

## Commentary

# TRADITION, JUDGES, AND CIVIL LIBERTIES IN CANADA<sup>©</sup>

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This Journal, and the school in which the conference was held, are named after William Osgoode (1754–1824), the first chief justice of Upper Canada, now the province of Ontario.<sup>1</sup> The school has had close connections with the Bar for over a century, and numbers many hundreds of distinguished practitioners and judges among its graduates. For thirty-five years it has been a university faculty, and we are immensely proud of its academic reputation as a place where critical, engaged, and scholarly approaches to the law have been understood as the core of legal education. The subject of this issue of the Journal is one on which Osgoode himself had strong feelings, for his entire judicial career unfolded in an historical period when fears of sedition, of ‘terror,’ of an alien enemy, were strong.

Osgoode was a barrister of Lincoln’s Inn and an equity draftsman before he was appointed chief justice of the new British colony of Upper Canada, where he sat from 1792 to 1794. He has been revered here as the author of the legislation establishing our superior courts, the founding father of our legal traditions.<sup>2</sup> But there are traditions and traditions. In Quebec, where he went after a few years here to take up the more important chief justiceship of Lower Canada, he made his reputation as an effective instrument of state power, at the expense of his judicial impartiality.

During the American revolutionary war of 1776–1783 the Canadiens of Quebec (conquered by the British in 1760, their territory ceded to Britain in 1763) had been imperfectly loyal in the eyes of their new rulers. During that war, the British governor, taking the view that *habeas corpus* did not obtain in Quebec, had imprisoned without charge those suspected of sedition (some

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<sup>1</sup> The School is named after the place in which classes were originally held, Osgoode Hall, the seat of the superior courts of this province since the mid-nineteenth century.

<sup>2</sup> *Dictionary of Canadian Biography*, vol. 6 (Toronto: University of Toronto Press, 1966–) s.v. “William Osgoode” is the most recent standard account of his life, by S.R. Mealing.

Canadiens, Scots, and Americans), for the duration.<sup>3</sup> Ten years later, Osgoode, now part of the governing elite of Quebec, absorbed their fears of the people and their view of the uses of the law during the even more alarming juncture of a war with revolutionary France. As a British judge, he shared the view of the rest of the small governing elite of Englishmen in Quebec City. They were faced with subversion, potential treason, and the dangerous ideological influences of godless and revolutionary France in a precariously loyal society of French-speaking Canadiens. The poisonous influence of an assembly elected on a broad franchise, granted to the colony in 1791, and a turbulent local political scene, undermined all order. By the mid-1790s some of the inhabitants of Lower Canada (Quebec) in fact were singing the Marseillaise, insulting the local nobility, and wearing the ‘phrygian bonnet,’ the red revolutionary hat of Jacobin France, while rioting against government orders to work on the roads and to join the militia. *Habeas corpus* (by then recognized as part of the law of Quebec) was suspended for almost the entire period from 1794–1812,<sup>4</sup> and Osgoode, as chief justice, but also as the speaker of the upper house of the legislature, and a member of the governing executive council, was committed to upholding aristocratic, monarchical, and anti-democratic government. Democracy and subversion were both to be feared and fought; indeed, they were the same thing. In 1797, the authorities caught a spy. His trial was their opportunity to present an object lesson to their unruly French subjects, and Osgoode’s role in this, the first important Canadian state trial, was crucial.

The accused was an American citizen, David McLane, detected as he ineptly sought to plot on behalf of the government of revolutionary France. His citizenship, and other issues about the charge and the evidence, might have been raised by good lawyers, but McLane did not have such counsel. He was convicted of treason and two weeks later hanged, his head cut off, his body partially disembowelled by the hangman, to the horror of the attending crowd in Quebec City.<sup>5</sup> The prosecution, charge, and trial itself have been much criticized, and Osgoode is a main target of that criticism. The historian of McLane’s trial, the late Murray Greenwood, concluded in a wide-ranging analysis of treason law in the common law world that Osgoode was one of two

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<sup>3</sup> Jean-Marie Fecteau & Douglas Hay, “Government by will and pleasure instead of law’: Military justice and the legal system in Quebec, 1775-83” in F. Murray Greenwood & Barry Wright, eds., *Canadian State Trials, Volume I: Law, Politics, and Security Measures, 1608-1837* (Toronto: University of Toronto Press, 1996) 129 [*Canadian State Trials*].

<sup>4</sup> *Canadian State Trials*, *ibid.* at 333-35.

<sup>5</sup> F. Murray Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: University of Toronto Press, 1993) c. 7 and *passim*; F. Murray Greenwood, “The Treason Trial and Execution of David McLane” (1991) 20(1) *Man. L.J.* 3 at 3; *Dictionary of Canadian Biography*, vol. 4 (Toronto: University of Toronto Press, 1966–) s.v. “David McLane.”

Quebec judges in the period who “pushed constructive treasons to their limits,”<sup>6</sup> considerably beyond the limits observed by the judiciaries of the new United States and of England. In McLane’s prosecution Osgoode also helped broker a deal in which the chief crown witnesses were promised large grants of land in return for their testimony. The Chief Justice also appointed as defence counsel two young and inexperienced barristers. One of them had acted for one of the crown witnesses in the land deal; he was also the protégé of the Attorney General, in fact was a member of his household at the time.<sup>7</sup>

As a judge and statesman in Canada, Osgoode fought the treasonable doctrines of democracy in whatever guise they appeared, including opposing the grant of a charter to Quebec City because he feared popular control of local government. He worked ceaselessly until he retired to England in 1801 to bolster “a respectable and steady aristocracy ready to withstand the Tribunes of the people.”<sup>8</sup> For his success in fighting the elected legislature and asserting the power of unrepresentative government he was hailed by his anti-Jacobin friends in London as “the Queller of Riots and Seditious in the New World.”<sup>9</sup> In a period of counter-revolutionary and anti-democratic repression throughout the British Empire, Osgoode stood out as one of the fiercest defenders of British oligarchical government, at the expense of the Rule of Law, as he opposed the dangers of invasion and revolutionary terror.

So there are also Canadian traditions, including judicial ones, for extraordinary times. The historical record shows that legislators, governments, and judges have often done great injustice, oppressed innocent but unpopular minorities, and, in doing so, rarely contributed to national security. Such periods of panic have also usually been quickly forgotten by the dominant political culture, although not so quickly by the victims. Since the era of Osgoode, it turns out that we have had a lot of extraordinary times in this country, as the series of volumes now appearing as *Canadian State Trials* testifies.<sup>10</sup> They chronicle a history of suppression of civil liberties inferior to few jurisdictions in the common law world, particularly in times of war, but also in periods of

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<sup>6</sup> F. Murray Greenwood, “Judges and Treason Law in Lower Canada, England, and the United States During the French Revolution, 1794-1800” in Greenwood & Wright, *supra* note 3, 241 at 269.

<sup>7</sup> *Ibid.* at 266-69.

<sup>8</sup> Osgoode to John King (19 February 1796) in William Colgate, ed., “*Letters from the Honourable Chief Justice William Osgoode*” (1954) 46 Ontario History 149.

<sup>9</sup> Douglas C. Hay & Ruth Paley, eds., *Friends of the Chief Justice: The Osgoode Correspondence in the Archives of the Law Society of Upper Canada* (Toronto: The Law Society of Upper Canada, 1990) vii-viii.

<sup>10</sup> F. Murray Greenwood & Barry Wright, eds., *Canadian State Trials, Volume II: Rebellion and Invasion in the Canadas, 1837-1839* (Toronto: University of Toronto Press, 2002). The Osgoode Society (Ontario’s society for legal history) is, of course, named after William Osgoode.

apprehended civil insurrection.<sup>11</sup>

The means by which that suppression took place differed of course by period, but several elements have consistently recurred since William Osgoode's tenure as chief justice. Panicked or pressured governments often greatly exaggerated the danger to the state. They ignored the large powers already found in the criminal law and enacted statutes drawn in vague and encompassing language that struck widely rather than narrowly, and that in particular could be used also to target legitimate, if radical, political opinions. Such laws were often presented as emergency legislation that nevertheless effectively became permanent, a constant danger to civil liberties in times of political or social conflict. Wesley Pue's account in this issue of our recent anti-terrorism legislation echoes much of that longer history.<sup>12</sup> Finally (and Osgoode is an instance), too many judges in past centuries were all too ready to accept the opinions of the most frightened members of the governments of the day, in part because of their own social formation, role in the state, and political opinions, which overcame doubts about the need for draconian laws. The assumption that judiciaries are particularly willing to contest oppressive laws in such circumstances is one belied by much of the historical record and by recent responses in other countries. Whether that will also be the case in the present conjuncture in Canada remains to be seen.

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<sup>11</sup> The literature is growing, but the late F. Murray Greenwood stands out for his dedication to the recovery of a useable history of civil liberties, based on the best sources. In addition to *Canadian State Trials*, see F. Murray Greenwood, "The Drafting and Passage of the War Measures Act in 1914 and 1927: Object Lessons in the Need for Vigilance" in W. Wesley Pue & Barry Wright, eds., *Canadian Perspectives on Law & Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 291; and his other writings.

<sup>12</sup> W. Wesley Pue, "The War On Terror: Constitutional Governance In a State of Permanent Warfare?" (2003) 41 *Osgoode Hall L.J.* 267. See also Andrew Parnaby & Gregory S. Kealey, "The Origins of Political Policing in Canada: Class, Law, and the Burden of Empire" (2003) 41 *Osgoode Hall L.J.* 211; Reg Whitaker, "Keeping Up With The Neighbours? Canadian Responses To 9/11 In Historical and Comparative Context" (2003) 41 *Osgoode Hall L.J.* 241.