CONTRACTS: CASES AND COMMENTARIES by Christine Boyle and David R. Percy, Eds. (Toronto: Carswell, 1989) pp. lxix + 856.

This is the fourth edition of a casebook on Contracts which has been widely used in Canada since 1979, primarily as a basis for introductory courses in Contracts. It contains fifteen chapters by ten contributors from eight universities in five provinces. Four of the chapters were written or edited by people who did not write or edit them for the third edition.

The editors have described the contents of the fourth edition:[1]

> The materials and their organization are somewhat traditional, for they are designed to constitute the basis of a core course in Contracts. We do not attempt to imbue the reader with a particular philosophy of the Law of Contracts and indeed any attempt to do so would be fruitless given the number and variety of our contributors. Rather we try to note a number of different approaches to Contracts throughout and to leave scope for individual teachers to pursue their own themes with those materials as a solid base.

The materials in the book come from a number of different jurisdictions and include many excerpts from the Report on Amendment of the Law of Contract published by the Ontario Law Reform Commission. The excerpts from the Report should assist students to understand the existing law and to appreciate the need in some cases for the reform of that law.

The book contains more than can be conveniently covered in an introductory course in Contracts. Much of the unused material, however, would be useful in courses on commercial law, restitution and remedies.

Several of the chapters of the fourth edition have been substantially changed. The chapter on offer and acceptance contains at least three important new cases. One of the cases[2] deals with the difference between sales by auction and fixed bidding sales, the second[3] discusses the initial contracts which may arise in the tendering process, and the third[4] is a Canadian case on a classic battle of forms.

The chapter on privity of contract is one of the better chapters in the fourth edition. It is clear from the cases and materials in the chapter that claims by third parties were routinely allowed until late in the nineteenth century when the modern rules of privity of contract began to be developed. With this historical background, students should be able to understand why modern courts are so troubled by cases involving third party claims and why their judgments in these cases so often seem artificial and contrived. The chapter ends with a new case which should prompt students to consider the future of the third party claim in Canada. In *International Terminal Operators Ltd.* v. *Miida Electronics Inc.*[5] the owner of goods sued the defendant for damages for the loss of those goods. The defendant relied on the terms of an exclusion clause in a contract between the owner of the goods and the carrier from whom the defendant acquired the goods. The exclusion clause was obviously included for the pro-

1. Preface, v.
2. *Harvela Investments Ltd.* v. *Royal Trust Co. of Canada (C.I.) Ltd.*, [1985] 2 All E.R. 966 (H.L.).
3. *R.* v. *Canamerican Auto Lease & Rental Ltd.* (1987), 37 D.L.R. (4th) 591 (F.C.A.D.).
4. *Tywood Industries Ltd.* v. *St. Anne-Nackawic Pulp & Paper Co. Ltd.* (1979), 100 D.L.R. (3d) 374 (Ont. H.C.).
5. [1986] 1 S.C.R. 752.

tection of persons like the defendant. In the course of finding a contract between the owner and the defendant, the Supreme Court of Canada specifically left open for consideration "on another day"[6] the issue of privity of contract and third party rights.

The chapter on the requirement of writing is less satisfactory. On the one hand, two new cases[7] have been added to illustrate the marked liberalization of the law concerning the requirements for part performance. This is an improvement. On the other hand, all of the cases in the chapter now deal with contracts for the sale of interests in land, and all but one of these cases are about part performance. Section 4 of the *Statute of Frauds* catches four other types of contract, and not all of these types are adequately dealt with in the series of short descriptions written by the contributor.

The chapter on contingent agreements is one of the most difficult chapters in the fourth edition. It is also the most disappointing. Apart from a very few minor changes, and the addition of an extract from *Turney* v. *Zhilka*,[8] this chapter is unchanged from the third edition and is very confusing for professors and students alike. It is a chapter that requires serious reappraisal.

There are several additions and omissions of cases in the casebook, reflecting changes in the law which have occurred since the previous edition. In *J. Nunes Diamonds Ltd.* v. *Dom. Elect. Protection Co. Ltd.*,[9] the Supreme Court of Canada appeared to reject the possibility of concurrent liability in tort and contract for a misrepresentation made by a defendant in the course of performing a contract. As Pigeon J. said, ". . . the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can be properly considered as 'an independent tort' unconnected with the performance of the contract . . ."[10] In *Central Trust Co.* v. *Rafuse*,[11] the law was changed. There can be concurrent liability unless the plaintiff has contracted with the defendant in such a way as to excuse him from tortious liability for the act or omission alleged. Subject to this one qualification, in cases in which concurrent liability exists, the plaintiff has the right to assert whatever cause of action seems most appropriate to him. Because of this change in the law, the *Nunes Diamond* case does not appear in the fourth edition of the casebook.

In the fourth edition, the editors continue to document the revolution that has occurred in the law of tenders. In *Ron Engineering*,[12] Estey J. held that a bid submitted in response to a call for tenders which required bids to be irrevocable for sixty days was binding on the tenderer and gave rise to an initial contract which Estey J. called Contract A to distinguish it from the construction contract, Contract B, into which the successful bidder would be required to

6. *Ibid.* at 788.
7. *Lensen* v. *Lensen*, [1984] 6 W.W.R. 673 (Sask. C.A.), reversed on other grounds, (1987) 44 D.L.R. (4th) 1 (S.C.C.); *Currie* v. *Thomas* (1985), 19 D.L.R. (4th) 594 (B.C.C.A.).
8. [1959] S.C.R. 578.
9. [1972] S.C.R. 769.
10. *Ibid.* at 777 and 778.
11. (1986), 31 D.L.R. (4th) 481 (S.C.C.).
12. *R.* v. *Ron Engr. & Const. (Eastern) Ltd.*, [1981] 1 S.C.R. 111.

enter. Estey J. considered only the initial contract and the question of the forfeiture of the deposit which accompanied a bid. He expressly declined to consider what effect, if any, the tenderer's mistake could have on the contract he would be expected to make if his bid was accepted. The editors included an extract from *Ron Engineering* in the third edition. In the fourth edition, they included *Ron Engineering* and extracts from two new cases which were based, in part, on *Ron Engineering*. In *R.* v. *Canamerican Auto Lease & Rental Ltd.*,[13] the Federal Court of Appeal found a contract of the type described by Estey J. as Contract A. This case appears in the chapter on offer and acceptance. In *Calgary* v. *Nor. Const. Co.*,[14] which appears in the chapter on mistake, the Court of Appeal of Alberta considered but did not resolve the issue of the effect of the tenderer's mistake on Contract B.

The chapter on illegality and public policy has been completely redone. It now contains cases on sexuality and intrauterine adoption that should be of considerable interest to students interested in public policy and social change. In *Jones* v. *Daly*,[15] an American court had to consider a cohabitors agreement made between a young man and an older man in which the young man's sexual services were an express and inextricable part of the agreement. The agreement was held to be unenforceable. In the *Baby M* cases,[16] two American courts considered the rights of the parties to a surrogacy agreement and arrived at different conclusions. These cases vividly illustrate the need for courts to adapt to social change and to react, and often very quickly, to the new, strange and sometimes very frightening developments made possible by modern science.

From a purely pedagogical point of view, the reviewer has a few minor criticisms of the casebook. The casebook contains questions from the authors interspersed among the cases and articles. While questions are valuable, students sometimes have difficulty in understanding and answering questions asked by people other than their instructors, and they often do not know and cannot determine whether the answers they give are correct. Since it is impossible to discuss all of the questions in the book in class, the editors might consider publishing a manual containing the answers or the outlines of answers to their questions. The market for such a manual ought to be at least as large as the market for the casebook itself.

Published casebooks, unlike faculty-produced types, have to cover an area of the law completely and yet be of reasonable and publishable length. The reviewer suspects that this is one of the reasons why the chapter on the requirement of writing contains only extracts from cases involving interests in land. This fact may also explain why the chapter on intention to create legal relations contains only twelve pages and extracts from three cases. In general, however, the editors of the fourth edition have been very successful in adding new material without eliminating very much that was of value from the old. In the fourth edition, the editors have reduced the number of questions and the number and

13. *Supra*, note 3.

14. [1986] 2 W.W.R. 426, 42 Alta. L.R. (2d) 1 (Alta. C.A.).

15. 176 Cal. Rptr. 130 (1981).

16. 525 A. 2d 1128 (N.J. Super. Ct., 1987) and 537 A. 2d 1227 (N.J.S.C., 1988).

length of the notes. In addition, some of the extracts from cases which appeared in the third edition are now only summarized in the notes.

It would seem to the reviewer that the editors have not wholly resisted the temptation to include, for the purposes of discussion, extracts from cases which are wrongly decided. In this regard, the reviewer would refer to *Goldthorpe* v. *Logan*[17] and *Carmichael* v. *Bank of Montreal*.[18] Both of these cases appear in the chapter on offer and acceptance and will presumably be considered by students very close to the beginning of their first year. While such cases do give the professor a chance to display his knowledge and to show why he, too, should be a judge, first-year students tend to put more faith in the opinions of judges and in what is written in casebooks, especially published casebooks, than they do in the opinions of their instructors. At the very least, the editors might note which of their cases might be wrongly decided.

It would also seem that in some instances the editors have chosen to replace old cases and cases from lower courts with newer cases and cases from higher courts without first considering whether the replacements are better teaching cases. The reviewer would refer to the replacement of *Scivoletto* v. *De Dona*[19] with *Stott* v. *Merit Investment Corp.*[20] and to the replacement of *Shadwell* v. *Shadwell*[21] with *Pao On* v. *Lau Yiu Long*.[22] The facts in the old cases were much more easily understood (and in the case of *Scivoletto* v. *De Dona* much more memorable) than the facts in the cases which replaced them. The statement of the law in the old cases was adequate. Since students and professors have only so much time, they should spend that time in studying the law, not in struggling with facts.

With the exception of such minor criticisms, however, the reviewer has no hesitation in recommending the fourth edition of this casebook to both professors and students. It is a better book than the third edition and well-suited for use in an introductory course in Contracts.

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17. [1943] O.W.N. 215, 2 D.L.R. 519 (C.A.).
18. [1972] 3 W.W.R. 175, 25 D.L.R. (3d) 570 (Man. Q.B.).
19. (1961), 35 W.W.R. 44 (Alta. D.C.),.
20. (1988), 48 D.L.R. (4th) 288 (Ont. C.A.).
21. (1860), 9 C.B. (N.S.) 159, 142 E.R. 62 (C.P.).
22. [1980] A.C. 614 (P.C.).