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The Judiciary in Canada: The Third Branch of Government

Peter H. Russell
Toronto: McGraw-Hill Ryerson, 1987, pp. xv, 388

The title of Peter Russell's very fine book on the Canadian judiciary emphasizes his view that the judiciary is "an integral part of a country's political system" (3). In his discussion of the nature of judicial power, he illustrates the point with reference to the courts' adjudician and law-developing functions.

with reference to the courts' adjudication and law-developing functions. Adjudication is the authoritative and reasoned resolution of disputed legal claims. But in the end, the authority of reason is backed by the coercive powers of the state, and this coercion grounds the judiciary in the executive. In terms of law development, the judiciary shares in the legislative power of the state to the extent that it shapes the law in the course of settling disputes about it. There is also the fact that for some citizens, the courts are the occasion of a personal encounter with the state and the state's justice.

One such encounter is jury duty, although the institution of the jury has been

in decline for some time (274). Russell, who rightly regards the jury as a democratic institution that assists in educating citizens in self-government, deftly assesses the broader political consequences of its apparent demise against its technical failings in the eyes of judges and lawyers. Montesquieu urged the virtues of juries from the standpoint of those unfortunate enough to come before them: "By this method the judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible." As Russell points out, mankind's most common encounter with the terrible judicial power takes place in the lower criminal courts (202). Following Montesquieu, then, students of political liberty ought to be as concerned with the nature of that encounter as they are with voting procedures or the concentration of power in the modern executive. Russell's study offers the authoritative and

His analysis covers the history of our complex judicial system, the organizational changes it has undergone, and the issues currently under debate. The latter range from matters of particular concern to members of the legal profession, such as the status of provincially-appointed judges as opposed to that of federally-appointed judges, to broader concerns about the independence of judges and the categories of disputes best handled in the various courts. In reviewing these matters, Russell is careful to sort out positions based on the vested interests of the legal profession from considerations based on the interests of the larger community, including, of course, litigants themselves. Few of the problems canvassed admit of easy solutions. And one of Russell's greatest strengths as an analyst is his ability to extract what is valid in contending points of view. However, he does offer a firm opinion on one major issue, namely, the existing hierarchy of trial courts, from the provincial courts at the base to the superior courts at the top. He disputes the utility of this hierarchical organization, its inflexibility and rigidity. He also objects to its tendency to

confine adjudication on issues of the greatest concern to lower-income individuals, for example, small claims and family matters, to the "inferior" or provincial courts. He proposes instead an organizational scheme that features

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**M Lipman** 

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