

Book Review
Compte rendu

A History of Canadian Legal Thought: Collected Essays

by R.C.B. Risk, edited by G. Blaine Baker and Jim Phillips
Toronto: Osgoode Society

Reviewed by Mark Carter*

It says something about Canadian legal culture and the history of law's development as a subject of academic study in this country that R.C.B. Risk's collection of essays can be titled *A History of Canadian Legal Thought*¹ while focussing primarily on thinkers in central Canada and dealing most heavily with the topic of constitutional law and federalism in particular. The central Canadian focus is partly explained by the fact that the "history" in question starts in the late nineteenth century and ends for the most part in the early middle years of the last century. Accordingly, the people who are the subjects of most of these essays were active at a time when legal study and practice in Canada was more highly concentrated in the center of the country. Nonetheless, a reader who is looking for information about legal thought as it may have been generated west of Ontario will be largely disappointed.² The emphasis that the book places on constitutional law,³ on the other hand, may well reflect a "true" national obsession which must figure largely in any book that presumes to discuss legal thought in this county.⁴

* University of Saskatchewan

¹ R.C.B. Risk, *A History of Canadian Legal Thought: Collected Essays*, ed. by G. Blaine Baker and Jim Phillips (Toronto: Osgoode Society, 2006).

² One exception is the essay on John Ewart who, although he came from Ontario and returned there, founded and edited the *Manitoba Law Journal*. Also, the essay "Rights Talk in Canada in the Late Nineteenth Century" puts into this context the Manitoba schools crisis.

Risk is not, however, oblivious to how an association with parts of the country beyond Ontario and English-speaking Quebec might produce different variations of "Canadian" legal thought and, indeed, more of this would have been interesting. In contrasting Lederman's concept of balanced federalism with the more centralized "model of nation" version favoured by Bora Laskin, Risk writes that "[t]he thousand miles between their birth places [Lederman was born in Saskatoon and Laskin in Fort William Ontario] put [Lederman] in the middle of the prairies and in Saskatoon, a long cultural and political distance from [the University of Toronto] and the model of nation;" see "On the Road to Oz: Common Law Scholarship about Federalism after World War II," in Risk, *supra* note 1 at 417.

³ Again, there are important exceptions. The essay on Ewart, for example concerns his scholarship on the law of estoppel; see *ibid*.

⁴ One is reminded of the well-worn (among constitutional law teachers at least)

All of this, however, is to quibble about a title (and perhaps the assumptions that underlie it). In fact, as a collection of essays that were published over twenty years, *A History of Canadian Legal Thought* is not an attempt to provide a comprehensive overview of the subject. It serves, rather, as an overview of the thought of some well-known, and some lesser-known, men⁵ – academics, lawyers, politicians and judges – about the project of grappling with and articulating an understanding of the nature and operation of law as it has developed on this part of the North American continent.

Taken together, the essays in this anthology draw a fascinating philosophical picture of Canada's first century of legal development. We are introduced to or reminded of the task faced by the earliest generations of Canadian legalists. In articles and political debates, these men strove to reconcile for the purposes of the new Dominion the classic tension between the common law naturalism of Blackstone and the legal positivist tradition that best explains the core British constitutional principle of parliamentary sovereignty. A central paradox in all of this is Canadian federalism itself: a concept foreign to the British unitary system but one which – according to the preamble of the *British North America Act (BNA Act)*⁶ – must be developed in a manner that is “similar in principle” to the British constitution.

Federalism was also a constitutional arrangement which brought with it the institution of judicial review of the constitutionality of legislative activity, something for which there was no direct British correlate, notwithstanding the fact that a British court – the Judicial Committee of the Privy Council (JCPC) – had the final say over the exercise of this power until 1949. Risk notes, however, that this judicial novelty was not a substantial issue until the twentieth century, and, in particular, until our current interest and concern about the politics of adjudication under the *Charter*.⁷ A leitmotif of this anthology is the question of whether the JCPC's stewardship of the federalism provisions of the *BNA Act* represented a subversion of the constitution's “true” centralist, non-federal character, or instead signified the salvation

joke about books concerning elephants written in different countries. The French book is titled *Elephants and Fine Cuisine*. The British book is titled *Elephants and the Loss of the Empire*. The Canadian book is titled *Elephants: a Matter of Federal or Provincial Jurisdiction?*

⁵ No women are the main subjects of any of these essays.

⁶ U.K., 30 & 31 Victoria, c. 3 (now the *Constitution Act*, 1867).

⁷ “Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work,” in Risk, *supra* note 1 at 54.

of the provinces' rightful coordinate rather than subordinate status in relation to the Dominion government.

A History of Canadian Legal Thought is divided into three parts. Part One, "The Classical Age: Canadian Legal Thought in the Late Nineteenth Century" contains six essays. The first of these, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work"⁸ provides an overview of some of the earliest Canadian constitutional scholarship. Most of the subsequent essays in Part One are concerned with the writing and thought of particular figures during this period: University of Toronto professor A.H.F. Lefroy, lawyer and politician Edward Blake, lawyer John Ewart, and William Meredith, lawyer, politician and ultimately Chief Justice of Ontario. A particularly fascinating essay in this section also deals with "Rights Talk in Canada in the Late Nineteenth Century: 'The Good Sense and Right Feeling of the People'"⁹ in the context of which the thought of Edward Blake again figures prominently, but also that of Dalton McCarthy.

The five essays in Part Two fall under the heading "The Challenges of Modernity: Canadian Legal Thought in the 1930s." Part Two begins with a "Tribute and Belated Review"¹⁰ of the first volume of the University of Toronto Law Journal, founded in 1935. John Willis and W.P.M. Kennedy receive their own essays in this part. Other essays in Part Two are also dedicated to "The Scholars and the Constitution: POGG and the Privy Council"¹¹ and "Canadian Law Teachers in the 1930s: When the World Was Turned Upside Down."¹² Part Three of *A History of Canadian Legal Thought* contains a single essay: "On the Road to Oz: Common Law Scholarship about Federalism after World War II."¹³

The first essays in *A History of Canadian Legal Thought* are aimed at rescuing from obscurity the important work of scholars of the post-Confederation period. Works such as Dennis O'Sullivan's *A Manual of Government in Canada*¹⁴ and, more significantly, A.H.F. Lefroy's *The Law of Legislative Power in Canada*¹⁵ provide the historical bases for

⁸ *Ibid.* at 33.

⁹ *Ibid.* at 94.

¹⁰ *Ibid.* at 211.

¹¹ *Ibid.* at 233.

¹² *Ibid.* at 341.

¹³ *Ibid.* at 403.

¹⁴ 2d ed. (Toronto: Carswell, 1887).

¹⁵ (Toronto: Toronto Law Book and Publishing, 1897-8).

doctrines which might be assumed to be abstract and timeless by contemporary scholars who think that they “do not care much about history, but who do care about twentieth-century federalism and its fate.”¹⁶ Risk points out that Lefroy, for example, was responsible for identifying concepts that continue to be used in federalism analysis including the very timely “pith and substance,” “paramountcy” and “double aspect” doctrines.

Confederation in 1867 was, significantly, a reaction to American expansionism after the Civil War and was influenced by a concomitant wish to retain strong ties with Britain. In light of this, it is interesting to read about contemporary Canadian scholars’ somewhat schizophrenic attitude to the new federal constitution. On the one hand, Risk recounts the outrage of Canadians at the suggestion of A.V. Dicey – the giant figure of nineteenth-century British constitutional scholarship – that Canada’s constitution was modeled on that of the United States.¹⁷ On the other hand, a theme of Risk’s essay is the extent to which Canadian scholarship of the period evinced both pride in, and fascination with, the uniqueness of our federal experiment and the extent to which it set the Canadian constitution apart from its British parent.

Risk and R.C. Vipond, in an article written jointly, use several political episodes during the late nineteenth century, as well as the political rivalry of the federal Conservative Dalton McCarthy and the Liberal Edward Blake, to examine “Rights Talk in Canada in the Late Nineteenth Century: ‘The Good Sense and Right Feeling of the People.’”¹⁸ Central to a number of these episodes was the Dominion government’s power to disallow provincial legislation which it invoked in 1882, for example, to protect land owners’ property rights from being limited by Ontario’s *Rivers and Streams Act*. The perspectives on rights which emerge compare fascinatingly with our contemporary debates over the meaning and scope of constitutional rights protections and the legitimacy of judicial review under the *Charter of Rights and Freedoms*. According to Risk and Vipond, nineteenth-century lawyers in Canada evinced a faith, which is “now essentially lost” and which seemed “bizarre or outrageous to elite lawyers in the United States”¹⁹ of the time, that legislatures rather than courts are the forum for protecting rights and liberties and for determining the appropriateness of limits on those values. In discussing the “childhood thesis” which

¹⁶ “Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work,” in Risk, *supra* note 1 at 34.

¹⁷ *Ibid.* at 37.

¹⁸ *Ibid.* at 94.

¹⁹ *Ibid.* at 96.

suggests that an increasingly industrialized and pluralistic Canada would necessarily grow into the need for more judicial protection of rights, the authors argue that for Canadian lawyers “the legislative protection of rights was not a second-best alternative; it was best-suited to Canada and superior to American judicial review.”²⁰

One of the stand-out essays in Part Two of *A History of Canadian Legal Thought* is “The Scholars and the Constitution: POGG and the Privy Council.”²¹ The essay concerns the scholarship about sections 91 and 92 of the *British North America Act* in the 1930s. The background for the discussion is the JCPC’s treatment of the reference to the federal power, contained in the preamble to section 91, to “make Laws for the Peace, Order, and good Government of Canada” (POGG). By the late 1920s this wording had been interpreted to provide the federal government with a power that could only be used in emergencies. Otherwise, the federal Parliament was limited to the catalogue of powers under section 91. This interpretation of the POGG power was in tension with what H.A. Smith at McGill in the 1920s argued was the “true” intention of the *BNA Act* as reflected in its wording and in the confederation debates that preceded its passage. According to Smith, the Dominion government was supposed to have a general power to pass whatever legislation it believed was in the interests of Canada in general.²²

The critique of the JCPC’s development of the division of powers provisions of the *BNA Act* was extended through the 1930s by W.P.M. Kennedy at the University of Toronto, Vincent MacDonald at Dalhousie, and Frank Scott at McGill. All of them believed that Canada’s ability to launch an effective centralized response to the economic and social challenges of that decade had been undermined by the JCPC’s decisions. This essay carries the discussion into the early 1970s, examining *inter alia* Bora Laskin’s strong criticisms of the JCPC decisions and, ultimately, Bill Lederman’s assertion that these decisions formed the necessary basis for creating the model of balanced federalism in Canada which most closely reflects our contemporary understanding – and perhaps hopes – for the federal/provincial relationship.

“Canadian Law Teachers in the 1930s: ‘When the World Was Turned Upside Down’”²³ introduces us to some of the people who were

²⁰ *Ibid.* at 110.

²¹ *Ibid.* at 233.

²² *Ibid.* at 241-42.

²³ *Ibid.* at 341.

active during a period when there were only about forty teachers in common law schools in Canada. Risk describes an academic world with teachers relatively isolated in their respective schools, and drawing most of their academic inspiration from English and American journals and books.²⁴ Risk tracks the development of a distinctive critical mood that developed within the Canadian legal academy, beginning with the “manifestos” of “Caesar” (Cecil August) Wright of Osgoode Hall. Wright argued against uncritical acceptance of the common law’s virtues, and in favour of making law serve the needs of modern industrial society. This reflects a strong legal realist sentiment and Risk discusses the influence of this American movement on Canadian scholars, many of whom did their graduate work at universities in the United States.

The final essay in *A History of Legal Thought*, and the only one in Part Three, “Postwar Developments” is titled “On the Road to Oz: Common Law Scholarship about Federalism After World War II.”²⁵ At the core of this discussion is the work of Frank Scott, Bora Laskin, and Bill Lederman. Scott and Laskin’s strongly centrist vision of Canadian federalism and their concomitant criticism of the JCPC’s provincial rights jurisprudence stands in some opposition to Lederman’s balanced model. Ultimately, Lederman’s view has proved to be the most influential. A complement of more recent scholars – “The Generation of the 1960s” – several of whom are from western schools, are briefly mentioned in the essay as well. These scholars include Dale Gibson at Manitoba, Ken Lysyk at the University of British Columbia and Barry Strayer at Saskatchewan. The “Oz” of the title refers to the very different world of contemporary constitutional scholarship, with the past’s obsessive concern over federalism having been replaced by an overwhelming interest in rights in general and the *Charter of Rights and Freedoms* in particular.

As an anthology of essays rather than a single cohesive work, many of the essays in *A History of Legal Thought in Canada* overlap with each other. The essay in Part One on “Blake and Liberty” repeats and expands upon much of the material that is contained in the essay on rights talk in the nineteenth century. Similarly, when taken together the essays in Part Two become somewhat repetitive. The essays on “POGG and the Privy Council,” “The Many Minds of W.P.M. Kennedy” and “Canadian Law Teachers in the 1930s” deal with many of the same topics and personages, although with somewhat different points of emphasis. However, Risk’s skill and the significance of the subject

²⁴ *Ibid.* at 342.

²⁵ *Ibid.* at 403.

matter are such that it was probably worth erring on the side of retaining the coherence of each essay, rather than editing them to avoid overlap. The book also lacks an index which is, for some reason, a feature which seems to be endemically absent from anthologies of essays such as this.

Notwithstanding its central Canadian focus and its dominant concern with constitutional law in general and federalism in particular *A History of Canadian Legal Thought* has much to offer almost any legal scholar. It will obviously be of particular interest, however, to constitutional law scholars and teachers. Baker and Phillips, the editors of this collection of essays, hope that *A History of Canadian Legal Thought* will inspire other scholars to “identify and assess... [some of the] regional similarities or differences in national private and public law thought” that Risk’s focus may have missed.²⁶ Not only will *A History of Canadian Legal Thought* inspire this project, it will provide some of the essential first steps toward it.

²⁶ G. Blaine Baker and Jim Phillips, “Introduction,” in Risk, *supra* note 1 at 4.