HOW NOT TO WRITE CONSTITUTIONAL HISTORY

A Review of Randall Balcome, Edward McBride, and Dawn Russell, *SUPREME COURT OF CANADA DECISION-MAKING: THE BENCHMARKS OF RAND, KERWIN, AND MARTLAND* (Toronto: Carswell, 1990, pp. ix + 413)

This book is about contributions made to the work of the Supreme Court of Canada between 1935 and 1982 by three of its prominent members: Chief Justice Patrick Kerwin and Justices Ivan Rand and Ronald Martland. A colleague who saw the book on my desk asked, "Why those three? Why not more prominent figures, like Duff, Laskin or Dickson?" I'd say the choice wasn't bad. No small selection of judges could ever be representative of a court composed of so many independent and idiosyncratic individuals, of course, but the decision to focus on Kerwin, Rand and Martland can be justified.

The judicial careers of those three spanned almost half a century, a period during which the Supreme Court of Canada evolved from an intermediate appellate court, subordinate to the Judicial Committee of the British Privy Council, to the court of last resort in a constitutional system that gives the judiciary unprecedented power over the lives of Canadians. Kerwin, Rand and Martland all served that Court for lengthy terms: nineteen, sixteen and twenty four years respectively. They represented, moreover, three sharply distinct approaches to the judicial function; Rand's being of the left, Martland's of the right, and Kerwin's a quintessential example of Canadian middle-mindedness.

Even if they were not representative of differing judicial approaches, Kerwin, Rand and Martland would be worthy of study on their individual merits. Their personalities differed sharply, and not always in ways that a stereotyped view of their public utterances might suggest. I had occasion to appear before the Court in 1962, when Kerwin and Martland were members. This was my first appearance in any superior court, and because my client was impecunious I was there alone, without a leader. I was terrified, and my terror intensified as the hearing progressed. The judges' incessant and often hostile questioning left me feeling like tenderized meat by the time the Court finally retired. Later, however, a clerk brought me a note from Mr. Justice Martland, containing some encouraging comments about my performance, and my self-esteem began to revive. Until then, Martland had seemed a forbidding figure, who fittingly personified a view of law and life diametrically opposed to my own. How was it, I wondered, that such an icon of socio-political establishmentarianism could find in his stone heart sufficient sympathy to offer kind remarks to a young lawyer acting for a minor client? It then occurred to me that a knowledge of the personalities of key judges might tell us as much or more about their decision-making than assumptions based upon the schools of thought they are supposed to represent.

A comparative study of these three judicial careers, and of the personalities of these three remarkable men, could reveal much, therefore, about the dynamics of constitutional interpretation during a lengthy and important period of Canadian history. Sadly, this book does not do so. It does provide some useful information, but not enough, in my opinion, to merit publication in book form.

It's a strange book. The first intimation of its strangeness comes in the dedication: "To Our Spouses and Spouses-To-Be."

Since there are only three authors, the pluralization of both "spouses" and "spouses-to-be," implying at least four partners in total, could mean only one of two things: (a) that at least one of the authors wished to salute both a present spouse and a future replacement or replacements, or (b) that the authors are careless writers. I had not read much more of the book before it became clear that the latter hypothesis was the more probable.

Syntactic and spelling errors abound, especially in the section on Rand. Words are frequently misused, as in the description of Premier Duplessis' withholding of a liquor licence to a political enemy as "largesse,"[1] the statement that Kerwin, although not deserving of sainthood, "at least deserves a beautification,"[2] (perhaps a typographical corruption of "beatification"); and the comment that newspaper accounts comparing the religious and ethnic backgrounds of Kerwin and the Quebec francophone he replaced as Chief Justice seemed "almost serendipitous in candour and political flavour."[3] A list of three "coherently related positions," turn out to be the *identical* statement repeated three times, perhaps with some kind of Andy Warhol emphasis in mind.[4] An "Appendix" suddenly appears in the middle of the book[5] with little indication of its relationship to what precedes or follows it.

Conspicuous differences of style from one section of the book to another (the Rand and Kerwin sections being written in the first person, for example, and the Martland section in the third person) leave no doubt that each of the judges studied was dealt with by a different author. So determined were the authors to work independently that they do not even seem to have agreed in advance about the order in which the respective Parts would be presented. Part II, which concerns Kerwin, begins with an Introduction and ends with an Epilogue, which were both clearly intended to introduce and conclude the entire book, and are glaringly out of place within the Kerwin section. Oddly, however, the authorship of each Part is not identified (although it is ascertainable from internal clues).

While many of these gaucheries ought to have been weeded out by the publisher, there is much for which the authors themselves must take full responsibility. The Introduction and Parts I and II are cluttered, for example, with irrelevant and sometimes obtrusive displays of erudition and para-erudition which do little to advance the purpose of the book. The Introduction offers a flurry of jurisprudential ideas that are seldom referred to again in subsequent chapters, and the Kerwin Part is sumptuously loaded with useless Americana. The latter Part opens for instance, with a discourse on Justice Anthony M.

---

1. Randall Balcome, Edward McBride and Dawn Russell, *Supreme Court of Canada Decision-making: The Benchmarks of Rand, Kerwin, and Martland* (Toronto: Carswell, 1990) at 55.
2. *Ibid.* at 173.
3. *Ibid.* at 176.
4. *Ibid.* at 152-3.
5. *Ibid.* at 145-6.

Kennedy of the United States Supreme Court,[6] and when Kerwin is described as a "paradigmatic figure in Canadian constitutional law" we are told in a footnote that an American scholar regards Felix Frankfurter as such a figure in American constitutional law.[7] After a Kerwin decision is described as being "plain wrong" we are informed in another footnote that another professor once used the same words to describe the judgment of another judge in another case.[8]

While the foregoing criticisms, and the dozens of others like them to which the book is vulnerable, might be considered petty, the combined effect of so many minor flaws is to erode one's confidence in the authors' professional competence. There are some things, moreover, that even the most tolerant reviewer could not overlook. The assertion that Mr. Justice Ritchie "was not an innovative judge" but "knew the law well and applied it,"[9] for instance, suggests that the author may never had read Ritchie's chameleonic performances in the *Robertson and Rosetanni*[10]*/Drybones*[11]*/Lavell*[12] trilogy concerning the Canadian Bill of Rights. The statement that "Rand's centralist views ... in a man born and raised in Moncton, New Brunswick [are] inexplicable"[13] casts serious doubt on the author's understanding of the role regional economics have always played in the dynamics of Canadian federalism. The failure of the authors to go much beyond secondary research sources is another major disappointment. Somewhere there must be correspondence or other documentation relating, for example, to the Court's astonishing creativity during the 1950s. Yet, apart from an interview or two, the book presents very little new primary data.

And then there is the authors' remarkable self-imposed ordinance of complacency. They postulate in the Introduction three "orders" of questions that a book of this sort might consider: (1) doctrinal (relating to whether a judge got the black-letter law right); (2) ideological (in the limited sense of the value assumptions, "within the background of our liberal democratic 'idea culture'", that influence a judge's reasoning); and (3) socio-political (in the broad sense of the fairness and desirability of this "liberal democratic" social structure upon which the judicial system rests).[14] The authors announce candidly at the outset that they will not concern themselves with "third order" questions.[15] While that may be a defensible approach for a study whose limited number of subjects would make systemic analysis difficult, the authors' pronouncement that "we reject the view that legal reasoning is either incoherent or subjective"[16] seriously impaired their ability to

6. *Ibid.* at 136-8.
7. *Ibid.* at 176.
8. *Ibid.* at 180.
9. *Ibid.* at 139.
10. *Robertson and Rosetanni* v. *R.*, [1963] S.C.R. 651.
11. *R.* v. *Drybones*, [1970] S.C.R. 282.
12. *Attorney-General of Canada* v. *Lavell*, [1974] S.C.R. 1349.
13. *Supra*, note 1 at 118.
14. *Ibid.* at 4-5.
15. *Ibid.* at 6.
16. *Ibid.* at 4.

deal thoroughly and persuasively with even the "second order" questions they promised to examine.

Another and even more crippling impediment to an effective comparison of the judges studied was the authors' decision to examine each judge in isolation. Each author analyzed the career of his or her judge in the manner he or she considered to be appropriate to the subject. Points of intersection between Parts are therefore random and infrequent. If the authors had wanted to compare and contrast their subjects effectively they might have been wise to organise the study thematically, each of them tracing one or more themes through all three judicial careers. Even if that were considered too ambitious an approach, surely it would have been possible to agree among themselves on a uniform set of themes to be explored in their several studies. Their failure to do this has produced a result rather like a comparison of camels, eagles and cats which discloses that camels have fur and drink water; eagles fly and eat mice; cats are four-footed and purr.

I had been looking forward to reading this book, and I did learn a few things I hadn't previously known about its subjects, especially about Martland. (The Martland Part is less prone than the others to many of the criticisms I've raised, by the way). But when I turned the final page it was with a sense of disappointment that the worthy task undertaken by the authors had not been fulfilled.

Dale Gibson
Professor, Faculty of Law,
University of Manitoba,
Belzberg Professor of
Constitutional Studies,
University of Alberta,
1988-1991.