

THE CANADIAN BAR REVIEW

VOL. XXIII

March, 1945

No. 3

THE CANADIAN LAWYER*

"A Startling Paradox"

When the King of The Pirates of Penzance is disclosing the complications that have arisen on the discovery that Frederick, who more than twenty years before had been apprenticed to the band until he reached his twenty-first birthday, had been born on the twenty-ninth day of February, he sings:

A startling paradox . . . a most ingenious paradox . . .
We've quips and quibbles heard in flocks,
But none to beat this paradox.

And thinking about the lawyers of Canada, and what manner of men they are, it seemed to me that the refrain of that song might well be applied to us.

Every lawyer in Canada is a member of a corporate body of lawyers and as such has a strong sense of corporate solidarity and of corporate pride, of corporate honour, and of corporate ethics; and at the same time every lawyer in Canada, in the daily practice of his profession is a very definite and intense individualist.

The corporation to which the lawyer belongs is in all cases a provincial corporation, and I do not use the word provincial in its narrow and unflattering sense though at times I am tempted to do so. We speak of a man as a Quebec lawyer, or an Ontario, or British Columbia or Alberta lawyer, and so on: but a lawyer is in very poor practice indeed who in the course of a year does not find that some client's interest requires him to travel across Canada or to some foreign state or to correspond with lawyers

*Being the substance of Addresses by E. K. Williams, K.C., to the Quebec Insurance Section of the Canadian Bar Association at Montreal, to the Vancouver Bar Association at Vancouver, to the Victoria Bar Association at Victoria, to the Calgary Bar Association at Calgary, and to the Lawyers Club at Toronto.

or business men in other jurisdictions and to study and know something of the laws and territories other than his own province.

By the very nature of his profession the lawyer is the student and historian and custodian of the Past: he is always looking backward and cherishing that which the Past has given him: and at the same time he is keeping pace with and not infrequently leading the changes that an ever more rapidly moving world makes necessary.

He must be a student of books all his practising life and in that sense academic: the light in his study must burn far into the night, but his work must not smell of the lamp: by day he must work and consult with and advise and frequently guide, shrewd men of business in every kind of undertaking financial, commercial, and industrial, and be ready at all times to act as guide, philosopher and friend to all sorts and conditions of men in their more intimate personal relationships. As Dr. Johnson put it long ago "Lawyers know life practically. A bookish man should always have them to converse with. They have what he wants", and again "The law is the last result of human understanding, acting upon human experience for the benefit of the public."

To state it in another way, the lawyer must be a theorist in his studies of the academic part of his profession: in his book-work he must be familiar with all the theories of all the writers on the multitudinous branches of the law, and new theories are being propounded almost every time a new book or article on a legal subject is published. But in his practice every lawyer must be a searcher after and a judge of facts, cold, hard, facts, which must exist and be found to exist, before any rule of law can be applied.

You will recall Milton's vision, in *Paradise Regained* of the debate between Christ and Satan during the Temptation in the Wilderness. The Arch-Enemy, after several failures returns to the attack with these words:

. be famous, then,
By wisdom; as thy empire must extend,
So let extend thy mind o'er all the world.
In knowledge, all things in it comprehend.
All knowledge is not couched in Moses' law,
.
The Gentiles also know and write and teach
.
Without their learning, how wilt thou with them,
Or they with thee, hold conversation meet?

And then the reply:

Think not but that I know these things
 However, many books,
Wise men have said, are wearisome; who reads
Incessantly, and to his reading brings not
A spirit and judgment equal or superior,

Uncertain and unsettled still remains,
Deep versed in books, and shallow in himself,
Crude or intoxicate, collecting toys
And trifles for choice matters, worth a sponge
As children gathering pebbles on the shore.

The practice of law is exacting and demands unremitting attention to the matters with which the lawyer is charged in the interest of his client: it makes tremendous demands upon all his energies and powers and the work is never done. All this has a marked tendency to make a lawyer concentrate on his own practice sometimes to the exclusion of all wider interests. It was of lawyers of this type that Thackeray was thinking when he wrote:

He has only been bringing a great intellect labouriously down to the comprehension of a mean subject and in his fierce grasp of that, resolutely excluding from his mind all higher thoughts, all better things, all the wisdom of philosophers and historians, all the thoughts of poets; all wit, fancy, reflection, art, love, truth altogether—so that he may master that enormous legend of the law which he proposes to gain his livelihood by expounding.

There is much exaggeration here: but much truth. The law is not a mean subject: it is one of the great and living forces of the world: but it can be practised meanly and when it is, untold harm is done. That type of lawyer whom Thackeray described is fortunately rare and rapidly becoming extinct: he is now nearly a museum piece. In fact the lawyer of to-day is working unselfishly and without much credit, in the interest of the public whom he serves, to simplify and cheapen the law, and to improve the administration of justice.

It is a matter of significance and of pride that when The Canadian Bar Association was organized in 1914 the following were placed first amongst its objects

to advance the science of jurisprudence, promote the administration of justice, and uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces

The promise contained in these words has been honourably kept, and while much is still to be done, a great deal has been

accomplished. The work of the Commissioners on Uniformity of Legislation, a body created as a result of the work of the Canadian Bar Association, composed of members of the Association, who give their time and often sacrifice their holidays, for no other reward than the consciousness of good work well done,—I fear that even recognition of that fact is often withheld from them,—is only one of the many public services rendered by members of the legal profession. I shall mention only one of the achievements of that Conference, the Uniform Life Insurance Act passed in the common law provinces in 1924, which by clarifying and simplifying the law have saved the public of Canada, literally, hundreds of thousands of dollars in the last twenty years.

But the Canadian lawyer is more paradoxical still. The portion of the objects of the Canadian Bar Association which I have already read refers to "the basic systems of law in the respective provinces". In eight provinces of Canada we have the Common Law: in the great province of Quebec the basic system is that of the Civil Code. The Common Law is the work of the inductive mind of the English-speaking people of which Bacon is one of the foremost, though not the earliest, examples: the Civil Law is the product of the deductive mind, of which Aristotle is the arch type. I suggest to you that as lawyers we are fortunate that this should be so. But I also suggest to you that the lawyers practising under each system have not yet begun to take advantage of our most favourable situation and that it would become us all to study the system under which we are not practising.

Stair in his "Institutions of the Law of Scotland", one of the greatest legal works of all time, wrote that "no man can be a knowing lawyer in any nation who hath not well pondered and digested in his mind the common law of the world" and this statement should be taken to heart by every lawyer in Canada. We of the Common Law in Canada have an almost unequalled opportunity to study the Civil Law at first hand, but are not taking advantage of it; and our confreres in Quebec would, I think, be the first to admit that they in their turn do little more in the way of pondering and digesting the Common Law.

The reference to Stair's "Institutions" naturally leads to the question whether or not a valid comparison can be made between the situation existing in Canada and that existing in Great Britain, having regard to the history and nature of the law of England and the law of Scotland. And my mind naturally turns to two addresses given by Lord MacMillan and collected in his book "Law and Other Things". The first address

entitled "Law and Religion" was delivered to the Edinburgh Philosophical Institution in October 1933: the second address "Two Ways of Thinking" was the Rede Lecture delivered before the University of Cambridge in May of 1934. Lord MacMillan first trained under the Scottish System, was subsequently as a member of the Privy Council called upon to study and to administer the entirely different system of the law of England. It was of his study of the two legal systems that first started him thinking about the subjects of his addresses. In these he points out that in the early times such law as there was in Scotland was English law but when Scotland and England came into political and economic conflict the Scottish youth migrated to the Continent and studied in the great law schools of Paris, Utrecht, Leyden, Bologna and Padua where they came in contact with the great teachers of the Roman law then flourishing in all the splendor of its Renaissance. As a result the law of Scotland became impregnated with the principles and the spirit of the Roman law. Let me quote from the second of the addresses:

I doubt if we sufficiently appreciate the totally different approach which the Continental, and particularly the Latin, mind makes to every problem as contrasted with what I may call the British approach. It needs imagination to enter into another mentality and imagination is not the strong suit of the English race. 'The power of realizing and understanding types of character very different from our own is not, I think, an English quality,' says Lecky in his discourse on *The Political Value of History*. I believe that the failure of the multitude of international conferences of recent years to achieve the aims which we all profess to have in common is in no small degree due to the incompatibility of the ways of thinking of those who have participated in them.

The second quotation is Lord MacMillan's attempt to state the true answer to the problem as to the comparative value to mankind of the two ways of thinking. After saying that there is no answer he proceeds:

Neither method is intellectually or ethically better than the other. Both are essential. At different times and in different places, in one race or in another, sometimes the one habit of mind and sometimes the other is found to predominate, lending its distinctive colour, variety and interest to thought and practice, but the world has need of both ways. Each has its contribution to make to the attainment of the goal of all right ways of thinking—the Truth.

And now I come to the last of our many paradoxes. The lawyers of Canada fall into two great groups. Those whose mother tongue is English and those whose mother tongue is French. I am convinced that here again if we had the wit to

see it we have something of which we should take the fullest advantage, something which if we did take advantage of it would be of inestimable value to us not only as lawyers but as Canadians. And because I believe the lawyers of Canada are in a singularly good position to give a lead, and because if that lead is given it can mean so much to our Canadian life I will ask you to bear with me while I develop the thoughts that I have in mind.

I have never been able to understand to my own satisfaction the effect of thought on language or of language on thought. It has been suggested that just as in its turn the knowledge of writing was confined to the initiated and priestly castes and only grudgingly taught to the common man so in an earlier stage of human evolution the knowledge of speech was the prerogative of the instructed few. But I think it can safely be said that while speech was first used to express emotions and instinctive desires and needs, as it developed it had a tremendous influence on thought: and that thought was moulded in various ways by the medium through which it was expressed. From this it follows, to my mind at least, that no one can fully or perhaps even partly understand the thoughts of a person whose mother tongue is different unless he also understands and speaks and can to some appreciable degree think in that other language.

The Canadian who speaks and thinks only in English can never really understand the Canadian who speaks and thinks only in French.

The English-speaking Canadian who understands and speaks, and can think in, French, will not necessarily think alike with his French-speaking compatriot: he probably will differ on many important things: the two types of mind and thought, particularly when their ages of past history are taken into consideration are bound to arrive at different conclusions on many things but they will at least understand, and when they understand, respect the result honestly arrived at by thought processes different from their own. The same considerations will apply equally to the French-speaking Canadian who understands and speaks, and can think in, English. And when mutual respect and understanding are achieved is it too much to expect that common needs of people living in the same environment will in time produce an assimilation of ideas that will do more than anything else to produce national unity?

No one will challenge the statement that a man who knows more than one language has a broader culture and a better view

of all learning than he who knows only one. In the past generations there were certain fields of knowledge more or less closed to scientific men who did not at least read German. To-day I have heard it said by men who should know that the same will soon be true of those who do not know Russian. The knowledge of French or English will open to a man learning those languages for the first time doors which he should open but which will forever remain closed to him unless he acquires that knowledge.

While it is perhaps too soon to hope that every Canadian will be educated both in French and English it is not, I think, too much to hope that every Canadian lawyer may in our time be reasonably skilled in the two languages. I have always been impressed by the fact that most of the leaders of the Bars of England and Scotland possess a working knowledge of the French language and I have noticed that the members of the Bar of Paris have in a number of cases been completely bilingual. I have no doubt that in the immediate future there will be a closer cooperation and understanding between the lawyers of Great Britain and the lawyers of France. Let us not lag behind.

Another of the expressed objects of the Canadian Bar Association is to encourage and foster cordial intercourse among the members of the Canadian Bar. How well that object has been carried out let every man who has attended an annual meeting tell. Twice we have experienced the wonderful hospitality of Vancouver and Victoria; Montreal has taken us to her great heart no less than four times, and will do so again in 1945; Toronto has given us an Ontario welcome on six occasions, Ottawa and Quebec City have been our hosts on three; we have been to St. John, Regina, Calgary and Halifax and been overwhelmed in each place and the City of Winnipeg four times has tried to repay the kindnesses the Bar of Manitoba, *quorum pars minima sum*, has everywhere received.

Wherever we have gone we have been at home, we have met and worked and played together, doing all equally strenuously, the Common Lawyer and the Civil Lawyer, he whose mother tongue is English and he whose mother tongue is French, the inductive mind and the deductive mind, the man from the East and the man from the West and all those in between, the Judge and the practising lawyer, all Canadian Lawyers. We have forgotten racial extraction, creed and politics, we have known, and appreciated, and enjoyed, each other; we have debated great matters in a spirit of understanding and good will.

"Iron sharpeneth iron, so a man sharpeneth the countenance of his friend . . . as in water face answereth to face, so the heart of man to man."

We have made friendships which we shall cherish all our lives and we have done useful service to our country and the public whom we serve. Our work has only begun, but the foundations have been well and truly laid. Can we not truly say "We are the microcosm: Canada is the macrocosm." What we are doing can be done in all Canada if we, and those who think as we do, are willing, as we are able, to testify in some noteworthy fashion to the faith that is in us.

No man can live to himself alone. That is a truism which we are all inclined to utter but to disregard. More than three hundred years ago John Donne wrote:

Man is not an iland, entire of itselfe; every man is a piece of the continent, a part of the maine; if a clod bee washed away by the Sea, Europe is the lesse, as well as if a promontorie were, as well as if a mannor of thy friends or thine owne were. Any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls: it tolls for thee.

Is there a Canadian lawyer? In a limited technical sense there is legally no such person. Actually every lawyer practising in the Dominion of Canada is a Canadian lawyer and the Act of Incorporation of the Canadian Bar Association recognizes the status of "The members of the Canadian Bar."

The law is our meeting ground, the law where already the boundaries between the Civil Law and the Common Law are being crossed and re-crossed. Almost imperceptibly we have made substantial progress. Our education and development must proceed at an accelerated rate and if our progress is inspired and directed by goodwill who will dare say that the lawyers of Canada will not be the most potent force for achieving what we must achieve and what I sincerely believe we shall achieve, a real Canadian unity.

E. K. WILLIAMS.

Winnipeg.