BOOK REVIEWS

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LAW IN AN UNSTRUCTURED SOCIETY ESSAYS IN THE HISTORY OF CANADIAN LAW, VOL VI BRITISH COLUMBIA AND THE YUKON

Hamar Foster and John McLaren (Editors)

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MAKING LAW, ORDER AND AUTHORITY IN BRITISH COLUMBIA, 1821 - 1871

Tina Loo

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In his essay, *Letters to the Family*, written in 1908, Rudyard Kipling wrote:

> The law in Canada exists and is administered, not as a surprise, a joke, a favour, a bribe, or a Wrestling Turk exhibition, but as an integral part of the national character - no more to be forgotten or talked about than trousers.[1]

Leaving aside the Kiplingesque flourish with which it was made, the statement captures well one of the truths about the Canadian character. Or, rather, it captures well a sentiment that Canadians would *like* to be true. The same point was made in slightly more restrained terms by the Canadian philosopher George Grant, when he noted in his book *Lament for a Nation* that what united both French and English Canadians was the "belief that society required a high degree of law, and respect for a public conception of virtue".[2] Living as they do so close to the world's sole remaining superpower, whose appetite for consuming other cultures is voracious in the extreme, one of the myths of distinctiveness to which Canadians have clung is their preference for law and order. Whereas American government is based upon the "self-evident" truth that life, liberty and the pursuit of happiness are inalienable rights, the scheme of things in Canada is premised on the notion that the duty of the state is to legislate in aid of "peace, order and good government".

This is important to bear in mind when looking at the history of the Canadian legal system. Insofar as post-modernists are right, and the idea of "objectivity" is but a smokescreen for cultural prejudices, the screen through which the Canadian story has tended to be told is one of insecurity and fear. Canadians are a people who have always felt under threat: from native peoples, from Asians, from Americans, from Germans and Japanese, even from the land itself. Unlike Australia, Canada has never felt itself to be a lucky country. On the contrary, there is almost a Calvinistic fatalism about the way in which Canadians view themselves and their society.

While this marks a profound difference between Canada and Australia, it oddly enough makes Canadian history - and Canadian *legal* history, in particular - of even more value to the Australian scholar. Legal realism notwithstanding, debate about the nature of the legal and constitutional order in this country tends still to be couched in positivistic terms. To gauge the truth of this, one need only consider the present-day debate over republicanism in Australia. A pro-republic argument that one hears from

time to time is that an alteration of the formal constitutional document under which we are governed will somehow lead to a national rejuvenation; that it will in fact change the way we act, and in which we relate to the world. Jeremy Bentham would draw considerable succour from the Australian debate about constitutional reform.

These two books - one a collection of essays, and the other a revised version of a doctoral thesis - serve as a useful reminder that this is not the way in which common law society operates. Those societies which have embraced the common law as the foundation of their social order have never been positivistic. Nor have they been anticipatory in their approach to social problems. Instead, they have been deeply conservative and reactive. These works show that the form of government in British Columbia - as was also the case in Australia - is the egg, rather than the chicken. In British Columbia - and in Australia - all the panoply of government came *ex post facto*. First came an imported political philosophy, and the version of the rule of law that emerged was the result of conflict between that philosophical ideal and the realities of daily life in the 'wilderness' of western British North America.

The first book is the sixth volume of the *Essays in the History of Canadian Law* series, published by the Osgoode Society for Canadian Legal History. The Osgoode Society was founded in 1979, largely as the result of the efforts of the Hon Roy McMurtry, then the Attorney-General for Ontario, now a Justice of the Ontario Court of Appeal. Its brief is a broadly stated one: "to encourage research and writing in the history of Canadian law".[3] In this respect, the Osgoode Society has been extraordinarily robust. From the beginning, it has been very prolific, producing, in addition to the six volumes of *Essays*, a series of well-written and highly regarded books on a number of topics connected with the legal history of Canada. It is also worthwhile to note that the Society represents a genuine working link between the practising and academic arms of the profession - something which we in Australia could do well to emulate.

The collection of papers in this sixth volume is a broad-ranging one. McLaren and Foster, the two editors, are highly regarded and eclectic Canadian legal historians, whose names will be known to many here in Australia. The thirteen contributing authors represent a diversity of interests and backgrounds. From the academy come not only lawyers, but also criminologists and historians. There are also three student contributions, which seems to be a normal and highly commendable feature of the *Essays in the History of Canadian Law* series.

The theme of this collection is the process by which the English common law was taken to what is now the western coast of Canada. The book contains fourteen exceedingly well-written essays, grouped into five broad subject areas: Aboriginal people and the law; vice, crime and policing; religion and education; labour and social welfare; and the legal profession. As the editors tell us, a notion common to these seemingly unconnected subject areas is "the extent to which some elements of the inherited European legal system proved problematic for segments of the British Columbian and Yukon community".[4]

Taken as a whole, the essays make clear that the process of reception in British Columbia and the Yukon was neither even nor smooth. On the contrary, English law was (in the early days, at least) received only patchily, and that part that was received was refracted through the prism of local conditions and prejudices. In short, the message is that the Cariboo was not Kent, and that while English law could replicate in a fashion in western North America, it could not clone. This point, as uncontroversial as it may seem when set out in black and white, is one of tremendous importance for all common lawyers, for it reveals something profound about the common law, namely its malleability. In this sense, the essays provide a useful corrective to some of the more ill-informed criticism of the law that one reads these days.

If the common theme to the collection is the rather bumpy process of reception, the common *thread* is the personality of the small band of 'law-bringers' who lived and worked in the western part of British North America in the latter part of the nineteenth century and the early part of the twentieth. As one would expect in any group of writings dealing with the affairs of two small jurisdictions, certain names pop up again and again. Chief among them is Mr Justice Matthew Baillie Begbie, a colourful and idiosyncratic man, whose imprint on the legal culture of British Columbia long outlasted his own life. Begbie, as some will know, was the judge who is reputed to have said once: "The statute books are exceedingly muddled. I seldom look into them."[5]

From time to time, it is fashionable among historians to argue about the role that individual personalities play in shaping history. Marxist historians, in particular, are fond of positing a sort of pre-deterministic view of social and political development. This collection goes a long way to cast doubt on such a pessimistic view of humanity. Several of the papers, for instance, show the way in which Judge Begbie's temperament and personal philosophy played a vital role - for good or bad - in shaping

the "tone" of the rule of law in British Columbia. In a similar vein, the paper by Burt Harris on the legal profession in the Yukon ("Fighting Spirits: The Yukon Legal Profession, 1898 - 1912") shows that when there is a small pool of talent, individual foibles and quirks can have an impact far beyond their initial reach. To state it in terms of "chaos" theory, the smaller the field of interaction, the greater the consequential potential for individual character.

One ought not, though, think that it is a thesis of these essays that the socially non-empowered were not relevant in the legal evolution of Canada. On the contrary, the book makes plain how in their attempt to impose order in an "uncivilised" land, the law-bringers had to take account of local feeling, and often had to modify English practices, to prevent a breakdown of law and order. The papers by Jonathan Swainger ("A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872 -1880"), Alan Grove ("Where is the Justice, Mr Mills? A Case Study of *R v Nantuck*"), Tina Loo ("Tonto's Due: Law, Culture, and Colonization in British Columbia") and Nancy Parker ("Swift Justice and the Decline of the Criminal Trial Jury") illustrate clearly just how strewn with eggshells was the path that faced the early British and Canadian authorities in this respect.

Swainger's essay in particular, which deals with the use of the Royal prerogative of mercy, shows an awareness on the part of the authorities to Indigenous sensitivities which might surprise many people today. Part of his paper describes the dilemma which faced the Court in two cases in which Indigenous people had, out of revenge for the infection of the Native population with smallpox, robbed and killed groups of Europeans. As Swainger put it, these cases "presented the court with the problem of effecting a suitable punishment in a cultural context in which the objectives and dictates of white justice were not well understood".[6] Swainger shows just how aware Mr Justice Begbie was of the delicacy of the situation. In his draft memorandum on the cases, Begbie wrote:

> To execute the sentence of law upon one, and to pardon the other, however explicable to the white population, would have been an inexplicable anomaly to the Indian population on the NW coast; and the main reason of the arrest and prosecution was to produce an intimidating and sedative effect, which would be entirely missed, if the result were to appear unduly severe, or unduly mild, or capricious, or unequal.[7]

The solution in the circumstances was to convict the accused of *piracy*, rather than murder, for this enabled the Court to recommend that their sentences be commuted to open but supervised custody. The means seem rather clumsy by our standards, but one cannot doubt that British Columbian judges were aware that their duty involved the taking into account of cultural distinctions.

Perhaps unintentionally, this same point comes up in Joan Brockman's essay on women in the legal profession in British Columbia.[8] Brockman provides an interesting discussion of the efforts that were taken by a few pioneering women - in the face of blind prejudice and antagonism on the part of the Benchers of the Law Society - to be admitted as barristers and solicitors in British Columbia. Her story is an inspiring one and thought-provoking. The gist of her argument is that since the British Columbia *Legal Professions Act* 1897 said that "any person" with the necessary qualifications could be admitted, that ought to have included women. Brockman is a criminologist. I do not know if she considers herself to be a post-modernist as well, but it is interesting to see how she grounds her argument in the literal approach to statutory interpretation. Clearly, a contextual approach to the interpretation of the *Legal Professions Act* in the late nineteenth and early twentieth centuries would have supported the Benchers.

One thing which may startle today's reader - especially in Australia, with its hyper-sensitivity about judicial independence - is just how loosely the doctrine of separation of powers operated in British Columbia and the Yukon in the last century. One reads, for instance, of Mr Justice Begbie and other judges being employed as legislative draftsmen,[9] as well as of the regular attempts by the executive authorities to exert a direct influence on the outcome of litigation.[10] Of course, one need only look at the story of Chief Justice Forbes in this country,[11] or - much more recently - Sir John Latham's supposed involvement in the drafting of the Communist Party Dissolution legislation[12] to see examples of the very same problem in Australia. Nevertheless, one is left with the distinct feeling that British Columbia in the last century was decidedly not a *Boilermaker*-friendly place.[13]

In a different way, this is the point of Tina Loo's book, *Making Law, Order and Authority in British Columbia*. Loo (who, as noted, contributed one of the essays to the first book) is a self-described post-structuralist, whose thesis is that the law that emerged in British Columbia was the positive creature of the discourse of liberalism, rather than any process of

natural evolution. She would likely take issue with my claim that by reason of its extreme malleability the common law becomes effectively content neutral in its orientation. To borrow her words:

> [A] post-structuralist approach has led me to view the legal order that came to characterise British Columbia as something that was constructed through a particular discourse (the discourse of liberalism), rather than something that was natural, inevitable or self-evident.[14]

To prove her thesis, Loo has constructed a comprehensive and balanced analytical framework. In seven chapters, she considers in the British Columbian context each of the traditionally accepted elements of a legal order: property rights, the police power, trade and commerce, and the court system. Each of the chapters is well-researched and engagingly written. The result is a convincing book that is a joy to read.

Stripped to its bare essence, Loo's thesis is not especially controversial (though I am given to believe that the book did cause some stir in Canada). In her conclusion, Loo says that liberalism's shortcomings in achieving 'justice' were a result of two conflicting ideals:

> one that emerged out of a desire for the rule of a set of standardized and evenly enforced laws and like results in like cases, and another that reflected an equally strong desire for a set of laws that would recognize, honour and privilege the particularisms ... out of which disputes arise.[15]

This internal conflict - between the ideals of equality and individuality - has been a feature of the common law from the very first time that a Justiciar was required to distinguish a case. But what makes the book so valuable, and so timely for an Australian audience, is that it considers this jurisprudential see-saw in the context of a culturally diverse, multi-ethnic society. It is one thing to expect a common law judge to be appreciative of the sort of difference that is represented by a plaintiff with a thin skull. It is quite another to expect the law, and the legal apparatus, to be able not just to accommodate, but to actually *reconcile* the sorts of differences that stem from a profoundly different conception of the social order. As Loo suggests, this dilemma is made even more perplexing when one bears in mind - as Loo correctly reminds us that we must - that in attempting to affect the reconciliation of differences, the players in the legal system are themselves engaging in a discourse infused by liberal ideology.

These books, in my view, represent legal history at its finest. AJP Taylor once wrote that he had "never supposed, as many earlier historians did, that men can learn any useful lessons from history, political or otherwise".[16] This may or may not be true with history in general, but legal history, it seems to me, is different. It can serve a function that is at once enlightening and cautionary. Through the study - the *close* study - of history, we can gain insight into the inevitable unintended consequences which attend all efforts at law reform. At the same time, legal history can reveal to us the law's limitations.

The law - at least the common law, with its passive nature and built-in conservative yardstick in the form of the doctrine of *stare decisis* - is a blunt and clumsy instrument. As a tool of large scale social reform, the law seldom succeeds. The British settlers to western North America acted instinctively when they sought to replicate their conception of order among the "savages" and "Orientals". But the result, as is the result of any attempt to impose a foreign code of behaviour on an already-existing society, was not a particularly happy one. By setting out this lesson in such a clear, readable and reflective manner, both these books will provide Australian lawyers and scholars with much food for thought.

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1 Quoted in R G Riddell (ed), *Canadian Portraits: CBC Broadcasts* (OUP, Toronto 1940) p33.

2 *Lament for a Nation: The Defeat of Canadian Nationalism* (McClelland & Stewart Ltd, Toronto 1965) p69.

3 See the Foreword, pxi.

4 At p1.

5 Quoted in Riddell (ed), *Canadian Portraits: CBC Broadcasts* p91.

6 At p210.

7 At p211.

8 "Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia" (ch14) at p508.

9 See, for example, Parker, "The Decline of the Criminal Trial Jury" at p173.

10 See, for example, Swainger, "Fighting Spirits: The Yukon Legal Profession, 1898 - 1912" (ch6) and Lambertson, "After *Union Colliery*: Law, Race and Class in the Coalmines of British Columbia" (ch11).

11 Sir Francis Forbes (1784 - 1841) was the first Chief Justice of New South Wales. At the same time, he served as a member of the Legislative and Executive Councils.

12 Lloyd, "Not Peace but a Sword! - The High Court Under JG Latham" (1987)11 *Adel L Rev* 175 at 202.

13 In *R v Kirby; Ex parte Boilermarkers' Society of Australia* (1956) 94 CLR 254 the High Court held that Parliament could not confer judicial functions upon non-judicial bodies and that therefore, curial powers were to be strictly the preserve of the judicial branch.

14 At p11.

15 At pp157-158.

16 AJP Taylor, "Accident Prone, or What Happened Next", in Wrigley (ed), *From Napoleon to the Second International: Essays on Nineteenth-Century Europe* (Hamish Hamilton, London 1993) p21.