

JUDGES AND CANADIAN LEGAL THOUGHT: *THE COURT OF QUEEN'S BENCH OF MANITOBA 1870-1950: A BIOGRAPHICAL HISTORY*, DALE BRAWN (TORONTO: UNIVERSITY OF TORONTO PRESS, 2006) AND *A HISTORY OF CANADIAN LEGAL THOUGHT: COLLECTED ESSAYS*, R.C.B. RISK (TORONTO: UNIVERSITY OF TORONTO PRESS, 2006)

Canadian Confederation gave birth to more than a country: it also created a new law. Prior to 1867, each of the colonies of British North America was responsible for its own laws and legal systems. At times these laws were close to their English or French models, at times they differed distinctively. But in each case the legal regime that developed was peculiar to the needs of the colony and subject to its own lawmakers and to British imperial surveillance. Confederation changed that: a new federal government was responsible for a wide range of things, from establishing the criminal law to appointing judges to reviewing all (and disallowing some) provincial legislation. Before Confederation, the decisions of other colonial courts and the statutes of other colonial assemblies had only limited influence over local law making. After Confederation, while provinces remained distinct, legal decisions by judges and legislators had influence on and were influenced by legal developments in other provinces.

The period after Confederation was a period when a uniquely Canadian law was made for the first time. Two recent books, each covering the period from 1870 to the 1950s, offer opportunities to reflect on the creation of a distinct (English) Canadian law. In *The Court of Queen's Bench of Manitoba 1870-1950: A Biographical History*,¹ Dale Brawn of Laurentian University offers a portrait of a court over 80 years, from its inception to the point of its post-war growth. Constructed through a series of judicial biographies, Brawn's book captures a bench in formation and consolidation. *A History of Canadian Legal Thought: Collected Essays*² by retired University of Toronto law professor R.C.B. Risk, traces the intersection of the legal academy, the bench, and others in attempting to describe and explain nascent and adolescent Canadian jurisprudence. Although neither sets out to argue that a distinct Canadian law was made in the 80 years after Confederation, their conclusions about who judges were, what they did, and what place they had or were supposed to have in law making tell us much about how Canadian law came into its own.

It may seem odd to look for a national law in a book like Brawn's, which focuses on a single, provincial court. However, as Brawn notes, Manitoba is particularly well-suited to such a study for three reasons. First, the Manitoba bench was small, and over the 80 years of his study, only 33 judges were appointed to the Court of Queen's Bench. Second, Manitoban judges and lawyers played a more significant role in the professionalization of the Canadian bar than their numbers would suggest, such as in the composition and adoption

¹ Dale Brawn, *The Court of Queen's Bench of Manitoba 1870-1860: A Biographical History* (Toronto: University of Toronto Press, 2006).

² R.C.B. Risk, *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press, 2006) [Risk, *History*].

of the Canadian Bar Association's (CBA) first Code of Ethics.³ Third, the Queen's Bench judges, at least early on,

saw themselves as agents of improvement, and were determined to create an environment conducive to rapid and sustained growth. They became an essential part of John A. Macdonald's National Policy because of their roles in ensuring that peace, order, and good government prevailed in a potentially violent frontier, and that growth took place within the confines of law.⁴

Another reason, unnoted by Brawn, is Manitoba's peculiar position in Canadian legal history: unlike the other six early provinces,⁵ Manitoba had only a limited legal structure prior to joining Confederation. The other provincial courts were occupied with bringing their pre-Confederation legal rules into conformity with the *British North America Act, 1867*⁶ and, to a lesser degree, with each other's. Manitoban law makers were given a clean slate.⁷ They had little to worry about in terms of local legal precedents or a legal community that predated Confederation and so most developments were within the new Canadian regime.

Brawn uses the biographies in his book to place judges within their historical contexts, understanding what made them as men (at this point they all were men), who made them judges, and what they accomplished on and off the bench. Unlike many judicial biographers, Brawn spends little time dissecting the judges' decisions. Rather, he traces out their education and careers before and after they were appointed, and pays particular attention to the appointment process itself.

The road to the bench was remarkably the same for many Manitoban judges. Alexander Morris, the first judge of the Court of Queen's Bench, articulated under John A. Macdonald and later served in both the Canadian (Ontario-Quebec) assembly and, after Confederation, the House of Commons as a Liberal-Conservative, just like Macdonald. When he left Parliament in 1872, he asked Macdonald to be appointed to the Manitoba bench, and the Prime Minister was happy to oblige in making him the first Chief Justice of the province. Almost seventy years later, William James Major was appointed to the bench after three terms in the Liberal-Progressive provincial government of John Braken. In response to news of Major's imminent appointment in 1941, one Law Society bencher recorded in his diary, "[i]f this is official it means that Bracken has promised Mackenzie King the support of his government in the

³ Brawn, *supra* note 1 at 9, citing W. Wesley Puc, "'The Disquisitions of Learned Judges': Making Manitoba Lawyers, 1885-1931" in G. Blaine Baker & Jim Phillips, eds., *Essays in the History of Canadian Law: In Honour of R.C.B. Risk*, vol. 8 (Toronto: Osgoode Society, 1999) 512 at 541.

⁴ Brawn, *ibid.* at 8-9.

⁵ New Brunswick, Nova Scotia, Ontario, Quebec (1867), British Columbia (1871) and Prince Edward Island (1873).

⁶ Now known as the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁷ This is not to say there was no law, nor even courts, in pre-Confederation Manitoba, only that they had little to do with the legal structure and laws established at or after the province's entry into Confederation. For example, while the bench and bar in Nova Scotia remained essentially the same before and after 1 July 1867, Manitoba's bench was almost completely changed between 1869 and 1872, and a modern, trained bar only first appeared with Confederation (see Brawn, *supra* note 1 at 13-15; Dale & Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis Publishers, 1972) at 65-67, 69-73).

coming election in return for some favours.”⁸ Brawn concludes that at first, men were appointed to the bench as “rewards for service other than in law”; by the end of the nineteenth century, a good lawyer’s “professional reputation ... compensate[d] for a lack of connections,” but by the 1930s, “lawyers with connections but no professional standing once again started going to the bench in large numbers.”⁹ Even when judges were not previously elected officials, they “were in fact behind-the-scenes supporters of the government party, or closely connected to someone [like a law partner] who was.”¹⁰

The political nature of judicial appointments carried over to the political aspects of their jobs. On the one hand, decisions often had serious political effects. The Manitoba Court of Queen’s Bench in this period heard cases on Louis Riel’s treason conviction, French-language schooling (a precursor to the Manitoba Schools Question), and labour activism or sedition (in the aftermath of the Winnipeg General Strike in 1917), to name but three controversial and deeply political cases. On the other hand, judges played an important role in the functioning of government, both on and off the bench. As early as the 1870s, judges were routinely appointed commissioners to public inquiries of one sort or another. Off the bench in their private practice, their non-legal work, and their professional activities, judges helped to build the province and the bar. In public discourse judges are often held apart from politics and business. As Brawn makes clear, however, judges have in fact played central roles in Manitoban and Canadian political history.

An example of these various elements can be found in Hugh Amos Robson, first appointed to the bench in 1910. In the years before his appointment, Robson worked as assistant Attorney General for the Territories (now Alberta and Saskatchewan), but was lured away by James Aikins, the Winnipeg counsel for the Canadian Pacific Railway. Robson practised with Aikins for eleven years before moving to the bench. Just two years after his appointment he resigned to take over the newly formed Public Utility Commission. In 1915, he chaired the Legal Education Committee of the Canadian Bar Association and recommended that would-be lawyers in Canada take three years of full-time study at a “recognized” law school, followed by one year of articles. In 1921, the Manitoba Law School he had helped establish in 1914 was the first law school in Canada to follow the CBA plan. In 1915 and 1919 respectively, he sat on commissions investigating accusations of provincial political corruption and the origins of the Winnipeg General Strike. After leaving the Public Utilities Commission, he joined the Board of Directors of the Union Bank of Canada. In the mid-1920s, back in private practice, he served as leader of the provincial Liberal party, only to be re-appointed to the bench, first at the Court of Appeal, and then as Chief Justice of the Court of King’s Bench. Robson was surely exceptional, but if the other Manitoban judges did less in their lives, the network between politics, political friends, private and public work and service, and the bench were there for them all. As Brawn suggests, biographies of these judges provide an excellent way to comprehend these networks.¹¹

⁸ Brawn, *ibid.* at 315-17, quoting the diary of Robert Graham.

⁹ *Ibid.* at 355.

¹⁰ *Ibid.* at 357.

¹¹ *Ibid.* at 232-46.

Risk too, at times, comes close to writing biography in *A History of Canadian Legal Thought*.¹² Ultimately, however, his concern is with the broader intellectual milieu of Canadian law in the years following Confederation. While the doctrines established by the Supreme Court of Canada and the Judicial Committee of the Privy Council seemed generally immaterial to the legal practice of most of Brawn's judges, the decisions of these two appellate bodies loomed large for Risk's subjects. Risk is concerned not with how judges ensured "peace, order and good government,"¹³ but with explaining what different generations of scholars, judges, and the odd politician, thought that phrase meant for Canadian law.

In the final essay in the collection, Risk imagines a legal scholar of the 1960s transported Dorothy-like by tornado to a constitutional law conference in 2000, a place akin to Oz. The time-traveller would be confused by the discussion of the *Canadian Charter of Rights and Freedoms*,¹⁴ and find the types of scholarship presented as alien to his own practice. Using this analogy, it is worth considering how the Risk book itself works like a trip to Oz: both its style and content take the contemporary reader to a different world. Risk writes in a disarmingly personal way, and seems at points to be simply reconstructing these older legal ideas for a modern audience. But these choices in writing belie a rigorous historical project as through these pieces, Risk is attempting to understand the intellectual origins of some of the most contentious elements of contemporary Canadian legal thought: rights, the powers of the state, and federalism.

The concept of "rights" is perhaps most interesting for the twenty-first century lawyer. While Risk finds rights to be of great importance from Confederation forward, the expression of those rights in Canada was radically different than in the United States both historically and today. The most detailed discussion of this topic included in the book is in an excellent essay Risk wrote with Robert C. Vipond, first published in the *Law and History Review*.¹⁵ Their thesis is that issues like "property rights, railroad rates, religious liberty, and protective social legislation"¹⁶ were as prominent in late nineteenth century Canada as they were in the United States (this the era leading up to *Lochner v. New York*¹⁷). While debates over these issues and the individual rights intrinsic to them involved lawyers in both countries, in Canada the focus was on the legislature and against judicial review. As Risk and Vipond put it, those arguing over rights in Canada "believed strongly that individual and political liberties were at once mutually reinforcing and mutually limiting. It followed that legislatures, not courts, were the appropriate bodies to determine the limits on rights, and at the same time to protect individual liberty, for they were the bodies through which political liberty was expressed."¹⁸ At first glance this may seem to be an odd argument: today we often think of the centrality of the courts for not only the enforcement but also expansion of rights,

¹² Risk, *History*, *supra* note 2.

¹³ This oft-quoted phrase is derived from the *Constitution Act, 1867*, *supra* note 6, s. 91.

¹⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁵ Richard Risk & Robert C. Vipond, "Rights Talk in Canada in the Late Nineteenth Century: 'The Good Sense and Right Feeling of the People'" (1996) 14 L.H.R. 1.

¹⁶ R.C.B. Risk & R.C. Vipond, "Rights Talk in Canada in the Late Nineteenth Century: 'The Good Sense and Right Feeling of the People'" in Risk, *History*, *supra* note 2, 94 at 95.

¹⁷ 198 U.S. 45 (1905).

¹⁸ *Supra* note 16 at 95.

and if we remember our constitutional history classes, we can recall the emphasis placed on the decisions of the Judicial Committee of the Privy Council regarding such things as prohibition or the state's interference with a landowner's property rights in rivers and streams.¹⁹ Risk and Vipond know this, and tackle it head-on. They give a clear description of the origins of the river and streams fight, and while they quickly cover the legal battles up to the Judicial Committee, they stress the fights in the House of Commons between Tory Dalton McCarthy and Liberals Edward Blake and David Mills. Both sides focused on property rights and held a view of individual rights rooted in common law inheritances and fought over through the developing rubric of "provincial rights." The Liberals saw the legislature as having the power to restrict rights for the public interest; McCarthy granted the legislature that power and responsibility, but asserted that a higher body (the federal executive) had to be able to review the exercise of this power. Blake's view of rights triumphed in the nineteenth century, and the federal government stopped disallowing repeated enactments by Ontario on the issue. Risk and Vipond note that at the time they wrote this, in the mid 1990s, the McCarthy view was prominent in Canadian law, but the arguments made by Blake and the Liberals continue to be made today.²⁰

By the mid-twentieth century, the question of rights had developed into a discussion of the functioning of the modern administrative state and judicial review of legislative action or administrative tribunals. In a piece not included in this book, Risk traced the origins of administrative law in Canada.²¹ In the pieces that are included, particularly a review of the scholarship of John Willis of Dalhousie University, Risk looks at how legal scholars first started thinking about the state, administrative agencies, and the courts. Unlike many on the bench, the scholars Risk discusses came to support an expanded state by the 1930s. They devoted their legal scholarship to explaining how it could operate in Canada, and how the courts and a peculiar understanding of the rule of law, prevented or at least hindered any such development. The scholarship of this era repeated concerns in some of the earlier rights debates. For example, Risk describes how Willis's analysis of court decisions on administrative law and the *British North America Act* identified a judge-made "common-law bill of rights"²² used to show "a lack of respect for the declared preferences of the legislatures."²³ Here, once again, was a debate between those who saw the public interest protected by the legislature versus those who believed legislative action had to be subject to control by a superior body: at this stage, the common law courts.

The third theme Risk addresses once again turns on similar debates, but carries through in one way or another from Confederation well into the 1960s. Legal thinkers, much like today, focused their attention on the Constitution, and, unlike today, particularly on the workings of federalism. Rights in the late nineteenth century were expressed in federal-

¹⁹ *Caldwell v. McLaren* (1884), 9 App. Cas. 392 (P.C.), rev'g (1882), 8 S.C.R. 435, rev'g (1881), 6 O.A.R. 456.

²⁰ *Supra* note 16 at 96. See also Risk's extended discussion of Blake's ideas: R.C.B. Risk, "Blake and Liberty" in Risk, *History*, *supra* note 2, 130.

²¹ R.C.B. Risk, "Lawyers, Courts and the Rise of the Regulatory State" (1984) 9 Dal. L.J. 31.

²² R.C.B. Risk, "John Willis: A Tribute" in Risk, *History*, *supra* note 2, 271 at 283 [Risk, "John Willis"], citing John Willis, "Administrative Law and the British North America Act" (1939) 53 Harv. L. Rev. 251 at 274, 281.

²³ Risk, "John Willis," *ibid.*

provincial terms. The first sustained legal writing in Canada in the nineteenth and early twentieth century described and (eventually) analysed the federalism decisions of the Judicial Committee. In the 1920s, W.P.M. Kennedy attempted to explain the development of federalism from the time of the conquest, and in the 1930s, 1940s, and 1950s, a new generation of scholars like F.R. Scott, Bora Laskin, and William Lederman re-evaluated federalism from positions that out-right attacked the Judicial Committee, and moved toward interpreting the effective functioning of the federal framework established by the Judicial Committee's core decisions. As with Willis and Blake, many of these thinkers addressed the conflict between the legislature and review (be it executive as in disallowance or judicial as by the Judicial Committee). Time and again, although from different political perspectives and with different goals in mind, the analysts of federalism returned to asserting the importance of legislative action and the problem of judicial review.

Risk's legal thinkers are essentially English-Canadian and write from within the common law tradition, rather than Quebec's civil system. Although two of the earliest Manitoban judges were French-Canadian from Quebec, the legal structure of Manitoba, most of its judiciary, and eventually its social structure, was English-Canadian. What these books together say about Canadian law is in many ways limited to Canada outside of Quebec.

What they do say about the formation of Canadian law is fascinating. While the law, lawyers, and the courts are important in Canada, both Brawn and Risk, although coming from different positions, point to the subordination of the courts to politics. Neither suggests that judges regularly made decisions in support of political interests. Rather, in stressing the importance of politics in getting appointed to the bench, or in demonstrating the consistent critique of judicial review of the legislature in Canadian legal thought, Brawn and Risk demonstrate how the bench was often not a place for law-making or even a place of particular power. Judges certainly had, or hoped for, authority. In Manitoba their power was more frequently exercised off the bench than on it, and in Canadian legal thought up to the 1950s, exercises of judicial law-making were often denigrated and argued against rather than supported. These two books show that a Canadian law was made in the 80 years following Confederation, but it was a law that in many ways no longer exists. The power of lower court judges has diminished as their number has grown. The power of appellate court judges has increased to the point that many now look to this judiciary as a positive bulwark against the legislature rather than a hindrance to good law-making and the exercise of rights.

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