

OF JUDGES AND SCHOLARS: REFLECTIONS IN A CENTENNIAL YEAR *

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I

A strange thing happened to the Supreme Court of Canada on the way to the celebration of this, its centennial year: the public discovered that the court exists. One may also surmise that the members of the court find this novel attention to be a rather mixed blessing. The tone of popular treatments of the court has been no more complimentary than the academic studies which have lain in obscurity for years. In this essay, I shall resist the urge to add another refrain to the litany of complaints about the performance of our final court. Instead, I am tempted by another target—the academic community itself.

II

The deficiencies in Canadian judicial performance are, in large measure, a product of the failure of Canadian legal theory. I believe there is a direct relationship between a nation's philosophy of law and the character of its judicial decision-making. (By philosophy, I do not mean a logically worked out system, but rather a cast of mind, a point of view about what our judges are and should be doing.) Our courts are a part of the legal community, a community which embodies certain more or less articulate assumptions about the nature of law, the role of judges in the evolution of that law, and the relevance of the arguments and considerations which lawyers should advance to a court about how it should settle the law. Appearances notwithstanding, the effective law-making power of our final court of appeal is tangibly restricted to those possibilities which appear sound in the light of prevailing views about these fundamental issues. So when we shudder at some particularly distressing piece of legal craftsmanship

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ship and prepare to apply some after-the-fact negative reinforcement to the judges through a slashing law review critique, we should first of all consider how helpful was the Canadian scholarly analysis of that problem which they might have drawn on. The blunt truth is that too often the quality of our academic reflection matches the level of interest of our lawyers and judges in making use of it.

To the extent that there has been sustained worthwhile reflection on the nature of judging in Canada, it has been directed largely at the problem of the influence—or lack of it—of legal rules in judicial reasoning. How free are the courts to go beyond established doctrines and take account of changing social values in refashioning our law? What are the limits which doctrines of precedent or canons of statutory interpretation place on the judicial contribution to legal change? Not for a moment should that effort be downgraded. Its aim is an expanded concept of the nature of law in the courts, one which requires that the judges offer equal deference to the policies and principles embedded beneath the surface of the rules. The assumption of this work is that only if our judges appreciate the full range of relevant legal considerations will they be capable of the quality of judicial craftsmanship which is required for the rational administration and evolution of our legal system.

III

There is some evidence in recent Supreme Court decisions that the lessons of scholarly analysis are beginning to sink in. The Justices appear now to recognize their own responsibility for the course which Canadian law will take and are openly coming to grips with the problems which this poses. One striking example is the recent decision in *Harrison v. Carswell*.¹ Sophie Carswell was an employee in a small store and a member of a union. When the employees went on strike in accordance with provincial labour legislation, they became entitled to picket their employer. However, the store was located in a large shopping centre, the walks and roads of which were owned by a private developer who had leased the store premises. Although the picketing by the employees was entirely peaceful, they were asked to leave the shopping centre. When Carswell refused, she was charged with a violation of the Petty Trespasses Act.²

¹ *Harrison v. Carswell* (1975), 75 CLLC 14, 286, at p. 15, 306 (S.C.C.).

² R.S.M., 1970, c. P-50.

For our purposes, the important issue raised by these facts is the power of our Supreme Court to rework the ancient common-law concept of trespass to property in order to take proper account of such modern developments as public shopping centres and collective bargaining legislation. Not surprisingly, Chief Justice Laskin was undeterred by the challenge:³

It seems to me that the present case involves a search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation. The history of trespass indicates that its introduction as a private means of redress was directed to breaches of the peace or to acts likely to provoke such breaches. Its subsequent enlargement beyond these concerns does not mean that it must be taken as incapable of further adaptation but must be applied on what I can only characterize as a level of abstraction which ignores the facts.

From that premise, the Chief Justice fashioned a new legal privilege to engage in peaceful picketing in the public area of a shopping centre, pursuant to a lawful strike against a tenant of the centre. As is becoming his habit, he wrote this in dissent. But what is encouraging is that the majority decision did not retreat into a purely formal analysis of the problem. Instead, Mr. Justice Dickson recognized that it was legally possible for the Supreme Court to introduce that legal innovation into the fabric of our law. He explicitly stated his reasons why he chose not to take that step, in the light of this concept of the scope and limits of judicial creativity:⁴

The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this Court under the Canadian Constitution. The duty of the Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the Court to act creatively—it has done so on countless occasions; but manifestly one must ask—what are the limits of the judicial function? . . .

If there is to be any change in this statute law, if A is to be given the right to enter and remain on the land of B against the will of B, it would seem to me that such a change must be made by the enacting institution, the legislature, which is representative of the people and designed to manifest the political will, and not by the Court.

³ *Supra*, footnote 1, at p. 15, 313.

⁴ *Ibid.*, at pp. 15, 308-15, 309.

For my purposes, the significance of *Carswell* is not the specific legal conclusion at which it arrives.⁵ Rather, it resides in the fruitful questions which are posed and the dialogue which is opened up. Moreover, both judgments display a willingness on the part of the court to look to scholarly work for assistance in that fundamental judicial inquiry. It is up to legal scholars to take up that challenge. The main point which I wish to make in this essay is that in order to be of any substantial help, Canadian legal theory must go beyond its emphasis on the logic of legal *rules*, and occupy itself with the problem of judicial *role*, especially the role of our final court of appeal.

IV

I begin with the simple assumption that the Supreme Court of Canada is not just a part of our legal system; it is also a major institution of Canadian government. An inescapable feature of a final appellate tribunal is that it establishes a society's legal policy in the course of adjudicating many, if not most, of the concrete disputes which come before it. But that merely states the problem; it does not solve it. It is not unfair to sum up the results of academic speculation about judicial policy-making in these terms.

⁵ I would add the comment that a plausible case can be made for each position. This is not true of the substantive legal issue. Chief Justice Laskin thoroughly documents how anachronistic is the use of trespass law here and provides an intriguing legal concept to avoid that consequence. I believe that Mr. Justice Dickson tacitly agrees on the merits that the law should be changed. *Prima facie*, the court is the appropriate institution for renovating such outmoded common law doctrines (for reasons I have elaborated upon in my book, *In The Last Resort* (1974), pp. 61-65). But here the court is asked to intervene in the high-visibility, emotion-laden field of labour relations. There are substantial reasons why a court should ordinarily leave it to the legislature to adopt new legal policies which tilt the delicate balance of economic power between the contesting parties (see *In The Last Resort*, *ibid.*, pp. 123-125). I do not mean to suggest there are no counter-arguments which may be made in support of Laskin C.J.'s judgment. *Carswell* raises a subtle and intriguing problem within the framework of analysis which I have developed in my book, but that will have to await another occasion. However, I cannot resist adding this other note. The Ontario Court of Appeal effected a much bolder change in the industrial relations balance of power when it created a *per se* bar on secondary picketing in the absence of any legislative authorization of any kind: *Hersees of Woodstock v. Goldstein* (1963), 38 D.L.R. (2d) 449 (Ont. C.A.), criticized in Arthurs, Comment (1963), 41 Can. Bar Rev. 573. The propriety of that judicial innovation has not yet reached the Supreme Court of Canada. The logic of Mr. Justice Dickson's argument for the majority in *Carswell* points clearly to reversal of the *Hersees* doctrine. See Weiler, Legal Values and Judicial Decision-making (1970), 48 Can. Bar Rev. 1, at pp. 42-46.

Our judges should make some law, but not too much. How much is too much is left up to judicial discretion. The judges may be pardoned for finding this not terribly helpful.

How does one go about improving the level of analysis? The starting point is a *realistic* assessment of what our courts are like. Who gets appointed a Supreme Court judge? How are they recruited and what is their status and accountability when they get to the court? What types of problems come before the court, how are they formulated, and what resources of information and experience are the judges able to bring to bear on them? What are the instruments which the Supreme Court has available for the solution of social problems, how influential are judge-made standards of behaviour likely to be, and what mechanisms has the court for monitoring and learning from the results of the social experiments which it has initiated?

Only when we understand what the court is like can we make an informed judgment about what it should be doing. Here I refer especially to the final court's policy-making function. What are the sectors in which the court should take an aggressive, activist posture in shaping the law and what are the areas in which the court should be restrained, deferring to policies adopted by others? Judges who understand the reasons why courts are given certain tasks—such as the administration of a Bill of Rights—are best able to navigate the troublesome shoals which they face. But it is precisely at this point that Canadian legal theory is deficient. As a result, even if it wanted to use it, our Supreme Court would now find available only a tiny fraction of the help that American scholars give the United States Supreme Court.

V

Two decisions of the Supreme Court of Canada serve to illustrate the point I am making. And in keeping with my resolve not to score any easy points off the court in this essay, I have selected two of the best judgments in its recent history. The first—written, alas, in dissent—came in *Murdoch*,⁶ perhaps the most publicized Supreme Court decision in recent memory. (And it is not without irony that the point at issue in the case was one of provincial, private law, an area which several commentators have argued should be totally removed from the court's jurisdiction.) All students of the court are familiar with Mrs. Murdoch's unsuccessful suit for an interest in a ranch which was legally owned by her

⁶ *Murdoch v. Murdoch*, [1974] 1 W.W.R. 361 (S.C.C.).

husband, a ranch upon which, according to her husband, she did "just about what the ordinary rancher's wife does":⁷

Haying, raking, swathing, mowing, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done.

Mr. Justice Laskin's remarkable dissent—which according to a C.B.C. radio reporter made him a "jurisprudential folk hero"—is a model of the kind of argument a judge may legitimately make in clearing away the doctrinal obstacles to the legal relief that justice and sensible social policy demands. Yet even his reasoning reflects the curious reticence of the Canadian legal establishment about meaningful judicial renovation of our common law. Throughout his judgment beats the theme of the "extraordinary" contribution of Mrs. Murdoch, the fact that "her labour is not simply housekeeping, which might be said to be merely a reflection of the marriage bond". Chief Justice Laskin appeared to be trying to stake out the unique features of this case, so as to make clear that, as he put it:⁸

The Court is not being asked in this case to declare an interest in the appellant merely because she is a wife and a mother; nor is there here an implicit plea for a community property regime to be introduced by judicial fiat.

The Chief Justice did go on to hold, in the unusual circumstances of this case, that Mrs. Murdoch was entitled to an interest in the ranch on the basis of the equitable doctrine of constructive trust:⁹

In making the substantial contribution of physical labour, as well as a financial contribution, to the acquisition of successive properties culminating in the acquisition of the Brockway land, the wife has, in my view, established a right to an interest which it would be inequitable to deny and which, if denied, would result in the unjust enrichment of her husband. Denial would equate her strenuous labours with mere housekeeping chores which, an English Court has held, will not *per se* support a constructive trust.

What I find significant in the tenor of these remarks is the unspoken common ground which he shares with the majority judges in *Murdoch*: that it would be quite improper for the Supreme Court to begin a *general* reform of our system of property law for the benefit of the *ordinary* wife and mother. (And I should also mention my own, quite disconcerting discovery that the female law students in my Supreme Court seminar this past year were unanimously of that view as well.)

⁷ *Ibid.*, at p. 374.

⁸ *Ibid.*, at p. 380.

⁹ *Ibid.*, at p. 384.

But why? Even if we were to assume that the legislature is the better forum for adopting a new matrimonial property law, there is no reason why judicial efforts cannot make a substantial improvement on what we have now. As Chief Justice Laskin put it, "the better way is not the only way". But I take issue also with his comment that:¹⁰

No doubt, legislative action may be the better way to lay down policies and prescribe conditions under which and the extent to which spouses should share in property acquired by either or both during marriage.

In my view, a realistic and sophisticated comparison of legislature and court suggests that there is considerable doubt about whether the former is the superior institution for the reform of our law of matrimonial property. I do not mean to deny the significant virtues of the legislative route. Heated emotions are aroused in this area, and these the representative character of the legislature may help defuse. There are a number of problems related to the property issue—for example, maintenance, and child custody and support—and perhaps these are best tackled in a comprehensive statutory package. Finally, in order to serve both of these objectives, the legislature may commission a full-scale study by a law reform body which can hear representations from numerous interested groups and then prepare a detailed set of proposals.

The first problem with this all-too-familiar argument is that it idealizes the legislative process. It assumes that simply because the legislature *might* do a better job, it *will* do the job. Matrimonial law is a sufficiently ticklish issue that an elected body always faces the temptation to find that the safest course is to do nothing, and to claim that there are too many other pressing problems on the legislative agenda. The evidence from statutory reform of matrimonial property law is not terribly sanguine. As well, there is reason to believe that this subject is not readily amenable to once-and-for-all legislative action which, of necessity, uses a procrustean legal formula. Family relationships are simply too variable, too complex, to be captured in that manner. Once that legal formula has been embedded in our statute books, it is exceedingly difficult to move the legislature back into the area to take a second look and to develop the necessary qualifications.

From each of these perspectives, we can appreciate the positive virtues of judicial law reform. The courts are moved to action by concrete problems brought by litigants such as Mrs. Murdoch, who acted as a one-person lobby demanding considera-

¹⁰ *Ibid.*, at p. 380, italics mine.

tion of her case in the light of the fundamental principles and policies of the law. Unlike a pressure group demanding action of the legislature, her position must be dealt with one way or the other by a court which has to adjudicate the immediate dispute and give its reasons for doing so. Moreover, a court which is receptive to this kind of argument is able to conduct its revisions and refinements of the law in an incremental way. The scope of the alteration in the previous law may then be tailored to the scope of the policies which the judges are confident about in the immediate case. Ample room is always left in the discursive language of judicial opinion for changes of direction, or even retreat, if this appears politic. Only gradually does a new legal principle emerge from this cumulative experience.

In the larger perspective, one should perceive these two governmental institutions in a law-making partnership, making ideal use of their complementary virtues. The judges are faced with the immediate pressures for legal change. They should feel entitled to break the logjam holding back reform. A court can take initiatives which likely will prove satisfactory, but remain confident that their mistakes can still be undone by legislative reversal. Ultimately, the court will run up against institutional barriers which limit their capacity to achieve comprehensive reform. But in the meantime, the momentum will have developed by which the legislature—society's ultimate law-making resource—can step in to finish the job.

But it is not my objective to substantiate that case in detail here. My point is simply this: neither before nor after *Murdoch* have Canadian judges had the benefit of a *sustained* analysis of the proper scope and limits of judicial reform of matrimonial property law. I find that particularly ironic in light of the millions of words flowing from expensive law reform studies across the country. One finds in these rarely a mention of this central institutional issue of where and how the process of changing our law of family property should be carried on. Nowhere do the reformers advert to the ability of the courts to implement certain changes in the common law without direct legislative intervention. Not surprisingly, this failure is matched by our judges' refusal to consider the significance of such law reform studies in their decisions (and that is true even of judges such as Chief Justice Laskin who often utilize the work of the same scholars appearing in the law reviews). It has always seemed to me that the quest for a fair and satisfying legal framework for a basic human situation such as marriage is never-ending and that the quality of law which we achieve will reflect the peculiar feature of the govern-

mental institutions which produce it. Conscious recognition of these truths is conspicuous by its absence from the product of law reformers in this area. It behooves the academic critics of the refusal by the Supreme Court majority in *Murdoch* to take even the first step in this process of legal change to consider that, before letting loose their critical broadsides.

VI

Let me turn next to the judicial role in the public law area. A common thread runs through such diverse fields as administrative law, federalism law, and civil liberties law. In each, the court reviews the judgments of another agency of government—whether it be the legislature, a department, or an administrative tribunal—by measuring them against such legal instruments as the British North America Act,¹¹ the Bill of Rights,¹² or a regulatory statute such as a labour code. Here I sense a curious contrast with the prevailing judicial attitude to private law reform, one which we saw expressed in *Murdoch*. There is much less reluctance about the value of active judicial involvement, about the Supreme Court imposing its own views of socio-legal policies upon other public officials. The trend is seen most dramatically in the reception to the *Drybones*¹³ interpretation of the legal effect of the Bill of Rights. A much stronger tide is bringing about pervasive judicial control over the administrative process, flowing especially from the *McRuer Report*.¹⁴ But there did appear to be one exception to the trend in recent years, and this was the retreat which the Supreme Court had gradually beaten from the Privy Council's front line position in constitutional decision-making. That is what I find so intriguing about the recent *Thorson*¹⁵ decision which promises some renaissance in the court's role as the umpire of Canadian federalism.

Thorson, the former Chief Justice of the Exchequer Court, was a vocal leader of the opposition to the federal government's bilingualism policy. Having lost the battle against the Official Languages Act¹⁶ in the legislative arena, he carried his struggle into the courts, alleging that the legislation was unconstitutional. There he was met with a fifty-year-old doctrine, established by the Supreme Court of Canada in the *Smith*¹⁷ case, which denied

¹¹ 1867, 30 & 31 Vict., c. 3 (U.K.).

¹² R.S.C., 1970, Appendix III.

¹³ *Re Drybones*, [1970] S.C.R. 282.

¹⁴ Royal Commission Inquiry Into Civil Rights (1968).

¹⁵ *Thorson v. A.-G. of Canada* (1974), 43 D.L.R. (3d) 1 (S.C.C.).

¹⁶ R.S.C., 1970, c. O-2.

¹⁷ *Smith v. A.-G. of Ontario*, [1924] 3 D.L.R. 189 (S.C.C.).

standing to individuals who sought, as members of the public or as taxpayers, to challenge the validity of statutes under the British North America Act. In another carefully-crafted opinion by the Chief Justice, but this time for the majority, the court overturned the *Smith* doctrine and held that Thorson had standing to proceed with his action.

Within the premises from which he begins—assumptions which are the traditional wisdom of our constitutional scholars—Chief Justice Laskin's reasoning is impeccable. He poses this "telling" question: "whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute." His response is forthright:¹⁸

It would be strange and indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication. . . .

Nor was it an answer that the Attorney General of one of the provinces might question the constitutionality of the federal statute in a proceeding of its own. Canadians should have the vehicle of a "public action", brought by an individual to enforce "the right of the citizenry to constitutional behaviour by Parliament where the issue of such behaviour is justiciable as a legal question". As the Chief Justice puts it:¹⁹

I am unable to appreciate how an argument of principle can be made that such a wrong, an illegality which is certainly justiciable, should go uncorrected at law, whatever may eventuate as political redress.

Within that perspective, the *Smith* doctrine would appear to be an irrational relic in our public law, and most of us will applaud the readiness of our Supreme Court to proclaim its demise.

However laudable the craftsmanship of the majority opinion, I have serious reservations about the substance of the *Thorson* decision. The time is long past for a re-examination of the present status of judicial review of federalism conflicts in Canada, an institution whose legal roots lie in the Colonial Laws Validity Act.²⁰ One need not gainsay its value in the early days of the British North America Act in the 1870's in order to believe that judicial review is outmoded in the mature federalism of the 1970's.

Take as an example just one of the prominent concerns of Canadian federalism at this time: the problem of pricing, sale,

¹⁸ *Thorson*, *supra*, footnote 15, at p. 7.

¹⁹ *Ibid.*, at p. 15.

²⁰ 1865, 28 & 29 Vict., c. 63 (U.K.).

and taxation of oil and gas. Each of these propositions holds true for that issue:²¹

- (a) Neither the language nor the established principles of the British North America Act offer any firm guidance to a *legal* solution to the conflict.
- (b) A court which is required to dispose of a concrete lawsuit will have to fashion constitutional policy from its own resources.
- (c) An adjudicative body such as the Supreme Court faces serious institutional obstacles in developing a technically satisfactory solution to the problem of legislative jurisdiction.
- (d) An unrepresentative tribunal such as the court risks serious damage to its long-run legitimacy if it is constantly forced to come down on one side or the other of these heated political battles which are the stuff of Canadian federalism.
- (e) Judicial retreat from the role of umpire of Canadian federalism will not leave the task of conflict-resolution undone. As the oil and gas issue graphically illustrates, constitutional negotiations between governments have replaced constitutional adjudication as the most prominent institution in recent Canadian federalism.
- (f) Contrary to the traditional legal point of view, judicial settlement of who has the *right* to exercise legislative jurisdiction detracts from the likelihood of voluntary, political agreement about the acceptability of particular governmental programmes.

On the basis of these judgments, I have elsewhere staked out an extreme position: the desirability of abolishing judicial supervision of Canadian federalism except in the case of direct conflict in actual statutes from two jurisdictions.²² I argued for that position not because I expect it to be realized in the foreseeable future, but rather as an heuristic framework which should define our approach to resolving immediate federalism concerns. There is nothing jurisprudentially radical about the argument. We have recently enjoyed a relatively sophisticated dialogue of the need

²¹ While I state them in the form of conclusions, I recognize, of course, how controversial each of these propositions is. The evidence and argument in support of them are marshalled in Chapter 6 of my book, *op. cit.*, footnote 5, and my article *The Supreme Court and the Law of Canadian Federalism* (1973), 23 U. of T.L.J. 307.

²² In the pieces referred to in footnote 21. An earlier version of the argument was published as Chapter 3, *The Supreme Court of Canada and Canadian Federalism*, of the book, *Law and Social Change*, edited by Ziegel (1973), p. 39.

for, and the value of, judicial use of our written Bill of Rights to invalidate statutory law. It is generally recognized by scholars that there is a plausible argument for both sides of that debate. Yet our constitutional lawyers have thrown up their hands in horror at the comparable suggestion for judicial application of the British North America Act.

But this refusal to think about the unthinkable has proved distinctly unhelpful to the judges who have to grapple with a problem such as that posed in *Thorson*. Only a romantic could disagree, after a close examination of our court's performance in the constitutional area, that the role of judicial umpire is at best a necessity, not a virtue. Within that perspective, the limitations on private standing have been a valuable roadblock against judicial intervention too soon and too often. They have afforded the necessary breathing space to the process of legislative innovation and constitutional bargaining. Suppose then that the affected governments reach a consensus about the federal arrangements needed to deal with a pressing social problem in Canada. It would seem strange to allow a private citizen, for his own purposes, to try to persuade a judge to invalidate the programme adopted by one elected legislature on the grounds that it could only be enacted by another legislature, particularly when the latter has no objections itself. In my view, *Thorson* has moved Canadian constitutional law in precisely the opposite direction from the one suggested by a sophisticated analysis of the judicial role.

But it is not my purpose to document that case here. I merely wish to underline this point: even someone as steeped in our constitutional theory as Chief Justice Laskin finds it not only strange, but indeed, *alarming* to entertain that subversive thesis. He has a great deal of company. Our constitutional scholarship—at least, the Anglophone version—does not seriously address itself to these absolutely fundamental questions about the contemporary viability of this judicial role of umpire in our federal system.

VII

These rather sketchy remarks about the recent decisions in *Carswell*, *Murdoch* and *Thorson* are intended to depict this jurisprudential question. What contribution may the Canadian public rightfully expect from its final appellate court in the solution of our pressing issues of legal policy. I could have drawn instead on numerous other problems recently before the Supreme Court: due process for the parolee; a proper measure of control of police enforcement of the criminal law; rationalization of our archaic

law of occupier's liability; equality before the law for Indians; responsibility of the corporate director; and a host of others. But these are sufficient to underscore the theme I sounded at the outset. Judicial reasoning about particular social and legal problems is always heavily influenced by a community's veiled philosophy of the proper scope and limits of the judicial function. We do not now have in Canada a sustained dialogue bringing this basic issue of political and legal theory out into the open for conscious reflection. It just is not good enough for us to continue to draw, quite uncritically, on models for judicial performance developed in Britain, France, or the United States. One hundred years after the creation of the Supreme Court of Canada, twenty-five years after it became our final court of appeal, it is high time to get the scholarly task underway.
