Correspondence

Encouraging Canadian Law Books

TO THE EDITOR:

We were interested in the last two paragraphs of your review on pages 766 and 767 in the August-September issue of the Canadian Bar Review. We have felt for some years that something could be done to help the Canadian practitioner by producing English standard works, either with separate notes giving references to the appropriate Canadian law, or with special supplements, and we have discussed the suggestion with our Canadian associates in Toronto. Nothing has so far come of it because of the conviction on the part of the Canadian publishers that such a course would have little or no effect on the sale of books in Canada, and we must say that our own inquiries among Canadian lawyers (and the writer visited Canada this year and discussed the problem with a number of lawyers) supported the publisher's view.

It is obvious that whatever scheme is adopted is bound to be fairly expensive in editorial fees and in additional printing costs, and unless we can see a reasonable chance of recovering these by a substantial expansion of the Canadian market, we do not feel justified in going to the additional expense and trouble involved. In a limited field it is, of course, possible to go further than this and to make references to Canadian decisions as an integral part of a text-book; this was done by Professor Glanville Williams in his book on *Joint Torts and Contributory Negligence;* but this course is not feasible in the case of the more general type of text-book, because it makes the book unattractive to the English user, who is extremely conservative and does not, unfortunately, put much faith in decisions of any courts other than his own. Further complications are, of course, bound to arise from the fact that there is not one single jurisdiction in Canada, and that the laws of the various provinces frequently vary, so that for the Canadian lawyer it will often be necessary to provide perhaps five or six separate statements on the position in the various provinces.

Similar problems arise, of course, in Australia, and we have explored the possibilities with our associated company there, and exactly similar conclusions were arrived at.

We have also considered the possibility of publishing separate editions of some of our text-books for the Canadian market, but we have, like the Canadian publishers, thought that the Canadian market is too small in most cases to support a separate edition. On the face of it there would seem to be no reason why the market should not be adequate, but it is a fact that Canadian lawyers as a whole are not book buyers in the sense the lawyers of this

country and, in particular, of New Zealand are. The sales of some of the purely Canadian publications which one would have thought to be indispensable are evidence of this.

We have a substantial interest in promoting the sale of law books in Canada, whether they be published here or in the Dominion, and we can assure you that if we feel that by collaboration with our Canadian friends we can produce books which will have sufficient sale to be profitable, we shall not hesitate to do what we can to help, whether or not it has an adverse effect on sales in Canada of wholly English publications. We think that the recent activities of the Carswell Company Limited in the publishing field are evidence that that company is not content just to sit back and sell books which it imports from England; this is a development which we have long felt was overdue. We think that it will continue, and we hope that the profession will find the books produced as useful as they seem to us to be.

M. W. MAXWELL*

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TO THE EDITOR:

I have read with interest your review of Dalrymple's *French-English and English-French Dictionary* in the August-September issue, in which you raise the important question of encouraging the production of Canadian legal texts. There are several publishers in Canada who would gladly undertake the publication of professional texts in medicine, engineering and the other professional disciplines, providing there is sufficient backing for the book, either in the form of an adoption by a medical school, an engineering association or, say, the Canadian Bar Association. The Ryerson Press have published medical texts adopted for use in medical and nursing schools. We brought out *The Law of Negotiable Instruments* by Dr. John D. Falconbridge and it has passed through several printings. We have issued *Accounting Principles and Practice* and *Canadian Banking*, among others, because they were authorized for use by universities and in banking and chartered accountants courses. We are always looking for more books of this sort.

There has been an astonishing development along this line, and I rather think along the line of your own special interest. More specialized texts are being issued in Canada than ever before. Whereas Canada for a long time was a market for British and American texts, Canadian publishers are now accepting increasing numbers of books written in Canada by Canadians. During the last couple of months we have appointed a special educational representative at the college level, and we shall hope, so far as this house is concerned, to add an increasing number of books such as you have in mind to our list as the days go on. I am quite certain that we shall proceed as they do in England and the United States, and that publication will depend on the approval of colleges and professional associations. This will make it worth while for the publisher to keep the texts constantly under review and revised for successive printings as required. If you know of any publications in the field of law that need to be done especially in Canada, we would consider it a great favour if you would let us know.

LORNE PIERCE†

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The Use of Legislative History

TO THE EDITOR:

Professor Kilgour in his very interesting and informative article "The Rule Against the Use of Legislative History", beginning at page 769 of the October 1952 number of the Review, contends that there is no rule of law precluding recourse to the legislative history of a statute on questions of interpretation; that the so-called rule goes only to weight and not to admissibility; and that in a few appropriate cases, of which the *Canadian Wheat Board* case is an example, discriminating use of the legislative history will be of great assistance. I find myself in disagreement with the author's conclusions. My primary purpose in writing you, however, is not to express my dissent, but rather to stress some features of the *Wheat Board* case which Professor Kilgour has not mentioned.

The facts of that well known case do not require detailed review. The questions involved were whether the Governor General in Council had, under the National Emergency Transitional Powers Act of 1945, power to expropriate and whether the courts could review an order in council passed by the Governor General in Council in ostensible exercise of the powers conferred by the Act.

The October 1952 part of the Appeal Cases, which I assume was not available to Professor Kilgour when his article was prepared, indicates that counsel for Nolan, in the course of his argument and while comparing the War Measures Act and the Transitional Powers Act, attempted to put in the bill which became the Transitional Powers Act. The Privy Council not only declined to receive the bill, but refused even to entertain an argument on admissibility, as will appear from the following statement in [1952] A.C. 427, at p. 433:

> "Counsel sought to put in the bill which became the Transitional Act, and, on objection being taken for the appellants, referred to the following cases in support of his right to do so in a constitutional case: *In re Provincial Fisheries* (1895) 26 S.C.R. 444 and *Re Gray* 57 S.C.R. 150, 180; but he was directed by the Board not to continue with that point."

It is unfortunate that the Privy Council's ruling is not given in full and that nothing is said about it in the opinion, but I learn by inquiry that the Board declined to accept the bill not because of lack of proof, or because the bill should have been introduced at an earlier stage of the proceedings, but on the ground that the bill was not admissible in aid to interpretation. It is understood also that the Board was quite firm in its rejection. It may be that the Privy Council considered that its views on the use of legislative history were well known and did not require elaboration. In this respect reference is made to what Lord Watson said, speaking for the Judicial Committee, in *Administrator-General of Bengal* v. *Prem Lal Mullick* (1895), L.R. 22 Ind. App. 107, at p. 118:

> "Their lordships observe that the two learned Judges who constituted the majority in the Appellate Court, although they do not base their judgment on them, refer to the proceedings of the Legislature which resulted in the passing of the Act (No. II) of 1874 as legitimate aid in the construction of section 31. Their lordships think it right to express their dissent from that proposition. The same reasons which exclude these

considerations when the clauses of an Act of the British Legislature are under construction are equally cogent in the case of an Indian statute."

The ruling on admissibility in the *Wheat Board* case accords with the opinion given by Lord Watson; with the views expressed in *Gosselin* v. *The King* (1903), 33 S.C.R. 255, at pp. 263 *et seq.*, and in *Herron* v. *Rathmines*, [1892] A.C. 498, at pp. 501-502; and also with Lord Wright's obiter dictum (Lords Atkin and Thankerton, and apparently also Lord Warrington of Clyffe, concurring) in *Assam Railways* v. *C.I.R.*, [1935] A.C. 445, at p. 458, that:

"It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible. . .".

It would appear from the foregoing that the rule relating to the use or non-use of legislative history on questions of interpretation goes far beyond what Professor Kilgour has referred to as "merely a counsel of caution".

Professor Kilgour also contends that, if there is a rule against the use of legislative history, one exception, based on the *Wheat Board* case, is that "speeches made in Parliament are admissible so long as they have been published by a government agency which has adopted them as an expression of its official policy". He justifies the alleged exception on the ground that certain instructions to the trade issued by the Wheat Board, which had attached to them an outline of government policy as announced in Parliament (the outline was in fact, although not so described, a verbatim excerpt from the speech of the Minister of Agriculture) were received in evidence.

I venture to suggest that there is nothing in the Privy Council's judgment in the *Wheat Board* case to support the contention that speeches made in Parliament, even when published in the circumstances mentioned by Professor Kilgour, can be used on a question of interpretation. There was an issue as to the validity of the instructions. They would, therefore, be admissible and presumably everything attached to them would also be admissible. That is not to say, however, that the document with its annex was admissible for all purposes, and apparently it was used only on the question whether the order in council could be reviewed on the ground, put shortly, that it was made for an improper purpose. The question of the interpretation of the order in council was not involved, it was not necessary for the Judicial Committee to make use of the instructions for that purpose, and the Board did not in fact do so. In any event, on whatever basis the outline of government policy may have been relevant, it cannot be said that the Privy Council received it with any great enthusiasm. Lord Radcliffe, delivering the opinion of the Board, concludes his reference to the outline by saying at page 442:

"A copy of the government announcement formed part of Instructions to Trade No. 59, which fixed the new maximum prices; and in any event it has been referred to in so many of the judgments under review that it cannot but be treated as a relevant part of the case".

JOHN T. MACQUARRIE*

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Judicial Appointments: A Qualified Dissent

TO THE EDITOR:

General Clark's detailed and considered proposals (The President's Address (1952), 30 Can. Bar Rev. 651; Appointments to the Bench (1952), 30 Can.

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Bar Rev. 28) concerning the making of appointments to the bench in Canada deserve attention, but I should be sorry if they were to produce any undue rigidity in the process of selection of personnel for the highest appellate tribunal in Canada, the Supreme Court of Canada.

General Clark's starting point is his statement that "the first recital in the preamble to the British North America Act expressed the desire for a federal union into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom. Unless, therefore, there are good reasons for adopting other customs and conventions, we should follow the customs and conventions around which the Constitution of the United Kingdom is built." (30 Can. Bar Rev. at p. 652)

Is this a valid starting point? The constitution of the United Kingdom is rather different from that of Canada. As Professor Dicey noted years ago, the English constitution has three main characteristics: "First, there is no law which Parliament cannot change . . . acting in its ordinary legislative character. Secondly, there is under the English Constitution no . . . distinction between laws which are not fundamental or constitutional and those laws which are fundamental or constitutional. Thirdly, there does not exist . . . any person or body of persons, executive, legislative, or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the Constitution, or on any ground whatsoever, except, of course, its being repealed by Parliament." (Dicey, Law of the Constitution (9th ed., 1939) pp. 88-91)

By contrast to the extreme flexibility of the English constitution, the Canadian constitution is rigid — the process of amendment of the B.N.A. Act, even apart from the current proposals for a new amending procedure to be operated wholly within Canada, is productive at times of considerable delays and difficulties, throwing a corresponding burden upon indirect agencies of constitutional change. In addition, and again in contrast to the English constitution, the Canadian constitution is of course a federal constitution, involving a division of legislative powers between the federal government and the member-provinces and correspondingly difficult problems of adjustment in determining the boundaries of the respective spheres of federal and provincial legislative power. And of course the Supreme Court of Canada is now exercising the power of judicial review in passing upon the constitutionality of federal and provincial legislation.

Though it would be an error to write off the opportunities possessed by English judges for delaying and frustrating legislative majorities in the process of "interpretation" of statute law, the position of a supreme court (such as the Supreme Court of Canada) exercising judicial review under a written and rigid federal constitution clearly differs *toto coelo* from that of a tribunal sitting, as the House of Lords does, as the highest tribunal in a jurisdiction concerned primarily with private law cases. The work of the judges sitting as members of the Judicial Committee of the Privy Council and reviewing constitutional law cases stemming from the countries of the British Commonwealth is of course well known to Canadians. The story is one of judges, who are trained in the strict disciplines of the inns of court and of the ancient universities, and have devoted most of their professional lives to the fine argument of private law cases, being suddenly confronted for the first time with the broad policy problems inherent in public law ad-

judication. The Watson-Haldane approach to the Canadian constitution was to treat it as an ordinary statute and to subject it to the ordinary (restrictive) rules of interpretation devised by the common-law judges for statute law, with the result that a constitution which "(rightly or wrongly) embodied a Centralized Federalism in which Dominion legislative power was of paramount importance . . . has yielded a Decentralized Federalism in terms of legislative power; and one, moreover, that is ill-adapted to present needs". (MacDonald, The Constitution in a Changing World (1948), 26 Can. Bar Rev. 21, at p. 44).

General Clark's strictures on the need for a "judiciary chosen on the basis of merit only, divorced from political considerations" (*op. cit.*, p. 652), therefore, in so far as they go beyond a plea for the avoidance of corrupt influences on the making of judicial appointments, are misleading if they intend to imply that a hard-and-fast line can be drawn between law and politics. The common law mind, with its emphasis on the strict construction of statutes and the reading-down of their provisions, can be just as much political in its consequences as the straight-out policy-oriented interpretation, the more so perhaps because the former approach is normally an unconscious one, and the judicial decision-maker can often remain unaware that he is in the end result shaping policy anyway. Lord Haldane, moreover, seems to have had no illusions about the political consequences of the Privy Council's interpretation of the Canadian constitution or about the creative rôle played by himself and Lord Watson in this regard, when he paid tribute to Lord Watson's work thus: "As a result of a long series of decisions, Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh that the Constitution of Canada took a new form. The Provinces were recognised as of equal authority co-ordinate with the Dominion, and a long series of decisions were given by him which solved many problems, and produced a new contentment in Canada with the Constitution they had got in 1867. It is difficult to say what the extent of the debt was that Canada owes to Lord Watson." (Haldane, The Judicial Committee of the Privy Council (1923), 1 Camb. L.J. 143, at p.150)

I am not so sure, therefore, that General Clark's submission that "the practice of having the Cabinet consider each appointment to the judiciary is objectionable and unnecessary" (*op. cit.*, p. 653) is a particularly sound submission, so far anyway as appointments to the Canadian Supreme Court are concerned. If judges at that level are in fact policy-makers, in the sense that they are laying down the lines of future development for the constitution, it may become quite important to know what the value preferences of the individual judges are and what policies they are in fact likely to implement on the bench. These are questions transcending purely professional expertise that can be answered quite as well by the Prime Minister and the Cabinet as a whole as by the Minister of Justice. Canada has indeed always paid deference to the importance of "political considerations" in the making of appointments to the Supreme Court. The Supreme Court Act of 1875 provided that two judges out of a bench of six should come from Quebec: the amendment of 1949, in addition to its main task of abolishing the appeal to the Privy Council, increases membership in the court to nine judges, and at the same time provides that one third of those judges should come from Quebec. Canada is, to my knowledge, the only country thus far to concretise into positive law form the principle of according representation to regional

and sectional interests in the nation in the making of appointments to the superior courts. The principle is accepted to some degree in the United States, in the sense that at the present day the Supreme Court's nine members will tend to include representatives from such outlying areas as the South, and the Far West, and also representatives of minority religions such as the Roman Catholic and Jewish. The idea of regional representation on the United States Supreme Court seems to have originated as a rule of convenience in the fact that from the time of the first Judiciary Act in 1789 until Congress finally, after more than a century, relieved them, the individual justices of the Supreme Court, in addition to their appellate work, were also required to act as trial judges assigned to a particular circuit of the United States: this situation of course no longer applies to-day, and the regional representation principle therefore, if it is to be more than a vestigial survival, must be justified on broader grounds. One might add that there has been a tendency in recent years, and especially since the New Deal era, to appoint members of another, and one would hope increasingly important, minority professional group, the university professors (note in this regard Chief Justice Stone, and Justices Douglas and Frankfurter, and the late Mr. Justice Rutledge).

As a question of strict professional competence of course, regional and sectional factors such as these are irrelevant. Yet any mode of judicial appointment in Canada, for example, that did not take account of them would ignore the cardinal feature of the Canadian political scene to-day, the presence in Canada of the two distinct and sometimes conflicting "living laws" stemming from the two separate races and cultures within its boundaries.

What I am saying is that this question of strict professional competence is only one (though admittedly a most important one) of many factors to be considered in the making of appointments to final appellate tribunals. In making judicial appointments at this level, it is submitted, it should be recognized that, since essentially a policy-making office is being filled, the background and value preferences of individual nominees deserve some especial scrutiny. It is submitted that consideration can also reasonably be given to regional and sectional interests in the making of such appointments, though one might hope that this would not be carried so far as to become mechanical.

What then are the over-all qualities that make a good constitutional judge? Not formal education alone — Chief Justice Marshall after all only attended one month of law lectures — though it must be noted that Holmes, Brandeis, Hughes and Stone all had made their mark as legal scholars among other things. The essential distinction between these men and the other eighty odd justices appointed to the United States Supreme Court since 1789 may well be in the special ability to perceive long-range national trends and in the disposition to shape constitutional formulas accordingly to suit those needs. The judicial decision-maker at the highest appellate level must in this sense, therefore, be above all a trend-thinker as well as an expert manipulator of legal doctrine: it is characteristic, I think, of the United States Supreme Court justices just mentioned that they have all had a very keen political sense. One could add that the same tends to hold true elsewhere in the Commonwealth — the first bench of the High Court of Australia (Griffith C. J., Barton and O'Connor JJ.) was essentially a Founding Fathers' Court, since each of the three justices had been active in the political movement leading to the federation of the Australian States, Barton having

been the first Prime Minister of the new Commonwealth and O'Connor a member of the federal cabinet. These men, together with Isaacs and Higgins, who were appointed shortly afterwards and who had had substantially similar experience in public life, gave a clear, bold interpretation to the new constitution that persisted until a newer generation of equity lawyers appointed to the High Court bench began to apply the same restrictive methods of interpretation to the Australian constitution as have marked the Privy Council's approach to the Canadian constitution. It is perhaps characteristic that the broadest and most beneficial construction in recent years of federal constitutional powers in Australia has been given by Sir John Latham, only recently retired as Chief Justice of Australia: Sir John Latham is a former Deputy Prime Minister of the Commonwealth, and former Conservative political leader, but that has not prevented his taking the lead in upholding legislation of which in many cases, on the basis of his past political record, he would probably have personally disapproved.

In short, Sir, I have the feeling that General Clark's proposals place too much emphasis on purely professional experience and qualifications, and for that reason might operate restrictively to cabin and confine appointments to high judicial office. A broad basis of appointment and recruitment at the highest appellate level, it is submitted, is the best guarantee that an instrument like the Canadian constitution, which after all is not an "ordinary statute" but presumably (like the United States constitution) intended to endure for ages to come, may, in Chief Justice Marshall's words, be adapted to the various crises of human affairs.

EDWARD MCWHINNEY *

Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

Civil Procedure of the Trial Court in Historical Perspective. By ROBERT WYNESS MILLER. New York: The Law Centre of New York University for The National Conference of Judicial Councils. 1952. Pp. xvi, 534.

Fluoridation of Municipal Water Supply: A Review of the Scientific and Legal Aspects. By CHARLES S. RHYNE AND EUGENE F. MULLIN JR. Report No. 140. Washington: National Institute of Municipal Law Officers. 1952. Pp. 62. ($3.00)

John A. Macdonald: The Young Politician. By DONALD CREIGHTON. Toronto: The Macmillan Company of Canada Limited. 1952. Pp. xii, 525. ($5.75)

The Law of Homicide. By ROY MORELAND. Indianapolis: The Bobbs-Merrill Company, Inc. 1952. Pp. viii, 338.

The Law of Municipal Contracts with Annotated Model Forms. By CHARLES S. RHYNE. Washington: National Institute of Municipal Law Officers. 1952. Pp. 192. ($7.50)

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Legal Aid Contributions to the Relief of Inadequacy States in Domestic Relations. Psychoanalytic Jurisprudence Series No. 2. By JOHN H. MARIANO. New York: Council on Marriage Relations Inc. 1952. Pp. 42. (50 cents)

A Man of Law's Tale. The Reminiscences of the RT. HON. LORD MACMILLAN, P.C., G.C.V.O., LL.D., D.C.L. London: Macmillan & Co. Ltd. Toronto: The Macmillan Company of Canada Limited. 1952. Pp. viii, 379. ($4.50)

A Manual of International Law. By GEORG SCHWARZENBERGER, Ph.D., Dr. Jur. Third edition. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1952. Pp. lii, 441. ($6.75 net)

Modern Equity: The Principles of Equity. By HAROLD GREVILE HANBURY, D.C.L. Sixth edition. London: Stevens & Sons Limited. 1952. Pp. xl, 774. ($12.00 net)

Outlines of Canadian Planning Law: A comparative survey of the town planning legislation operative in the Provinces of Canada. By NORAH MCMURRAY, with a foreword by HAROLD SPENCE-SALES. Ottawa: Community Planning Association of Canada. 1952. Pp. 80. (50 cents)

Roman Law & Common Law: A Comparison in Outline. By the late W. W. BUCKLAND and ARNOLD D. MCNAIR, K.C., LL.D. Second edition revised by F. H. LAWSON, D.C.L. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada, Limited. 1952. Pp. xx, 439. ($6.75)

The Taxation of Corporate Income in Canada. By J. RICHARDS PETRIE. Sponsored by the Canadian Tax Foundation. Toronto: The University of Toronto Press. 1952. Pp. xvii, 380. ($7.00)

Tax-Saving. By HUGH B. SAVAGE, C.A., associate of the Chartered Institute of Secretaries. Montreal: Kingsland Publications. 1952. Pp. 146. ($3.00)

A Classical Education

In the moving tribute paid in your columns to Lord Greene emphasis was justly laid upon the influence which his classical education had upon him. It was indeed profound. His presidential address to the Classical Association in 1947 was an affirmation of his faith in the humanities, of which he was himself so remarkable an exponent. . . .

In the same address he defined the lessons to be learnt from Greece and Rome in terms which fairly describe his own rare mental characteristics. 'Integrity of mind . . . , accuracy of thought and expression, and the impulse to reject what is slovenly or superficial; distrust of the catchword . . . , the habit and method of reasoned criticism which forbids us to accept or reject a proposition merely because it is pleasant to do so, or because it saves the trouble of thought; the power to recognize and enjoy beauty in all its forms.'

Thus, as may sometimes happen in the case of a man whose practice closely approximates to his ideals, he provided unconsciously the best commentary on himself. . . . (An extract from a letter by the Rt. Hon. Sir Raymond Evershed M.R. to The Times of May 1st, 1952)