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Subrata Bhattacharjee

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## **The Captive Court: A Study of the Supreme Court of Canada**

Ian Bushnell

Montreal & Kingston: McGill-Queen's University Press, 1992.,  
604 pp.

Reviewed by Subrata Bhattacharjee\*

When considering judicial function, the reductionist temperament of lawyers is such as to make a Gestaltist weep. Non-doctrinal considerations are regularly subsumed to the understanding of doctrine: what judges *say* becomes more important than the context within which they make their pronouncements, inclusive of social and political considerations. Although lawyers readily understand the ramifications of a decision for *stare decisis*, they are often woefully unaware of the process underlying the production of the decision.

This is what makes Ian Bushnell's book so very interesting. His goal is to undertake "an examination and critical analysis of the Canadian thoughts that existed over the years and those that exist today regarding the nature of the judicial or legal system and the role of a final appeal court within that system."<sup>1</sup> Bushnell's central thesis, borrowed from an article written by ex-Chief Justice Bora Laskin, is that the history of the Court has been characterized by captivity, a result of a lack of Canadian legal doctrine, and, indeed, of an independent judicial tradition.

Bushnell undertakes an examination of the evolution of the Supreme Court from 1875 to the present. The account is satisfyingly wide ranging, inclusive not only of selected examples of the court's jurisprudence, but also of the extra-judicial considerations which underlay the formation of the the court, its day to day function, and arguably, adjudication itself. Going beyond the standard listings of curriculum vitae, Bushnell makes copious references to public and professional perceptions of appointees. Thus, we find that the first appointments to the newly constituted Supreme Court were, in some quarters, treated with some disdain:

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\* Dalhousie Law School, LL.B. anticipated 1993.

<sup>1</sup> I Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 3.

The opinion of the Conservative Montreal *Gazette* with regard to the appointments [from Quebec] was venomous. Fournier's appointment was attacked by saying that the difficulty in finding people to accept an appointment may have been because of 'lawyers of standing [being] unwilling to accept such a colleague.' He was said not to add strength to the court and to be little known to the bar. With respect to Taschereau, the newspaper was polite. He was said to be a gentleman, and of fair standing in the legal profession.<sup>2</sup>

And similarly, media reaction to the ascendancy of the Supreme Court and the corollary decline of appeal to the Judicial Committee of the Privy Council is presented as follows:

The censure that appeared in some newspapers concerning the appeal was based on the idea that the appeal was an interference with self-government....Apparently the newspapers had split along party lines – the Liberal papers favoured restricting or ending the appeal, while the Conservative press wanted to retain the “link of Empire.”...The *Financial Post* suggested that the attacks on the appeal were part of the socialistic movement.<sup>3</sup>

Clearly, the study benefits from Bushnell's holistic approach to the subject matter. In his eagerness, however, to consider the potential external influences upon judicial function, the author sometimes makes embarrassing gaffes. For example, in Chapter 27, Bushnell seeks to bolster his assertion that English cases are still slavishly followed in some contexts by Canadian courts with reference to Wilson, J.'s reliance upon House of Lords decisions in *Beson v. Director of Child Welfare*<sup>4</sup> and *City of Kamloops v. Nielsen*.<sup>5</sup> Unfortunately, his offered explanation for the justice's alleged predilection for judicial anglophilia is one terse line to the effect that “Wilson was born in Britain and arrived in Canada when an adult.”<sup>6</sup>

The overall thesis of “sterility” is also open to question. In many ways, the author's conclusion is driven by the book's methodology, that specifically focusses upon decisions and other issues more or less directly connected with the institution itself. On this basis, there is no doubt that early 20th century Anglo-American jurisprudence was characterized by excessive rulism and

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<sup>2</sup> *Ibid.* at 43.

<sup>3</sup> *Ibid.* at 192.

<sup>4</sup> [1982] 1 S.C.R. 716.

<sup>5</sup> [1984] 2 S.C.R. 2.

<sup>6</sup> *Supra* note 1 at 378.

legislative deference, and as Bushnell repeatedly points out, the Canadian Supreme Court was no exception, particularly in the years 1903 to 1929. Similarly, there is little doubt that for a time the appointment of justices was largely on the basis of privilege, resulting in an ideologically homogenous bench. If these were the only factors we were to consider in assessing the Supreme Court's efficacy, then we might be justified in concluding, as Bushnell does, that the majority of the years of the court's existence have been characterized by "sterility."<sup>7</sup>

Nonetheless, there are other indicia to suggest that Bushnell's conclusion ignores the *societal* context within which the Court operates. In the last three chapters especially, it seems that judicial progressivity is equated with the pursuit of the readily ascertainable social goals embodied in the *Charter*, with the conclusion that pre-*Charter* days were characterized by rulism. There is no doubt that the relatively late addition of the *Charter* revolutionized perceptions of the judiciary, providing an idealized standard with which to measure governmental and individual conduct. In 1982, judges were called upon to engage in highly public deliberations which were often explicitly political and value-laden in nature. Through *Charter*-struck eyes, the pre-1982 years do indeed seem sterile, characterized not by discussions of fundamental freedoms or equality rights, but rather by less inspiring subjects such as the division of powers.

This, however, does not necessarily mean that the pre-*Charter* years saw the Supreme Court as being a captive institution. As Professor Peter Russell has suggested, the court's exercise of policy-making power has been a constant throughout its existence, through adjudication on matters of common law, interpretation of statutes, or the refereeing of the constitutional division of powers.<sup>8</sup> The appearance of a constitutional guarantee of rights merely operates to further expose what the courts have been doing all along to the public eye.

The greatest strength of this book is its approach to its subject. Bushnell is free of the dubious preconception that politics and other social pressures are absent from the operations of the highest court in the land. In incorporating information pertaining to the class background of judges and the circumstances surrounding their appointments and pronouncements, the author provides the reader with the much needed background necessary to understand the nature of the doctrinal webs spun by judges. Judging is a political activity. The cardinal virtue of *The Captive Court* is that it recognizes this, allowing readers to gain a

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<sup>7</sup> *Supra* note 1, Ch. 35.

<sup>8</sup> P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill, 1987), at 3.

fuller appreciation of the role of the Supreme Court and indeed, of the judiciary, in government.