

XXI

From Empire Ontario to California North: Law and Legal Institutions in Twentieth-Century Ontario

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NINE DECADES OF THE twentieth century have produced fundamental changes in Ontario. A largely rural population, comparatively homogeneous in the eyes of modern observers and economically preoccupied with natural resources and the land, grew dramatically through successive waves of immigration, absorbing—with some awkwardness—people from around the globe, attracted to urban centres of manufacturing, commerce and emerging service industries. If this panoramic, one-sentence summary conveys any impression of social and economic change in twentieth century Ontario, what can be said of provincial law and legal institutions in the same period? Assuming for a moment that the often overlooked legal aspects of Ontario's history also presented a picture of change, how were such developments related to social and economic life? Can we regard law and legal institutions as autonomous and independent? Or were they merely derivative from the social and economic context? Alternatively, perhaps law and legal institutions exerted a causal influence on the evolution of Ontario society?

While not yet a preoccupation, questions such as these intrigue legal historians, and the temptation to answer them conclusively and directly must surely be acknowledged! Could it be argued, for example, that a broad legal transformation has occurred, and that its essential characteristics might be embodied in “before” and “after” images of “empire Ontario”, a description much-favoured by some historians and “California North”, an epithet in vogue during the 1980s as litigation seemed to proliferate. Loosely put, did an ordered, hierarchical and conservative legal régime rooted in British values and practices give way to a much more conflictual, open and innovative legal environment, following a more American model?

The possibility that Ontario's twentieth century legal inheritances saw Charles Dickens ushered out to welcome in “LA Law” does have some glib appeal. But such a dramatic and vivid characterisation must yield to more modest imagery. This account of twentieth century law and legal institutions in Ontario will illustrate how select developments have accompanied social and economic changes. One way to explore the inter-relationship is to consider the several roles that members of the legal community have played.

Ontario lawyers, judges, and others were—and are—simultaneously practitioners, professionals and members of political communities. They enjoy and suffer with their contemporaries the experiences of changing social and economic circum

stances.¹ As practitioners, with clients and colleagues, their focus may well be local, anecdotal and immediate.² As professionals they participate in a broader legal tradition with Law Society status where self-government grounds its own organisation and practices. And as members of political communities they have opportunities to reflect on or to participate actively in events unfolding around them in such fields as industry and commerce, international relations, cultural affairs, and education. An array of legal institutions, also varied and changing, provides the setting for lawyers' work: courts, administrative tribunals, regulatory agencies, educational programs, and even their office environment are examples of legal institutions where the interplay of practice, professionalism and provincial public affairs unfold.

This vast scope of legal identities and experiences defies comprehensive treatment and challenges one to identify a few select themes: moral reform, the response to industrialisation, resource development and the environment, and the status of women and minorities. These will serve as surrogates for a thorough and detailed portrait of the changing legal culture in twentieth century Ontario.

I. Post-Victorian Empire and the Great War, 1900–19

A. Legal Institutions and the Profession

At the turn of the century, the legal community was still adjusting to the implications of fusion as initiated in 1881, when the *Ontario Judicature Act* consolidated the then existing courts of Chancery, Queen's Bench and Common Pleas into the High Court of Justice as divisions of that court.³ By 1903, the addition of an Exchequer division alongside the three divisions of the High Court made critics apprehensive about a renewal of institutional fragmentation. In 1909, Sir James Pliny Whitney's Conservative administration responded with the *Law Reform Act*, "another landmark in the history of the Ontario courts," which provided for abolition of the Divisional Courts of the High Court and produced one Supreme Court of Ontario, consisting of two branches, the Appellate Division and the High Court Division. It was not until 1913 that these changes came into force, accompanied by greatly simplified Rules of Practice developed by Mr. Justice Middleton, the most recently appointed member of the Chancery Division.⁴ A good many years would pass before the offices of the chancellor and the last of the three divisional chief justices finally disappeared and thereby removed "the last vestiges of a separate administration for law and equity."⁵

¹ Biographical studies, including work encouraged by The Osgoode Society and *The Dictionary of Canadian Biography*, may well illuminate these relationships but for the moment such studies are rare.

² E. Bloomfield "Lawyers as Members of Urban Business Elites in Southern Ontario, 1960 to 1920" in C. Wilton, ed., *Beyond the Law: Lawyers and Business in Canada, 1830-1930* (Toronto: The Osgoode Society, 1990) 112.

³ See P. Romney, "The Administration of Justice in Ontario, 1784–1900" and, M.A. Banks, "The Evolution of the Ontario Courts, 1788–1981" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. II (Toronto: The Osgoode Society, 1983) 492.

⁴ J.D. Arnup, *Middleton: the Beloved Judge* (Toronto: McClelland and Stewart, 1988).

⁵ P.M. Perrell, "A Legal History of the Fusion of Law and Equity in the Supreme Court of On-

In addition to the Supreme Court of Ontario, the province's judicial hierarchy included two senior courts, the Supreme Court of Canada in Ottawa and the Judicial Committee of the Privy Council in London, England, as well as an array of other special and localised legal institutions. The Supreme Court of Canada had advocates and original supporters hoping for it to contribute significantly to a process of national integration; but it has recently been regarded by some observers—for the early decades of the twentieth century—as a “court in decline.”⁶ A high turnover in membership, with new appointees too often thought to be wearing the colours of patronage, contributed to instability and a falling off in professional and popular respect. The frequency with which judges participated in such extra-judicial activities as commissions of inquiry diverted the court's energies, while a pronounced tendency to follow past decisions slavishly persuaded more than a few observers that it would not be a responsive or innovative legal forum. James Snell and Frederick Vaughan have written that “Supreme Court justices in the early twentieth century were even more thorough than their predecessors in searching for precedents as a sure and secure way through the tangle of legal problems.”⁷

A few observers traced the Court's weaknesses to its subordinate position in relation to the Judicial Committee, and some institutional critics such as John S. Ewart and W.E. Raney urged abolition of appeals to London.⁸ Yet this theme of criticism remained inchoate. Resort to London for resolution of Canadian legal disputes increased in the years immediately preceding World War I, a period of widespread support for the idea of British imperial unity. Blaine Baker has remarked that “the turn of the twentieth century witnessed a massive increase in the relative importance of the Judicial Committee of the Privy Council to Canadian, especially Ontarian, lawyers.”⁹ The wide circulation of English legal literature throughout Ontario added to the intricate pattern of factors that “facilitated and encouraged a commitment to the Empire.”¹⁰

If deference to tradition and attachment to the institutions of the British empire were not quite universal characteristics of the legal profession, another feature was. In 1902, when Eva Maude Powley was admitted to practice, she joined Clara Brett Martin to double the number of women practising law in Ontario, indeed in the British Commonwealth. These pioneering women, having attended a highly structured institutional program administered by the Law Society of Upper Canada,

tario” (1988) 9 *Advocates' Quarterly* 472 at 482; also, Banks, *supra* note 1 at 528–29.

⁶ J.G. Snell & F. Vaughan, *The Supreme Court of Canada* (Toronto: The Osgoode Society, 1985) ch. 4.

⁷ *Ibid.* at 101.

⁸ W.E. Raney, “Justice, Precedent and Ultimate Conjecture” (1909) 29 *Canada Law Times* 454; J.F. Newman, “Reaction and Change: A Study of the Ontario Bar, 1880-1920” (1974) 32 *University of Toronto Faculty of Law Review* 51 at 71; G.B. Baker, “The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire” (1985) 3 *Law and History Review* 219 at 271.

⁹ Baker, *ibid.* at 268–69.

¹⁰ *Ibid.* at 270. On the general question of imperial sentiment, see C. Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867–1914* (Toronto: University of Toronto Press, 1970).

shared with other recent entrants to the profession an extended period of service as articling students.

In 1889, the process of legal education in Ontario had been altered by the creation of a permanent law school at Osgoode Hall, under the close supervision of the Law Society's Legal Education Committee. The Committee served as the new institution's "collective 'Dean,'" carefully considering matters of staff appointments, curriculum, texts and discipline.¹¹ Addressing the close relationship of practical training and formal instruction in his inaugural lecture, the School's first Principal, W.A. Reeve, concluded: "There is no conflict between the educational functions of the office and those of the school. Both are necessary. Each is the complement of the other."¹² For its part, the Law Society continued to emphasise the practical, an orientation that has endured alongside sometimes quite pronounced shifts in academic approaches to legal education.

Toronto, continuously developing as a financial centre for the expanding nation, provided a wealth of opportunities for graduates inclined toward corporate and commercial practice. One hundred and thirty seven private banks in Ontario in 1895 began disappearing early in the new century; but Canadian chartered banks, numbering some three dozen in 1900 added over 1,200 Ontario branches between 1895 and 1922.¹³ Newton Wesley Rowell, embarking on his career in the 1890s, enjoyed the abundance of work then available to good lawyers as he acted in property and corporation matters for clients such as Molson's Bank and the Ontario Loan and Deposit Company. Rowell's biographer has remarked that "the legal fraternity of Toronto at the time displayed a brilliance probably unexcelled in any other period of its history," highlighting the educational opportunities available as he began to practice "in the world of Samuel and W.H. Blake, the several Oslers, Christopher Robinson, A.B. Aylesworth, Charles Moss, D'Alton McCarthy, E.F.B. Johnston, and Zebulon A. Lash."¹⁴

Lash was "Toronto's most prominent solicitor," and "the pre-eminent corporation lawyer of the Cox group"; his distinctive practice ranged far beyond provincial frontiers.¹⁵ In addition to the Bank of Commerce, National Trust, Bell and Canada

¹¹ B.D. Bucknall, T.C. H. Baldwin & J.D. Laskin, "Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957" (1968) 6 Osgoode Hall Law Journal 137 at 160-71.

¹² *Ibid.* at 165. With reference to the inaugural address of W.A. Reeve in 1889 as principal of the law school, Baker writes: "The modifications of the Society's classes and clubs that occurred in the fourth quarter of the nineteenth century signal that 1889 was a watershed in the history of Upper Canadian legal education. As one scholar has noted, at the end of the century the Law Society sat Janus-like with the Tory values of Upper Canada behind it and the emerging values of an urban, industrialized culture ahead." G.B. Baker, "Legal Education in Upper Canada, 1785-1889: The Law Society as Educator" in D.H. Flaherty, ed., *supra* note 1 at 111.

¹³ E.P. Neufeld, *The Financial System of Canada: Its Growth and Development* (Toronto: Macmillan Co., 1972) at 167, 79 and 173.

¹⁴ M. Prang, *N.W. Rowell: Ontario Nationalist* (Toronto: University of Toronto Press, 1975) at 18.

¹⁵ M. Bliss, *A Canadian Millionaire* (Toronto: Macmillan Co., 1978) at 61; C. Armstrong & H.V. Nelles, *Southern Exposure: Canadian Promoters in Latin America and the Caribbean 1896-1930* (Toronto: University of Toronto Press, 1988) 10.

Life among other major clients, Lash helped to extend Ontario's industrial connections into Mexico and South America; he participated directly in commercial negotiations for his clients in England and Europe, still managing to find free moments for political engagements. Remarkably, all these accomplishments followed his earlier service as a federal deputy minister of justice, 1876–1882.

But the careers of senior practitioners, whether strategists, advocates, technicians, promoters and more recently “rainmakers,” are not always a guide to more conventional experience. Much of a lawyer's routine work related to practical and immediate client needs where non-legal competitors such as conveyancers and trust companies were becoming a threat and pre-occupation.¹⁶ For some, the pressure of economic competition may have been a central concern, while control over quality of service troubled others who felt threatened by loss of fees and professional status to specialised but uncertified providers of legal services. Clara Brett Martin's position was perhaps all the more precarious as a consequence.

B. Moral Reform and Social Issues

The role of legislation and the state in governing personal conduct was vigorously contested as popular understanding of the relationship between moral values and social issues evolved.¹⁷ The concerns were most apparent in the debate between advocates of temperance and individual self-restraint, as one response to the perils of alcohol and those, on the other hand, who favoured statutory prohibition. Provincial legislation, popularly tested on occasion by referenda and frequently challenged in the courts for violating federal jurisdiction, attempted to resolve tensions before World War I when the Ontario *Temperance Act* established the base for a régime with some potential for interim stability. Law students might have been prepared to grapple with the technical aspects of such legislation, through the course on “Construction and Operation of Statutes” which had been added to the Law School curriculum at the time of Reeve's appointment as Principal in 1889.¹⁸ However, seemingly semantic differences about interpretation in the pleadings really reflected deeply held beliefs about individual autonomy, the limits of collective action and appropriate levels of cultural diversity and homogeneity within society.¹⁹

Numerous controversies from the public agenda forced value conflicts into legislative and judicial settings. Thus, the judiciary also faced differences over

¹⁶ Newman, *supra* note 6; Curtis Cole, “A Developmental Market: Growth Rates, Competition and Professional Standards in the Ontario Legal Profession, 1881–1936” (1983) 6 *Canada-United States Law Journal* 125 at 128–132.

¹⁷ See S. E. D. Shortt, *The Search for an Ideal: Six Canadian Intellectuals and their Convictions in an Age of Transition 1880–1930* (Toronto: University of Toronto Press, 1976); R. Cook, *The Regenerators: Social Criticism in Late Victorian English Canada* (Toronto: University of Toronto Press, 1985); D. O'ram, *The Government Generation: Canadian Intellectuals and the State 1900–1945* (Toronto: University of Toronto Press, 1986); M. Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885–1925* (Toronto: McClelland & Stewart, 1991).

¹⁸ Bucknall *et al.*, *supra* note 11 at 166.

¹⁹ G. Hallowell, *Prohibition in Ontario* (Toronto: Ontario Historical Society, 1972); R. C. B. Risk, “Canadian Courts Under the Influence” (1990), 40 *University of Toronto Law Journal* 687.

sabbath observance, albeit under a procedure authorising questions on the validity of legislation to be referred to the courts. In *A.G. Ontario v. Hamilton Street Railway*,²⁰ for example, the Judicial Committee declared Ontario's Lord's Day legislation²¹ *ultra vires* on the ground that criminalising the subject was reserved to the federal parliament.²² Nevertheless, sabbath observance measures persisted in other forms of regulation.

Sometimes known as "child saving," the challenge of rescuing youth from the temptations of criminal activity had been the subject of a prolonged campaign with European and American antecedents before gaining prominence in Canada. In Ontario, where J.J. Kelso served actively as Superintendent of Neglected and Dependent Children and Inspector of Industrial Schools, the educational and social welfare dimensions of "child-saving" were most widely known. Yet the phenomenon also had an impact on legal institutions. For example, W.L. Scott, local Master of the Supreme Court of Ontario at Ottawa, heralded the federal *Juvenile Delinquents Act* (1908) as "a great advance in the methods of dealing with delinquent children." A judicial attitude of "punishment and repression" towards the accused child was to be replaced, Scott asserted, by one that is "benignant, paternal, salvatory, and for these reasons more efficiently corrective."²³ Indeed, the statute itself urged that "as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."²⁴

The new approach to juveniles emphasised treatment, with the result that "(o)ny minor and largely ineffectual concern was expressed for the 'legal rights' of children." This imbalance would later be reversed²⁵ but, partly as a consequence of financial constraints, actual changes in organisational structure and personnel brought about by the reformers' success in obtaining legislation were modest and gradual.²⁶ Indeed, when Ontario took action in 1910 pursuant to the *Juvenile Delinquents Act*, the province simply provided that existing police magistrates and county and district criminal courts would also function as juvenile courts.²⁷

²⁰ *Ontario (A.G.) v. Hamilton Street Railway* (1903), [1903] A.C. 524, 2 O.W.R. 672 (Privy Council).

²¹ *An Act to Prevent the Profanation of the Lord's Day*, R.S. O., 1897, c. 246.

²² See also Ontario Law Reform Commission, *Report on Sunday Observance Legislation*.

²³ W.L. Scott, "The Juvenile Delinquent Act" (1908) 28 *Canadian Law Times* 892.

²⁴ *The Juvenile Delinquent Act*, 1908, S. C., 1908, c. 40, s. 31.

²⁵ *Young Offenders Act*, S. C., 1980-81-82-83, c. 110.

²⁶ J.S. Leon, "The Development of Canadian Juvenile Justice: A Background for Reform" (1977) 15 *Osgoode Hall Law Journal* 71 at 104; S. Houston, "Victorian Origins of Juvenile Delinquency: A Canadian Experience," *History of Education Quarterly* (1972) 12, 254; Jones, "Closing Penetanguishene Reformatory: an Attempt to Deinstitutionalize Treatment of Juvenile Offenders in Early Twentieth Century Ontario," *Ontario History* (1978) 60, 226; G. Parker, "The Century of the Child" (1967) 45 *Canadian Bar Review* 741, at 746-49; Reitsma-Street, "More Control than Care: A Critique of Historical and Contemporary Laws for Delinquency and Neglect of Children in Ontario," (1989-90) 3 *Canadian Journal of Women and the Law* 510; Neil Sutherland, *Children in English-Canadian Society: Framing the Twentieth Century Consensus* (Toronto: University of Toronto Press, 1976)

At approximately the same time as these developments in the juvenile courts, pressure emerged for creation of a separate women's court to handle charges against female defendants. Toronto's local Council of Women led the campaign to segregate male and female prisoners and to provide separate courts for women. Clara Brett Martin "eagerly joined in the lobbying, for she felt that separate women's courts would improve the atmosphere for women's trials." The first such court, presided over by a man, was established in Toronto in 1913.²⁸

Friction over education between elements of the English-speaking population and the province's French language minority had been managed with few serious incidents through the late nineteenth century when bilingual schools enjoyed official approval. Yet the divergent aspirations of Ottawa's Irish and French Catholic communities reached the Privy Council in 1906,²⁹ and the potential for escalating conflict grew thereafter. The Orange Order as well, still a powerful force in public life and well-connected as supporters to the provincial Conservative government, took an increasingly critical interest in the aspirations of the growing Franco-Ontarian community—particularly following the first French-Canadian Congress of Education in 1910 and the formation of L'Association Canadienne-Française d'Éducation d'Ontario.³⁰ Growing pressure from Irish Catholic spokesmen, the Orange Order, and the "ultra Protestant wing of the Ontario Conservatives" represented by Howard Ferguson contributed to the development in 1912 of "Regulation 17," a Department of Education instructional circular intended to ban the use of French beyond the elementary level in Ontario schools.³¹ The ensuing struggle over the status of French in Ontario education moved simultaneously onto the national wartime political agenda and advanced through the legal system as part of a conflict over the administration of separate schools in Ottawa. In 1917, the Privy Council, while regretting that Regulation 17 "is couched in obscure language," nevertheless upheld its validity.³² All this litigation was conducted in English, since 1897 the only language recognised in the courts of Ontario.

²⁷ Banks, *supra* note 1 at 544–45.

²⁸ C. B. Backhouse, " 'To Open the Way for Others of My Sex': Clara Brett Martin's Career as Canada's First Woman Lawyer" (1985) 1 *Canadian Journal of Women and the Law* 1 at 34; D.E. Chunn "Maternal Feminism, Legal Professionalism and Political Pragmatism: The Rise and Fall of Magistrate Margaret Patterson, 1924–1934" in W.W. Pue and B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 91.

²⁹ M. Barber, "The Ontario Bilingual Schools Issue: Sources of Conflict" in R. Cook, C. Brown and C. Berger, eds., *Minorities, Schools, and Politics: Canadian Historical Readings*, vol. VII (Toronto: University of Toronto Press, 1969) 63 at 67 [reprinted from (1966) 47:3 *Canadian Historical Review*].

³⁰ *Ibid.*

³¹ As quoted by Margaret Prang in "Clerics, Politicians, and the Bilingual Schools Issue in Ontario, 1910–1917", *ibid.* Regulation 17, Section 3 reads in part: "(1) Where necessary in the case of French-speaking pupils, French may be used as the language of instruction and communication; but such use of French shall not be continued beyond Form I, excepting during the school year of 1912–13, when it may also be used as the language of instruction and communication in the case of pupils beyond Form I who, owing to previous defective training, are unable to speak and understand the English language."

³² *Mackell v. Ottawa (Roman Catholic Separate School Board)* (1917), 32 D.L.R. 1, [1917] A.C.

When provincial conservation policies conflicted with Aboriginal hunting and wildlife use, Ontario asserted its position, notwithstanding legislation that appeared to respect Aboriginal wildlife interests and to recognise the existence of unsundered territory.³³ In response to public concern about conservation, it has been suggested that prosecutions were initiated to “shift Indian hunting skills towards guiding and to ensure an allocation of big game for sportsmen.”³⁴ The federal Office of Indian Affairs, which might have intervened more vigorously, is said to have “capitulated to Ontario’s assault on Indian hunting,” although federal authorities, among others, occasionally sought special consideration for those convicted. When enforcement and regulations became still more intrusive, the Hudson’s Bay Company explored avenues for legal resistance on behalf of its fur suppliers, but eventually accepted a political resolution which left the status of Aboriginal and treaty rights unresolved.³⁵

C. Industrialisation

Provincial measures to secure public benefits and control of valuable natural resources also provoked legal controversy. For example, when the Ontario Bureau of Mines and then the legislature acted in 1905–06 to safeguard the “people’s share” of the mineral wealth of New Ontario, an aggressive syndicate, the Florence Mining Company, protested the alleged confiscation of its rights. Florence’s claim was ultimately judged to be entirely without foundation; but for nearly half a decade keenly interested and legally well represented parties diverted attention to property rights and the limits of a legislative authority that had been used in an attempt to keep the matter from the courts. Criticism of government action was further stimu-

62. See also: *Ottawa (Roman Catholic Separate School Board) v. Ottawa (City)* (1917), 32 D.L.R. 10, [1917] A.C. 76; Barber, *supra* note 27; M. Prang, *supra* note 29 at 85; Prang, *supra* note 12; C. W. Humphries, “*Honest Enough to be Bold*”: *The Life and Times of Sir James Pliny Whitney* (Toronto: University of Toronto Press, 1985).

³³ Section 12 of the *Game Protection Amendment Act* of 1892 stated: “The provisions of the game law of this Province shall not apply to Indian or to settlers in the unorganized districts of this Province with regard to any game killed for their own immediate use for food only and for the reasonable necessities of the person killing the same, and his family, and not for the purposes of sale and traffic. And nothing herein contained shall be construed to affect any rights specially reserved to or conferred upon Indians by any treaty or regulations in that behalf made by the government of the Dominion of Canada, with reference to hunting on their reserves or hunting grounds or in any territory specially set apart for this purpose; nor shall anything in this Act contained apply to Indians hunting in any portion of the Provincial territory as to which their claims have not been surrendered or extinguished.” S. O., 1892, c. 58, s. 12.

³⁴ F. Tough, “Ontario’s Appropriation of Indian Hunting: Provincial Conservation Policies v. Aboriginal and Treaty Rights, 1892–1930” (Ontario Native Affairs Secretariat, January 1991).

³⁵ *Ibid.* See also: D. MacNab “Principally Rocks and Burnt Lands: Crown Reserves and the Tragedy of the Sturgeon Lake First Nation in Northwestern Ontario” in K. Abel and J. Friesen, eds., *Aboriginal Resource Use in Canada: Historical and Legal Aspect* (Winnipeg: University of Manitoba Press, 1991) 157; J. Benidickson & B.W. Hodgins, *The Temagami Experience: Recreation, Resources and Aboriginal Rights in the Northern Ontario Wilderness* (Toronto: University of Toronto Press, 1989) at 144–47; and, S. L. Harring, “The Liberal Treatment of Indians’: Native People in Nineteenth Century Ontario Law,” 56 *Saskatchewan Law Review* 297 at 326–28.

lated by the ongoing confrontation between private hydro developers and Ontario's public power initiative, Adam Beck's Hydro-Electric Power Commission. No less a figure than A. V. Dicey, the British constitutional scholar, weighed in to supply ammunition for opponents of public power.³⁶ By this time Justice W.R. Riddell had rather pointedly set the judicial tone in an early round of the Florence litigation when he observed: "... the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule, human or divine" Twisting the knife, he added, "And there would be no necessity for compensation to be given."³⁷ But to acknowledge legislative authority was hardly to welcome its exercise.

Also crucial in terms of long-term implications were the early administrative agencies and regulatory tribunals. These appeared at the federal level where the Board of Railway Commissioners was established in 1903³⁸ and in the provincial sphere. The Ontario Railway and Municipal Board, for example, a forerunner of one of the province's principal tribunals, dated from the same era. Controversy surrounding the introduction of administrative agencies demonstrated the innovative nature of these new institutions. While debate about their relationship to courts and legislatures remains current today, the legal community pragmatically adapted to their operations.

A series of statutory initiatives concerning conditions of work and compensation for injury culminated in 1914 with adoption by Ontario of a "no-fault" plan and the creation of a new tribunal, the Workmen's Compensation Board, to administer the compensation scheme.³⁹ Several jurisdictions in the United States and Europe had already implemented comparable arrangements, as had the provinces of British Columbia, Alberta, Nova Scotia, Saskatchewan and Quebec. The Ontario initiative was thus hardly innovative; its significance lay in Ontario's industrial stature and any consequential effects the new arrangements had on the legal system overall.

"Worker's compensation abandoned the faith in individual autonomy and responsibility", concluded the author of a comprehensive study of the Workmen's Compensation Board's early history. Instead of tort claims revolving around personal fault and causation, worker injuries would be resolved in administrative proceedings,

³⁶ H.V. Nelles, *The Politics of Development: Forests, Mines & Hydro-Electric Power in Ontario, 1849-1941* (Toronto: Macmillan Co., 1974). See also: J. Benidickson, "Private Rights and Public Purposes in the Lakes, Rivers and Streams of Ontario 1870-1930" in D.H. Flaherty, ed., *supra* note 1, 365. Dicey's opinion is reproduced in (1909) *Canada Law Journal*, 45 at 457.

³⁷ *Florence Lake Mining Company v. Cobalt Lake Mining* (1909) 18 OLR 275 at 279 (C. A.). See also: C. Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942* (Toronto: University of Toronto Press, 1981).

³⁸ For discussion of the history and origins of the BRC, see J. Benidickson, "The Canadian Board of Railway Commissioners" (1991) 36 *McGill Law Journal* 1224; K. Cruikshank, "The Transportation Revolution and Its Consequences: The Railway Freight Controversy of the Late Nineteenth Century" (1987) *Canadian Historical Association Historical Papers* 112; A.W. Currie, "The Board of Transport Commissioners as an Administrative Body" (1945) 11 *Canadian Journal of Economics and Political Science* 342; A.V. Wright, "An Examination of the Role of the Board of Transport Commissioners for Canada as a Regulatory Tribunal" (1963) *Canadian Public Administration* 349.

³⁹ R.C. B. Risk, "The Nuisance of Litigation: The Origins of Workers' Compensation in Ontario" in Flaherty, *supra* note 1.

with compensation based on the assumption of general social responsibility. Decisions about awards "were all products of compromise, not rules" and "the justification of the law changed" as compensatory awards were defended on grounds of efficiency, compromise, and acceptability.⁴⁰ Despite what was in some respects a revolutionary transformation in outlook suggested by the new approach to worker's compensation, the common law retained many of its long established pre-occupations with personalised responsibility.

As Ontario industrialised, the adaptability of the common law faced other challenges. For example, conflict between promoters of economic development and the settled interests of communities and property holders had been an inevitable consequence of new industrial activity. Thus, in applying common law principles, such as nuisance doctrine to conflicts between neighbouring parties, courts have often had to try to balance competing social interests. Interpreted strictly, traditional doctrine might have provided a powerful constraint against industrial expansion with its disruptive impacts on the surrounding population; but nineteenth century courts in England and the United States have sometimes been thought to have adapted the law in an instrumental manner to accommodate economic development.⁴¹ Somewhat later, when similar development was actively underway in Canada with official governmental approval, the same issues came before the courts: did "Canadian judges let traditional common law impede ... (government) policy or join ... their British and American brethren in modifying the law to facilitate development?"⁴²

One answer is that "Canadian courts were considerably less willing to abridge the common law rights of occupiers in response to the pressures of industrialization." They were "also generally unwilling to deny traditional remedies in order to foster development or minimize its costs."⁴³ In a range of early twentieth century nuisance cases, judges "seem to have been acting on a principled conviction that their job was to protect traditional rights, and they carried out this conviction in the face of contrary precedent."⁴⁴

The most remarked upon exception to this tendency involved pollution claims against Canada's largest wartime employer, in cases where Justice Middleton "drastically departed from clear Canadian precedent."⁴⁵ His disinclination to issue an injunction against a company whose sulphur dioxide emissions were injuring

⁴⁰ Risk, *ibid.* at 473-75.

⁴¹ J.F. Brenner, "Nuisance Law and the Industrial Revolution" (1974) 3 *Journal of Legal Studies* 403; M.J. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977).

⁴² J. Nedelsky, "Judicial Conservation in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law, 1880-1930" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (Toronto: The Osgoode Society, 1981) 281 at 285.

⁴³ *Ibid.* at 286-87. See also: *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 (Div. Ct.); *Beamish v. Glen* (1916), 28 D.L.R. 702, 36 O.L.R. 10 (C. A.).

⁴⁴ Nedelsky, *supra* note 42 at 306.

⁴⁵ D.N. Dewees & M. Halewood, "The Efficiency of the Common Law: Sulphur Dioxide Emissions in Sudbury" (1992) 42 *University of Toronto Law Journal* 1 at 9.

farm operations near Sudbury was supported by his assessment of social and economic consequences.

Mines cannot be operated without the production of smoke from the roast yards and smelters, which smoke contains very large quantities of sulphur dioxide. There are circumstances in which it is impossible for the individual so to assert his individual rights as to inflict substantial injury upon the whole community.... Once closed the mines, and the mining community would be at an end, and farming would no longer continue.... The court ought not to destroy the mining industry—nickel is of great value to the world—even if a few farms are damaged or destroyed.⁴⁶

Middleton's approach appeared to be unusual in an era when the judiciary more frequently attempted to avoid explicit policy and value choices, leaving such matters as far as possible for legislators to resolve.⁴⁷

The common law framework was indeed being modified and supplemented through legislative initiatives, as reported annually by the *Canadian Law Times*. Some of these—the legislature's interest in the width of sleighs—were of comparatively little moment. Other measures such as legislation regarding milk inspections hinted at the consumer protection potential of modern regulatory régimes.⁴⁸ Similarly, initiatives such as the 1903 *Consolidated Municipal Act*, a formidable document with some seven hundred and fifty sections spread over four hundred pages, represented a virtual codification for managing the challenges of modernisation. As they accumulated, such measures constituted both cause and effect in a gradual process of twentieth century bureaucratisation and professionalisation.⁴⁹

II. The Interwar Years and World War II, 1919–45

A. Legal Institutions and the Profession

The Toronto Local Council of Women, the Women's Christian Temperance Union and other organisations promoting moral reform after World War I renewed efforts to secure appointments of women to the juvenile and women's courts in Ontario's largest city.⁵⁰ When, in 1921, the United Farmers' government authorised the appointment of women as magistrates or deputy magistrates in cities with a population over 100,000, Dr. Margaret Patterson quickly emerged as the favoured candidate of the principal pressure groups. Despite her lack of legal training, other qualifications—her extensive experience in volunteer social service, in monitoring the Toronto Police Court's treatment of accused females, and in advising the federal government concerning criminal code offences against women—made it "unlikely that a more perfect example of the ideal maternal feminist could have been found."⁵¹

⁴⁶ *Black v. Canadian Copper Co.* (1917), 12 O.W.N. 243.

⁴⁷ R.C. B. Risk, "Sir William R. Meredith CJO: The Search for Authority" 7 *Dalhousie Law Journal* 713.

⁴⁸ W.H. Heick, *A Propensity to Protect: Butter, Margarine and the Rise of Urban Culture in Canada* (Waterloo: Wilfrid Laurier University Press, 1991).

⁴⁹ Harold Perkin, *The Rise of Professional Society: Britain Since 1880* (London: Routledge, 1989).

⁵⁰ Chunn, *supra* note 28.

⁵¹ *Ibid.* at 95. According to Chunn, "Margaret Patterson's appointment to the Women's Court was

Thus, in 1922—a few years after Emily Murphy’s path-breaking appointment in Alberta—Margaret Patterson was named to the Toronto Women’s Court.

Her tenure did not overlap with that of Colonel George Denison, a minor Toronto Police Court legend whose singular incumbency had stretched from 1877 to 1921, during which time he had personally handled some 650,000 cases.⁵² “It was not uncommon,” reports an account of “Denison’s Law,” for him “to deal with 250 cases in 180 minutes.”⁵³ Criminal justice had largely become justice at the hands of the province’s 200 magistrates, as statistics reported by Dorothy Chunn confirm: “The total number of convicted who were sentenced to imprisonment in 1919 was 7904; of these, 7033 were sentenced by justices of the peace and magistrates.”⁵⁴

Denison’s retirement in 1921 provided an occasion for members of the bar to lament the perfunctory performance of a magistracy largely lacking in legal training, and to call for reforms. Thus, notwithstanding the enthusiasm of her supporters, Dr. Patterson’s appointment was the subject of “vociferous opposition ... from the adherents of legal professionalism who were implacably against the appointment of non-lawyers as magistrates, the more so if they were women.”⁵⁵ Several decades later the legalists’ efforts to promote the “judicialization of the magistracy” would ultimately bear fruit. On the other hand, however slowly, women eventually began to enter the legal sphere, including the judiciary.

During the Depression a few Ontario lawyers first acknowledged the distinctive needs of the unemployed, the working poor, and pensioners for improved access to legal services, thereby creating a basis of support for what would eventually become a comprehensive program of legal aid. When Toronto’s Board of Control approached the York County Law Association in 1931 to provide a volunteer lawyer to advise welfare recipients without charge, one of the first institutional steps toward legal assistance was taken.⁵⁶

Some may have viewed a well-established legal profession as the key to a stable régime with potential to resist disruptive innovation. Others urged that law should respond and adapt to developments within the community. Among the latter group,

really a side effect of the larger concern about enforcing prohibition. She was certainly a kindred spirit with Raney and her elevation to the Bench seems to have occurred less because she was a woman and more because she was also a long-time moral reformer and Presbyterian.”: *ibid.* at 99.

⁵² O. Homel, “Denison’s Law: Criminal Justice and the Police Court in Toronto, 1877-1921” (1981) 73 *Ontario History* 171; for further information on Denison see C. Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867-1914* (Toronto: University of Toronto Press, 1970); P. Craven, “Law and Ideology: The Toronto Police Court 1850-1880” in D.H. Flaherty, ed., *supra* note 1, 248; Col. G.T. Denison, *Recollections of a Police Magistrate* (Toronto: The Musson Book Co. Ltd., 1920); and J.P.S. McLaren, “The Canadian Magistracy and the Anti-White Slavery Campaign, 1900-1920” in Wes Pue and Barry Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 329 at 340-344.

⁵³ Homel, *supra* note 52 at 173.

⁵⁴ Chunn, *supra* note 28 at 97.

⁵⁵ *Ibid.* at 92.

⁵⁶ M.P. Reilly, “The Origins and Development of Legal Aid in Ontario” (1988) 8 *Windsor Yearbook of Access to Justice* 81. More generally, see Dieter Hochne, *Legal Aid in Canada* (Lewiston: The Edwin Mellen Press, 1989).

Cecil Augustus Wright, since 1927 a full-time instructor at Osgoode Hall, exerted an increasing influence. He argued in 1932 that: "What is law today is not necessarily law tomorrow. Hence law, like the movements of the earth itself can only be observed in operation. Let us then at the same time observe and consider the changing conditions of society which furnish the path that law must follow and to which it must adjust itself."⁵⁷

Wright gradually emerged as the central figure in the eternal question of reform of legal education. Persistent tension between academic and professional approaches to legal education in common law Canada throughout the interwar years prompted one legal historian to observe that "whatever potential existed in the Canadian legal education system for further growth and development of sophistication remained largely dormant."⁵⁸ Modest curricular reforms introduced by Principal J.D. Falconbridge in the 1920s were reversed in the following decade through the influence of the Law Society's Legal Education Committee. Describing this as "palpably retrogressive," John McLaren concluded that they increased the difficulty of reconciling academic and professional objectives, "thus sowing the seeds of conflict in the future."⁵⁹

On the one hand, practical scholars such as Dean J.D. Falconbridge and F.W. Wegenast produced writings of immediate service to the profession.⁶⁰ On the other, were those such as Wright whose more theoretical and philosophical approaches were often critical of practitioners' established orthodoxies. Among the latter group of academic writers, several appeared much more sympathetic than their professional and judicial colleagues to ongoing changes in regulatory and legal institutions. In particular, young writers such as John Willis and J.A. Corry supported administrative tribunals and government intervention, viewing these as means most capable of responding flexibly and efficiently, on the basis of professional expertise, to the challenges of modern society.⁶¹

Bora Laskin, initially a student of Wright's at Osgoode Hall, completed graduate studies at Harvard under Felix Frankfurter in 1937. The influence of both teachers promoted his sympathies for sociological jurisprudence, a point of view soon evident

⁵⁷ C. A. Wright, "An Extra-Legal Approach to Law" (1932) 10 *Canadian Bar Review* 1 at 17.

⁵⁸ J.P.S. McLaren, "The History of Legal Education in Common Law Canada" in Mr. Justice R.J. Matas and D.J. McCawley, eds., *Legal Education in Canada* (Montreal: Federation of Law Societies of Canada, 1987) 111 at 126.

⁵⁹ *Ibid.* at 128.

⁶⁰ J.D. Falconbridge, *Canadian Law of Banks and Banking: The Clearing House, Currency and Dominion Notes, Bills, Notes, Cheques, and other Negotiable Instruments*, 2nd ed. (Toronto: Canada Law Book Co. 1913); J.D. Falconbridge, *The Law of Mortgages of Land, Including Mortgages or Charges under the Land Titles System* (Toronto: Canada Law Book Co., 1931); J.D. Falconbridge, *The Law of Negotiable Instruments in Canada* (Toronto: Ryerson Press, 1955); J.D. Falconbridge & S. E. Smith, *Manual of Canadian Business Law* (Toronto: Pitman, 1930); F.W. Wegenast, *Extra-Provincial Corporations: A Sketch of the Operation and Effect of Extra-Provincial Licensing Acts in Force in the Various Provinces of Canada* (Toronto: Carswell, 1911); F.W. Wegenast, *Law of Canadian Companies* (Toronto: Burroughs & Co. Ltd., 1931).

⁶¹ R.C. B. Risk, "Lawyers, Courts and the Rise of the Regulatory State" (1984-85) 9 *Dalhousie Law Journal* 31 at 42.

in Laskin's teaching at Osgoode Hall and the University of Toronto.⁶² Laskin's thesis on the recently reconstituted Ontario Municipal Board, demonstrated his willingness to recognise and promote the contributions of administrative tribunals to social advancement.

Lack of enthusiasm for the procedure of new administrative institutions, as demonstrated in Lord Hewart's *The New Despotism*, was also evident in some quarters of Ontario. On his ninetieth birthday in 1934, Chief Justice Muloch was surely not speaking without purpose when he reported that changes to the *Judicature Act*, merging two divisions of the Court of Appeal, had made it possible for the court "to wipe out arrears and to keep abreast of all current appeals."⁶³ Not only could the courts satisfy any reasonable expectations on grounds of efficiency, but Ontario's chief justice reminded his no doubt sympathetic audience about the deficiencies of the tribunal, this "non-judicial body, often ignorant of the law, bound by no law, free to disregard the evidence and the law, and practically at its own will, to dispose finally of ... (the citizen's) rights." Contrasting the choice as one between the courts and "the exercise of arbitrary power," he wondered whether the latter represented an alternative "to which anyone with British blood in his veins should quietly submit."⁶⁴ The chief justice's remarks were consistent with the conclusions of Ian Kyer and Jerome Bickenbach, who felt that the old guard tended to resist change as Ontario modernised: "Their views were clouded by their reverence for tradition and their romanticized perception of the English system."⁶⁵

A more conciliatory tone, if still somewhat grudging, was evident a few years later when a special committee of the Canadian Bar Association on administrative tribunals and law reform acknowledged the permanence of tribunals, and urged members "under this situation to make the best of them that is possible."⁶⁶ To committee members this appeared to mean the assimilation of tribunals to a judicial model. The same theme was soon echoed in a note on tribunal reform by J.B. Coyne, who called for studies of federal and provincial tribunals "in order to determine how far general or specific rules governing such tribunals and appeals therefrom are reasonable and desirable."⁶⁷

B. Moral Reform and Social Issues

The years 1919 to 1923, "an unforgettable interlude in the life of the province," were characterised politically by campaigns for 'moral uplift' in relation to smoking,

⁶² D. Reaume, "The Judicial Philosophy of Bora Laskin" (1985), 35 *University of Toronto Law Journal* 438.

⁶³ Rt. Hon. Sir W. Muloch, "Address of the Chief Justice of Ontario" (1934) 12 *Canadian Bar Review* 35 at 36.

⁶⁴ *Ibid.* at 38-39.

⁶⁵ C. I. Kyer and J.E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: The Osgoode Society, 1987) at 272.

⁶⁶ "Report of Special Committee on Administrative Tribunals and Law Reform" (1941) 25 *Canadian Bar Association Proceedings* 208 at 209.

⁶⁷ "Some Points for Consideration in Preparing a Report of the Committee on Administrative Tribunals and Law Reform, 1943" (1943) *Canadian Bar Association Proceedings* 215 at 217.

race-track gambling, Sunday observance, and the consumption of alcoholic beverages.⁶⁸ The appointment of W.E. Raney, a prominent social crusader, as attorney-general in E.C. Drury's United Farmers of Ontario government, was a significant but not universally welcomed event. Many were sceptical of the appointment and indeed, the Toronto *Evening Telegram* noted that "critics denounce W.E. Raney as a moral reform bigot who will hasten to establish a reign of the saints."⁶⁹ Inquiries concerning the compliance status of Riley Brothers' Rum and Butter Toffee suggested that the newspaper's assessment was not far off the mark. Reports in the attorney-general's records of suspected *Lord's Day Act* violations by toboggan slide and skating rink operators, as well as Native lacrosse players, provided further confirmation.

Raney embarked with zeal upon his "most difficult task," enforcement of the Ontario *Temperance Act*, a statute whose wartime enactment and popular approval by referendum in 1919 were high water marks for temperance forces. Yet the legislation had the full support of neither "wets" nor "drys." To promote enforcement Raney appointed a special police liquor squad, introduced a series of amendments intended to strengthen the *Temperance Act*, and recruited a talented prosecutor, James C. McRuer, to the crown attorney's office.⁷⁰ Defendants, of course, were in ample supply; the results were highly visible to the legal community. The Ontario Law Report for 1920 contained nineteen decisions on the legislation,⁷¹ while the subsequent volume included no less than eighteen index headings leading to cases on such subjects as "intoxicating liquors," "liquor," "prohibition," "sale of liquor," and "temperance."⁷²

Vigorous, probably too vigorous, inspection and prosecution initiatives and even interference by Raney with Ontario magistrates, provoked severe criticism and outrage. In the aftermath of one such incident, Howard Ferguson, the opposition leader, lamented that: "it is the first time in the history of the Province that any Attorney General has attempted to treat the Magistrates who are, surely, judicial officers, as merely ... men who must carry out what is according to the sweet will of the attorney general himself."⁷³ In 1921 Raney proposed amendments to expedite appeals from convictions by excluding new evidence in proceedings that would be taken before a high court judge, rather than a member of the county court bench. This authoritarian initiative led Ferguson to label the attorney-general "a bully of the law." Despite Raney's enthusiasm and McRuer's prosecutorial acumen, circumstances would "demonstrate conclusively the impossibility of enforcing legislation which lacked the support of a large minority in the population."⁷⁴

68 P. Oliver, "W.E. Raney and the Politics of 'Uplift'" (1971) 6 *Journal of Canadian Studies* 3.

69 *Ibid.* at 5.

70 P. Oliver, *supra* note 68; Patrick Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: The Osgoode Society, 1994) at 56-59.

71 [1920] 48 O.L.R.

72 [1921] 49 O.L.R.

73 P. Oliver, *supra* note 68 at 10.

74 *Ibid.*; also, H.W. Arthurs, "Law as an Instrument of State Intervention: A Framework for In-

Raney's initiatives against racetrack betting also encountered resistance. A majority of the Court of Appeal declared provincial legislation unconstitutional, although in a colourful dissent Justice Riddell argued that if the legislature may prohibit use of land that is dangerous to physical health, "why may it not forbid a use or a condition dangerous to the moral health of the community?"⁷⁵ Soon after, when Justice Middleton directed that proceeds from a controversial tax on pari-mutuel betting be paid into court, Raney railed against the action. Then, in the "*Declaratory Act, 1922*" the United Farmers' government provocatively denounced as inexpedient court action "to restrain a Minister of the Crown in the performance of his duty":

It is declared that the law is and always has been that no extraordinary remedy by way of injunction, mandamus or otherwise lies against the Crown or against any Minister thereof or any officer acting upon the instructions of any Minister for anything done or omitted or proposed to be done or omitted in the exercise of his office including the exercise of any authority conferred or purporting to be conferred upon him by any Act of this Legislature.⁷⁶

This was one of a series of legislative measures intended to restrict access to the courts for politically divisive issues.

Charles Vance Millar, a Toronto lawyer with several race horses and a significant shareholding in O'Keefe's Brewery, was sufficiently entertained by the attorney-general's enthusiasm for uplifting moral causes that he bequeathed Raney a valuable share in the Ontario Jockey Club.⁷⁷

C. Industrialisation

In the aftermath of a series of stock fraud prosecutions, Ontario investors were offered protection by the introduction of so-called "blue sky" legislation, based on an earlier Kansas approach to regulation; but the law was never proclaimed. The 1923 defeat of the United Farmers by Ferguson's Conservatives produced a government with a more cautious attitude towards business regulation. The new premier had constitutional reservations about proposed securities legislation; he also cautioned that governmental examination of securities issues might be interpreted by a gullible public as an endorsement of them.⁷⁸ Yet when speculation turned feverish later in the 1920s, the Ferguson government did introduce broker and salesman registration, among other measures to control securities fraud.⁷⁹ Further investor

quiry" in I. Bernier & A. Lajoie, ed., *Law, Society and the Economy* (Toronto: University of Toronto Press, 1986) 77.

⁷⁵ *Re: Race Tracks and Betting* (1921), 49 O.L.R. 339 (C. A.).

⁷⁶ *The Declaratory Act, 1922*, S. O., 1922, c. 13, s. 2.

⁷⁷ Arnup, *supra* note 2 at 121-24; M. M. Orkin, *The Great Stork Derby* (Don Mills, Ontario: General Publishers, 1981). The proceeds from Raney's share eventually went to charity.

⁷⁸ P. Oliver, *G. Howard Ferguson: Ontario Tory* (Toronto: University of Toronto Press, 1977) at 128 and 153-55. For discussion of early developments in securities law, see H. Garfield Emerson, "An Integrated Disclosure System for Ontario Securities" in Jacob S. Ziegel, ed., *Canadian Company Law*, vol. II (Toronto: Butterworths, 1973) 400-412; and, J. Peter Williamson, *Securities Regulation in Canada* (Toronto: University of Toronto Press, 1960).

⁷⁹ P. Oliver, *supra* note 78 at 342.

protections were soon added, including directors' liability for damages arising from false statements in a prospectus.

In 1931 provision was made for a "Board, commission, or body of persons, or any person" to administer the anti-fraud measures in the new issues market. Two years later this body became the Ontario Securities Commission. The Commission's potential significance was suggested in trading statistics for 1939, a year in which over 56% of the value of Canadian stock exchange trading was handled in Ontario.⁸⁰ In Ian Drummond's words, the province "had acquired a new regulative agency, one of immense power and one that rapidly acquired considerable prestige as well."⁸¹ The prestige of the Securities' Commission may have risen rapidly in some circles; it was neither immediate nor universal. Thus, "Mitch" Hepburn, Liberal premier of Ontario after the 1934 elections, did not hesitate to dismiss the head of the agency, George Drew, a lawyer, former Guelph mayor, and a prominent Conservative.⁸²

Far more than personality and politics inhibited acceptance of new regulatory institutions and administrative tribunals such as the Ontario Securities' Commission. R.C. B. Risk, surveying both federal and provincial regulatory initiatives during the interwar years, saw little change in the 1920s. The 1930s in contrast, he observed, experienced "massive changes in regulation, both in degree and in kind." The federal government intervened with regulatory measures in several fields including agriculture, culture, finance, transportation and social security. The *Natural Products Marketing Act* (1934), the Canadian Wheat Board (1935), the Canadian Radio Broadcasting Commission (1932) and, following the Macmillan Royal Commission on Banking, the Bank of Canada (1934) all marked a major shift towards centralised economic policy. Another royal commission, the Stevens inquiry into price spreads, contributed to acceptance of the philosophy underlying Prime Minister R.B. Bennett's "New Deal," with its proposed extension of federal activity into employment and social insurance.⁸³

From the perspective of legal institutions, Risk concluded that in the 1930s the "market and individual responsibility were challenged and restricted much more than they had been in any other single decade." Moreover, the goals of regulation were altered as "redistribution and planning had become larger and more apparent objectives."⁸⁴ Rod Macdonald, who conceives regulation broadly, emphasises changes in the nature of regulatory instruments and background assumptions during the 1930s.⁸⁵ Whatever the precise nature of the institutional changes of the 1930s,

⁸⁰ I.M. Drummond, *Progress Without Planning: The Economic History of Ontario from Confederation to the Second World War* (Toronto: University of Toronto Press, 1987) at 336.

⁸¹ *Ibid.* at 338.

⁸² R. Graham, *Old Man Ontario: Leslie M. Frost* (Toronto: University of Toronto Press, 1990) at 47.

⁸³ Risk, *supra* note 61. See generally C. D. Baggaley, *The Emergence of the Regulatory State in Canada, 1867-1939* (Ottawa: Economic Council of Canada, 1981).

⁸⁴ Risk, *supra* note 61 at 39-41.

⁸⁵ R.A. Macdonald, "On the Administration of Statutes" (1987) 12 *Queen's Law Journal* 488 at 490-91.

it is not surprising that they had vigorous advocates and equally determined critics. And, again not surprisingly, labour regulation emerged as a major battleground.

The federal government revised coverage of its *Industrial Disputes Investigation Act* (1907) in the aftermath of a judicial decision that “altered the character of the nation’s labour law by remitting most of it to the provinces for enactment.”⁸⁶ In 1932, Ontario opted into the program of compulsory conciliation which the federal legislation established⁸⁷ while in the process of devising a labour relations régime of its own. Other labour measures of the interwar period included a minimum-wage law for women. This “very gentle statute,” administered from 1921 by the Ontario Minimum Wage Board, gradually resulted in a modest support framework of maximum hours and minimum wages in a small number of designated trades.⁸⁸ In relation to working conditions and industrial standards, advances from the 1884 *Factory Act* to the *Factory, Shop and Office Building Act* of 1932 were slow and gradual.⁸⁹ Development of a mine safety code, accompanied by an inspection capability was noteworthy, though actual monitoring and compliance were another matter.

Ontario’s *Industrial Standards Act* of 1935 was the culmination of the province’s interwar response to labour conditions. Roughly comparable to the *National Industrial Recovery Act*, an important component of U.S. President Roosevelt’s New Deal, the legislation authorised the provincial minister of labour to convene a decision-making conference on labour practices in a particular industry at the request of employers and employees. Agreements reached through this process with respect to wages and hours would have legislative effect. Operating through the Minimum Wage Board after 1935–36, the Industrial Standards program resulted in several agreements. These, however, were highly localised and specific in nature. Of more fundamental concern, none of the Ontario measures addressed the underlying question of collective bargaining at a time when “industrial development had gone too far for any system of joint consultation to obviate the demand for union organisation and recognition.”⁹⁰

The young Bora Laskin sharply criticised judicial responses to labour matters. He advocated measures comparable to the U.S. *National Labour Relations Act*, designed to avoid recognition strikes. Writing in the late thirties, Laskin anticipated that Canadian developments would follow the lines of the U.S. statute, which had structured collective bargaining and established a board to oversee the relations of labour and management. The “legal recognition of new social forces must hereafter be primarily the concern of the legislature and not of the courts,” he affirmed in 1938.⁹¹

⁸⁶ *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 1 W.W.R. 785 (P.C.); P. Hogg, *Constitutional Law of Canada*, 2nd ed., (Toronto: Carswell, 1985) 386.

⁸⁷ Drummond, *supra* note 80 at 234.

⁸⁸ *Ibid.* at 236.

⁸⁹ *Ibid.* at 235.

⁹⁰ *Ibid.* at 237.

⁹¹ See generally, D. Beatty and B. Langille, “Bora Laskin and Labour Law: from Vision to Leg-

A good many members of the Ontario bar would have found Laskin's generous endorsement of legislative intervention rather curious, as they scrutinised the progress of cases involving statutory attempts to extricate the Hydro Electric Power Commission from some unpromising contracts and to prevent the courts from examining the conflicts. Though presented as guidance on interpretation, Justice Middleton's condemnation of the government's efforts, was unmistakable. The legislature, he insisted, "transcends its true function when it undertakes to say that the language used has a different meaning and effect to that given it by the Courts, and that it always has meant something other than the Courts have declared it to mean."⁹²

In 1943, Ontario recognised collective bargaining⁹³ and simultaneously provided for a branch of the High Court to be designated the Labour Court of Ontario.⁹⁴ With the introduction of wartime labour relations regulations by the federal government in 1944, Ontario then replaced that court with the Ontario Labour Relations Board, initially responsible for administering the federal scheme. The Labour Relations Board assumed authority independent of the federal wartime arrangements in 1947, and for some time its responsibilities centered on certification and decertification of trade unions as agents for collective bargaining.⁹⁵

D. Minorities

Intense feelings about the quality of Ontario justice and relations between courts and tribunals were also aroused in the context of human rights, a subject whose importance grew in the light of wartime atrocities and ongoing international discussions. Though less glaring than the legislative measures directed against Asian residents of British Columbia and the west in the early twentieth century, discrimination was evident within Ontario society. Racial and religious minorities faced a number of exclusions and limitations from which Ontario courts provided scant protection. At the outbreak of World War II, "it was clear that Canadian courts regarded racial discrimination as neither immoral nor illegal ..., the victim of discrimination could obtain no redress, no matter how flagrant the discriminatory act."⁹⁶

acy" (1985) 25 University of Toronto Law Journal 672.

⁹² *Beauharnois Light, Heat and Power Co. v. Ontario Hydro-Electric Power Commission* [1937] O.R. 796 at 822-23, [1937] 3 D.L.R. 458 (C. A.).

⁹³ *The Collective Bargaining Act*, 1943, S. O., 1943, c. 4.

⁹⁴ Banks, *supra* note 1 at 535. For a history of the labour court, including reports of decisions for the period of its operation in 1943-1944, see J.A. Willes, *The Ontario Labour Court, 1943-1944* (Kingston: Queen's University Industrial Relations Centre, 1979).

⁹⁵ *The Labour Relations Board Act*, 1947, S. O., 1947, c. 54; B. Laskin concluded that the federal scheme did "not shine when compared with the 1943 Ontario act": "Recent Labour Legislation in Canada" (1944) 22 Canadian Bar Review 776 (quoted in Beatty & Langille, *supra* note 89 at 673).

⁹⁶ I.A. Hunter, "The Origin, Development and Interpretation of Human Rights Legislation" in R. St. J. Macdonald & J.P. Humphrey, eds., *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworths, 1979) 77 at 79.

Limited anti-discrimination provisions appeared in certain Ontario statutes during the 1930s, but a proposal for a more general prohibition against discriminatory publications and displays was defeated in 1933.⁹⁷ Under pressure from elements in the legislature, George Drew's minority Conservative government brought forward a *Racial Discrimination Act* in 1944 despite resistance from advocates of free speech. This statute, focusing on the issues of race and creed, prohibited advertisements that indicated a discriminatory intent in relation to employment and other matters. Although an important initiative, this early human rights legislation would shortly appear modest and limited: both the necessity for the attorney-general's consent to prosecution under the act and the low level of fines it authorised moderated the statute's deterrent effect.⁹⁸

The new Ontario human rights legislation figured shortly after its enactment in a much discussed decision. In *Re: Drummond Wren*,⁹⁹ Justice MacKay, a future member of the Ontario Court of Appeal and later lieutenant-governor, struck down the terms of a title deed prohibiting the sale of land to "Jews or persons of objectionable nationality." Although the *Racial Discrimination Act's* prohibition against advertising was too limited to apply directly in the case of a discriminatory covenant in a private deed, MacKay cited the legislation along with Canada's signing of the Universal Declaration on Human Rights as an indication of public policy. He further observed:

...nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups ... than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas.¹⁰⁰

MacKay's decision was hailed by the *Globe and Mail* as an important precedent which "moved forward substantially the achievement of the social equality of mankind." Not all commentators were so persuaded,¹⁰¹ and further legislative intervention was soon required, even to confirm this specific advance.¹⁰²

⁹⁷ L. R. Betcherman, *The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties* (Toronto: Fitzhenry & Whiteside, 1975) at 50–52.

⁹⁸ W. Kaplan, *State and Salvation* (Toronto: University of Toronto Press, 1989) at 22–28. See also Betcherman, *Supra.* note 95; R.B. Howe, "The Evolution of Human Rights Policy in Ontario" (1991) 24 *Canadian Journal of Political Science* 783.

⁹⁹ *Re: Drummond Wren*, [1945] O.R. 778, 4 D.L.R. 674 (High Ct.) [hereinafter cited as O.R.].

¹⁰⁰ *Ibid.* at 782–83.

¹⁰¹ "Re Wren" (1946) 15 *Fortnightly Law Journal* 264.

¹⁰² See also *Noble and Wolf v. Alley* [1951] S. C. R. 64; J. Batten, *Robinette: the Dean of Canadian Lawyers* (Toronto: MacMillan, 1984) at 129–132.

III. Ontario after the Second World War

A. Legal Institutions and the Profession

The impetus towards abolition of Canadian appeals to the Judicial Committee of the Privy Council had been greatly strengthened during the 1920s and 1930s by several factors including the Privy Council's 1926 decision in *Nadan v. The King*,¹⁰³ a controversial criminal appeal. Then a series of decisions in 1937 declared various parts of R.B. Bennett's "New Deal" unconstitutional.¹⁰⁴ Repeal of the *Colonial Laws Validity Act* pursuant to the *Statute of Westminster* in 1931 eliminated an important obstacle to the abolition of appeals to London. First in the criminal law field, and then—though hardly in haste in relation to civil matters—legislative steps to abolish appeals to London were proposed, tested and finally implemented in 1949. Simultaneously the Supreme Court of Canada expanded by two members to a total of nine. John Robert Cartwright thereupon joined Patrick Kerwin and Roy Kellock as Ontario members of a court that had the potential to be "supreme at last."¹⁰⁵

The institutional change, as Laskin and other observers noted, could be seen as a further element in the evolution of Canada's relations with the British empire.

It was a system under which Canadian judicial dependence on imperial authority was of a piece with Canadian subservience in both the legislative and executive areas of government. And just as the action of imperial legislative and executive organs was necessary to bring that subservience to a proper constitutional termination, so was the action of another imperial organ, the Judicial Committee of the Privy Council, necessary to bring to a close judicial dependence.¹⁰⁶

The new institutional configuration with the Supreme Court of Canada at the summit of the domestic legal hierarchy created opportunities which Laskin, among others, welcomed with the thought that the Court would henceforth "explore the entire common law world and not only that part which is called Great Britain."¹⁰⁷ The prospect of innovation, he argued "makes it possible for the first time to contemplate deviation of Canadian law from British law in all its branches."¹⁰⁸ The direction, let alone the purpose, of the anticipated Canadian judicial innovation was far from clear; nor would the implicit criticism of British legal decision-making as inherently unresponsive prove to be entirely accurate. Observers of Canadian administrative law, for example, might well have been dismayed by a comparison

¹⁰³ [1926] A. C. 482. In this decision the Privy Council struck down s. 1025 of the *Criminal Code* as being *ultra vires* the federal parliament. This provision purported to prevent any appellate body of a U.K. court, including the Privy Council, from hearing a criminal appeal.

¹⁰⁴ See W.H. McConnell, "The Judicial Review of Prime Minister Bennett's New Deal" (1968) 6 *Osgoode Hall Law Journal* 39; and W.H. McConnell, "Some Comparisons of the Roosevelt and Bennett New Deals" (1971) 9 *Osgoode Hall Law Journal* 221.

¹⁰⁵ M.J. Herman, "The Founding of the Supreme Court of Canada and the Abolition of Appeals to the Privy Council" (1976) 8 *Ottawa Law Review* 7; Snell and Vaughan, *supra* note 6; P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987).

¹⁰⁶ B. Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 *Canadian Bar Review* 1038.

¹⁰⁷ *Ibid.* at 1046.

¹⁰⁸ *Ibid.* at 1069.

between domestic doctrine and the idea of procedural fairness as it emerged in the decisions of British courts.

Important developments also occurred in legal education after the war. As veterans swelled admissions lists at Osgoode Hall, various initiatives to resolve the conflict between the Law Society and a few somewhat more academically inclined teachers over the direction of legal education in Ontario took place. In 1945, Laskin, with the approval of Dean W.P.M. Kennedy of the Faculty of Law at the University of Toronto, transferred to Osgoode Hall in anticipation of a "rapprochement" between the two institutions. Two years later Premier George Drew encouraged the formation of a group to "consider the possibility of improving legal education under some plan of effective co-operation between the Law Society of Upper Canada and the University of Toronto." By 1948 only limited progress had occurred when replacement of Dean Falconbridge by Professor Wright brought the situation to a head.

Wright's views on legal education were well-known from his speeches and publications:

I believe that the future of schools lies in what looks like two opposite directions; in improving the technical branch of our training by some method of supervised and rounded practical work, and with a teaching of every course with some view of the social purpose that law serves, how it might be improved, how it ought to function.¹⁰⁹

When the Law Society effectively rejected Wright's philosophy, Osgoode's Dean resigned along with most of the other permanent faculty, several of whom accepted positions at the University of Toronto where Wright himself took charge. Under pressure from students and from its own membership, the Law Society significantly re-oriented its approach towards conformity with Wright's views on full-time academic legal education in 1949. Toronto's university-trained graduates, however, remained at a disadvantage in relation to their Osgoode Hall counterparts until 1957, when a three year academic law degree followed by a bar admission program (articling and course work administered by the Law Society) was accepted as the first stage of admission to the profession.¹¹⁰

New law schools were soon established at Queen's University in Kingston, the University of Western Ontario and later at Windsor, while the University of Ottawa added a common law section to a faculty where civil law was already being taught. The shift to university-based legal education was completed in 1968 when Osgoode Hall Law School became affiliated with York University. Although the Law Society continued to regulate certain basic course requirements, it lost operational authority over legal education while retaining control of admission to the practice of law through articling and bar admission requirements.¹¹¹ Controversy continued but as

¹⁰⁹ C. A. Wright, "Law and the Law Schools" (1938) 16 *Canadian Bar Review* 597, quoted in Bucknall, *supra* note 11 at 210.

¹¹⁰ C. Cole, "After the Crisis: Legal Education at Osgoode Hall, 1949-1957," *Proceedings of the Canadian Law in History Conference*, vol. III (Ottawa: Carleton University, Department of Law, 1987).

¹¹¹ For further discussion, see Kyer and Bickenbach, *supra* note 65; Bucknall, *et al.*, *supra* note 11; McLaren *supra* note 58; and D.A.A. Stager with H.W. Arthurs, *Lawyers in Canada* (Ottawa: Sup-

one distinguished analyst explained in a mid-century survey of the condition of legal education in Canada, this was “indicative more of the fluidity of the problems, and the difficulty of final judgments on methods and objectives, than of indecision or immaturity within the profession—academics and practitioners alike.”¹¹²

In the late 1960s changes in the operations of the Law Society rendered the organisation more accountable to the public and potentially somewhat more responsive to the views of its membership. The *Law Society Gazette* began publication in this period, and the decision to make the Treasurer’s annual statement available to members through the *Ontario Reports* occurred at roughly the same time. In 1969 the first general meeting of the membership took place at Windsor, where a series of resolutions increased the number of benchers from thirty to fifty while eliminating “life benchers,” those who had served as elected benchers for fifteen years; it also increased the frequency of elections to three year intervals, rather than five. These reforms followed new Law Society legislation inspired by the report of J.C. McRuer’s inquiry into civil rights, which advocated greater public protection measures for self-governing professions, including the appointment of lay members to the relevant governing bodies. McRuer’s recommendations thus helped to redress a situation that Harry Arthurs described this way: “... if the winds of change had blown but gently in the direction of internal accountability, the notion of public accountability was entirely becalmed.”¹¹³ Although the legislation as enacted in 1970 did not fully accept McRuer’s proposals on public accountability, several measures (notably the addition of lay members) were expected to increase the prospects for scrutiny and greater responsiveness.¹¹⁴

At about the same time, an informal, charitable system of legal aid which had been established on a province-wide basis in 1951 was replaced by a publicly funded program. The new arrangements embodied an understanding articulated by the authors of a joint committee of the Law Society and the attorney-general that “... legal aid should form part of the administration of justice in its broadest sense. It is no longer a charity, but a right.”¹¹⁵ Although serious reservations were expressed in some quarters about the appropriateness of the Law Society exclusively administering the new, publicly financed system of legal aid certificates, the *Legal Aid Act* (1966) conferred this responsibility on the profession’s governing body, “subject to the approval of the Attorney-General.” To respond to “unmet legal needs” and “gaps” within the certificate system, however, various initiatives provided alternative types of delivery of legal services. Thus, by the early 1970s, the Injured Workers’ Consultants program, the Canadian Environmental Law Association and Parkdale Community Legal Services had been formed as “clinics” with external financing

ply and Services Canada, 1990).

¹¹² M. Cohen, “The Condition of Legal Education in Canada” (1950) 28 *Canadian Bar Review* 267 at 268.

¹¹³ H.W. Arthurs, “Authority, Accountability, and Democracy in the Government of the Ontario Legal Profession” (1971) 49 *Canadian Bar Review* (1971) 1 at 12.

¹¹⁴ *Ibid.* at 13–15.

¹¹⁵ Quoted in M.J. Mossman, “Community Legal Clinics in Ontario” (1983) 3 *Windsor Year Book of Access to Justice*, 375 at 378.

from private foundations, the federal Local Initiatives Program and the federal Department of Justice.

After several years of operation outside the framework of the provincial Legal Aid Plan, the distinctive contribution of the new clinics was recognised, and the Plan administrators were authorised by regulation to support "independent community-based clinical delivery systems." The extent of the support and the nature of the independence have frequently been contested, but the program flourished, growing to approximately 70 clinics in 1990. Mary Jane Mossman's assessment was that "the combination of the focus of clinic work, the structures for decision-making in the clinic system and the nature of community involvement in clinic legal services makes Ontario clinics uniquely capable of effective progress toward equal justice for the poor."¹¹⁶

Arguably, the more regularised availability of legal aid was an important stimulus, along with McRuer's report, for a process that has come to be known as the "judicialization of the magistracy." In 1968, Ontario replaced magistrates courts with the Provincial Court (Criminal Division), an initiative subsequently adopted across Canada, greatly enhancing independence of these judges from the political executive.¹¹⁷

Modest initiatives on the part of the provincial government to extend French language services began in the 1960s but fell well short of meeting the aspirations of Franco-Ontarians. These measures exemplified the re-emergence of group-based claims alongside interest in individual rights. Challenges and protests were made against English traffic tickets, license plate renewal forms and other manifestations of administrative unilingualism. Gradually, commencing with a pilot project in the Sudbury provincial court (1976), Ontario began incremental progress towards judicial bilingualism in the court system, proceeding geographically and on the basis of designated areas of jurisdiction. By 1984, French was recognised as an official language in Ontario courts, and the *French Language Services Act*, 1986, took the process one step further. Significant efforts, including the French Language Services Programme of the Law Society, have also been devoted to the status of French in legal education and professional training; however, institutional limitations remain.¹¹⁸

B. Industrialisation

The Ontario Labour Relations Board's early impact on collective bargaining proved to be controversial in both legal and political terms. In language which "seemed as plain as words could be" to non-lawyers,¹¹⁹ the legislation stated that

¹¹⁶ *Ibid.* at 384.

¹¹⁷ Russell, *supra* note 103, 208–210; Banks *supra* note 1 at 546–7; Baar, "Court Reform in Ontario" (1988) 8 Windsor Yearbook of Access to Justice 105 at 110; *Valente v. R.*, [1985] 2 S. C. R. 673.

¹¹⁸ M. Bastarache and S. Schwartz "La Place du français dans la common law" in *Legal Education in Canada*, *supra* note 58 at 513. See also M. Bastarache "Bilingualism and the Judicial System" in M. Bastarache, ed., *Language Rights in Canada* (Montreal: Yvon Blais, 1987) 119 at 154–162; and, M. Cousineau, "L'Utilisation du français de l'Ontario: un droit à parfaire", *ibid.*

¹¹⁹ Graham, *supra* note 82 at 268.

“the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed nor shall any proceeding before the Board be removed, nor shall the Board be restrained ... by any court.” Yet when the Board certified the Toronto Newspaper Guild in 1950 as bargaining agent for negotiations with the *Globe and Mail*, management successfully applied for a court order nullifying the decision.

Justice Gale’s conclusion that the privative clause would not insulate the board from judicial review was based on an extensive examination of existing cases and certain fundamentals. He reminded readers that:

while this is not frequently mentioned, Magna Carta is the law of this Province ... and gives force to the contention that any act of a tribunal which disallows to any person who comes before it his privilege of justice is ultra vires of that tribunal and for that reason alone it may well be thought that a denial of justice is equivalent to disclaimer of jurisdiction.¹²⁰

Representatives of organised labour expressed anger at the government’s refusal to appeal the adverse court decision and became apprehensive about the agency’s future utility.

Premier Leslie Frost addressed the institutional controversy in a lengthy speech in which he accepted the necessity for administrative tribunals on the grounds that: “Matters have to be determined quickly and efficiently and indeed without appeal.” Yet after recognising the concern associated with any measures that might affect the rights of individuals, he continued:

I am satisfied that the Legislature in giving broad, non-appealable powers ... have done so with the understanding that there would always be a full and complete hearing and fair trial of the issues and that there should be the fullest opportunity of presenting all sides of the case.

The premier defended quasi-judicial bodies as endeavouring to ensure fairness, but “after all they are human beings and with arbitrary powers they may be inclined sometimes to err,” in which circumstances it would be difficult to object to review by the courts.¹²¹ The Toronto Newspaper Guild decision and the division it provoked were symptomatic in the immediate post-war era of a widespread, enduring conflict between competing visions of justice and institutional competence.¹²²

Other matters associated with industrial and economic development found their way to the public agenda in the post-war era, and again legal conflict helped to stimulate institutional changes. In 1946, with provincial support, the Kalamazoo Vegetable Parchment Company revived previously inactive pulp and paper facilities on the Spanish River near Espanola. Effluent from the plant seriously affected water quality to the detriment of downstream tourist operators.¹²³ They sued successfully

¹²⁰ *Re: Toronto Newspaper Guild and Globe Printing* [1951] 3 DLR 162 (Ont. HC) at 196-7, aff’d [1952] 2 DLR 302 (Ont. CA), aff’d [1953] 2 SCR 18.

¹²¹ Graham, *supra* note 80 at 268-272.

¹²² See generally, H.W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) 1-12.

¹²³ For information on pollution levels at the approximate time of the litigation, see J.R. Dymond and A. V. Delaporte, “Pollution of the Spanish River”, Technical Series Research Report No. 25, (Toronto: Ministry of Lands and Forests, 1952).

as riparian owners for an injunction to prevent KVP from further polluting the river. Chief Justice McRuer condemned the company's "indifference toward the rights of others" and saw no reason to assess damages rather than grant an injunction, for to do so would sanction KVP's wrongful act and permit the company to purchase the rights of the downstream owners. Nor was Ontario's chief justice willing to consider the financial impact of the decision on KVP or on the Espanola community, although he did suspend the injunction for six months to permit the company to modify its operations.¹²⁴

The government's assessment of the interests at stake differed markedly from McRuer's. So when the courts declined a legislative invitation to weigh the economic contribution of the mill to the community and its inhabitants against the injury to the plaintiffs, the province legislated again, "in effect" argued one environmental authority "legalising the 'expropriation' of common law rights" to the detriment of water quality.¹²⁵

Conflicts between industrial development and the environment increased in frequency and intensity during the second half of the century as more residents became aware of adverse environmental impacts. But conflicts were typically resolved after the fact in the context of particular disputes, rather than addressed comprehensively through anticipatory and preventive measures.¹²⁶ Once more law and politics converged to stimulate legislative action.

Downstream riparian owners again received sympathetic responses from the judiciary in claims launched a few years after the Spanish River controversy against municipal sewage operations, whose escaping effluent threatened neighbouring lands.¹²⁷ Injunctions granted in the *Richmond Hill* and *Woodstock* cases were dissolved by the legislature, where a different view of the public interest initially prevailed. The cases have been cited as illustrating that "the refusal of courts to compromise rights in the interests of what might be perceived to be the broader public interest has sometimes been one of the most effective instruments of social progress."¹²⁸ These incidents accelerated consideration of a more comprehensive approach to water treatment in the province. In fact, the Ontario government was already under significant pressure to act. The prime minister of Canada persistently raised the matter of boundary water pollution by Ontario municipalities and industry,

¹²⁴ *McKie et al v. The KVP Co.* (1948), 3 D.L.R. 201. For commentary on the strengths and limitations of McRuer's decision from an environmental law perspective, see D. P. Emond, "Environmental Law and Policy: A Retrospective Examination of the Canadian Experience" in I. Bernier and A. Lajoie, eds., *Consumer Protection, Environmental Law and Corporate Power* (Toronto: University of Toronto Press, 1985).

¹²⁵ Emond, *ibid.* at 132.

¹²⁶ As Laskin remarked in "The Function of Law" (1973) 11 *Alberta Law Review* 118, the courts "can deal with the nuisance of pollution as between neighbours but cannot prescribe a clean environment for the public benefit unless there is some constitutional or legislative basis for the prescription."

¹²⁷ *Stephens v. Richmond Hill*, 40 O.L.R. 572; [1956] O.R. (CA); *Burgess v. Woodstock*, [1955] 4 D.L.R. 615.

¹²⁸ J.Z. Swaigen, "The Role of the Civil Courts in Resolving Risk and Uncertainty in Environmental Law" (1990) 1 *Journal of Environmental Law and Practice* 199 at 201.

while Frost's own Minister of Health reported frequent complaints about pollution. Moreover, building upon a determined inter-departmental initiative involving senior public servants, the head of the province's Pollution Control Board (1953) urged a major program of expenditures; and the state of Michigan threatened to litigate.

The premier's reluctance to respond to the widespread problem of municipal sewage rested on financial grounds. But after endeavouring to transfer costs upstream to Ottawa and downstream to the municipalities, the Frost government appointed an Ontario Water Resources and Supply Committee and then, in 1956, established the Ontario Water Resources Commission.¹²⁹ An astute observer of the agency's early years remarked that the short statute creating it contained "the potential for development." The Commission might come to play a major role in municipal development, a prospect perceived to have certain attendant risks:

... unless some system of planning co-ordination is worked out, the Water Commission may become, along with the Power Commission and the Department of Highways of Ontario, one of the major planning bodies in the province. Industry, then people, will go where water is made available and the decision to make water available may not always be made by the municipality. From one point of view the new commission's powers represent a major step toward effective regional planning. From another point of view the powers represent a serious inroad on local government.¹³⁰

The Water Resources Commission was so sufficiently influential that the future premier John Robarts agreed to enter the provincial cabinet to oversee its operations from a political perspective.¹³¹

Planning itself contributed directly to the controversial post-war history of another Ontario institution, the Ontario Municipal Board, reconstituted as an independent tribunal in 1932 from the original Railway and Municipal Board of 1906. With expanded authority over municipal matters and—after the *Planning Act* (1946)—with enlarged responsibilities in relation to land use planning, the Municipal Board had a vital role in development decisions. Situations such as the proposed creation of the Spadina expressway through residential districts of Toronto highlighted the public significance of the tribunal's work. But controversies on this scale were rare.

In another important regulatory field, in early 1963 Attorney-General Fred Cass announced the government's intention to review the operations and powers of the Ontario Securities Commission. The investigation's scope extended the recommendation of the Canadian Bar Association to encompass primary distribution, insider trading, and information disclosure requirements. A committee chaired by J. R. Kimber, Master of the Supreme Court of Ontario, undertook a review whose lifespan coincided with several highly de-stabilising incidents in Ontario finance. Wild speculation in 1964 surrounding a mineral discovery in the Timmins area by the Texas Gulf Sulphur Company, and fallout from the 1965 collapse of the Atlantic

¹²⁹ Graham, *supra* note 82 at 206–210. See also A. W. Bryant, "An Analysis of the Ontario Water Resources Act" in P. S. Elder, ed., *Environmental Management and Public Participation* (Toronto: Canadian Environmental Law Research Foundation, 1975) 162.

¹³⁰ J. B. Milner, quoted in Emond, *supra* note 124 at 133.

¹³¹ A. K. McDougall, *John P. Robarts: His Life and Government* (Toronto: University of Toronto Press, 1986) 48–50.

Acceptance Corporation after it defaulted on a routine obligation, created a favourable climate for strengthening the Commission and for the general reorganisation of provincial institutions involved in financial regulation.¹³² As Mr. Justice Samuel Hughes later wrote of the Atlantic Acceptance default:

From it flowed the collapse of Atlantic Acceptance and all its subsidiaries, the bankruptcy of many small companies dependent upon it, the ruin of many lives and the searching re-examination of financial practices and legislation of long standing.¹³³

In the post World War II era, Ontario appeared to be resorting with increasing frequency to administrative boards and tribunals as a means of managing controversy in the environmental, social and economic fields.¹³⁴ Yet observers of powerful new agencies in the fields of labour, planning, human rights, financial services and so on, had begun to wonder "if what we had planted is a garden or a jungle."¹³⁵ Walter Gordon, already an experienced analyst of public institutions, was commissioned to assess the situation. Although he sagaciously reported in 1958 that: "We need not expect that final solutions are likely to be found,"¹³⁶ lawyers persisted with their grievances.

"What lawyers object to about administrative tribunals," Robert F. Reid explained, "is their lack of regular procedure and the frequent lack of a satisfactory appeal The first of these faults is aggravated by the failure of many tribunals to publish rules of procedure."¹³⁷ In public lectures Chief Justice McRuer of the High Court expressed similar reservations, urging the legal profession to be "vigilant to expose and resist legislation which gives to governmental boards jurisdiction to decide cases between their employer, the government, and the Queen's subjects, with no adequate right of review in the courts."¹³⁸ Within a few years, McRuer, as the head of a wide ranging inquiry into civil rights in Ontario, had ample opportunity to survey the province's legal landscape and to assess its operation against his own highly developed sense of legal values.¹³⁹

¹³² *Ibid.* at 145–156. For discussion of the legislative developments, see Harry S. Bray, "Recent Developments in Securities Regulation in Ontario: The Securities Act, 1966" in Jacob S. Ziegel, ed., *Canadian Company Law* (Toronto: Butterworths, 1967) 415.

¹³³ *Report of the Royal Commission Appointed to Inquire into the Failure of Atlantic Acceptance Corporation Ltd.*, (1969) at 8–9, quoted in McDougall, *supra* note 131.

¹³⁴ According to Walter Gordon in the *Report of the Committee on the Organization of the Government of Ontario* (September 1959), the provincial auditor found five boards and commissions "of size and consequence" had existed in 1943 and that sixteen others had been created by 1957. A 1977 survey identified more than 300 regulatory institutions. See B. Bresner and T. Leigh-Bell "Ontario Agencies, Boards, Commissions, Advisory Bodies and Other Public Institutions: An Inventory (1977)" in M.J. Trebilcock, et al., eds. *Government Regulation: Issues and Alternatives—1978* (Toronto: Ontario Economic Council, 1978).

¹³⁵ Robert Reid, "Administrative Tribunals under Review in Ontario" (1958) 1 *Canadian Bar Journal* 57.

¹³⁶ *Report of the Committee on the Organization of Government in Ontario* (September 1959) 3.

¹³⁷ Reid, *supra* note 135 at 59–60.

¹³⁸ J.C. McRuer, *The Evolution of the Judicial Process*, (Toronto: Clarke, Irwin and Company, 1957) 75.

McRuer's Inquiry into Civil Rights helped to stimulate changes in various aspects of the legal system, including creation of the Divisional Court as "a court to exercise an appellate jurisdiction inferior to that of the Court of Appeal" and a basic codification of procedures for administrative tribunals.¹⁴⁰ Though many reforms, in administrative law and other fields, arose from the Inquiry into Civil Rights, it is notable, as his biographer emphasises, that as far as McRuer's proposals reflected his own legal values, these were in some fundamental sense rooted in a deep appreciation and respect for British legal tradition.¹⁴¹

C. Women and Minorities

New measures to extend human rights protection in Ontario beyond the hesitant foundations of the 1944 *Racial Discrimination Act* became a constant feature of the legislative agenda during the 1950s and 1960s.¹⁴² As additional limitations became apparent, the scope of prohibited grounds for discrimination widened. The application of the anti-discrimination provisions extended to a range of new settings. Eventually, deficiencies in the administration and enforcement of existing legislation led to creation of the Ontario Anti-Discrimination Commission in 1958. This body was soon replaced in 1962 by the Human Rights Commission which had responsibility for the various existing fair practices measures, as consolidated in the Ontario Human Rights Code.¹⁴³

Resistance to the Human Rights Commission's compliance and enforcement measures, and some apprehension about the agency's procedures, resulted in early court challenges to its authority roughly comparable to previous tests of the Labour Relations Board. *Bell v. Ontario Human Rights Commission*—a case judicially-oriented around the meaning of a "self-contained dwelling unit"—is perhaps the most renowned example of judicial scepticism towards the new régime.¹⁴⁴ In 1979, however, the Ontario Court of Appeal dramatically invoked the general policy of the statutory code to recognise a new tort of discrimination applicable to conduct and injury not covered by the statutory scheme.¹⁴⁵ This well-intended judicial innovation

¹³⁹ Ontario Royal Commission, *Inquiry Into Civil Rights* (J.C. McRuer Commissioner, 1968).

¹⁴⁰ On the Divisional Court, see Banks, *supra* note 1 at 535.

¹⁴¹ Boyer, *supra* note 68.

¹⁴² *The Fair Employment Practices Act*, 1951; *The Female Employees Fair Remuneration Act*, 1951; *The Fair Accommodation Practices Act*, 1954; *The Age Discrimination Act*, 1966.

¹⁴³ Early commentaries include: T.M. Eberlee and D.G. Hill, "The Ontario Human Rights Code" (1964), 15 *University of Toronto Law Journal* 448; W.S. Tarnopolsky "The Iron Hand in the Velvet Glove: Administrative Enforcement of Human Rights Legislation" (1969) 46 *Canadian Bar Review* 565; T.C. Hartley "Race Relations Law in Ontario" (1970) *Public Law* 20 and 175.

¹⁴⁴ *Bell v. Ontario Human Rights Commission* [1971] S. C. R. 756; see also P.W. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell v. Ontario Human Rights Commission*" (1971) 9 *Osgoode Hall Law Journal* 203; I.A. Hunter (1972) 7 *University of British Columbia Law Review* 17; and P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974) 139–143.

¹⁴⁵ *Bhadauria v. Board of Governors of Seneca College* (1979) 105 D.L.R. (3d) 707 (C. A.); (1981) 124 D.L.R. (3d) 193.

failed to survive further scrutiny in the Supreme Court of Canada; but elaborate debate about the limits of the common law directed attention to the issue of employment equity in a diversifying community. Additional legislative measures were subsequently taken to promote employment equity.

In the fifteen years from 1971 to 1986, the number of women lawyers in Canada rose from 780 to 9,410, while the number of men in the profession doubled from 15,500 to 33,300. In terms of the profession as a whole, whereas one Canadian lawyer in twenty was female in 1971, the ratio was roughly one-in-five by 1986. Women constituted 42% of lawyers under thirty years of age by 1986.¹⁴⁶ Notwithstanding rapidly changing demographics, and despite the first appointments of women to the senior courts,¹⁴⁷ women lawyers in Ontario continued to report constraints on their professional development.¹⁴⁸

The representativeness of the Ontario judiciary was also debated and addressed, not only from the perspective of women but in light of the concerns of visible minorities, whose numbers began to grow rapidly in the 1970s, and of Native people in the province.¹⁴⁹ Shortly after his installation as premier, Bob Rae's remarks to a conference of Native peoples confirmed the official recognition of an accelerating transformation. Rae observed that "Native people were here first" and that they "exercised power, and, yes, sovereignty in a system of law." He went on to express his belief in the existence of "an inherent right to self-government." Calling for a process of negotiations, Premier Rae hoped to address relations between Native and non-Native Canadians in terms of governmental powers and the transfer of resources.¹⁵⁰ Much of the effort before and since the premier's remarks was directed toward the question of Aboriginal justice, a subject intensely scrutinised in several other provinces.¹⁵¹ Measures to increase Aboriginal involvement in Ontario justice have included an Aboriginal courtworker program, specialised clinics, and increased law school enrollment for Native men and women intended to raise the number of Native lawyers well above the 1986 Canada-wide level of 125. In addition, considerable interest has been shown in traditional Aboriginal value systems, especially as these affect conflict and dispute resolution.¹⁵²

¹⁴⁶ Stager, *supra* note 111 at 148–149.

¹⁴⁷ Madam Justice Van Camp was appointed to the High Court in 1971; Madam Justice Wilson joined the Court of Appeal in 1976.

¹⁴⁸ *Transitions in the Ontario Legal Profession: A Survey of Lawyers Called to the Bar Between 1975 and 1990* (Toronto: Law Society of Upper Canada, 1991).

¹⁴⁹ Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice: Papers Prepared for the Ontario Law Reform Commission* (Toronto: 1991); Ontario, Judicial Appointments Advisory Committee, *Final Report and Recommendations* (June 1992).

¹⁵⁰ Ontario Native Affairs Directorate, "Transcript of remarks by Premier Bob Rae to the Assembly of First Nations Banquet, University of Toronto, Tuesday, October 2, 1990."

¹⁵¹ See, for example the *Royal Commission on the Donald Marshall Jr., Prosecution* (Nova Scotia) (December 1989) and the *Report of the Aboriginal Justice Inquiry of Manitoba*, 2 vols. (Winnipeg: Province of Manitoba, 1991).

¹⁵² R. Ross, *Dancing with A Ghost: Exploring Indian Reality* (Markham: Octopus Books, 1992); P. Coyte, "Traditional Indian Justice in Ontario: A Role for the Present" (1986) 24 Osgoode Hall Law

Initiatives designed to increase the participation of women and Native people in the justice system are elements in a more generalised concern for the effectiveness and responsiveness of the legal process to cultural diversity and, indeed, to a still broader concern with access to justice.¹⁵³ The impact may be seen in several aspects of the legal system, from court reform to measures associated with opening further the judicial system and the scope of legal education and research.

IV. Conclusion

Recent assessments of Ontario's legal system at the close of the nineteenth century are in general agreement that law and legal institutions were in the midst of a profound transformation, as was Canada itself.¹⁵⁴ One author, ultimately focusing on the emergence of regulatory institutions, observed that "massive changes in the law began during the late nineteenth and early twentieth centuries, changes in doctrine, institutions, practice, and ways of thinking."¹⁵⁵ Another account emphasised change in the social and economic context as a factor that produced "a general awareness ... of a major threat to the status of the lawyer within society" and thereby prompted reaction.¹⁵⁶ A third analyst referred to "a story of disruption and subsequent dissociation from the past." The transformation amounted to the rupture of "an eclectic and principled local legal culture" one which had involved "a more cosmopolitan, flexible, and thoughtful legal tradition than that which has prevailed in twentieth-century Ontario."¹⁵⁷ Still more recent work has identified legal changes of the early decades of this century as constituting a "fundamental reordering."¹⁵⁸ These valuable and specialised studies do not advance a comprehensive claim about the overall nature of change in legal culture and institutions during the full course of the twentieth century. Nor can such arguments be made on the basis of the foregoing survey.

While Ontario in 1900 was clearly not a static society, it is less certain whether the outcome of twentieth century transition has been rupture and local discontinuity, evolution and adaptation to a new norm, or something more in the nature of an adjustment around continuing tensions that may well be a feature of much of the common law community.

By 1986 Ontario claimed nearly seventeen thousand lawyers with very large increases having occurred between 1971 (6,845) and 1981 (13,450). This extraordinary 96% increase over the decade was actually below the national average of 110% for the same period and well below the British Columbia expansion rate, where a

Journal 605.

¹⁵³ Also note *Access to Legal Services by the Disabled*, Report of a Study by Judge Rosalie Abella, 1983.

¹⁵⁴ R. Cook and R.C. Brown, *Canada 1896-1914: A Nation Transformed* (Toronto: McClelland and Stewart 1974).

¹⁵⁵ Risk, *supra* note 61.

¹⁵⁶ Newman, *supra* note 6 at 53.

¹⁵⁷ Baker, *supra* note 6 at 285.

¹⁵⁸ Chunn, *supra* note 28 at 92.

144% increase raised the lawyer population from 1,835 to 4,470.¹⁵⁹ Roughly four out of five Ontario lawyers in 1986 worked in private practice, although this proportion reflected the results of a gradual half century decline from a level well above nine out of ten. In response to business opportunities and technological changes, large, multi-jurisdictional law firms were beginning to appear. But despite their prominence, such organisations represented only a modest percentage of practicing lawyers. Twenty percent of Ontario lawyers found employment in public administration, with departments of the federal and provincial governments, in private industry, or with such institutions as hospitals and universities.¹⁶⁰

Along with lawyers' enthusiastic response to the litigation possibilities of the *Charter of Rights and Freedoms*, and concerted media pressure for unrestricted access to judicial proceedings, the proliferation of lawyers is one of the factors that has suggested to some observers that Ontario is becoming legalised in a fashion often associated with California. In the words of the Ontario Task Force on Insurance:

Although Ontario is decidedly not a California of the North today, there is every indication that it may become so in the foreseeable future—not so much in the escalation of the size of awards but rather in the continuing expansion and extension of liability.¹⁶¹

Although detailed empirical evidence on the Ontario experience is limited, there are indications that the legal infrastructure is, indeed, being adapted to address increased levels of “disputing.”

The past decade has seen ongoing reorganisation of the Ontario court system, both structurally and procedurally. The first major overhaul of the rules of civil procedure since Justice Middleton's work in 1913 came in 1984 under the direction of Justice Morden. He advanced the general principle that the rules “shall be interpreted to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.”¹⁶² Procedural innovations such as class actions and the introduction of contingency fees were advanced during the 1980s, even as the very structure of the Ontario court system was subjected to scrutiny. In 1990, a significant restructuring of courts effectively merged the High Court and the District Court into the Ontario Court (General Division), including the former Small Claims Court as one of its branches. Simultaneously, the Ontario Court (Provincial Division) was created to incorporate the criminal and family divisions of the former provincial court, as well as the provincial offences court, while judicial administration was geographically divided among eight judicial regions.¹⁶³

Comparable developments occurred in administrative law where rights of participation were extended and measures taken to facilitate public involvement, particularly in the context of wide-ranging and policy-oriented proceedings in such

¹⁵⁹ Stager, *supra* note 111 at 145.

¹⁶⁰ *Ibid.* at 157–159.

¹⁶¹ Ontario Task Force on Insurance, *Final Report* (May 1986) at 53.

¹⁶² J. Morden, “An Overview of the Rules of Civil Procedure” in *New Rules of Civil Procedure* (Continuing Legal Education Program of the Law Society of Upper Canada, the CBAO, and the Advocates' Society, 1984).

¹⁶³ G.D. Watson and M. McGowan, *Ontario Civil Practice* (Toronto: Carswell, 1990).

fields as energy, natural resources and transportation. As the length and technical complexity of widely influential administrative proceedings grew, innovative measures were employed to extend opportunities for public participation. When interim cost awards proved to be generally unavailable,¹⁶⁴ an *ad hoc* program to provide qualified intervenors with advance funding was established in 1985 and replaced three years later with a more formal but still experimental system. Ian Scott, attorney-general at the time of the introduction of the *Intervenor Funding Project Act*,¹⁶⁵ and a close observer of the value of funding as counsel to the Berger Inquiry on the Mackenzie Valley Pipeline, had long been sympathetic to the basic need.¹⁶⁶

The substantive constraints still facing litigating parties, as well as the alarming costs and frequent delays found in the judicial and administrative processes, encouraged resort to alternative procedures.¹⁶⁷ The basic elements of negotiation, mediation, conciliation and arbitration were hardly new, and they have been extensively used in several contexts over the decades. However, observers claim an increase in the popularity of such techniques, possibly amounting to a transformation in the nature of lawyers' work: "Increasing interest in finding alternative means for dispute resolution has begun to shift the emphasis in lawyers' work from an adversarial approach to mediation."¹⁶⁸ Commercial matters are among the subjects dealt with by Ontario's version of "rent-a-judge."¹⁶⁹ Well-placed commentators in the environmental and labour fields now note a marked tendency to resolve or avoid conflicts through innovative processes.¹⁷⁰

Despite forceful accounts of legal transformation in the early decades of the century, and despite extensive recent innovation and change, it is perhaps salutary to acknowledge elements of continuity and some striking similarities in legal pre-occupations. As commentators once reflected on a legislative role for the state in relation to drink, sabbath observance and betting at the race track, their descendants have recently been engaged in comparable debate about grocery store liquor sales, a statutory day of rest, and the tantalising prospect of casinos. Natives in the province who resisted provincial restrictions on their hunting and trapping with limited success in the early 1900s have returned to the defence of their interests, with the considerable advantages of constitutional recognition. The claim has even been

¹⁶⁴ *Re: Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee Inc.* (1985), 51 OR (2d) 23; *Re: Ontario Energy Board* (1985), 51 OR (2

¹⁶⁵ *Intervenor Funding Project Act*, S. O. 1988, c. 71.

¹⁶⁶ R. Anand & I.G. Scott, "Financing Public Participation in Environmental Decision-Making" (1982), 60 Canadian Bar Review 81.

¹⁶⁷ The Grassy Narrows and White Dog mercury pollution claims took more than fifteen years to resolve.

¹⁶⁸ Stager, *supra* note 111 at 79.

¹⁶⁹ Doran, Burke "The Private Court: How It Works" in *Alternative Dispute Resolution: Taming the Blame Game, Proceedings of a Conference Hosted by the Unified Family Court of Hamilton-Wentworth* (May 1990).

¹⁷⁰ D.P. Emond "The Greening of Environmental Law" (1991) 36 McGill Law Journal, 742; G. Adams "Towards a New Vitality: Reflections on Twenty Years of Collective Bargaining Regulation" (1991) 23 Ottawa Law Review 139.

province who resisted provincial restrictions on their hunting and trapping with limited success in the early 1900s have returned to the defence of their interests, with the considerable advantages of constitutional recognition. The claim has even been made that Aboriginal self-government includes “an absolute right to create a lottery law and operate gaming houses.”¹⁷¹ The legal community, once alarmed about competition from “conveyancers” and the prospect that the introduction of a workers compensation plan might reduce litigation, has more recently been apprehensive about in-house and tied counsel, para-legals, and the implications of no-fault auto insurance.¹⁷² The legal atmosphere of mid-nineteenth century England—often associated with the descriptive writings of Charles Dickens—has lost its relevance. Nevertheless, the influence of his century’s intellectual contemporaries, A.V. Dicey in particular, continues to be felt.¹⁷³

The contextual influences responsible for change, and for its absence, are difficult to determine in any reliable way. Domestic social and economic conditions, ideas emerging in a broader intellectual environment, and the working out of institutional dynamics or internal characteristics of the profession, are all involved in the transition from “then” to “now.” Thus, few if any commentators are inclined to suggest that the path of change has been linear and that its exclusive or even primary causes are easily identified.

171 “Natives should have free rein on gambling, argues lawyer” *Daily Miner and News*, 5 July 1994. The Ontario Court of Appeal rejected this claim in *R.v. Pamajewom*, 21 O.R. (3d) 385.

172 D. Brillinger, “Update on Ontario Paralegals” *The Lawyers Weekly*, 27 February 1987, 16–7, 21–3; L. Taman. “The Emerging Legal Paraprofessionals” in P. Slayton, and M.J. Trebilcock, eds., *The Professions and Public Policy* (Toronto: University of Toronto Press, 1978) at 237–243.

173 H.W. Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979), 17 *Osgoode Hall Law Journal* 1; David Dyzenhaus, “Dicey’s Shadow” (1993), 43 *University of Toronto Law Journal* 127.