Osgoode Hall Law Journal

Volume 3, Number 2 (April 1965)

Article 1

Foreword: [Critical Review of the Work of the Supreme Court of Canada]

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FOREWORD

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Periodic critical review of the work of the Supreme Court of Canada has never yet been undertaken. The disinclination towards such a step exhibits the traditionally reticent attitude towards courts generally, observed in England and followed in this country. That judgments of the highest courts should be subjected to open and rigorous treatment by juristic scholars, that such pronouncements should not be treated as bearing their own conclusive justification, has never been the accepted view in either land. Comment on individual judgments has maintained a sensitive respect toward them; search for indicated tendencies towards fresh problems in either private or public law has only lately become the subject of general academic inquiry. To some extent that attitude in Canada can be attributed to the comparative absence of broad scholarly concern for legal research, itself owing largely to the slow emergence of law schools and to their tardy expansion of interest beyond provincial boundaries. The domination, also, of the Judicial Committee tended not only to stifle academic criticism, formerly looked upon as a trespass upon a sacrosanct field, but also to repress independent judicial thinking in our superior courts. Conceding at once to those who have given the basic direction to constitutional interpretation and legal principle affecting Canada, Lord Watson, Viscount Haldane and their associates, the possession of powerful and comprehensive minds, yet the mere fact of their position as spokesmen for the sovereign of an Imperial Kingdom tended to reduce Canadian courts to a submissive observance of the exact letter of both word and phrase in their pronouncements. Their formidable titles themselves were inordinately compulsive to that acceptance. Had appeals to London been abolished in say 1880, as Edward Blake had advocated, there can be little doubt that a body of decision in terms of Canadian thinking and expression would have resulted which, in the constitutional field at least, would today exhibit a maturity in language, reasoning, and outlook presently in a midway stage of accomplishment.

That Lord Watson tended to be influenced by considerations not clearly articulated in his utterances seems clear from language used in a tribute to him by Viscount Haldane, published in Volume 11 of the Juridical Review, *January-December—1899: "He was an Imperial judge of the very first order. The function of such a judge, sitting in the supreme tribunal of the Empire, is to do more than decide what abstract and familiar legal conceptions should be applied*

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to particular cases. His function is to be a statesman as well as a jurist, to fill in the gaps which parliament has deliberately left in the skeleton constitution and laws that it has provided for the British Colonies . . . He completely altered the tendencies of the decisions of the Supreme Court, and established in the first place the sovereignty (subject to the power to interfere of the Imperial Parliament alone) of the legislatures of Ontario, Quebec and the other provinces. He then worked out as a principle the direct relation in point of exercise of the prerogative, of the Lieutenant-Governor to the Crown. In a series of masterly judgments he expounded and established the real constitution of Canada." We can at once agree that constitutional interpretation involves high statesmanship as well as juridical function; but the attribution of sovereignty to a province whose legislative enactments are subject to disallowance by the general government of a federalism is a surprising use of words in such a context, in fact a misuse. Earlier Viscount Haldane had spoken of a "great unrest" in Canada as the result of the decisions of the Supreme Court. The language quoted may be taken as an accurate general statement of the work of Lord Watson, to which in the same sense may be added the accomplishment of Viscount Haldane himself; but as many commentators have shown, this course of interpretation was not based upon the language of the British North America Act; and historical sources do not appear clearly to support the statement that there was in the 80's and 90's any condition arising from the interpretation of that Act by the Supreme Court which could fairly be described as a "great unrest". It has been suggested that the outlook of Lord Watson envisaged the perpetuation of the Empire, considering the greater probability to be that its consolidation would be strengthened were the powers of the provinces enlarged and those of the Dominion curtailed that a powerful Dominion would sense the instinct of independence more quickly and deeply than the smaller and more or less dependent provinces. Whatever the authenticity of this suggestion, certainly it is consistent with the tenor of the judgments to which Viscount Haldane refers.

In the remaining field of private and public law, there existed a similar unconscious coercion, an effort to fit the case into the mold of the Committee's language, but by the nature of the subject matter affected, perhaps less influential on the course of Canadian law development. The abrogation of the appeal in 1949 has undoubtedly given a fillip in the superior courts to a deepening sense of responsibility; here at last are tribunals by the decrees of which, finality, affecting the lives and fortunes of Canadians, will henceforth characterize Canadian adjudications. And that responsibility has brought implications for the members of the profession and legal scholars of the entire Dominion. The increasing profusion of new features and complexities of social life inherently call for intensification of legal education; academic scholarship has become a vital complement to law's administration; and the scholarly member has become the demand of the profession.

The analytical dissection and weighing of individual judgments can legitimately lead to the effort to catch the intellectual temper of courts, to glimpse their freedom from or bondage to unconscious attitudes, their flexibility or rigidity, their openness or closure to fresh ideas, their awareness of transforming social life, their imaginative capacities, their instinct for logic, strict or pragmatic. These attributes or conditions reveal themselves in subtle indications, the perception of which enables achievement of the end in view. But legitimacy here stops at the line of that classification, individually, of judges which, at times, has run wild in the United States.

To those who have participated in the production of this critique, thanks and appreciation are owed by all who are interested in the advancement of our legal culture. It is to be approved unstintingly as a desirable feature of academic work. We have already a body of writing by senior scholars which in analysis, grasp of relevant considerations, and conclusions drawn, is of excellent quality. It is steadily growing; its authors are advancing in competence and confidence; and the appreciation of its utility for the practitioner is steadily deepening. The responsibility imposed upon Canadian schools in 1949 is being accepted and this review is to be valued not only for its specific accomplishment but as well for the evidence it furnishes of intellectual stimulation and expansion within the ranks of the neophytes of law. As on a task of academic fulfillment, they cannot better be employed.