Correspondence

Audition des appels de Québec à la Cour Suprême

Monsieur le directeur:

Me permettriez-vous d'ajouter à ma critique de l'arrêt de la Cour suprême du Canada (page 950 *supra*) dans l'affaire *Donaldson*, un post-scriptum touchant à la question des juges *ad hoc*. L'article 30 de la Loi sur la Cour suprême prévoit la désignation de juges *ad hoc* à la demande du juge en chef s'il n'y a pas de quorum des juges. Cinq juges forment quorum, sauf dans les causes ou les parties consentent à être entendues par quatre juges. Cet article se lit comme il suit au paragraphe premier:

> Si, à une époque quelconque, il n'y a pas de quorum des juges de la Cour suprême pour tenir ou continuer une session de la Cour à cause d'une ou de plusieurs vacances, ou d'absence par suite de maladie ou de congé, ou en raison de l'exécution d'autres fonctions attribuées par statut ou arrêté en conseil, ou de l'inhabilité d'un ou plusieurs juges, le juge en chef ou, en son absence, le doyen des juges puînés peut, par écrit, requérir la présence aux séances de la Cour, à titre de juge *ad hoc*, pendant toute période de temps qui peut être nécessaire, d'un juge de la Cour de l'Echiquier, ou si les juges de ladite cour sont absents d'Ottawa ou ne peuvent siéger pour quelque motif, d'un juge d'une cour supérieure provinciale que désigne par écrit le juge en chef, ou en son absence, le juge en chef suppléant ou le doyen des juges puînés de cette cour provinciale, sur la requête à lui faite par écrit.

C'est seulement dans le cas où cinq juges ne sont pas disponibles que le juge en chef peut requérir la présence d'un juge *ad hoc*. Et la loi ne fait aucune distinction entre le quorum pour une cause de Québec et le quorum pour les causes des autres provinces. Ce qui veut dire, par exemple, que même s'il n'y avait aucun juge de Québec disponible mais qu'il eût quorum, les causes de Québec, même celles de droit civil pur, doivent être entendues et jugées, sauf remise, par un banc entièrement formé de juges venant des provinces de la *common law*.

Il y a donc anomalie au deuxième paragraphe de l'article 30 qui se lit:

> A moins que deux des juges disponibles de la Cour suprême ne

> remplissent les prescriptions de l'article 6 [*i.e.*, soient de la province de Québec], le juge *ad hoc* pour l'audition d'un appel d'un jugement rendu dans la province de Québec doit être un juge de la Cour du Banc de la Reine ou un juge de la Cour supérieure de cette province, désigné comme il est prévu plus haut.

Cette disposition entre en jeu seulement s'il y a lieu de nommer un juge *ad hoc*, c'est-à-dire, s'il n'y a pas de quorum. Maintenant que la cour se compose de neuf juges, il est improbable que le nombre des juges disponibles tombe à moins de cinq, et que l'article 30(2) puisse s'appliquer. A cette disposition on pourrait, à l'avantage de notre droit, en ajouter une nouvelle par laquelle le juge en chef de la Cour suprême, ou, en son absence, le doyen des juges puînés, aurait discrétion de requérir la présence de juges *ad hoc* du Québec, dans tous les cas où il le jugerait à propos pour l'audition d'un appel d'un jugement rendu dans la province de Québec, quand les trois juges de cette province ne seraient pas disponibles.

La pratique de la cour a toujours tenu, dans les appels où des questions de droit civil sont à l'étude, que tous les juges de Québec disponibles fassent partie du banc. Depuis 1949, les trois juges ont toujours siégé, sauf inhabilité ou absence. La disposition nouvelle permettrait au juge en chef de requérir un juge *ad hoc* du Québec, quand un juge de cette province est absent, comme ce fut le cas dans l'affaire *Donaldson*. Il faudrait, à mon avis, donner au juge en chef une plus grande discrétion en cette matière.

LÉON LALANDE*

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Habitual Criminals: Judge's Discretion to Pass "Further Sentence"

TO THE EDITOR:

In reference to Mr. Joseph Cohen's interesting comment on the law relating to habitual criminals in your issue for April 1955, permit me to draw your attention to two recent cases which seem to confirm the theory of the learned author on the question of sentence.

In his comment, Mr. Cohen considered the judge's task after an accused has been declared to be an habitual criminal, and he came to the conclusion that under the new Criminal Code—as, indeed, under the old one—the judge is not obliged to pass "a further sentence". At the time the comment was published, the matter had not been raised, so far as I know, in Canadian courts,

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and the jurisprudence cited by Mr. Cohen was entirely of English origin. While the analogy is close, the English law relating to habitual criminals—sections 21 to 23 of the Criminal Justice Act, 1948—is nevertheless different, particularly on questions of sentence, since, under the English act, the judge has some discretion on the quantum of sentence. By contrast, in Canada, if the judge is to pronounce "a further sentence", it must be one of preventive detention as defined by section 659(c) of the Criminal Code.

As a result, although the wording of the Criminal Code appears to be clear, doubt was expressed in certain quarters whether or not the code meant what it said. For, it was argued, the naked finding that an accused is also an habitual criminal would be of no value unless his detention is ordered.

It always appeared to this writer, however, that those who failed to be convinced by the language of the code were influenced by their own thoughts of what the law *ought* to have been and this may have led to a coloured interpretation of the legislature's intent.

The doubt has now been resolved by the judgment of Lazure J. in the twin cases of *R.* v. *Short* and *R.* v. *Dushin*, and, since neither case is likely to be reported—the judgment was oral—it may be well to draw them to the profession's attention. Both cases were discussed by Mr. Cohen in relation to the sufficiency of notice, and neither case proceeded at the time it was first brought to court. After the comment appeared, proper notice was given and both men were brought to trial on additional substantive charges on October 14th, 1955, in the Court of Queen's Bench (Crown Side) at Montreal. At arraignment, both pleaded guilty to these additional charges and they were sentenced to five years apiece, the terms to be consecutive to equal terms imposed last year for different offences. As a result, as matters stood at that moment, each man was due to spend ten years in prison. The habitual criminal charges were then read to the accused and, again, both pleaded guilty.

Lazure J. next considered section 660(1) and came to the conclusion that the wording of the code gave him discretion in the matter of sentence. As a result, in view of the long terms of imprisonment already imposed, he upheld defence contentions that justice would best be served by not imposing a sentence of preventive detention and no such order was made. Since the delays for appeal have now expired, the judgment must be considered final.

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Unfusing the Profession

TO THE EDITOR:

Mr. Sedgwick's letter, approving the English division of functions between barristers and solicitors, and suggesting steps in that direction to be taken in Canada, has aroused considerable interest, as evidenced by a number of replies published recently in the Canadian Bar Review.

Two of the writers have stressed the monetary aspect: Mr. Arnup suggesting that the projected plan would prejudice financially the younger lawyers, who presumably would not consent to it for that reason; Mr. John G. McDonald contending that the system prevailing in Canada is more profitable to established counsel associated with solicitors having a large clientele. Readers of the Canadian Bar Review will, I am sure, agree with me that the main purpose of the legal profession, and the ultimate justification for its privileged position in our social order, is to serve society to the best of its ability, and only incidentally to provide for the adequate remuneration of its members.

Leaving aside the financial aspect, it cannot be disputed that the system prevailing in England has produced lawyers of the highest calibre from the point of view of both knowledge of the law *and* ability to plead. Of barristers of the class of Rufus Isaacs, Sir Edward Carson, F. E. Smith, Sir Norman Birkett—to cite but a few—any country might well be proud. Nor is the result surprising. For, excepting intellectual capacity, which is of course essential both for the lawyer in the office and the lawyer in the courtroom, the qualities that make for a top-flight solicitor are not those required in a top-flight barrister or counsel, and vice versa. Our system ignores this fact, with the result that first-class solicitors, lacking however the temperamental make-up necessary for pleading in the courts, are compelled by the force of circumstances to plead and, conversely, counsel outstanding in the courts are obliged to occupy themselves with office matters (interviewing clients, administration, and so on), for which they have no liking and little patience.

Under the English system, the young lawyer-graduate, working for and with an established barrister, receives a type of training that is denied to a majority of the lawyer-graduates in Canada. It may be that under the English system an aspiring young barrister not a member of a wealthy family must put off thoughts of marriage for a number of years. That in itself is no justification for rejecting the system. Service to the social structure on the highest plane possible must have priority, and should have priority, over a graduate's notion of love's young dream.

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The Crown-Servant Relationship

TO THE EDITOR:

The thoughtful article by Dr. Ivor Richardson in your April issue, Incidents of the Crown-Servant Relationship, raises some interesting and difficult questions regarding the contractual relationship involved in civil service employment. I am all too conscious of the pitfalls in this very complex area of the law, but I should like to comment on some of Dr. Richardson's remarks.

First, it is stated in footnote 1 on page 425 that: "No distinction is made between non-industrial and industrial civil servants . . .", the authority for this statement being, apparently, an official of Her Majesty's Treasury. It is not quite clear from the context if this means simply that the Tomlin Commission's definition of a civil servant[1] includes both industrial and non-industrial public employees; if it does, then the statement is certainly correct but does not take us far. If, however, it is meant to imply that the "rights" of each are identical then it is not quite accurate. For example, the political activities of industrial civil servants are much less restricted than those of the majority of non-industrial civil servants.[2]

Then at page 429, footnote 23, there is the comment: "He [Prof. J. D. B. Mitchell] considers, however, that the priority of private rights under contracts with the Crown should be recognized by the fact that, where their surrender is required, compensation is payable". Dr. Richardson suggests that "there is a simpler and more logical explanation", namely, that "specific performance cannot be enforced against the Crown (Crown Proceedings Act, 1947, 10 and 11 Geo. VI, c. 44, s. 21)".

I cannot agree with Dr. Richardson here. The fact that specific performance is statutorily excluded does not necessarily explain the Crown's willingness to compensate for broken contracts. The possibility could be envisaged that no remedy at all might be available—the field of administrative law is strewn with such "casualties". That such a recognition as Professor Mitchell visualises does exist would appear to be borne out by the case of *Attorney-General* v. *Lindegren* (1819), 6 Price 287, cited by Dr. Richardson at page 428. Private rights under Crown contracts seem, therefore, to be a matter of public policy quite independent of the Crown Proceedings Act.

[1] "Servants of the Crown, other than holders of political or judicial offices, who are employed in a civil capacity and whose remuneration is paid wholly and directly out of monies voted by Parliament."

[2] See the Report of the Masterman Committee (Cmd. 7718/1949) and subsequent White Paper issued by the government. The phrase "the majority of" is used advisedly since certain non-industrial civil servants, *e.g.* manipulative workers, are as free to enter politics as their industrial counterparts.

The view is expressed at page 432 that the implied term in Crown contracts that the Crown will not normally fetter its future action means that, ". . . in the absence of a special contract, the only enforceable rights of a civil servant relate to those terms which do not affect his future employment by the Crown", and it is then stated that "rights arising in respect of past service are enforceable". But because the Crown is understood not to fetter its *future* executive action, it does not necessarily follow that a civil servant will have enforceable *past* rights. Might the implied term not mean merely that the civil servant in Britain has *no* enforceable rights? I am not saying that such is the case—though I rather suspect that, if he has any rights, they are very few—but I do want to stress that to say that a civil servant has no rights in respect of his future service does not imply that he has, therefore, rights in respect of past services.

I should like to raise another point closely connected with this last comment. Dr. Richardson says that "The implied term that the Crown does not contract so as to bind its future executive action in any respect . . . applies only to conditions of service in the future and does not operate retrospectively to affect rights in respect of past service under the contract" (p. 433). And, again, ". . . there is an implied term enabling the Crown to alter the conditions of service. This, of course, does not enable it to affect rights of the civil servant in respect of completed service—for example, to reduce his salary retrospectively." (p. 434) I would suggest that this view needs considerable modification. Before the last war there was a civil service regulation which provided that certain civil servants, on completing fifteen years service, would become eligible to have their annual leave increased from thirty-six to forty-eight days. During the war leave was, naturally, curtailed; but since the end of the war this regulation has remained in abeyance and, to the extent that civil servants who have completed fifteen years service are deprived of the extra leave, it would seem that "rights" based on past service have been affected. Indeed one might argue that, since Dr. Richardson maintains that superannuation allowances are "part of the servant's compensation for services rendered" (p. 456, fn. 118), then these should not be subject to "the implied term" and ought to remain fixed throughout a civil servant's career. But it is hardly conceivable that the courts would hold that the Crown could not reduce the superannuation allowances payable to British civil servants; and if these allowances were reduced, would this not be a case of affecting the rights in respect of past service?

The whole argument about the effect on the civil servant of non-statutory regulations seems to me to be unnecessarily complicated. Dr. Richardson attempts to show that "there is an im-

plied term enabling the Crown to alter the conditions of service" (p. 434). First, he asks what effect non-statutory regulations have on either the Crown or the civil servant. Having given "three possible answers", Dr. Richardson selects the third, which is "that the regulations become terms of the contract binding both the Crown and the civil servant", and says, "From the viewpoint of theory, the third answer would appear to be the correct one" (p. 432). The difficulty then arises that one must distinguish (a) regulations which were in existence when the civil servant entered the service of the Crown, and (b) regulations promulgated afterwards, and I found, I am afraid, that Dr. Richardson's explanation of the effect of this distinction was far from convincing. A much simpler—and, I think, more accurate—solution lies in the first possible answer given, namely, "that neither party is directly and contractually bound by the regulations, which constitute mere statements of policy, but, if either party does not observe their terms or if the Crown changes its 'policy', the Crown may exercise its power of dismissal at pleasure or the servant may resign immediately . . ."(p. 432). Thus the British civil servant knows that his employment in the civil service will be circumscribed by regulations—which may alter from time to time; but he appreciates that he may resign if he feels unable to accept the regulations or that he may be dismissed if he fails to obey them. This does not, of course, mean that there is no "law" of the British civil service. I can do no better than quote Professor W. A. Robson on this point:

> The fact that there is very little legislation or case law dealing with the civil service does not necessarily mean that there is no law and practice of the civil service. *There is such a thing as customary administrative law;* and I contend that there is a considerable body of customary administrative law and practice regulating the civil service. *By this I mean a pattern of conduct regulating the relations between the Crown and its servants, involving obligations which are clearly formulated and regularly followed by all concerned.* Such a pattern of conduct can give rise to rights and duties which are effectively recognised and observed by the administrative authorities concerned *even though they are not enforceable in the courts of law.* ["Administrative Law", in Campion (ed.), British Government Since 1918 (1950) p. 97. The italics are added.]

A glance at "staff-official" relations in the British civil service indicates that this is a realistic appraisal of the general approach to the contract of service under the Crown.

Again, I cannot agree with Dr. Richardson's assertion that it is inaccurate to speak of rights "given by statute" and that such rights arise rather from the contractual relationship entered into under the statute. This argument is ingeniously developed (pp. 435, 444, 458) and a strong case is put for it. But I think that the desire to read as much as possible into the contract made by the Crown with

its servants has weighed too much with Dr. Richardson, who is reluctant to see this contract dissolve into a vague, unsubstantial, extra-legal relationship.

It is true that it is by entering into a contract of service with the Crown that a civil servant is brought within the scope of any relevant statutory provisions. Nevertheless, it is submitted that it is untrue to say that "the statute is simply an *offer* that certain provisions will give rights to those persons who bring themselves within its scope" (p. 435; the italics are mine). Is it not rather the case that the statute lays down certain rights and obligations which are then incumbent upon the parties to the contract in question? The legal incidents thus arising derive from the legislation itself; certainly the contract must be made before the statutory provisions can affect the parties, but the contract is often completely powerless to vary the statutory rights. Thus the contract, while it creates the *conditions* in which the provisions of the statute will take effect, does not create the *rights* themselves.

Finally, there is one minor factual error in Dr. Richardson's article. We are told that "The matter of pension allowances is the one aspect of the relation between the civil servant in the United Kingdom and the Crown which is regulated by statute" (p. 454). There are, in fact, a few other statutes which affect the civil service in Britain. The Official Secrets Acts, 1911 and 1920, and the Public Bodies Corrupt Practices Act, 1889, are two which readily come to mind.

LEO BLAIR*

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Evidence Obtained by the Police Illegally

TO THE EDITOR:

May I comment briefly on Mr. Sydney Paikin's letter in your October issue? Mr. Paikin attacks Professor Franck's choice of the law of evidence as the weapon with which the overzealous policeman can be controlled. However attractive the principle of excluding evidence, illegally obtained, may seem, it could only be arrived at, says Mr. Paikin, by a distortion of those classic and logical rules upon which the law of evidence has been formulated.

I would, with the greatest respect, point out to Mr. Paikin that these "classic and logical" rules already include, amongst their number, many which are not aimed at assisting the court to arrive at a satisfactory conclusion on the evidence but do nothing more than protect some private right of the citizen. The vari-

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ous rules of privilege protect the rights of the privileged parties without reference to possible difficulty in arriving at a satisfactory decision on the unprivileged evidence available. The marital privilege might be said to exist in support of the private right to a private marriage; the privilege protecting confidential communications between solicitor and client clearly protects a citizen's right to the fullest legal advice. Surely a rule of evidence might be added to protect the citizen's right to freedom from unlawful trespass to his person or property.

What of a confession illegally obtained? Mr. Paikin asserts that there is no true analogy between such a confession and direct factual evidence illegally obtained. In this, he apparently accepts the view of Wigmore that confessions are excluded because of their untrustworthy character; that the rule exists in order to protect the court from evidence which may be false. I would refer Mr. Paikin to *Hammond*, [1941] 3 All E.R. 38. In that case the admissibility of a confession was being considered on a voir-dire. The accused gave evidence that he had been brutally beaten by the police and that the confession had been extorted from him. On cross-examination, the first question was:

Q. "Your case is that this statement was not made voluntarily?"
A. "Yes."

followed by

Q. "Is it true?" A. "Yes."

After some investigation to ensure that the accused appreciated what he was saying, he was finally asked:

Q. "What you are now saying is that you were forced into saying what was true by something that was done. Is that right?"
A. "Yes, sir."

The Court of Criminal Appeal, in ruling upon the admissibility of such a question, held that it was relevant to the issue of whether the story which he was then telling *of being attacked and misused by the police* was true or false. It follows, I submit, that a confession, admittedly true, must be rejected if obtained improperly by a person in authority. Where could one find a truer analogy than between such a rule and the rule excluding evidence, illegally obtained, as suggested by Professor Franck?

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