

IN MEMORIAM

THE HONOURABLE GERALD ERIC LE DAIN

1924–2007

PATRICK J. MONAHAN*

The death of former Osgoode Hall Dean and Supreme Court Justice Gerald Le Dain on 18 December 2007 is deeply mourned by the law school's extended community. Le Dain's distinguished contributions as a lawyer, teacher, scholar, commissioner, and judge serve as a role model for all members of our community.

Following his service in the Canadian forces during the Second World War, Le Dain enrolled in the Faculty of Law at McGill University, where he received his B.C.L. degree in 1949. After being called to the Quebec bar in 1949, he pursued graduate studies at the University of Lyon in France, where he became a Docteur de l'Université in 1950. He practiced law in Montreal before joining the faculty at McGill in 1953; through the remainder of that decade and into the 1960s he spent time both at McGill and in the practice of law.

In 1967 Le Dain was appointed Dean of Osgoode Hall Law School, during a period of great challenge and historic change. Although the law school was still being operated by the Law Society of Upper Canada, the Law Society had entered into an agreement in principle with York University. Le Dain's challenges were to steer the ongoing negotiations to a successful conclusion and implement the historic move which brought Osgoode Hall Law School to York University. He accomplished both difficult tasks with great skill, diplomacy, and success.

While I was not part of the community during this period, I am told by colleagues that Le Dain had a larger-than-life personality, that he cared passionately about legal education, and that he was rarely on the losing end of an academic argument. By guiding us through this

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important transition, he in effect ensured that Osgoode would become a modern university law school, committed to a mission of liberal professional education. Le Dain completed his term as Dean in 1972 and remained a member of the faculty until 1975, when he was appointed to the Federal Court of Appeal. Le Dain was sorely missed at Osgoode following his elevation to the bench, as evidenced by the fact that the very next year he was awarded an Honorary Doctor of Laws degree (LL.D.) from the University.

Even while serving as Dean, Le Dain chaired a landmark commission of inquiry into the non-medical use of drugs in Canada. The Le Dain Commission's 1973 report recommended that marijuana be removed from the *Narcotic Control Act* and that the provinces control possession and cultivation, by analogy to their regulation of alcohol. Although his recommendations were not formally adopted, his Report was a landmark in terms of reshaping public attitudes and the *de facto* regulation of marijuana in Canada over the next generation.

Le Dain served with distinction on the Federal Court of Appeal for nine years and, in 1984, was appointed to the Supreme Court of Canada. There he served as a puisne judge for four years, during which time he wrote numerous key judgments, particularly in the public law area. For example, his masterful and elegant judgment in *Crown Zellerbach*¹ remains the leading authority on the scope of the federal general power to enact laws for the peace, order and good government of Canada. In 1989, he was made a Companion of the Order of Canada.

I had the privilege, along with my colleagues Professors Arthurs and Ryder, to attend the memorial service for Justice Le Dain in Ottawa on 28 December 2007. My colleagues both delivered eulogies which have been revised for inclusion in this Memoriam. Their tributes highlight Le Dain's passion for the law, his clarity of thought and writing, his integrity as an individual, and his commitment to family. While Gerald Le Dain's accomplishments were as diverse as they were distinguished, we at Osgoode Hall Law School are particularly proud of and grateful for his important contribution to the development of our institution, as well as to the advancement of legal education in Canada.

¹ *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

A LOCOMOTIVE OF A MAN

HARRY W. ARTHURS*

The first scheduled passenger train in England ran from Liverpool to Manchester in 1830. The local member of Parliament, a man named Huskisson, was supposed to greet the arriving train. However, no one had ever done that before, and poor Huskisson—misjudging the speed of the train—stepped in front of it and was run over. I know how he felt. My first meeting with Gerry Le Dain was pretty much that way. In fact, all my meetings with him were.

What a locomotive of a man Gerry was. Some law of thermodynamics seemed to regulate his speech. He would start off quietly—almost shrinking inward—like a locomotive building up a head of steam. Then he would begin moving slowly, his arms moving like pistons, his eyes slightly downcast, his voice quite quiet. But soon he would be at full throttle: striding back and forth, entering your physical and psychic space, his fists clenched—sometimes around one's lapels, his voice now loud, his eyes like headlights. And then when he had reached his destination, when had made his point—as he always did to great effect—he would slowly subside, moving more slowly, speaking more quietly, finally falling silent.

In a courtroom or classroom, in a committee meeting or a casual conversation, you came away from an encounter with Gerry feeling that you had either to get on board or risk being run over. It wasn't just the brilliance of his argument or the acuity of his analysis—though it was often both of those. It was the sheer force of his personality. Like so many others whose lives were touched by Gerry, I feel it still, forty years on.

Gerry Le Dain was a brilliant advocate. He represented the government of Quebec, as well as corporate and individual clients. However, he took on his toughest brief as Dean of Osgoode where he presided over a revolution in Canadian legal education. It was his responsibility to persuade York University, the Law Society of Upper Canada and the world at large that what we were doing was not only the

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legitimate, not only the sensible, but the *inevitable* way forward. This wasn't easy. Everything was changing in the law school: pedagogy and scholarship and governance and—not least—academic manners, a matter of concern to Gerry, who was an officer and a gentleman and a Supreme Court Justice in the making. Nonetheless, when the Le Dain locomotive of persuasion got up a head of steam, there was no stopping it. Gerry argued our cause with elegance and passion; he persuaded most people; and those he didn't persuade didn't make the same mistake as poor Huskisson: they got out of the way. Osgoode and all of Canadian legal academe owe him a debt they can never repay.

Gerry, not surprisingly, was a fabulous teacher as well. In his years at Osgoode, he taught constitutional law to our students. However, much more importantly, he taught his young colleagues—he taught me—many things we needed to know: how to set high standards; how to be self-critical; how to take one's self and others seriously; how to accept the demands of duty; how to draw lines when they needed to be drawn; how to act honourably and generously; and, especially, how to do these things while holding one's self open to all of life's joys and sorrows.

Gerry of course had his share of personal joys and sorrows. I'll speak of those in a moment. But first I want to say something about his willingness to take on the joys and sorrows of others. The revolution in legal education was not the only revolution of the sixties. As we all know, the sixties also involved a revolution in lifestyles which transformed the way young people behaved and deeply disturbed the great and the good, not to mention their parents. This revolution sparked a fierce debate in Canadian society, the crux of which was whether teenagers ought to be sent to jail for smoking marijuana. Gerry was at the centre of that debate. As Chair of a Royal Commission on the Non-medical Use of Drugs, he not only presided over public hearings and launched an innovative program of research, he placed the problem at the centre of his own life for the four years it took to conclude his mandate. Gerry had a special quality of empathy. He engaged with young people on their terms, and indeed on their turf. He listened to them; he felt with them; he imagined himself as their peers and their parents. In the end, his report recommended that recreational drug use be decriminalized. This was not only a groundbreaking legal and political resolution of a difficult social problem; it was an act of intense emotional courage for someone of Gerry's background and disposition.

I have to add that it was also a singular act of generosity. As we now realize, Gerry needed his emotional courage for himself. The turmoil he experienced on the Commission, the burdens we imposed on him when he was Dean, the subsequent ambiguities and contradictions of judicial life—all of these were hugely stressful. It seems so unfair that someone with such passion and enthusiasm, someone who gave so much to others, someone so utterly devoted to his family should have suffered the untimely loss of his two daughters and of Cynthia, whom he adored and who was his source of sustenance and joy.

I will end on the note that Gerry would want me to end on—a professional note—which testifies to Gerry's place in the pantheon of Canadian law. In my estimation, he sits there alongside Frank Scott, who held him in high regard as his best-ever student, and Bora Laskin, who selected him as Osgoode's founding Dean and whom he succeeded on the Supreme Court of Canada. Frank and Bora and Gerry were all men of high intellect and great learning. They believed in the power of law to improve society, though less so in its power to transform human nature. They each believed in the sovereign rule of reason, but they were all—each in his way—men of passion. What a privilege it was to know all three of them, in all their glory and complexities, and what an honour it has been to remember Gerry at this service.

TO MAKE A DIFFERENCE

BRUCE B. RYDER*

I had the great privilege of working as one of Justice Le Dain's law clerks shortly after his arrival at the Supreme Court of Canada in 1984. He was by then at the pinnacle of an illustrious forty year career in the law, which began in 1946 at McGill classes filled with returning veterans. As a student, he was particularly inspired by his constitutional law professor, F.R. Scott, who became his friend and mentor. Like Scott, Gerry Le Dain saw law as one of the liberal arts, requiring a broad foundation of learning, a deep and rich humanity, and a connection with other disciplines such as history and political science. He shared Professor Scott's professional rigour and his profound commitments to the rule of law, social justice, and the protection of human rights.

The journey Gerry took through law owes a great deal to paths opened up for him by Frank Scott, and, later, by Bora Laskin. Portraits of Scott and Laskin hung on the walls in Justice Le Dain's chambers at the Supreme Court. Laskin was a member of the selection committee that chose Le Dain as Dean of Osgoode. When Chief Justice Laskin passed away in 1984, Prime Minister Trudeau selected Le Dain to fill the vacancy. For Gerry, succeeding Laskin on the Court was a huge honour and a weighty responsibility.

Professor Le Dain was one of the pioneers of the modern era of law teaching and legal research in Canada. As a teacher from the 1950s to the 1970s, he patrolled the aisles of his classrooms, literally shaking his students into engagement. His excitement for learning was palpable and infectious. Professor Le Dain was adored by his students. He was a creative spirit at a time when there were few full-time university law professors, and fewer still with an interest, as he had, in fundamental research.

Though Professor Le Dain's contributions to scholarship and public policy are too numerous to catalogue, certain highlights must be mentioned. In 1952, he published the lead article in the inaugural issue

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of the McGill Law Journal.¹ Two decades later, as Dean at Osgoode, he used his considerable persuasive powers to convince the sceptical Benchers of the Law Society of Upper Canada to approve the opening of Parkdale Community Legal Services, the pioneering clinic staffed by Osgoode students that serves clients who cannot otherwise afford access to justice.² Meanwhile, Professor Le Dain's exquisitely crafted treatise on the jurisprudence of Chief Justice Duff, published in 1974 by the Osgoode Hall Law Journal, heavily influenced the Supreme Court of Canada's decision in the *Anti-Inflation Reference*.³ In the preface to *Essays on the Constitution*, winner of the Governor General's Award for Non-Fiction in 1977, Frank R. Scott gave special thanks to Professor Le Dain for the invaluable assistance he provided in the selection and arrangement of materials for the book.⁴ Dean Le Dain, after opening his mind and the drug commission hearings to what he initially found to be the bewildering perspective of a very different generation, had the moral courage to recommend the decriminalization of marijuana possession thirty-five years ago.⁵ In these and many other ways, we are still catching up with him.

On the bench, Justice Le Dain was a force. One of the striking aspects of his record during his nine years at the Federal Court of Appeal is that he almost always wrote for a majority, and rarely in dissent. Justice Le Dain's opinions were characterized by clarity, precision, and a thorough attention to legal intricacies. At the Federal Court he made signal contributions to the development of

¹ Gerald E. Le Dain, "The Twilight of Judicial Control in the Province of Quebec?," (1952) 1 McGill L.J. 1.

² This episode is recounted in Roy McMurtry, "Celebrating a Quarter Century of Community Legal Clinics in Ontario," (1997) 35 Osgoode Hall L.J. 425; Frederick Zemans, "The Dream Is Still Alive: Twenty-five Years of Parkdale Community Legal Services and the Osgoode Hall Law School Intensive Program in Poverty Law," (1997) 35 Osgoode Hall L.J. 499 at 511-15; Gerald Le Dain, "Response to the Chief Justice," (1997) 35 Osgoode Hall L.J. 439.

³ Gerald Le Dain, "Sir Lyman Duff and the Constitution," (1974) 12 Osgoode Hall L.J. 261, was cited in the *Anti-Inflation Reference*, [1976] 2 S.C.R. 373 at 451-52, 460-61; Beetz J.'s opinion—which is well entrenched in constitutional doctrine—stated that his analysis of the POGG power was "much indebted" to Professor Le Dain's article; *ibid.* at 452.

⁴ Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* at xi (Toronto: University of Toronto Press, 1977).

⁵ Commission of Inquiry into the Non-Medical Use of Drugs, *Interim Report* (Ottawa: Queen's Printer, 1970); Commission of Inquiry into the Non-Medical Use of Drugs, *Final Report* (Ottawa: Queen's Printer, 1973).

administrative law, particularly regarding rules of procedural fairness, and wrote frequently in the areas of maritime law, labour law, immigration law, constitutional law, patent law, and tax law.

It was a great privilege for his law clerks to work with Gerry on his rulings. He loved to teach and engage. He thrived on open and honest dialogue. When you had his attention, his focus was complete and intense. Legal disputes were never abstractions to him. He was painstaking about the quality of his deliberations, his research, and his writing.

R. v. Therens would be Justice Le Dain's first significant opinion at the Supreme Court of Canada.⁶ The case raised issues the Court was considering for the first time under the *Charter of Rights and Freedoms*, including definitions of section 10(b)'s right to counsel and section 1's "prescribed by law" requirement, and the exclusion of evidence under section 24(2). Justice Le Dain felt a heavy responsibility to launch the Court's jurisprudence on these questions in intelligent directions. The appellant claimed that his conviction for drunk driving was unconstitutional because the police had violated his right to counsel by not informing him of his right to call a lawyer before compelling him to take a breathalyser test. Justice Le Dain and I were discussing the case in his chambers when he stopped and said, "Look, Bruce, I need to tell you something. In my gut, I'm having a hard time with this case." As he spoke, he was pounding himself so hard in the chest I thought he might knock himself over. "I know the horror that can occur on our highways. My eldest daughter died in a car accident. I'm struggling with that." He took a deep breath, and we returned to our work. He needed to acknowledge and work through his feelings about his daughter's death so that his analysis of the legal issues would not be clouded by them.

In the end, Justice Le Dain crafted an opinion in *Therens* that did right by the victims of highway accidents and by the *Charter*. In memorable language, he affirmed that the enactment of the *Charter* signalled a new era in the protection of fundamental rights and freedoms in Canada.⁷ He defined the meaning of detention—the trigger for the right to counsel—in broad terms that broke sharply from past jurisprudence. He found that the police had violated the driver's *Charter*

⁶ *R. v. Therens*, [1985] 1 S.C.R. 613.

⁷ *Ibid.* at paras. 48, 49.

rights but had done so in good faith reliance on the previous state of the law. The conviction could stand in *Therens's* case because admitting the breathalyser evidence did not bring the administration of justice into disrepute. Yet Le Dain intimated that violations of the *Charter* right to counsel could jeopardize convictions in other cases. His opinion in *Therens* was a brilliant resolution of the legal issues, and remains central to the law on key points of *Charter* interpretation.

Justice Le Dain's intellectual stature is evident in the fact that of the forty opinions he wrote at the Supreme Court of Canada, more than half (twenty-one) commanded a unanimous Court. His opinions were scholarly and elegantly crafted; out of complexity and nuance he produced masterfully succinct statements of the law. He made defining and enduring contributions to the architecture of Canadian constitutional law in a number of areas, most notably regarding judicial independence,⁸ the right to counsel on detention and the need for restrictions on *Charter* rights to be prescribed by legal rules,⁹ and the scope of Parliament's power to pass laws relating to matters of national concern.¹⁰

Gerald Le Dain was a big man in every respect. Tall and handsome, he was a giant of a teacher, scholar, and judge. He was a person of great integrity and extraordinary generosity. He had a huge heart, large passions, and a striking capacity for empathy. To say that he felt things deeply and that he was an attentive listener would be gross understatements. Conversations were, for him, fully engaged transformative experiences. And his eyes would always be twinkling on the edge of some kind of mischief. Moments later the room would shake with his laughter. For those who had the privilege of knowing this great man, his presence was, and his memory will always be, a vivid exhortation to live large, to think boldly, to make a difference—and to have fun along the way.

⁸ *Valente v. The Queen*, [1985] 2 S.C.R. 673.

⁹ *Therens*, *supra* note 6.

¹⁰ *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.