CANADA'S COURTS by Peter McCormick (Toronto: James Lorimer, 1994)

Twenty years ago Canadian political scientists ignored the courts to a degree that now seems very surprising. The only cases likely to come to the attention of a student of Canadian government in the 1960s and early 1970s were the handful of Privy Council decisions that settled the boundaries of authority between the two levels of government. These were considered to be misguided though well-intentioned products of the Privy Council's lack of experience with federalism: massive granitic structures that played the same role for Canada's leaders that the Rocky Mountains did for the builders of the Canadian Pacific Railway. A quick look at Peter Russell's 1965 volume *Leading Constitutional Decisions*[1] and the courts could safely be forgotten while the real process of government was examined.

In the 1990s, the courts have emerged from musty obscurity to a prominent place in our political discourse. As Peter McCormick points out, hardly a week passes without some court case with important political implications making the front pages of our newspapers. Not surprisingly a number of political scientists have begun to specialize in the courts as a branch of government. Articles and new scholarly journals devoted to the broader context of legal studies have been appearing in the last decade or so, along with related work by sociologists, historians, and law professors with interdisciplinary interests. McCormick's book is the first attempt to synthesize these efforts into a comprehensive study of our court system from the point of view of a social scientist. His stated goal is to make the functioning of the courts more understandable by applying the analytical methods of the social sciences and "to translate the descriptions of the context and the operations of the judicial system into more everyday language — or at least into the language of the social sciences."[2] The first of these aims seems admirable; exchanging legal jargon for social science jargon will occasionally strike the reader as a less obvious gain.

Canada's Courts is a good deal more sophisticated than one might expect from a pioneering effort. The reason for this is that McCormick and the other social scientists whose work he relies on have ready at hand an enormous amount of American literature based on decades of studies of a system similar to our own. Models and methods for the study of such aspects of the courts as the appointment of judges or success rates of various categories of litigants are easily transferable. The book does this very well on the whole, making possible a number of interesting comparisons. Not surprisingly, the Canadian studies of such matters as the impact of caseloads on the courts tend to confirm those done in the United States. A potential pitfall of using American methodology is the temptation to ignore or minimize the differences between the two systems. One of the strengths of McCormick's book is that he scrupulously avoids this. He not only provides in chapter three the most lucid explanation of how the Canadian system differs from its American counterpart that I have seen, but throughout the book is always careful to explain the differences and why they are

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1 (Toronto: McClelland and Stewart, 1965).

2 P. McCormick, *Canada's Courts* (Toronto: James Lorimer, 1994) at 2.

important. The book should be immensely useful to Canadian students whose ideas about law and courts have been shaped by American popular culture.

McCormick's social science approach produces impressive results in several areas. I found the chapter on the appointment of judges very thought-provoking. It looks at the European and American methods of choosing judges and discusses their merits and defects. It then looks at the Canadian system and presents a well-reasoned defence of appointment by political patronage. The argument, briefly (and perhaps too simply) stated, is that because the courts are inescapably part of the political order, it is important that judicial appointees should reflect the values of democratically chosen governments, always provided that those chosen are technically competent. This kind of willingness to take a look at how the process actually works rather than automatically condemning political patronage is very refreshing.

The chapter on the impact of judicial decisions is excellent. Since the courts have no direct means of enforcing their decisions and since the hierarchy of courts is much more blurred in practice than in theory, the process by which authority is exerted is rather mysterious. McCormick provides a good theoretical explanation that is further illuminated by an intelligent discussion of three recent cases, *Carter*,[3] *Askov*[4] and *Morgentaler*,[5] whose force as precedents was complex and ambiguous.

Not every part of the book works as well. A chapter entitled "Winning and Losing in Canada's Courts" trundles out a piece of high-tech social science weaponry with the portentous title of 'Party Capability Theory'. This amounts to categorizing various kinds of litigants and comparing how well they do. It provides splendid scope for the kind of heavy duty number crunching that reassures social scientists that what they are doing is really scientific. The results of all this diligence will not surprise even the most naive layman, let alone those with some knowledge of the legal system — the big guys win court cases more often than the little guys. Maybe it is important to document this fact at great length but I suspect that all but the hardiest readers' eyes will glaze over at this point. The discussion of the literature on the nature of disputes in chapter four, in which some theorists attempt to do away with the concept altogether, is entirely unhelpful in understanding how the courts function.

These are relatively minor criticisms. On the whole McCormick's book is an excellent overview of our court system. It is quite readable and intelligently critical. No doubt *Canada's Courts* will have to be revised within a few years. The scholarly literature on the subject is just beginning to appear and, as McCormick makes clear in the book, the system itself is changing more rapidly than at any time in our history.

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3 *Carter* v. *A.-G. Saskatchewan*, [1991] 2 S.C.R. 158.

4 *R.* v. *Askov*, [1990] 2 S.C.R. 1199.

5 *R.* v. *Morgentaler, Smoling and Scott*, [1988] 1 S.C.R. 30.

This book should be required reading for anyone with a serious interest in the Canadian legal system.

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