

# Book Review: The Canadian Judiciary, Allen M. Linden (ed.)

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## Book Review

THE CANADIAN JUDICIARY, PROFESSOR ALLEN M. LINDEN (ed.), Toronto: Osgoode Hall Law School, 1976. Pp. x, 251.

*The Canadian Judiciary*, a book dedicated to the judges of Canada, was edited by Professor Allen Linden from the public lectures delivered by seven learned jurists concerning our judicial institutions. Thirteen commentators representing various disciplines add perceptive comments after each lecture. The lecturers and the title of their papers are as follows: Professor W. R. Lederman, "The Independence of the Judiciary"; Professor Ed Ratushny, "Judicial Appointments: The Lang Legacy"; The Honourable Chief Justice Deschênes, "The Judge as Lawmaker"; Professor Neil Brooks, "The Judge and the Adversary System"; Professor Garry D. Watson, "The Judge and Court Administration"; Professor Gordon Borrie, "The Judge and the Public: The Law of Contempt"; Professor Paul Nejelski, "The Judge and the Public: Some Recent Trends in the United States."

The unifying thread is the judges' essential characteristics and societal role perceived by a group of thoughtful scholars. The publication of this series of lectures, given under the sponsorship of the Canadian Institute for the Administration of Justice, is timely because of the increasing interest of Canadians in the judicial function.

Professor W. R. Lederman's paper, "The Independence of the Judiciary," and subsequent comments by Chief Justice N. T. Nemetz, bâtonnier Michel Robert and the Honourable R. G. B. Dickson, Justice of the Supreme Court Canada, reaffirm the fundamental position of the judge as "a primary autonomous officer of state in the judicial realm." The independence of the judge, a basic constitutional tenet, is discussed in relation to his workload and financial position. While the discussion contains many interesting suggestions for the safeguard of independence, I agree with Justice Dickson's comment to the effect that "the most effective and, at the same time, the most comfortable way for the judge to play his role in society is to do his judicial work well."

Professor Ratushny's inside experience as adviser on judicial appointments to the Minister of Justice of Canada gives him a particular insight in the appointment procedures. He describes the establishment of a system in relation to federal judicial appointments: the commitment of the last three ministers to a systematic gathering of personal and professional information as a comprehensive and continuous process resulting in a 'bank' of names: the role of the Canadian Bar Association's national committee on the judiciary, whose badge of qualification has been generally considered a prerequisite to federal judicial appointment. In his comments, Professor Angus is critical of this role of this committee in that it may give rise to a concern that "the committee's view will be coloured by an establishment conception of

desirable professional and judicial qualities." This commentator feels that the committee's approval should be influential but should not be a prerequisite. Mr. J. J. Robinette's comment provides a most perceptive account of the activity of this committee of the Canadian Bar Association, a committee of which he was then chairman. It discloses a complete understanding of the sensitive and limited nature of the committee's function.

The interaction between the lectures and the comments may be illustrated by reference to Chief Justice Deschênes' paper, "The Judge as Lawmaker." Chief Justice Deschênes' enthusiasm for judicial law-making, illustrated by great examples of judicial law reform in England, France, the United States and Canada, shows that the courts "can act as a powerful instrument of legal and social change." This brings the rejoinder by Dickson J. that judicial activism can lead in more than one direction. In discussing the "socio-economic area," Dickson J. brings into question the adequacy of the tools available to judges. So too, Dickson J. draws our attention to the role of law reform commissions. These commissions can undertake in-depth research and they have the opportunity to engage in wide consultation. Thus law reform commissions risk fewer untested value judgements. Professor Peter Russell, as a political scientist, properly points out the possibility that: ". . . if the judicial branch of government becomes too much embroiled in political controversy through the transparency of its law-making functions, it will suffer a significant loss of acceptability as an adjudicator of disputes." He also obviously doubts the suitability of the judiciary to play a major role, through the Bill of Rights, in "social equality" decisions, such as the treatment of Indians in this country. This issue would, in his view, be better tackled by policies that enable Indians to develop their own communities, on their own land, in their own way.

Professor Neil Brooks presents us with a scholarly paper entitled, "The Judge and the Adversary System," followed by 109 extended footnotes. His essay includes a wealth of documentation and useful references concerning the judge and the adversary system. The major premises of the system, i.e., party autonomy and party prosecution, create the essential difference in the judge's role in the adversary system, in contrast to the central function of the judge under the inquisitorial system. The adversary system is shown to lead to a more acceptable method of establishing facts. This is based on certain assumptions including motivation, representation and proper cross-examination. Professor Brooks argues for a more active judicial participation or "activism in controlling the conduct of the trial": he makes the point that "if cross-examination is to achieve its purpose in the adversary system, the judge must ensure that it is not used as an instrument to distort and obscure testimony." In his conclusion, Professor Brooks stresses that the responsibility of the judge is to ensure that the adversary system is used as "a procedural device which we have adopted in the pursuit of more ultimate process values."

Mr. Justice D. C. McDonald's comment on Professor Brooks' paper is almost as long (22 pages) as the paper itself. With respect, it is not a comment but a separate paper, with much emphasis on personal experiences, and the discussion of the Evidence Code recommendations of the Law Reform Commission of Canada. He quotes from famous trials which would seem to

have little to do with the basic subject of the adversary system, particularly with reference to the judge's power to question or call witnesses. As President of the Institute sponsoring the lecture series, Justice McDonald was certainly at liberty to adopt a different format for his most interesting comment.

Neil McKelvey, in his comment on Professor Brooks' paper, talks of judges defusing the adversary system to make it work in the way in which it was intended to work. He maintains that judges should take a liberal view of the rules of evidence: an approach he terms "judicial activism." He returns again and again to the judge's function to defuse the system. I do not understand the expression: the examples given where the adversary system brings about a ludicrous result are not due to the "rough edges of the system," but to a failure of the trial judge to properly intervene in the interest of justice.

Professor Garry D. Watson in his paper, "The Judge and Court Administration," has given a particularly clear and concise account of the role of the judge in court administration. He starts with a brief history of court administration in England in the days when judges had an interest in fees and patronage, and takes us through to the 19th Century reforms establishing salaried court officials appointed by the executive. He dramatically outlines the developing crisis in the courts caused by increased population and legislation, to the modern commission studies resulting in the Beeching Report<sup>1</sup> and the Ontario Law Reform Commission's Report on the Administration of Ontario Courts.<sup>2</sup> The jurisdictional question is central in the definition of the respective roles of the judiciary and the executive in court administration. This area of conflict is still unresolved and fundamental.

Professor Watson refers us to the United States "Third Branch Model." In the United States the separation of powers is a constitutional tenet, particularly at the federal level; the American courts have been successful in obtaining complete control over the administration and running of the court, including all administrative policy, i.e., court calendars, assignment of judges, personnel, internal administrative procedures and financial administration. However, state courts have particular problems in the governments' response for court financing.

In contrast, the Beeching Report on the administration of criminal courts recommended the establishment of a professional court administrative staff under the direct control of a Minister—the Lord Chancellor, who is himself answerable to Parliament. The Report resulted in the *Courts Act 1971*,<sup>3</sup> which was implemented in record time and with a minimum of acrimony and debate.

Professor Watson draws the necessary distinction between the English and American situation on the one hand and the Canadian situation on the other. The major distinction is in the unique role of the Lord Chancellor who

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<sup>1</sup> Beeching Committee—Report of the Royal Commission on Assizes and Quarter Sessions (1969; Cmnd. 4153).

<sup>2</sup> Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (Toronto: Ministry of the Attorney General, 1973).

<sup>3</sup> 1971, c. 23.

by tradition is the link between the government and the legal profession. This contrasts with the role of the Attorney General of Ontario, whose Ministry is a principal litigant in civil and criminal courts. No wonder the profession and the judiciary responded negatively to any suggestion that would increase the Attorney General's function or his responsibility and accountability for the administration of the courts.

Professor Watson brings to our attention two rightful concerns of great interest to the judiciary: (a) the possible manipulation of the case assignment process by the executive to its advantage; and, (b) judges should not be reduced to the role of "case deciders" but should retain a meaningful input on the overall court administration policy. The author understandably prefers the expression "the public's right to an independent judiciary" to the commonly used one, the "independence of the judiciary." The problem is intelligently discussed and various alternative proposals are identified. The issue is set out in the final sentence of the article as follows: "How *does* one deal with the problem of authority over court administration in a political system that has as twin pillars responsible government and an independent judiciary?" It may be that, since the lecture series, the right answer has been found in the White Paper scheme of unified control by the Judicial Council.<sup>4</sup>

The comments made by Chief Justice Cowan, Chief Justice Deschênes and by Robert Normand, Q.C., Deputy Minister of Justice for Quebec, are lively and valuable, and show the firm positions taken by the judiciary and the executive on this critical and timely issue.

Professor Gordon Borrie of the University of Birmingham, gave to his paper the title "The Judge and The Public: The Law of Contempt." As Chief Justice Hugessen points out in his comment, this title is much too broad for a paper limited to the law on contempt of court. The Chief Justice refers to a large number of topics relating to the public relations of the court and judicial image which could have been appropriate topics for discussion at the Conference.

The law of criminal contempt and its principal purposes are succinctly covered by Professor Borrie's paper, with a wealth of appropriate illustrations and quotations from English and Canadian jurisprudence. The paper is a short one. On the subject of "scandalising the court" by scurrilous attacks on judges, the author detects a trend away from the hard line set by Lord Hewart L.C.J. (described as "a man who would brook no criticism") in the 1920's and 1930's towards the Phillimore Committee recommendation that truth be a defence where the publication is in the public interest.

An interesting comment by Farrell Crook of The Toronto Daily Star is that the criminal court restrictions on the publication of evidence given at preliminary hearings have been well accepted by the news media in Canada. According to him the media also welcome clear directions from the Bench during the course of a trial on any restrictions on media reporting and the reasons therefor. Professor Borrie points out that there is no general power in a

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<sup>4</sup> Peter H. Russell and Garry D. Watson, *A Quiet Revolution in the Administration of Justice* (1977), 11 Law Society of Upper Canada Gazette III.

court to direct that the identity of an adult witness should not be disclosed. (Could it be contended that such a power does exist as an inherent power?)

Professor Paul Nejelski of the New York University School of Law entitled his paper, "The Judge and the Public: Some Recent Trends in the United States." In this paper he describes the historical basis of concern in the U.S.A. for popular election of state judges to replace executive appointment, as part of the democratic tradition. The public scrutiny of judges is reinforced by state commissions on judicial conduct and Bar Association reports released to the media evaluating state judges for retention and federal judges for advancement or promotion. Our system, described in an earlier paper by Professor Ratushny, makes the Bar Association scrutiny a preliminary to executive appointments. Both systems seem to arrive at similar results by different routes: the essential appears to be the informed scrutiny of judicial talent.

Professor Nejelski tells us of a recent trend in public-judge relations; namely, the court watcher programmes. In some areas there are court observers, laymen or lawyers, who evaluate the performance of sitting judges, and publish reports said to be helpful to the judges themselves and to the electors. Professor Nejelski also tells us of the use that has been made of film and video-tape of trials. He points out that the use of film offers an intriguing means of monitoring what is actually happening. Also, judicial statistical and information systems using computers and data processing equipment can develop useful information. When one considers all the possible abuses and misinterpretation of these requests for public information, one can only agree with the author's conclusion that the judiciary, rather than resisting them, should "work with them to the end that the equally important objective of judicial independence is also maintained." Unfortunately there is no comment on this last lecture.

It is regrettable that the book virtually ignores the existence of the Provincial courts and their importance to the judicial system. It seems to limit the 'judiciary' to judges appointed under Section 96 of the *British North America Act*.

There are some minor irritations in the book: a few typographical errors, the most glaring being found at page 214, reference to Chief Justice McRuer's address to the "Layers Club" of Toronto. Though the papers range over a wide field of interest, one can think of many associated topics which were not touched upon. It is, however, appreciated that this Conference is part of a continuing series; it was followed by a "Conference on the Canadian Court System: An Assessment" on February 17-18, 1977.

In this reviewer's opinion, *The Canadian Judiciary* represents a well balanced, instructive and provocative discussion of Canadian judicial institutions. I am convinced that it has achieved the hope of its editor, Professor Linden, that it will be of assistance to the judges of Canada "in the performance of their daily duties.

By MAURICE N. LACOURCIERE\*

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## ERRATA

Page 513. The table should read:

	Judgments	<u>Concurrences</u>											
		Fauteux	Abbott	Hall	Laskin	Martland	Judson	Ritchie	Spence	Pigeon	Dickson	Beetz	de Grandpré
Dickson													
Majority	15	1	1	0	19	8	3	12	9	9	—	1	5
Dissent	4	0	0	0	2	0	0	0	2	0	—	0	0
Beetz													
Majority	4	0	0	0	12	6	1	2	1	5	2	—	9
Dissent	0	0	0	0	2 <sup>5</sup>	0	0	0	1 <sup>5</sup>	0	1	—	0
de Grandpré													
Majority	11	0	0	0	9	7	2	3	2	3	2	1	—
Dissent	4	0	0	0	0	1	0	0	0	0	0	0	—

Page 709, sixth line. For “(p>.05),” read “(p<.05).”

