. v. O'Connell (1844) 7 Ir. L.R. 261 .....	169
R. v. Paine (1792) 22 St. Tr. 357 .....	172
R. v. Wilkes (1770) 4 Burr. 2527, 98 E.R. 327 (H.L.) .....	103
Richardson v. Mellish (1824) 2 Bing. 229, 130 E.R. 294 .....	16
Saunders v. Anglia Bldg. Society [1971] A.C. 1004, [1970] 3 All E.R. 961 (H.L.) .....	111

Schorsch Meier G.m.b.H. v. Hennin [1975] Q.B. 416, [1975] 1 All E.R. 152 (C.A.)	113
Scruttons Ltd. v. Midland Silicones Ltd. [1962] A.C. 446, [1962] 1 All E.R. 1 (H.L.)	6
Seaford Court Estates Ltd. v. Asher [1949] 2 K.B. 481, [1949] 2 All E.R. 155, affirmed [1950] A.C. 508, [1950] 1 All E.R. 1018 (H.L.)	143
Sky Petroleum Ltd. v. V.I.P. Petroleum Ltd. [1974] 1 W.L.R. 576, [1974] 1 All E.R. 954	113
Slater v. May (1704) 2 Ld. Raym. 1071, 92 E.R. 210 ( <i>sub nom.</i> Slaughter v. May)	120
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) .....	14, 111, 112
Spears and Levy, Re (1974) 52 D.L.R. (3d) 146 (N.S. C.A.)	128
Spector Motor Service, Inc. v. Walsh, 139 F. (2d) 809 (1944)	112
Steadman v. Steadman [1976] A.C. 536, [1974] 2 All E.R. 977, affirming [1974] Q.B. 161, [1973] 3 All E.R. 977 (H.L.)	124
Swinfen v. Chelmsford (Lord) (1860) 2 L.T. 406, 157 E.R. 1436	171
Thorn v. Dickens [1906] W.N. 54	142
United Australia Ltd. v. Barclay's Bank Ltd. [1940] 4 All E.R. 20, [1941] A.C. 1 (H.L.)	54
United Scientific Holdings Ltd. v. Burnley Borough Council [1978] A.C. 904 (H.L.)	130
Wagon Mound, The <i>see</i> Overseas Tankship (U.K.) v. Morts Dock & Engineering Co.	
Waring, Re; Westminster Bank v. Awdrey [1942] Ch. 426 (C.A.)	116
Waring, Re; Westminster Bank v. Burton-Butler [1948] Ch. 221, [1948] 1 All E.R. 257	116
Whitfield v. Can. Marconi Co. (1967) 68 D.L.R. (2d) 251. Affirmed without written reasons (1968), 68 D.L.R. (2d) 766n. Application for rehearing dismissed [1968] S.C.R. 960	17

# CONTENTS

<i>Foreword</i> .....	iii
<i>Preface</i> .....	vii
<i>Table of Cases</i> .....	xiii
<b>Chapter 1 What is Law?</b>	
Introduction .....	1
Social Science or Humanity .....	2
Academic study or practical training .....	2
Rules or process .....	3
The idea of justice .....	5
The rule of law .....	8
The role of the judges .....	10
Public policy .....	16
Law and social change .....	18
Divisions and sources of law .....	21
<b>Chapter 2 Legal Education</b>	
The purpose of legal education .....	23
Canadian Legal education .....	25
Curriculum .....	28
The case method .....	30
Case briefs .....	31
Casebooks and textbooks .....	37
University law courses outside the law faculties ....	38
Law school admissions .....	40
Reasons for studying law .....	46
Admission to practice .....	47
<b>Chapter 3 The Language of the Law</b>	
Legal language .....	49
The language of litigation .....	50
Citing cases in legal writing .....	51
Civil litigation .....	53
French and Latin phrases .....	54

**Chapter 4 Analyzing Legal Problems**

Clarity .....	57
Critical analysis .....	58
Reserving conclusions .....	60
Arguing from first principles .....	61
Format of analysis .....	62
Use of decided cases .....	62
Facts in hypothetical problems .....	65
Problems in several parts .....	67
Concealed issues .....	68
Questions to which the answers are unknown .....	69
Essay questions .....	70
Unconventional analysis .....	72
Legal research and writing .....	75
Examinations .....	76

**Chapter 5 Public Law**

Criminal law .....	79
Administrative law .....	84
Constitutional law .....	85
International law .....	86

**Chapter 6 Private Law**

Divisions of private law .....	87
Contracts .....	87
Torts .....	88
Restitution .....	90
Property .....	92
Civil Procedure .....	93
General first-year courses .....	94
Quebec law .....	95
Other subjects .....	96

**Chapter 7 The Common Law**

Meaning of "common law" .....	99
Judicial reasoning .....	100
Logic, reason and the law .....	102

The use of decided cases	104
Res judicata and stare decisis	115
English, American and Commonwealth cases	117
Legal fictions	118
Law reports and digests	120
<b>Chapter 8 Equity</b>	
The Court of Chancery	123
The modern court	125
Equitable doctrines	126
<b>Chapter 9 Statutes</b>	
Legislative supremacy	131
The process of legislation	134
Regulations	135
Process of interpretation	137
Rules of interpretation	139
Legislative intention	142
<b>Chapter 10 The Structure of the Courts</b>	
Superior Provincial Courts	147
Supreme Court of Canada	148
Federal Court	155
Inferior Courts	156
Judicial titles and forms of address	159
English courts	159
American courts	161
<b>Chapter 11 The Legal Profession</b>	
Lawyers and the public	163
Varieties of practice	164
Lawyers outside private practice	165
Appointment to the bench	165
The adversary system	166
Ethics of advocacy	167
Influence of advocacy	172
Organization of the profession	179

Specialization .....	181
Legal aid .....	183
Fees for legal services .....	185
Contingent fees .....	185
Prepaid insurance for legal services .....	186
Advertising of Fees .....	187
<i>Appendix A</i>	
Latin words and phrases in common legal use .....	189
<i>Appendix B</i>	
Words and phrases derived from French .....	213
<i>Appendix C</i>	
Law reports, digests, encyclopedias and looseleaf services .....	219
<i>Appendix D</i>	
Canadian common law law schools .....	229
<i>Appendix E</i>	
Statement of the Association of American Law Schools, Policy on prelegal education .....	231
<i>Appendix F</i>	
List of common abbreviations .....	237
<i>Index</i> .....	249

# Chapter 1

## WHAT IS LAW?

### INTRODUCTION

A question like that in the title to this chapter is not to be answered in a few words, or even in a few books. Indeed, those responding to the question, even lawyers, will always differ from each other in their answers, because the concept of law is so basic to our ideas of society that it has no clear meaning outside the writer's own social and political philosophy. No doubt Canadian law is one thing to a capitalist, and quite another to a Marxist. Further, pre-revolutionary law in a Marxist state is one thing. Post-revolutionary law is something quite different.

Aristotle said that Man is a political animal. He did not, of course, have in mind the party politics of the twentieth century. He meant that Man naturally lives in a community (the polis or city-state being the particular kind of community he had in mind).<sup>1</sup> This view remains generally accepted. Despite the emphasis we place on Man as an individual, it can hardly be doubted that it is part of his nature to live in a community. As a recent commentator said, Man is not purely a social animal, nor a solitary animal, he is a social and a solitary animal at the same time.<sup>2</sup> No complete description of Mankind could possibly avoid reference to the community as well as to the individual.

A universal feature of human society has been conflict. Individuals have individual interests. On occasion, they conflict

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1 Aristotle, *Politics*, i, 2, 9. 1253a (Newman ed.).

2 J. Bronowski, *The Ascent of Man* (1973), p. 411. "Justice is a universal of all cultures. It is a tightrope that man walks between his desire to fulfil his wishes, and his acknowledgment of social responsibility. No animal is faced with this dilemma: an animal is either social or solitary. Man alone aspires to be both, a social solitary."

with each other. If a society is to survive it must develop a system of resolving conflicts between individuals, and conflicts between individuals on the one hand and the community on the other. The law is the system of resolving those conflicts.

### SOCIAL SCIENCE OR HUMANITY

Thus, the law in any society is the society's attempt to resolve the most basic of human tensions, that between the needs of man as an individual, and his needs as a member of a community. The law is the knife-edge on which the delicate balance is maintained between the individual on the one hand and the society on the other.

Law is, therefore, at the same time, a social science and a humanity. Indeed, it is fundamental to both, and constitutes the bridge between them. It must seem strange, then, to find that the study of law in most Canadian universities is rather isolated both from the Social Sciences and the Humanities. In most universities the Faculty of Law is independent of the Faculty of Arts and Science. The Humanities and Social Sciences research libraries rarely include collections of law books.

### ACADEMIC STUDY OR PRACTICAL TRAINING

Part of the explanation of the isolation of the law in the university undoubtedly lies in the pragmatic nature of legal study. One can talk at considerable length about the reconciliation of the individual and the community, but the study of law brings the lawyer down very suddenly from the purity of theoretical speculation to the sordid reality of practical needs. Can the police compel a suspected bank robber to undergo surgery against his will in order to discover whether a foreign body lodged in his shoulder is a bullet? Well, on the one hand, the interests of the community require us to facilitate police investigations, and it would be very useful for the police to discover whether the object is a bullet. The safety of society requires an effective police and reasonable regularity in punish-



ment of the guilty. But then, on the other hand, there is the sanctity of the human person, which every free society must respect. We cannot allow the police to cut people up to look at their insides even if it would make their job easier. Yes, but can we do it (the police will ask)? The police surgeon is free at four this afternoon. Can I stop them (the prisoner will ask you)? And how? And quickly? These are the questions that will be asked of lawyers and judges, and they demand answers. Mr. Justice Hugessen of the Quebec Court of Queen's Bench had to give one on July 7, 1972.<sup>3</sup>

Sometimes people are heard to advocate the study of law as a "liberal art", thereby implying that inquiry into what the law actually is can be eliminated and that the existing law schools should reform themselves or take their crass pragmatism elsewhere. The study of law, however, can never divorce itself from a living working system. A theoretical study of police powers without attention to what the police can actually do in a particular society is not a study of law. The bridge between the theoretical and the practical is of the essence. This is not to suggest that there is no place outside the law schools for the study of law. It will be suggested below what approach such study should take.

### RULES OR PROCESS?

Many think of the law as a set of rules, and, in part, it is. The law does regulate conduct. However, the study of law is not the learning of rules. Perhaps the biggest surprise to a beginning law student is to discover the uncertainty of legal answers even to basic questions. I should rather say, especially to basic questions, for the more basic the question the greater the uncertainty. Definite answers can often be given to trivial questions: Is income tax payable on an employee's bonus? Is it

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3 *Re Laporte and The Queen* (1972) 8 C.C.C. (2d) 343 (Que. Q.B.).