Osgoode Hall Law Journal

Volume 3, Number 2 (April 1965)

Article 58

Book Review: The Courts and the Canadian Constitution, edited by W. R. Lederman

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THE COURTS AND THE CANADIAN CONSTITUTION EDITED BY W. R. LEDERMAN, Q.C., Dean of Faculty of Law, Queen's University. Toronto: McClelland and Stewart Limited, 1964. pp. 248. ($2.95).

In *The Courts and the Canadian Constitution,* Dean W. R. Lederman has adeptly assembled a collection of twelve essays[1] and addresses which, taken together, form a commentary on our courts and constitution. A book of some 250 pages could not be more than a commentary on certain selected aspects of such an extended subject, nor does Dean Lederman profess it to be more than that. The book is not, however, an accumulation of "bits and pieces". The Dean has decided from the outset to choose essays on certain important aspects of our constitution, in order to give those aspects the well-rounded treatment they merit.

In the Introduction, Dean Lederman has stated that the theme of the book is the general nature of Canada's federal constitution and the general process of interpretation, but this is no more than the lowest common denominator shared by all the essays. The theme which weaves these essays together in the reader's mind, it is suggested, consists of at least two strands. The first is the necessity for an impartial, independent and secure judiciary free from control or influence by either executive or legislative bodies, whether federal or provincial. The second strand is the necessity for a reappraisal (within the process of interpretation) of the accepted doctrines for

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[1] To be more precise there are seven articles which originally appeared in law and other journals, one excerpt from a reported case, one address, one lecture, one essay, and one poem.

determining whether the power to pass a particular law is within the federal or the provincial legislative competence. These two strands, of course, are bound up in each other since it is the task of our judicial tribunals to carry out the process of interpretation, allotting the law-making powers to either the federal government or the provincial governments, according to the B.N.A. Act and the case law on the subject.

Dean Lederman (speaking through the essays he has selected), will be met by almost unanimous agreement on the first argument ascribed to him. It is basic to a democratic federal constitution that the Supreme Court,[2] as the final tribunal of interpretation, have an independence unthreatened by the influence or control of the legislative bodies whose interests are at stake.

The major part of the book is given over to establishing the second and more difficult of the two arguments attributed to Dean Lederman, that is, that there should be a reappraisal of that rationale underlying certain of the present doctrines employed by the courts in ascertaining the proper division of legislative functions. These doctrines are part of the legacy left by Privy Council decisions. At least two changes are advocated: first, that the federal general power found in the introductory words of s. 91 be given a more extensive range of operation than national emergencies, and second, that the Supreme Court, when faced with the problem of interpreting and classifying a matter which has both federal and provincial aspects, look more to the broader issue at stake and ask the question: when does the need for a national uniform standard outweigh the need for provincial autonomy? The latter of course involves the courts in a consideration of the values that prevail in our society.

Part I, *The B.N.A. Act As a Federal Constitution,* portrays the historical, political and sociological backdrop against which the suggested approach should take place. Professor Scott, in the first article, wrestles with the old problem of determining the nature of the body politic which Confederation was designed to create. He concludes that it was intended that the federal government have ample authority for the great task of nation-building. The Fathers of Confederation attempted to create a federation with strength at the centre, while preserving provincial autonomy in its proper sphere. In discussing the question of the respective jurisdiction of the federal and provincial governments, regard must be had to the economic, social, political and cultural conditions of the country.

> Either certain things are done by an authority with larger jurisdiction than that conferred on the provinces, or they are not done at all. The command of the law must bear some relationship to the size of the problems sought to be regulated.[3]

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[2] The establishment of the Supreme Court of Canada and the hopes of its founders are described in a later essay by Frank MacKinnon at p. 106.
[3] P.31.

Part II involves a consideration of the role of the courts in evolving a new balance between the federal and provincial jurisdictions. The major part of Part II is devoted to an article by Bora Laskin on the "Peace, Order and Good Government" clause, the Dominion's general legislative power. Professor Laskin, writing in 1947, urges that, because it had been made clear[4] that Parliament could vest final and exclusive appellate jurisdiction in the Supreme Court of Canada and because two recent cases[5] had neutralized much of what had been said by the Judicial Committee of the Privy Council, there was an excellent opportunity to take a fresh look at the introductory clause. He laboriously traces the vicissitudes of the development of the emergency doctrine with its culmination in the *Snider* case[6] and its temporary set-back in the *Canada Temperance Federation* case,[7] concluding that the Supreme Court (shortly thereafter made the ultimate judicial power)[8] should take advantage of this opportunity to breathe new life into the general Dominion power by making use of the aspect doctrine. While the article is an excellent one, the reader is warned to beware because, written in 1947, it says nothing about the recent developments on the federal general power. To bring himself up to date, the reader must skip ahead to an essay entitled *Legislative Power and The Supreme Court in the Fifties* where some of the recent cases[9] on this subject, and others, are discussed.

In a later article written in 1951,[10] after the Supreme Court had been made the exclusive and final tribunal, Professor Laskin argues that the Supreme Court is not and should not be hidebound by previous Privy Council decisions:

> What is required is the same free range of inquiry, which animated the Court in the early days of its existence, especially in constitutional cases where it took its inspiration from Canadian services. Empiricism, not dogmatism, imagination rather than literalness, are the qualities through which the judges can give their Court the stamp of personality.[11]

The theme is completed in Part III, *The Process of Interpretation,* which largely consists of two essays by the editor. Here he examines the problem of interpretation and classification of law-making powers and the doctrines used by the judges to solve the problem. He also looks at the concurrent operation of federal and provincial laws and the different effects of conflict, supplement and duplication in this respect, concluding that there is an opportunity

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4 In A.-G. Ont. v. A.-G. Can. (Reference Re Privy Council Appeals), [1947] 1 D.L.R. 801.

5 A.-G. Ont. v. Canada Temperance Federation, [1946] 2 D.L.R. 1 and Co-operative Committee on Japanese Canadians v. A.-G. Can., [1947] 1 D.L.R. 577.

6 [1925] A.C. 396.

7 *Supra* footnote 5.

8 Supreme Court Act, R.S.C. 1952, c. 259.

9 Johannesson v. West St. Paul, [1952] 1 S.C.R. 292; Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board, [1956] O.R. 862.

10 P.125.

11 P.151.

for political agreement between the provincial and Dominion governments, on the regulation of these concurrent matters.

The following excerpt taken from the essay, *Classification of Laws and the British North America Act,* in the author's words "suggests the main thesis of this essay." It also suggests the main thesis of the book and the purpose of the editor in assembling these essays:

> This suggests the main thesis of this essay: *That a rule of law for purposes of distribution of legislative powers is to be classified by that feature of its meaning which is judged the most important one in that respect.* The thesis so stated points to the heart of the problem of interpretation, i.e. whence come the criteria of relative importance necessary for such a decision? In this inquiry, the judges are beyond the aid of logic, because logic merely displays the many possible classifications; it does not assist in a choice between them. If we assume that the purpose of the constitution is to promote the well-being of the people, then some of the necessary criteria will start to emerge. When a particular rule has features of meaning relevant to both federal and provincial classes of laws, then the question must be asked Is it better for the people that this thing be done on a national level, or on a provincial level? In other words, is the feature of the challenged law which falls within the federal class more important to the well-being of the country than that which falls within the provincial class of laws? Such considerations as the relative value of uniformity and regional diversity, the relative merits of local *versus* central administration, and the justice of minority claims, would have to be weighed.[12]

Dean Lederman states in the Introduction that the book has been published to make certain materials more accessible to the public and university undergraduates. Certainly many of the non-legal articles would be profitable reading for undergraduates and the general public, but it is to be doubted whether the articles (such as those by Bora Laskin) which involve detailed analysis of the reported case law would mean very much to either the general public or university undergraduates. However, all the essays may be commended as profitable reading for law students[13] and practitioners as well.

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