

# A Decade of the Supreme Court Review

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Introduction

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## A DECADE OF THE SUPREME COURT REVIEW

In 1964, the Board of Editors of this Journal took their first tentative steps towards the establishment of the Supreme Court Review as an integral part of our publication. In that year Philip Lococo was called upon to prepare the first Statistical Analysis of the Supreme Court Reports. John Cavarzan wrote on the Court's jurisdiction and a number of case comments were prepared.

The Statistical Analysis has been the main thread of continuity in the Review ever since, with submissions covering every year since 1964. The last three years (covering the 1970, 1971 and 1972 Reports) have been tabulated in masterful style by Jennifer Bankier, and have matured this contribution into a much quoted tool for analytic research.

The Review has also featured a number of other articles which have been recognized as classics in their fields. In volume 4, Ronald Cheffins published his "The Supreme Court of Canada: The Quiet Court in an Unquiet Country". In Volume 6 we find Peter Russell's historic study of the jurisdictional difficulties of the Court (now to be cured in part by much-belated legislation). In volumes 9 and 10 we see the exchange between P. W. Hogg and David Mullan on the jurisdictional fact doctrine which is so frequently employed by the Court, often with amazing results. Finally, for Volume 11, Paul Weiler contributed his biting critique of the policy making role of the Court in "The Supreme Court of Canada and Canadian Federalism", now incorporated into his work *In the Last Resort*.<sup>1</sup>

It is extremely difficult to give any overview of content of the Review

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<sup>1</sup> P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: The Carswell Company, 1974).

in its first decade, but there are three streams of writing which deserve special note.

The most important of these streams has been our series of articles employing statistical methods to examine the heart of the Court's approach to the law and its impact on Canadian jurisprudence. The series led off in Volume 5 with S. R. Peck's introduction of the scalogram analysis. In Volume 7, J. T. Holmes and E. Rovat directly applied the Peck analysis to the Ontario Court of Appeal while Glendon Schubert analyzed the attributes and voting records of Australia's High Court as it was during the tenure of Mr. Justice Owen Dixon. In Volume 9 we find one of the series of Supreme Court Analyses done by Professor Paul Weiler while he was at Osgoode — this one being his well-known 'slippery slope' analysis of the Court's handling of labour relations cases — and in Volume 11, P. W. Hogg provided a similar topic-oriented work, reviewing exhaustively all the Supreme Court cases on administrative law, from 1949 to 1971. Volume 10 provided, in an article by Philip Slayton, a review and critique of the statistical methods used by Peck, Schubert, Weiler and others of the same school.

Closely linked with this stream have been the biographic materials of Adams and Cavalluzzo (found in Volume 7) and of Borden and Burstein (found in Volume 8). But at the same time, a new approach has also begun to flower — an approach which has found full expression in our tenth anniversary edition. I refer here to the 'man and his thought' form of biographic analysis, so abundant in the United States and so sadly lacking in Canada. The Journal began to fill this void with two articles on Mr. Justice Emmett Hall in our Volume 10. The first, by Professor Frederick Vaughan, analysed the background and jurisprudence of this great activist; the second gave room for Mr. Justice Hall to expound his own view on the role of the judiciary. Such extensive comment has been received on these two articles that the present Editors felt it incumbent upon them to respond, and to provide more of this form of material.

Finally, one must note the Review's especial concern for civil liberties in Canada. Innumerable articles and comments have touched on these problems, but the Sinclair analysis of *Drybones* in Volume 8, the reprise of Cavalluzzo in Volume 9, and the Mandel work on *Appelby* in Volume 10 deserve especial note.

Thus this year's Editors have inherited a solid and a challenging foundation. In preparing our edition of the Review we tried to respond to all major elements of the tradition laid by our predecessors.

The civil liberties stream finds expression both in Robert Kerr's article on sexual discrimination and in George Adam's comment on *Bell Canada v. Office and Professional Employees International Union, Local 131*.<sup>2</sup> Using an extensive and masterful analysis of the *Lavell* case as his starting point, Professor Kerr goes on to review the case law touching the whole range of

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<sup>2</sup> *Bell Canada v. Office and Professional Employees Inter'l Union, Loc. 131*, 73 C.L.L.C. para. 14, 170, (1973), 37 D.L.R. (3d) 561; [1972] 2 O.R. 595, 26 D.L.R. (3d) 263 (C.A.).

sex discrimination issues under several Federal statutes. Equally useful for our readers are his conclusions as to paths of argument and of reform left open by this often sad tradition of judicial interpretation. In his comment, Professor Adams deals with age discrimination as found in the guise of Bell Canada's unilateral right to retire certain of its employees over the age of 60. Adams describes the background of the problems facing early pensioners, the Court's willingness to interfere with inferior labour tribunals, the errors of interpretation in the majority's judgment and the "unassailable" reasoning of the Laskin dissent.

The 'analytic' stream is represented strongly by Ms. Bankier's most recent *Statistical Analysis*, covering the 1972 Reports.

Perhaps most strongly represented is the biographical stream. Here we have tried to balance the recent with the historical. Professor Dale Gibson has contributed a review of the background and attributes of one of our newer Supreme Court Justices, Mr. Justice Brian Dickson, and has added a quick sketch of the approaches Mr. Justice Dickson seems to have taken in several areas of law during his Manitoba career. Both elements will, we hope, add to the insight the Canadian bar is just now developing on the thinking of this senior adjudicator.

On the historical side, we have chosen the illustrious Sir Lyman Poore Duff as our subject. Mr. W. Kenneth Campbell, his long-time private secretary, has provided an informative but above all a moving, and very personal recollection of Sir Lyman, both as a man and as a great and distinguished judge. In addition, Professor Gerald LeDain, a noted constitutional lawyer and long an admirer of Sir Lyman, has provided an exhaustive analysis of the man's approach to the law, his views on specific legal issues and his continuing impact through to the most recent times.

All of these articles, taken together, would have provided an excellent edition for the Review. Yet the editors have felt it desirable, in this tenth year of its life, to expand the Review into a new area — the field of law reform. Indeed, a tenth anniversary seems a singularly appropriate time to reach out in new directions; but that was not our sole motivation. It simply seems to us that the work of Law Reform Commissions must now be recognized as a major contribution to the development of Canadian law. Canadian legal academics have, in the past, fixed their attention on the legislatures and the appellate courts, but now there is a new entry into the field, and it cannot and should not be ignored. These commissions are daily drafting and publishing reports which examine, in detail as well as in broad brush strokes, the heart of the law as it affects every citizen. These reports are being read closely by our legislators and one frequently sees their recommendations being translated into statutes and regulations. We would therefore be remiss in our responsibility if we did not invite articles which investigate and weigh, analyze and criticize, the process of law reform as it is being carried out in Canada.

We are therefore proud to lead off with an article from Noel Lyon, a former Commissioner himself and a professor noted for his teaching both in British Columbia and at McGill. Professor Lyon asks us to stop and take

note of what he perceives as a major error in the process — the dependence on legally-staffed professional bodies which issue written reports, to the detriment of reform-in-action carried on by those heavily involved in the day-to-day administration of the law. Dr. Hans Mohr of Osgoode, currently serving as a federal Commissioner, has taken the time to read the Lyon article, to discuss it with his colleagues in Ottawa, and to set out his reply. Dr. Mohr appreciates many of the points made, but also points out some of the deficiencies in the proposed line of attack.

Finally, Simon Fodden has provided a fine analysis of Commission-initiated reform, as it affected the law of landlord and tenant in Ontario. Professor Fodden carefully builds a model for law reformers, and then, on the basis of a statistical study of the post-reform litigation, applies his model in order to point up severe deficiencies in the path taken by the Ontario Commissioners and legislators.

In sum, we hope that these articles will lay the basis for intensive reflection on how effectively we are carrying out this crucial function, and, perhaps, will begin to provide a new focus of development in the field.