

THE CLERK OF THE CROWN'S TALE

J. R. MALLORY*

Montreal

We have come to think of civil service reform as the march of progress unalloyed. But it is progress at a price. For the reformer in his zeal sweeps from his path all those gaily incongruous offices which add colour and charm to the process of government: their preservation is of no concern to iconoclastic efficiency. Consider the case of the Clerk of the Crown in Chancery.

There is no clear reason why the government of Canada ever required the services of such an officer. In the United Kingdom the position of the Clerk of the Crown is tolerably clear, while his office may be traced back to the time of Wolsey and Thomas Cromwell. Today his chief function is to be permanent head of the Lord Chancellor's office. As such, among other things, he is responsible for the custody and use of the Great Seal of the Realm, for which the Lord Chancellor is the constitutional guardian. Thus on documents issuing under the Great Seal it is the name of the Clerk of the Crown which appears at the bottom in testimony that proper authority has been exercised for the use of the seal. In addition, he discharges certain other duties, for example it is he who reads out the titles of bills to which the Clerk of the Parliaments pronounces the royal assent.

But Canada has not had, since Confederation, a Court of Chancery in which the Clerk of the Crown could function. Furthermore, since Confederation the custodian of the Great Seal of Canada has been the Secretary of State, so that official responsibility for the use of the Great Seal has fallen on the Under Secretary of State. Nevertheless there was a Clerk of the Crown, probably for the reason that practically all the offices under the old Province of Canada were carried over under the new Dominion government at Confederation. The office in Canada was

*Associate Professor of Political Science, McGill University, and author of a recent study of Canadian federalism, *Social Credit and the Federal Power in Canada*.

first constituted by royal letters patent in the eighteenth century, and its existence was continued from time to time by statutory provision thereafter. The only traditional function which the Clerk of the Crown could perform under the government of Canada was his occasional and not very arduous part in the ceremonies attendant on the royal assent to bills. Mere attenuation of function would hardly have worried nineteenth century governments, for they did not judge a political office merely by its utility, but rather by its historic associations and its usefulness for political patronage.

It must not be thought, however, that the Clerk of the Crown fattened in idleness. He had statutory responsibilities and, as will appear, he was quite capable of discovering things to do on his own. Before Confederation he had been responsible for the compilation of voters lists, the conduct of elections, and the making of election returns, and this was the activity which his office carried on after 1867. By this time he must have become something of a constitutional anomaly, since he had no obvious place in the administrative hierarchy. For a number of years after Confederation he was carried on the estimates of the Privy Council Office. Then for some reason he was transferred to the Department of the Secretary of State, to be transferred ultimately to the House of Commons establishment. And there he remained, and might be to this day had not the restless reforming spirit of the twentieth century finally swept him into the dust-bin of history. It must be admitted that the operations of his office had too much of the comfortable air of the nineteenth century about them—an atmosphere of unskilled clerks with steel pens, disorderly records, casual financial practices, and a rather startling inefficiency.

The trouble started when the Auditor General drew the attention of Sir Robert Borden to the alarming increases in the contingent fund of the Crown Chancery Office. The Prime Minister passed the Auditor General's observations to the Speaker of the House of Commons for his consideration. It should be explained that the financial administration of the House of Commons falls under a body called the Committee of Internal Economy, consisting of Mr. Speaker and four Privy Councillors who are Ministers of the Crown. The Clerk of the Crown's estimates were transmitted, by way of the Clerk of the House of Commons, to Mr. Speaker who, as head of the Internal Economy Committee, was responsible for laying them annually before Parliament. By this roundabout compromise ministerial responsibility for all expen-

diture was reconciled with the nominal independence of the internal affairs of the House of Commons from the control of the government of the day.

After due consideration of the matter Mr. Speaker Sproule wrote to Sir Robert Borden, on October 19th, 1915, that he was "dissatisfied with the increase in the expense connected with the Office of the Clerk of the Crown in Chancery".¹ The annual outlay for contingencies, he pointed out, had increased from less than two thousand dollars in 1908 to over five thousand a year, and in the past fiscal year they had exceeded seven thousand dollars. The only exceptional year in this period, it appeared, was the one year in which there had been a general election—when they had fallen to less than three thousand dollars. Where was the money going?

It was evidently not going to the permanent staff. Until 1908 the staff of the Crown Office had consisted of two regular employees, the Clerk and the Deputy Clerk. In that year the number had been increased to three with the appointment of Mr. Castonguay to do "any translating or work in French that was required". Much of the contingent fund was being paid out to temporary employees "among whom are usually a number of members of his [the Clerk's] own family, including his son-in-law, at a high wage scale and, so I am informed", added Mr. Speaker tartly, "short hours, presumably to make the work pan out".

Mr. Speaker had tried to find out what the temporary employees were retained for. The explanation for the additional expenses of the office, the Clerk told him, "was that he had been completing the defective records of his office since Confederation". It was also asserted that the four temporary employees so retained were a necessary reserve of trained staff in the event of a general election. Neither argument seems to have carried great weight with a Speaker obviously unsympathetic to official historical research, of which he said, "I am unable to understand why this work should be necessary, or what useful purpose it would serve, the returns of the various elections being in print and available". The Speaker concluded by formally requesting the Prime Minister to have an order in council passed under the provisions of section 10 of the Civil Service Amendment Act, 1908, for an investigation of the operations of the Crown Office by the Civil Service Commission. The necessary order was approved on November 4th, 1915, and an inquiry commenced by the commission.

¹ The letters referred to are in the Borden Papers, Public Archives of Canada: R.L.B. 967 (117043-117112) and R.L.B. 2735 (136364-136365).

This time the scholarly activities of the Clerk of the Crown were reviewed by a greater authority on historical research than Mr. Speaker Sproule, for one of the civil service commissioners was Adam Shortt, sometime Professor of Political Science in Queen's University.

The commission concluded that the trouble stemmed from the Contingency Fund, which the Clerk of the Crown was apparently able to draw against at will and without prior submission of claims. With the money thus placed at his disposal, the clerk was able to finance his temporary help in various kinds of bootless and redundant activity. Something like five hundred dollars a year was consumed in counting the names on the lists of voters submitted by the chief provincial officers, who were paid on the basis of the number of names on their respective lists. But, the Civil Service Commission found, the Franchise Office of the Printing Bureau also counted and numbered the names on the voters lists. "This counting, it was found, was, as a rule, much more accurate than that performed by the temporary assistants employed in the office of the Clerk of the Crown." One counting, it was recommended, would do, and the commission reported with satisfaction that the Clerk of the Crown had agreed to discontinue the mathematical activities of his staff.

But the activity which clearly lay closest to the heart of the Clerk of the Crown was his prodigious research in completing the details of the full Christian names and political affiliations of all parliamentary candidates since Confederation and, "in the case of the first election of 1867, the compiling of an entirely new writ book, the original having been lost".

This should have pleased Dr. Shortt. But no. "So far as these records might have any official value, it is questionable as to whether the Clerk of the Crown in Chancery was justified in altering the names of the various candidates by attempting to give their full christian names where the signatures of the parties themselves had given simply their initials." It was not only tampering with official documents, it was far worse, for "no reference is furnished to the authorities for the alterations or additions in the records". Some of the information had come from parliamentary guides, newspapers, and business directories. More had come from individuals, or from hearsay, and the unfortunate clerk was rather hazy as to where any particular bit of information had come from. Poor Mr. Foley had not yet learned the first lesson in the technique of historical research; and yet he had been able to deploy

four well-paid though unskilled persons on his research and to lay out about six thousand dollars a year on it. Even after forty years of rising prices, that six thousand a year "research fund" will arouse the envy of all but the pampered darlings of the American educational foundations.

The Clerk of the Crown was not content with historical research. He also aspired to be a cartographer. The horrified Civil Service Commissioners found that he had begun the preparation of a "Dominion Atlas", giving the boundaries of the various constituencies and their polling subdivisions. A moment's calculation revealed that beside this vast enterprise the cost of the electoral history would be trifling. The commissioners firmly recommended the termination of all this scholarly activity, and recommended that in future no work by the Office of the Clerk of the Crown in Chancery which involved extra expenditure or the employment of temporary staff be undertaken without the express permission of Mr. Speaker. These recommendations were apparently carried out. But they did not deter Mr. James G. Foley.

On March 15th, 1916, he wrote to the Prime Minister the sad news that "Owing to the fire in the House of Commons, all the records in my office have been destroyed". But all was not lost, for the great task could be begun again. "As there is no record of elections, etc., from 1867 to 1896, I would suggest preparing a record, from all available sources, of elections held during that period." His Resume of Elections that he had prepared before Mr. Speaker had stopped expense on it "was a complete record prepared with great care as to details given. Had this been printed as I intended the loss of the records would not have been so serious." The undertaking of such work again would entail expense and would take much of his time, "but as there is no probability of a General Election for some time, the present would be the most opportune time to do this work". The alert reader will recall that there was in fact a general election the very next year.

But Borden was not to be drawn. He wrote to Dr. Shortt, who repeated and amplified his earlier verdict on Mr. Foley as an historian. "But if Mr. Foley has little conception as to what were the essentials of a historical record, much less had the temporary clerks whom he employed on the work, and who had never qualified for even the most elementary grade in the service, though they were paid at rates far in advance of those who had qualified for permanent appointments. As a matter of fact most of those

engaged on this work were his own relatives and personal friends." So Borden replied that he considered it undesirable to proceed with the compilation of the election records and, perhaps somewhat unkindly, enclosed Adam Shortt's letter.

By this time the days of the office of the Clerk of the Crown in Chancery were numbered. Perhaps such old-fashioned naive enjoyment of the perquisites of this historic sinecure offended against something crude and unsentimental in the make-up of the twentieth century. When James G. Foley was retired on superannuation in 1918, no appointment was made to the vacant office, but the deputy clerk (also nearing superannuation) was continued as acting Clerk of the Crown. There were, of course, applicants for the post. The most persistent of these was the Chief of the Franchise Office in the Printing Bureau, where, it will be recalled, most of the actual work of preparing election material was actually done.

He had written to Sir Robert Borden on July 20th, 1918, applying for the position of Clerk of the Crown. He pointed out that his division did most of the work anyway, "it was established in the first place for the purpose of taking over the work of that officer which he, for want of technical knowledge, was unable to carry out. . . . If you favour my appointment [he added], I would respectfully suggest for your consideration the abolition of the Franchise Office and the transfer of the work now being carried out by it under the King's Printer to the Crown Office. The saving to the Government if this were done would be in the vicinity of \$10,000 per year. . . ." He concluded by saying that he was next in line for the post after the aging Deputy Clerk, "if a man from within the service is selected and if long, faithful, honest service counts I have it in my favour, besides it would be in line with the principles laid down when the new C. S. Bill was before the House, viz., that promotion from within would always be considered if competent men could be found". Borden had replied laconically in his usual formula that "the application . . . will be attentively considered".

A year elapsed, and on July 30th, 1919, the application was renewed, concluding rather plaintively that "since the passing of the War Time Elections Act my work has been greatly curtailed and I feel very much disturbed as to my future position and standing in the Government Service". But it was not to be. A curt undated memorandum in the Prime Minister's office stated that the applicant was "scarcely suitable for such an appointment". No appointment was made.

By now the end was near, and the *coup de grace* was to be delivered in the great Dominion Elections Act, 1920, which in Professor Dawson's words "straightened out the confusion created during the previous years".² In introducing the bill in Committee of the Whole, Hon. Hugh Guthrie, the Solicitor General, said "It is proposed . . . to abolish a time-honoured custom and official, in the office of Clerk of the Crown in Chancery".³ He went on to announce that in the proposed legislation the functions and powers of the Clerk of the Crown in Chancery would be given to a Chief Electoral Officer, who would have the independence of tenure of a judge of the superior courts. It is a sad reflection on the way in which politics is regarded in North America that whenever it is necessary to have an official discharge public responsibilities with impartiality and integrity we find it so often necessary to dress him up in the trappings of judicial independence, as if only a judge could be an honest man.

Mr. Guthrie could see "no reason whatever for continuing that ancient and honourable dignity" and no one on either side of the House was sufficiently interested in the subject even to give it a brief eulogy. So Parliament was content to abolish the office and with it one of the last survivals of the old unreformed civil service. It was, after all, thoroughly out of harmony with the spirit of the twentieth century.

We can see clearly what was wrong with the old civil service. Appointments were subordinated to the purposes of party control. It is a misnomer to call it the spoils system. It was something older, part of an age in which patronage—the exercise of the power of appointment on behalf of persons to whom one owed an obligation or a duty—was an appropriate and magnanimous use of power. It was well described by Sir John A. Macdonald in a letter to one of his supporters in Prince Edward Island:

It is a principle long settled in Canada that the British and not the American system should prevail as to office, and that a man once appointed should not be removed on account of his political proclivities so long as he performs the duties of his office, and does not use his position or influence ostentatiously against the Government of the day. It is but right that each party as they get possession of the Government should appoint their friends. The present Government is doing so, and cannot object to its predecessor having done the same thing.⁴

² R. MacGregor Dawson: *The Government of Canada* (Toronto, 1954) p. 378.

³ Canada, House of Commons Debates, April 8th, 1920, pp. 1069-1070.

⁴ Pope Papers (Public Archives of Canada). Macdonald Biography Vol. 28, November 5th, 1879.

Nor would Sir Wilfrid Laurier have disagreed. He wrote on December 17th, 1909, to a colleague over a patronage difficulty where through oversight one of his supporters was in danger of being passed over "As the principle of promotion was then [the last time the office in question fell vacant] ignored by the Tories, he thinks it would be carrying virtue too far to now apply it against our own friends. It seems to me that this consideration is not without force."⁵

We should not forget that the old civil service contained some very able men. The trouble was that, through its methods of appointment and promotion, it produced high officials of such variable quality that a properly organized hierarchy of competent officials was impossible. It is surprising that it functioned as well as it did. With our eyes glued on the appalling accounts of investigations into well-known cases of scandalous incompetence and corruption, we are liable to be over-conscious of its defects, and neglect to marvel that it functioned at all.

Life is now so complicated that government requires the continuous application of a team of highly trained professional administrators. Selflessly devoted to the public service, the new class of administrators bring the expert's detached judgment to bear on the details and the mass of intricate issues. The result is a higher civil service in Canada which is, in the words of a former Prime Minister of the United Kingdom, "an impressive group of very able men, equal to the best in Whitehall".⁶

The nineteenth century civil servant, while no less devoted and occasionally as able, was of a different stamp from his twentieth century successor. He saw the issues with which he was confronted in more personal terms. In his struggles to achieve his ends he reminds us strongly of those numerous characters in the novels of Anthony Trollope whose lives were spent in relentless struggles within the hierarchy of church or state. One feels that while no great public issue depended on the results of these titanic struggles, the issues were important in shaping the personality and character of the man. Trollope catches his characters, not in the management of great affairs, but in the small things that reveal the true temper of the man. The old Canadian civil service was full of Trollopean characters, wrestling with shapeless and complicated Trollopean issues.

We can no longer afford to have the course of public business

⁵ Laurier Papers (Public Archives of Canada: 163627).

⁶ C. R. Attlee, *As It Happened* (London, 1954) p. 127.

distracted by personal foibles of conscientious misfits. The age in which we could do so has now passed. But it was an age which was, for that very reason, more relaxed and more attractive. Some of its flavour returns as we contemplate the decline and fall of the office of the Clerk of the Crown in Chancery.

Dependence

The decline of other-worldliness and the rise in the last four centuries of a secular spirit bent on making the most of this world have aggrandized worldly authority, the chief of which in our day is government. To secure the conditions of the good life here and now, we have become intensely preoccupied with the peace and stability of the earthly community. We have come to see that we must concede more to Caesar, that we must not press individual convictions and preferences on every issue, that we must grow steadily in accommodation.

To make the most of this world and exploit its material possibilities to the full, we have created an interdependent society of great complexity in which we must always be attending to the interest and desires of a multitude of other persons and groups, putting ourselves in the habit of endless accommodation and compromise. Our massive technology is cumbrous in the extreme. Whether its control rests in public or private hands, it can only be moved by concerted collective effort. At the very best, we must subordinate ourselves in a considerable degree to its demands. In short, we must be socialized. This is the deeper significance of the movement called progressive education which socializes our children instead of turning them into stiff-necked Presbyterians.

This interdependent society is marked increasingly by large-scale organization in which the many learn to obey and a few direct. What proportion of us now is in the posture of independent entrepreneurs, if I may use an economic term in a somewhat wider social sense, and what proportion of us acts as cogs in one or several organizations? What proportion of us is always having to calculate the bearing of our actions on the behaviour of others, which behaviour in turn has immediate consequences for the organization to which we give our efforts and our loyalty and only remote consequences for ourselves as individuals, and what proportion is constantly engaged in making personal decisions in which we take the attendant risks and responsibilities as individuals? Surely there must be a rapid spreading of a kind of employee mentality. We are becoming the prisoners of interdependence. There is a sense in which the directors and leaders of large organizations are the most heavily chained prisoners of all. In any organization which depends in large measure on securing voluntary co-operation, the leaders must always be subordinating their personal preferences to the kind of action which will evoke co-operative responses within the organization. The big wheel is also a big cog. (J. A. Corry, *The Prospects for the Rule of Law* (1955), 21 *Can. J. Econ. & Pol. Sci.* 405).