REVIEW

The Federal Court of Canada: A History, 1875–1992

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The Federal Court of Canada. A History, 1875–1992, by Ian Bushnell.
Toronto: The Osgoode Society for Canadian Legal History, 1997, xix + 447 pages.

THE FEDERAL COURT OF CANADA has been one of the most unknown and under-researched courts in Canada. Originally the Court of Exchequer, it was primarily a court that heard disputes involving the Dominion government, admiralty, and tax matters. Only later, in the mid-twentieth century, did it develop as an administrative appeal court.

Nonetheless, it has remained as unknown in the legal profession as it has to the general public. The Court invited Dr. Bushnell, who is known for his splendid history of the Supreme Court of Canada,[1] to research and write a history of the Federal Court of Canada, and its Exchequer predecessor, for its twenty-fifth anniversary, 1 June 1996. In a space of time unequalled for any work of this size, Bushnell completed his research and writing within 3 years.

Professor Bushnell is uniquely suited to write the first history of the Federal Court of Canada. An expert in Canadian legal history, his history of the Supreme Court of Canada stands as one of Canada's major court histories, ranking in historical and case law jurisprudence with the best histories of the United States Supreme Court. This work meets the exacting standards set by the Supreme Court of Canada history.

Bushnell's salient contribution to scholarship in this history is the development of four major themes which have been drawn from the focus of the Court's organisational framework and its judgments and interpretations of case law and statute. These include: (*i*) a model of judicial decision-making that

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1 I. Bushnell, *The Captive Court: A Study of the Supreme Court of Canada*, (Montreal: McGill-Queen's University Press, 1992).

stems from an exhaustive history of its judges; (*ii*) the changing role of the Court in the Canadian legal system from its inception to its later history, including its relationship with the Supreme Court of Canada; (*iii*) the relationship between the Court, as a representative of the state, to the individual; and (*iv*) the evolution of the Court's national character.

The book is divided into three chronological parts, held together by the themes which run through the book. They deal with the First Court, 1875–1887, the Second Court, 1887–1971, the Third Court, 1971–92, and the Court today. The judges themselves are prominent parts of the story as the author weaves their history on the Court with the issues in which they became engaged. Some, like Arthur Thurlow, 1956–88, and Frank Iacobucci, 1988–1991, are well done; some, like Alexander Maclean, 1923–42, and Wilbur Jackett, 1964–79, are perhaps overdone; and others, like the legendary George Burbidge, 1887–1908, and Joseph Thorson, 1924–64, are given perhaps less space than their careers deserved. Thorson is possibly the most interesting of them all. He took over a year to write judgments on more than half of his cases. Insisting on writing his own head-notes, a special volume of the Court's reports for 1956–60 had to be published in 1965—the year *after* his retirement.

Perhaps the most significant contribution of the work for the current legal profession is Part Four,[2] where Bushnell weaves a masterful narrative of the Court from the 1970's under Wilbur Roy Jackett, Arthur Louis Thurlow, Frank Iacobucci, and their development of its formalist legal tradition. The distinguishing characteristic of the Court today is Justice Julius A. Isaac, who was appointed in 1991 as the first black judge to the Federal Court system.[3] An able administrator from Grenada and Ontario with strong social-democratic views, Isaac has shaped the reforms of 1990 which came into force under his Chief Justiceship. He has also dedicated himself to raising the profile of the Court, particularly in the areas of intellectual property and immigration law.

The Court has had difficulties, however, in adapting to modern circumstances. The provincial superior courts remain pre-eminent in the areas of their jurisdiction, and the Court has never used s. 129 of the *British North America Act* to expand its powers.[4] Indeed, the Court's modern history can be read as if it has incorporated some of the past problems which precluded the Supreme Court of Canada from becoming a major force in the country until the post-world war era. The Court continues to lead a somewhat cloistered life and to have a reputation as a "government" court, even though most of its judges have

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2 I. Bushnell, *The Federal Court of Canada. A History, 1875–1992*, (Toronto: Osgoode University Press, 1997) at 157–328.

3 *Supra* note 2 at 31–44.

4 *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (formerly *British North America Act*).

backgrounds in private practice and commercial law rather than in public service and legal academia. Called by some as Canada's "Senate Two,"[5] it is also seen as a retirement club for past partisan political service.

Conceivably its most difficult job has been the Court's reconciling of the revised responsibilities of the Trial and Appeal Divisions. The Trial Division works chiefly with legal issues, not factual situations. But most of its appointments come from provincial trial courts where judicial experience is in resolving factual matters. While an academic background would be useful for Appeal Court appointments, most judges believe in promotion to the Appeal Division from within the Court's Trial Division. Thus the Court may not have an appointment system that is congenial with the changed circumstances of the organisation of its caseload. This problem was revealed in the oral interviews conducted for the study. Many judges of the Trial Division showed resentment towards their colleagues in the Appeal Division, who appeared to be aloof. While there is one court with one Chief Justice and one administrative system, the divisions are housed in different buildings and seniority dates from one's original appointment.

There is also a problem in some legal circles with the judgments of the Court. These can be seen as quick, brief, and a recitation of undigested facts and quotations without clarity or judicial reasoning. While some of its judges in their interviews spoke of the importance of innovative judgments, most rejected the creative mode, resting upon judicial formalism with little concern for the social context. This is actually, as Bushnell demonstrates persuasively, a change in the history of the Court's jurisprudence.

Historically, the First Court had several contextual jurists, jurists whose judgments remained a prominent feature of the Court's jurisprudence in its first half-century. The change came with Joseph Thorson and Wilbur Jackett, after the transition era (as this reviewer sees it) of the 1930s to the 1950s. They accepted formalism as legal methodology by the 1960s and have not been challenged since. Again, an analogy can made here with the Supreme Court of Canada. Bushnell argues near the end of his book that as formalism comes under greater attack in the legal profession, and as the Court's work is contextual in nature, that even the contextualists may abandon the formalist style of judicial writing.[6] Perhaps the twenty-first century will see a return to the world of judicial pluralism that marked common law thought from Sir John Davies to Blackstone and Dicey.

Readers will find here a fount of information on a wide variety of social, economic, and legal issues. They will also enjoy the judicious use of oral interviews to supplement the legal record for the post-1945 era. There is a series of

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5 *Supra* note 2 at 336.

6 *Ibid.* at 344.

clearly-produced portraits of the Court's judges, a comprehensive index of cases, names, and terms, and two appendices of the judges and their recorded interviews. Finally, the book is unusually well written for a subject that is complex in nature and quite technical in its language. The Court itself should be proud of a history that probably goes far beyond anything that it expected to achieve in such short order.