

# On Law and Society in a Time of Change: Three Speeches

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Publicity is the hallmark of justice, and trial in open court is the instrument through which publicity is effectively attained.

[Statement in overturning the barring of a reporter from a courtroom, 1979]

## CONTINUITY AND CHANGE: A TASK OF RECONCILIATION

[Speech, delivered at the Annual Dinner of the UBC Law Review, March, 2, 1973<sup>1</sup>]

### I. INTRODUCTION

The problem of effecting a reconciliation between continuity and change poses a challenge to those who serve the law. How much value is to be ascribed to the lessons and experience of the past? To what extent shall these lessons be overborne by the demands of the present? Was Napoleon right when he said that history is the only true philosophy? These are questions that have application in every sphere of life and society. They are particularly meaningful to us who serve the law. For we all know to what great extent our law is the produce of evolution from the past. That indeed is one of its glories—that it represents the treasured wisdom and the tested experience of earlier days. But we must ask ourselves the question, “Is that always enough?”

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<sup>1</sup> Published as Sam Freedman, “Continuity and Change: A Task of Reconciliation” (1973) 8:2 UBC L Rev 209; reproduced with the permission of the UBC Law Review Society. Please note: the footnotes in this chapter are Freedman’s original references (updated to conform with the 7th edition of the *Canadian Guide to Uniform Legal Citation*) for the speeches “Continuity and Change: A Task of Reconciliation” (notes 2-20), and “Law and Justice – Two Concepts or One?” (notes 23-50).

These thoughts raise various issues: of precedent, of *stare decisis* and where it stands today; of the need to keep law up to date, while at the same time recognizing the danger of too hastily departing from principles rooted in experience.

## II. THE TRADITIONAL CASE FOR *STARE DECISIS*

Those wedded to the rigorous application of the doctrine of *stare decisis* insist that it produces the three C's: Certainty, Consistency, Continuity. Certainty—we must know what the law is. Consistency—equality of treatment should be sought, with similar cases being treated similarly. Continuity—we must avoid the disastrous inconvenience of introducing doubt into the law through judicial departures from precedent. Linked with this approach is the reliance principle—that is to say, the principle that people have placed reliance on the law as established by judicial decisions, they may have ordered their affairs on the basis of those decisions, and therefore their interests would be adversely affected if judges now departed from those decisions.

But there is another side to the coin. The case against a total acceptance of *stare decisis* has been variously expressed. Guarding against the danger of giving a careless allegiance to an epigrammatic phrase, I cite some of the more familiar sayings. “It is no part of the function of any court to make error perpetual.” “There is not much to be said for the certainty of injustice.” “What uniformity is achieved may be a uniformity of error.” “It is not better that the court should be persistently wrong than that it should be ultimately right.”

## III. THE JUDICIAL HIERARCHY

Whether a judge should adhere or not adhere to a precedent is a question that arises only when he has the freedom to choose. If by reason of his place in the judicial hierarchy the precedent is binding on him, then he is obliged to follow it. The relationship of judges and courts within the judicial hierarchy may be viewed in two ways: vertically and horizontally. Vertically, the higher tier binds the lower. As Baron [Edward Hall] Alderson said: “I accede to the authority of that case. It does not convince me, it overcomes me.” Sometimes a lower court, reluctant to be bound, resorts to techniques of evasion. Of these the most common is to distinguish the case as not applicable. Distinguishing undistinguished precedents is a process from time to time encountered.

The horizontal relationship of judges involves the question [of] whether they should follow decisions of other judges who are at the same level as themselves, including their own previous decisions. To this question I shall return shortly.

#### IV. *STARE DECISIS* IN THE TIERS

Let me take a quick look at the three stages through which a case may go in the judicial process:

##### 1. *Trial Court*

The basic rule may be simply stated. A trial judge is bound by an applicable decision of his provincial Court of Appeal or of the Supreme Court of Canada. Other decisions—English, American, or those of courts of other provinces—are persuasive only.

Are there obligations flowing not from *stare decisis* but from considerations of judicial comity? For example, what of a judgment of another judge of his court? Should he follow it? This is the horizontal aspect of the hierarchy. Chief Justice [John O.] Wilson of the Supreme Court of British Columbia has expressed the view that it is eminently desirable that such a decision be followed by other judges of the same court, with certain defined exceptions: where subsequent decisions affect its validity; where some binding authority, either of case law or statute, had been overlooked; and where the judgment in question was delivered unconsidered and not reserved.

But what if the judge feels that his colleague's judgment was clearly wrong? Must he still follow it? "That were to wrong every man having a like cause, because another was wronged before." In my view, making all legitimate allowances for judicial comity, the judge would not be rigidly bound. He could depart from the earlier decision. In that connection it is interesting to note that in the province of Ontario a judge in such circumstances could escape the dilemma by referring the case before him to the Court of Appeal.<sup>2</sup>

Is a trial judge bound by the judgment of a Court of Appeal of another province? Is he at least so bound in federal matters? Perhaps there is a case here for invoking judicial comity, especially in the federal field; but there is no standard practice that is followed. The law, however, is plain: a court is not

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<sup>2</sup> *The Judicature Act*, RSO 1970, c 228 s 35.

bound to follow a decision of an outside appellate court, and there are not a few instances of refusal to do so.

## 2. *Court of Appeal*

A provincial Court of Appeal is bound by a judgment of the Supreme Court of Canada. That is the one thing that can be said with absolute certainty.

Is it bound by its own earlier decisions? On that point there is a division of thinking. Most judges and jurists say it is bound. A minority says it is not bound. Lord Denning M.R. is of that minority.

I recall the refreshing candour of Baron [George William Wilshire] Bramwell who, faced with an earlier decision of his own with which he did not agree, said, "The matter does not appear to me now as it appears to have appeared to me then." But usually the conflict is with decisions of other judges, perhaps of an earlier day. Time and circumstances change. The former decision may have been good then, but not so good now. Perhaps the conflict is with a decision of other judges of the present day. An appellate court may consist of, say, nine or ten judges, or even more. It may normally sit in panels of three. If a Court of Appeal is rigidly bound by its own earlier decisions, then conceivably two judges may bind the entire court. Is that a desirable situation?

If the court is bound against its will, how will the law be changed and brought into line with what the court thinks it should be? One line of thinking says, "Leave it to the Supreme Court of Canada." The difficulty, however, is that on account of expense the case may not get there, with a consequent injustice to the present defeated litigant. Another line of thinking says, "Leave it to the Legislature." But action from that source is an uncertain thing, legislative time is notoriously limited, and reform therefore may not come.

What of the judgments of other provincial Courts of Appeal? Should a Court of Appeal follow them? At least in federal matters? To the last question many judges would give an affirmative answer both by reason of judicial comity and because of a desire to achieve uniformity in the federal law. May I on that point enter a respectful dissent. I recall the controversy that for many years existed on the question of possession of a narcotic in circumstances where the possessor did not know the substance to be a narcotic. In other words, was *mens rea* essential? In the province of Quebec, the *Morelli* case said that it was not and that the accused in such circumstances was guilty, even

without *mens rea*.<sup>3</sup> Later, the same question had to be dealt with by the Court of Appeal of British Columbia in the *Hess* case.<sup>4</sup> That court did not follow the *Morelli* case. Instead it found the accused not guilty. Then came the *Lawrence* case in Ontario.<sup>5</sup> It followed *Morelli* and not *Hess*. Finally the Supreme Court of Canada resolved the problem by holding in line with *Hess* rather than with *Morelli* and *Lawrence*.<sup>6</sup> The situation here discussed poses the question, "Shall the state of the law depend on the quality of the judge who first expounds it?" For myself, I favour a right to differ, to be prudently exercised of course.

### *3. Supreme Court of Canada*

Let us recognize this Court for what it is—a final court. The judges there are not final because they are infallible, but they are infallible because they are final.<sup>7</sup>

Let us consider for a moment whether the Supreme Court of Canada is free to depart from one of its earlier decisions. In that connection, consider the celebrated pronouncement of the House of Lords in July 1966, that it would no longer regard itself as rigidly bound by its earlier decisions.<sup>8</sup> No similar pronouncement has yet been made by our highest court. Yet in my view it should have no less power in this area than the House of Lords possesses. It should be free to decide by the authority of reason, rather than by reason of authority.

Is it so free? Opinion on that point appears to be divided, even within the Court itself. Thus, Hall J. has said, "There is no doubt that the Supreme Court of Canada is not now bound rigidly by this doctrine [*stare decisis*] and the way is open to depart from previous decisions."<sup>9</sup> Does this represent the view of the Court as a whole? Laskin J., himself an advocate of greater freedom for the Supreme Court, has assessed the situation somewhat more cautiously: "It [*stare decisis*] is no longer an article of faith in the Supreme

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<sup>3</sup> *Morelli v The King* (1932), 52 Que KB 440, 58 CCC 120, [1932] 3 DLR 620.

<sup>4</sup> *Rex v Hess* (No 1), [1949] 1 WWR 577, 94 CCC 48, 8 CR 42 (BC CA).

<sup>5</sup> *Rex v Lawrence*, [1952] OR 149, 102 CCC 121, 13 CR 425 (CA)

<sup>6</sup> The resolution came in *Beaver v The Queen*, [1957] SCR 531, 118 CCC 129, 26 CR 193.

<sup>7</sup> The phrase is adapted from language of Jackson J, a former Justice of the Supreme Court of the United States.

<sup>8</sup> *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

<sup>9</sup> "Law Reform and the Judiciary's Role" (1972) 20 Chitty's LJ 77 at 80.

Court of Canada, but it still remains a cogent principle there.”<sup>10</sup> Departures from earlier decisions are in practice rare indeed.

On that question, may I assert my personal view in the following terms: (1) It is essential for a final court to have the power to depart from an earlier decision; (2) it should feel free to exercise that power whenever it is satisfied that a departure from precedent is warranted in the interests of justice; (3) if it denies itself that power, or declines to exercise it—which in practical terms is the same thing—it holds back the growth of the law; (4) liberation from the rigid confines of the doctrine is essential if we wish to make the judicial process responsive to the needs of a changing society.

## V. PROSPECTIVE OVERRULING

In recent decades we have witnessed a development in United States judicial circles aimed at harmonizing continuity and change. It is called “prospective overruling.”<sup>11</sup> Let us examine its nature briefly.

A legislative change is normally prospective in effect. A change by judicial decision is of retrospective effect. The theory underlying this—a legal fiction, perhaps—is that the courts merely expound what the law always has been. The new decision merely corrected the earlier decision’s error on what the law was.

How then does prospective overruling work? Let us say that the court confronts a rule arising from a decided case. It believes that the case had been wrongly decided. But on the faith that the case correctly expressed the law, people may have ordered their affairs. What shall be done in that situation? The court decides to apply the old rule to the case before it, but announces that in future a different rule will be applied.

We have here an attempt to obtain the best of both worlds. By upholding the old case, continuity is maintained. By declaring that the case will not apply in future, the way to change is opened.

Prospective overruling in the form I have described has not escaped criticism. Its weaknesses are obvious. On the court’s own finding the loser in the present case should have been the winner, and therefore has been denied justice. Moreover, the litigant who brings about the announced change in the

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<sup>10</sup> “The Institutional Character of the Judge” (1972) 7 *Isr LR* 329 at 341.

<sup>11</sup> This subject has been dealt with in an illuminating fashion by Mr Justice Walter V Schaefer of the Supreme Court of Illinois, in “New Ways of Precedent” (1966) 2 *Man LJ* 255, which I have found most helpful.

law does not benefit; so there is no incentive to other litigants to seek judicial change.

As a result of this kind of criticism, a modification in the use of the technique was introduced. Simply put, the immediate litigant was given the benefit of the change, but as to all others, the ruling would have prospective effect only. But even with this modification the technique is still subject to criticism. Other plaintiffs—even those whose claims arose from, let us say, the same accident, and whose cases have not yet reached trial—go uncompensated.

In making an assessment of prospective overruling, one must in fairness acknowledge that it can have a useful, even if limited role to play. The field of criminal law furnishes a good example. Some of the older persons here this evening may remember “bank night” at movie theatres during the Depression days. On bank night a draw would be made from the stage and the lucky winner would receive a money prize. It was a device to stimulate attendance, and it worked. The Supreme Court of New Mexico had to deal with a bank night case, first in 1937<sup>12</sup> and again in 1940.<sup>13</sup> On the first occasion the Court reached the conclusion that bank night did not constitute a lottery. It was therefore legal. After the decision in that case other bank night cases arose in other states. They were there held to be a lottery. When the New Mexico Court had to deal with the subject again in 1940, it was of the view that its earlier decision was wrong. But at the same time it recognized that theatre owners in New Mexico had introduced or carried on bank night in the knowledge that the Court in its 1937 decision had declared it to be legal. In this situation the Court held that for the present accused the 1937 case would be followed, but for the future that case would be treated as overruled.

It is plain that heavy reliance on the prior decision was the justification for employing the technique of prospective overruling. There is here much to be said in its favour, for to have applied the changed law against the accused would have made him guilty of something which was not illegal at the time when he did it. Prospective overruling here avoids a finding of criminality *ex post facto*.

I am not aware of the use of this technique in any reported case in Canada. Our judicial system, however, should be hospitable to new ideas and new approaches. It is not unlikely that some form of prospective overruling will sooner or later find its way into our courts.

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<sup>12</sup> *City of Roswell v Jones* (1937), 67 P 2d 286.

<sup>13</sup> *State v Jones* (1940), 107 P 2d 324.

## VI. CONTINUITY OR CHANGE IN THE RIGHT OF SILENCE

Till now my remarks have revealed a bias for change. I ask you to believe that this means change justified by reason. Still, the bias is there. Now, to show my versatility and to demonstrate that I am actually unclassifiable, let me identify myself with the cause of continuity. I do so in an area of criminal law. It concerns the accused's right of silence.

In recent years the accused's right to keep silent has been the subject of scrutiny and of criticism. "Make him subject to compulsory interrogation by the police," some have said. "Make him a compellable witness at his trial," others have added. Less than a year ago [in 1972] in England the Eleventh Report of the Criminal Law Revision Committee was released.<sup>14</sup> It dealt with this subject, among others. It recommended changes by way of legislation. The Report took an intermediate position between those who would leave the present law unchanged and those who would abrogate the right of silence entirely, in all its aspects.

"The right to silence is the concrete and visible assertion of the fundamental principle that the prosecution must prove their case and that no obligation lies upon the accused to prove his innocence."<sup>15</sup> The right to keep silent is accordingly an aspect of the presumption of innocence. To make the accused a compellable witness is to whittle down the presumption and rob it of part of its force. Is that what we want? Our system of criminal law rests upon a proper concern that an innocent person will not be found guilty. The presumption of innocence is an integral part of that system; and the right of silence is one aspect of it.

If the accused is made the subject of compulsory police interrogation there is a danger that the power may be abused. This is an area where, as has been said, a page of history is worth a volume of logic. The subject of compulsory interrogation conjures up memories of the Court of Star Chamber, of the Court of High Commission, of John Lilburne on trial in 1637 for importing allegedly seditious books into England, and being publicly whipped from Fleet prison to the pillory, a distance of two miles. I am aware that we live in a different age where such practices no longer occur. Police ask only for the right to orderly inquiry. But sometimes inquiry may become disorderly and rough. In the words of Wigmore, "If there is a right to an

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<sup>14</sup> UK, Criminal Law Revision Committee, *Eleventh Report: Evidence (General)* Cmnd 4991 (London: Her Majesty's Stationery Office, 1972).

<sup>15</sup> General Council of the Bar of England and Wales, *Evidence in Criminal Cases: Memorandum on the Eleventh Report of the Criminal Law Revision Committee: Evidence (General)* (London: Kenwell Services, 1973) at para 12.



answer, there soon seems to be a right to the expected answer—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse.”<sup>16</sup>

Those who seek abolition of the right of silence invoke the words of Jeremy Bentham:

If all the criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking as guilt invokes the privilege of silence.

May I suggest that we have here a bad generalization. First of all, it is erroneous to think that the only people interrogated are guilty people. Secondly, an innocent person on arrest may tell a false story. For example, a married man who was in the company of another woman; a youth on probation who was out after 11:00 p.m.; a police officer who was in “undesirable company”.<sup>17</sup> In all these cases an accused may not later feel it safe to take the witness stand. So too in the case of a man with a prior record. Does silence then necessarily signify guilt? “In *most* instances (a characterization of disturbingly little use in a *particular* instance) this is probably the true significance of silence.”<sup>18</sup> But we must never forget that it is the particular instance—the case of the accused presently on trial—that concerns us, and nothing else.

## VII. THE REPORT OF THE CRIMINAL LAW REVISION COMMITTEE

The Eleventh Report of the Criminal Law Revision Committee of England, so far as concerns my present theme, made two specific recommendations.<sup>19</sup> On the subject of police interrogation, its majority recommendation would permit adverse comment in court if an accused had

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<sup>16</sup> John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3d ed (Boston: Little, Brown, 1940) vol 8 at § 2251.

<sup>17</sup> Arthur Maloney & Paul V Tomlinson, “Future of the Law of Evidence—The Right to Remain Silent—Two Views” in RE Salhany & RJ Carter, eds, *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972) 321 at 339.

<sup>18</sup> John T McNaughton, ed, *Wigmore on Evidence* (Boston: Little, Brown, 1961) vol 8 at § 2272.

<sup>19</sup> *Supra* note 14.

failed during interrogation to mention something on which he later relied, provided he ought reasonably to have mentioned it. Concerning the right not to appear in the witness box, the Committee would maintain the right, but would make its exercise most dangerous. It would permit the prosecution a right of adverse comment on the accused's failure to testify. Moreover, it would require the accused formally to be called upon in court to take the witness box even when it was known that he did not wish to testify. The purpose of this device is to obtain the dramatic effect of the accused's refusal to testify after being specifically invited to do so.

It is apparent that, although the Report does not destroy the right of silence, from the practical point of view it abridges that right considerably.

In our country the right of silence as part of the privilege against self-incrimination is enshrined in the Canadian Bill of Rights. Moreover it has a long common-law history in its support. There is a heavy onus on those who would end that right. Till now that onus has not been discharged. The Law Reform Commission of Canada has already addressed itself to this issue and its report is expected shortly. All of us will await its recommendations with great interest.<sup>20</sup>

In a 1973 speech, Sam Freedman added a new, and primary, "objective" to those set out in 1967, in his speech "A Creed for Lawyers" (see chapter 7, *supra*). The new objective, *the necessity for civility*, grew out of the contemporary clash of political activism with courtroom procedure.

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<sup>20</sup> Law Reform Commission of Canada, "Compellability of the Accused and the Admissibility of His Statements" Study Paper no 5. Although this evidence project report bears the date of January 1973, it was not released until several months after that date. Its main proposal is for a system of supervised questioning before an independent official. The silence of the accused in the face of questions before this official may be used at trial to supply an inference of guilt. Early reactions to the proposal suggest that it is finding favour neither with civil libertarians nor with the police.

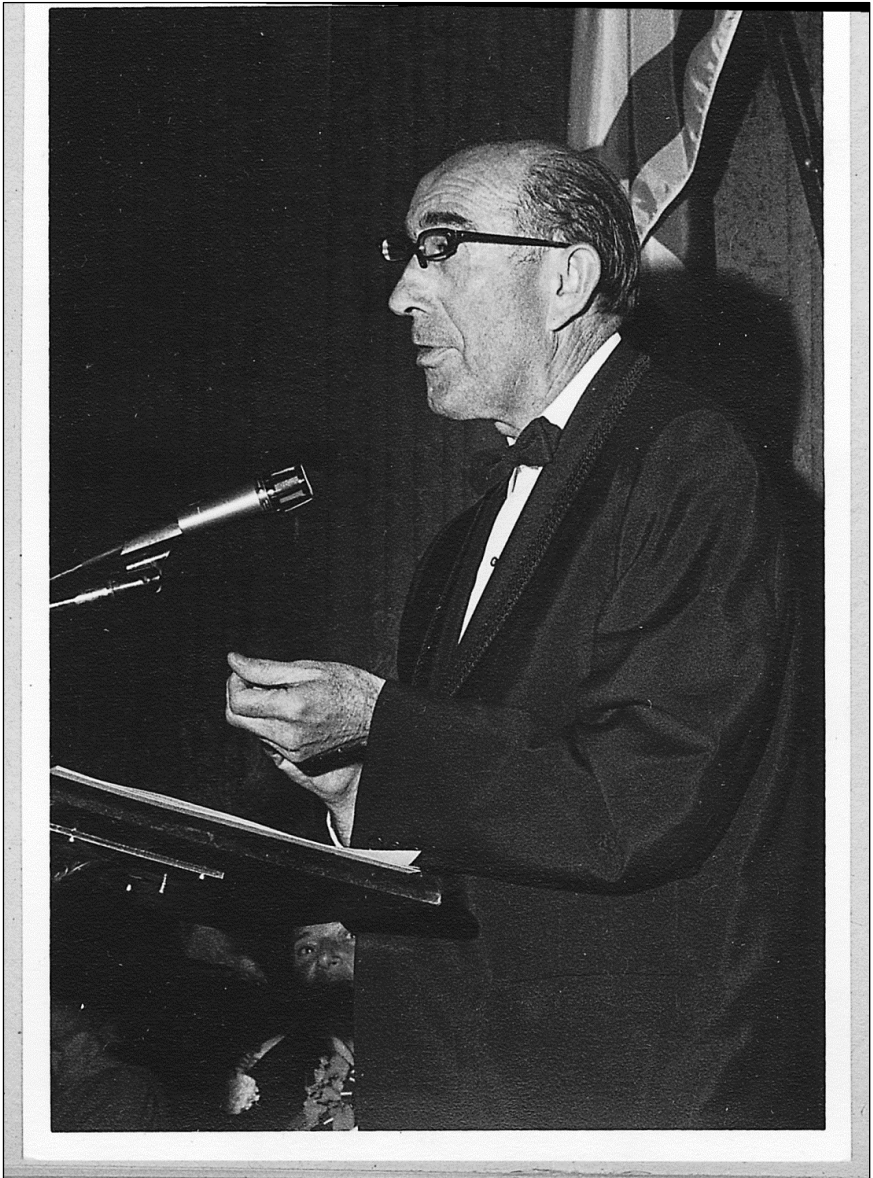


Fig. 9

## **SOME OBJECTIVES FOR THOSE WHO SERVE THE LAW**

[Speech, delivered at William Mitchell College of Law, St. Paul, Minnesota, June 10, 1973<sup>21</sup>]

Not long ago Chief Justice Warren E. Burger, assuredly one of the most distinguished graduates of this College, called attention to the necessity for civility, “if we are to keep the jungle from closing in on us.”

In recent years, in both Canada and the United States, we have encountered a new phenomenon. We may describe it as courtroom disruptions, for that is the form it takes.

Is this something new? In the form in which it is manifested, yes. Disruptions of court proceedings, rare though they have been, have not been unknown in legal history. But they have usually resulted from impulsive and thoughtless acts on the part of disgruntled litigants.

But I am thinking of courtroom disruptions of a different kind. These are deliberate, and their aim is either to frustrate the normal working of the judicial process or, in some cases, to use the courtroom as a forum to publicize a political cause.

Let me say that the necessity for civility is particularly required in the conduct of so-called “political trials”—these are trials wherein conflicting ideologies—social, economical, political—form part of the background of the case. These political trials have been accompanied by the emergence of what has been called “the new advocacy.” Its exponents assert the right to take only cases they believe in, and once in them, they battle with all their hearts, identifying in a subjective way with the cause of their client, with the result that their performance is often shrill, rude, and undignified. Sometimes these counsel question the relevance to political trials of traditional standards of professional behaviour. In their eyes the ideological conflict which lies at the root of the trial seems to be reason enough for abandoning rules of evidence, canons of ethics, and codes of professional conduct. Contrast this approach with advocacy as we have traditionally understood it—with the lawyer who recognizes and observes that he is counsel, not stating his own view, but putting the case for his client in the best way he can; knowing that the counsel who is his

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<sup>21</sup> This is a revised version of the speech, much of which repeated Freedman’s 1967 speech, “A Presentation of Four Objectives Which Might be Pursued by Members of the Bar”, as well as parts of the speech, “Challenges to the Legal Profession, July 1963”; see chapter 6, *supra*.

adversary is doing precisely the same thing from the opposite point of view; the whole being designed to enable the court, with the aid of both presentations, to arrive at a just result.

Let me stress, then, the need for the continuance of one of the fine traditions of our ancient and honourable profession: the tradition that the practice of law, in court or out, be carried out in an atmosphere of civility. Vituperation of language or bitterness of spirit need not be a feature of proceedings between members of the Bar. Rather, one would wish to see those proceedings carried on in an atmosphere of mutual trust, of true confidence. Only in that way will we merit the tribute which Shakespeare paid to our profession when he said, “Do as adversaries do in law. Strive mightily, but eat and drink as friends.”

## **LAW AND JUSTICE—TWO CONCEPTS OR ONE?**

[12<sup>th</sup> Annual Manitoba Law School Foundation Lecture, delivered at Robson Hall Faculty of Law, University of Manitoba, January 24, 1977<sup>22</sup>]

### **I. INTRODUCTION**

My theme this evening centres upon the concepts of law and justice and poses the question of whether these concepts are two in number or one. In approaching my task I must first lay down one or two ground rules. And the first of them is this: we must not be chained down to a strict and literal interpretation of the term “justice”. For we are dealing with a system that is admittedly fallible and imperfect and it is being administered by fallible and imperfect men. Sometimes the system may falter or fail, and the result will be something less than justice.

Does such an occurrence then brand the legal system as unjust? If so, I should stop here and now, for I cannot advance or support a thesis that the law will invariably produce a just result. Its failure to do so may spring from a defect in the legal system itself. More commonly it will proceed from an imperfection in those who administer the system—perhaps a negligent or inadequate lawyer, or even a negligent or inadequate judge. And these failures

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<sup>22</sup> Published as Samuel Freedman, “Law and Justice – Two Concepts or One?” (1977) 7:4 Man LJ 231.

tend to attract public notice and attention, indeed much more so than do the routine operations of the law. So my first ground rule is this—do not ask for perfection in the law, for perfection can only be an objective and not an attainment; look at the law in its entirety and judge it by its substantial performance, and so judging, ask whether it qualifies as truly an instrument for justice.

My second ground rule, growing out of the first, relates to the law's stance or attitude towards the imperfections that lie within it. If the law's attitude is one of unconcern or indifference, if it reveals itself as content with the status quo and willing to perpetuate it into the long future, the law can properly be condemned as unworthy and unjust. But if, on the other hand, those who form part of the legal system recognize its imperfections and actively seek to make the law a better thing in the world of tomorrow, then condemnation of the law as something other than justice becomes unwarranted and unfair. So I ask that here too we look not only at the law's blemishes but also at the remedial efforts that are steadily being made (and, I may add, on a vast and increasing scale) towards the objective of the law's reform. So our second ground rule is concerned with direction: is the law looking backward to the past or forward to the future?

My method of approach will be to select certain areas of the law and in them to examine and assess the law's performance, to see how far in some cases the law has been from justice, and how close it has been in others. The available field of inquiry is a vast one, indeed limitless. So it is necessary to select and to omit. The areas of the law chosen for examination tonight do not even begin to exhaust the theme. I recognize that other areas, no less valid and no less relevant, could be suggested by most of you. But I offer those which I have selected, three in number, in the belief that they are pertinent and illustrative, and in the hope that you will agree that they are worthy of inclusion in an analysis of the concepts of law and justice.

May I add that my concern will be less with the law in theory than with the law in action. The law must be measured by its performance, that is to say, by the quality of the cases and decisions to which it gives rise. Preferring the concrete to the abstract, I will this evening examine some actual cases, most of them well known, some perhaps not so well known—but always with the object of determining whether in them we have taken the right road to justice, or whether instead we found ourselves on an unhappy detour.

The three areas with which I will be concerned are human rights and the law; technicalities and the law; and women and the law.

## II. LAW AND JUSTICE: THREE EXAMPLES

### *1. Human Rights and the Law*

To put the subject in a setting which will indicate how far the law has moved from earlier days, I turn to an American case. The year is 1856, the locale where the events arose is the state of Missouri, and the decision is that of the Supreme Court of the United States. The plaintiff claimed that the defendant had assaulted him, his wife, and his two young daughters. The defendant admitted that he had laid his hands upon the plaintiff and the others, but claimed that they were his slaves and that he therefore had the right to do what he had done. The defendant further contended that the plaintiff, as a Negro slave, had no right to sue in any of the courts of the United States, and that therefore the court lacked jurisdiction to try the case. We are dealing of course with the celebrated Dred Scott case—*Dred Scott v. Sanford*.<sup>23</sup>

Hear now what Chief Justice [Robert B.] Taney had to say in giving the majority judgment of the Court (at 404):

The question before us is, whether the class of persons described ... (i.e. Negro slaves) compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.

Later Chief Justice Taney quotes parts of the Declaration of Independence, including the stirring lines: "We hold these truths to be self-evident: that all men are created equal." Well and good. But unfortunately he goes on to add that these words would not embrace the Negro race who, "were never thought of or spoken of except as property." And property the black slave was, said Chief Justice Taney, adding—and these are his words—"like an ordinary article of merchandise."

In the result Dred Scott was held to be a person without a right to sue in court, and his case was dismissed for want of jurisdiction.

What can one say about a case like that? Here is a decision rooted in bigotry, deriving from prejudice, and flowing from narrow-minded intolerance. It pays no respect whatever to the dignity of human personality.

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<sup>23</sup> *Dred Scott v Sanford* (1856), 60 USR 393; 19 Howard 393.

Nor is there anything to indicate that the court arrived at its decision with reluctance, that the result was forced on the Court by the compulsion of statutory language. Rather the result is asserted by Chief Justice Taney with conviction and, seemingly, with indifference as to whether it was just or unjust.

I do not single out the *Dred Scott* case in a spirit of chauvinism, because it was American rather than Canadian. We have had our unhappy moments too, as we shall see. And in fairness to our good neighbours I should add that in 1954, about a century after the *Dred Scott* case, came the decision of the Warren Court in *Brown v. Board of Education*, holding that segregation in education of blacks and whites, by depriving members of the black race of the equal protection of the laws, did violence to the American Constitution.<sup>24</sup> A far cry indeed from the unfortunate case of *Dred Scott*.

I turn to Canada now and to the Canadian treatment of this subject. Let us look at the decision of the Supreme Court of Canada in the case of *Christie v. The York Corporation* (1940).<sup>25</sup> Christie was a black; he was a British subject; and he was a season subscriber to hockey games held in the Forum in Montreal. In the Forum the defendant operated a beer tavern, selling beer by the glass. One evening Mr. Christie, accompanied by two friends, entered this tavern, put down 50 cents on the table, and asked the waiter for three steins of light beer. (Presumably beer was then 15 cents a glass.) The waiter refused to fill the order, stating that he was instructed not to serve coloured people. Because of this humiliating experience the plaintiff sued for damages for breach of contract and damages in tort. The case ultimately came to the Supreme Court of Canada. Here is the way Rinfret, J., speaking for the majority, dealt with the matter (at 142):

In considering this case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order.

This could hardly be clearer. A merchant is free to deal or not to deal, unless there is a specific law decreeing otherwise, and at that time there was none; or unless he adopts a rule that is contrary to good morals, and at that

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<sup>24</sup> *Brown v Board of Education* (1954), 74 SCR 686.

<sup>25</sup> *Christie v The York Corporation* (1940), SCR 139.



time discrimination against a coloured person was not regarded as violating good morals.

Lest we think that *Christie v. York* stands alone, I must tell you that there are other such misguided decisions, some earlier and some later. Thus in *Loew's Montreal Theatres v. Reynolds* (1919), the theatre owner was held entitled to deny the plaintiff, a coloured man, a seat in the orchestra section since only whites were permitted to sit there.<sup>26</sup> And in *Rogers v. Clarence Hotel* (1940), the hotel owner refused to serve the plaintiff, a black man, with a glass of beer on account of his race and colour.<sup>27</sup> The majority of the Court of Appeal of British Columbia (there was a strong dissent by O'Halloran, J.A.) held that *Christie v. York*, with its emphasis on freedom to deal or not to deal, enunciated the relevant principle and that it should be followed and applied. Again, in *King v. Barclay's Motel* (1960), a black man had been refused accommodation in the defendant's motel in Calgary.<sup>28</sup> The Court followed the *Christie v. York* decision and dismissed the plaintiff's claim. It noted that in Alberta there was no statute comparable to the *Fair Accommodation Practices Act*, 1954, c 28, of the Province of Ontario. That statute prohibited discrimination in the field of public accommodation on account of race, creed, colour, or nationality.

So there we have a number of decisions, all reflecting the spirit of *Christie v. York*, decisions which can hardly be said to represent Canada's finest hour. If the law were arrested at that hour, if it still expressed the mood and the policy of today, then assuredly it would not personify justice, and the terms law and justice would have to be described as distinctly two concepts and not one. But fortunately the law has moved forward, and in my view *Christie v. York* would never be followed today. What then brought about this change? Many answers might be given to this question. I offer two such: one, a series of very progressive decisions delivered by the Supreme Court of Canada during the 1950s; the other, the enactment by Parliament and legislatures of statutes in support of civil liberties and human rights, of which the most significant is the Canadian Bill of Rights passed in 1960.<sup>29</sup>

In the field of human rights the decade of the 1950s was a golden age for the Supreme Court of Canada. It produced a number of significant decisions concerning various aspects of individual freedom. The essence of democracy is the free communication of ideas. Free speech includes the right to advocate

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<sup>26</sup> *Loew's Montreal Theatres v Reynolds* (1919), QR 30 KB 459.

<sup>27</sup> *Rogers v Clarence Hotel* (1940), 2 WWR 545.

<sup>28</sup> *King v Barclay's Motel* (1960), 24 DLR (2d) 418.

<sup>29</sup> SC 1960, c 44.

the peaceful adoption of policies with which others may disagree. In other words, it includes freedom of speech for the dissenter. Over the years the case for permitting such freedom of speech has been articulated in impressive and convincing terms by many distinguished persons. Voltaire is surely of that company, as is John Stuart Mill, and, of course, Mr. Justice [Oliver Wendell] Holmes, who admonished us to remember that time has upset many fighting faiths, and that the best test of truth is its ability to get itself accepted in the competition of the market. In that spirit our Supreme Court dealt with several cases concerning human rights.

One of these related to what was known as the Quebec Padlock Law: this was a Quebec statute of 1937 aimed at communist activity.<sup>30</sup> It empowered the Attorney General of that province to make a closing order in respect of any building that had been used to propagate communism, that term however being nowhere defined. The amazing thing is that the statute went unchallenged for twenty years. Finally, in 1957, the Supreme Court of Canada dealt with that statute in the case of *Switzman v. Elbing* (1957) and declared it beyond the powers of Quebec to enact, and hence unconstitutional.<sup>31</sup> The judgment of Mr. Justice [Ivan C.] Rand is particularly noteworthy. He said that liberty of thought and the right to communicate it by language are no less vital to man's mind and spirit than breathing is to his physical existence. These rights are embodied in his status as a Canadian citizen and are beyond nullification by a province. The termination of the Padlock Law by judicial action was, I suggest, a great moment in Canada's onward quest for freedom.

Some of the cases before the Court arose from the activities of the sect known as Jehovah's Witnesses. As you know, they distribute literature, usually in the form of pamphlets or leaflets. Some of the literature distributed in Quebec was strongly anti-Catholic in tone. To prevent this distribution, municipal by-laws were passed requiring a prior licence or permit from the Chief of Police. The validity of such a by-law was tested in the case of *Saumur v. City of Quebec* (1953).<sup>32</sup> Again the judgment of Rand, J. is especially significant. The language of the by-law, in his view, comprehended the power of censorship. In despotisms the uncensored printed word was viewed with fear and wrath. But Canada was not a despotism. Rather it was endowed with a constitution "similar in principle to that of the United Kingdom." As such it embodied the concept of government resting ultimately on public opinion

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<sup>30</sup> *An Act to Protect the Province against Communistic Propaganda*, RSQ 1941, c 52.

<sup>31</sup> *Switzman v Elbiung*, [1957] SCR 285.

<sup>32</sup> *Saumur v City of Quebec* (1953), 2 SCR 299.

reached by discussion and the interplay of ideas. "If that discussion is placed under licence, its basic condition is destroyed: the government, as licensor becomes disjoined from the citizenry." The by-law was legislation in relation to religion and free speech and not in relation to the administration of the streets. It accordingly had to be declared invalid.

Long years ago, in 1612, to King James I, who was asserting the divine right of kings, Chief Justice [Edward] Coke said that, "The King ought not to be under any man, but the King was under God and the law." Kings and Premiers and all who sit in the seats of the mighty are indeed under the law. Whenever the despot, be he king claiming divine right or state asserting arbitrary powers, makes an attack on liberty, it is the judicial process which stands forth as the shield and the safeguard of the freedom of the individual.

Keeping pace with the progressive stand of the Supreme Court of Canada in the 1950s, and perhaps to some degree being influenced by it, our legislatures and Parliament have erected statutory safeguards for the protection of human rights. These have taken a variety of forms. Some of them were concerned with the field of public accommodation. Typically they provided that "everyone had the right to obtain accommodation or facilities of any hotel, victualling house, theatre or other place to which the public is customarily admitted, regardless of such person's race, creed, religion, colour or ethnic or national origin."<sup>33</sup> Some statutes were aimed at unfair discrimination in employment. Seeking the goal of fair employment practices they too prohibited discrimination on grounds of race, creed, colour, religion, or national origin. Our own province had enactments of these types, now combined into a single statute called the *Human Rights Act*.<sup>34</sup> Subject to certain declared exceptions, it prohibits discriminatory practices based on race, nationality, religion, colour, sex, age, marital status, or ethnic or national origin. A *Christie v. York* incident would find itself in direct conflict with the express provision of sec. 3 of the Human Rights Act.

Let me say a word about the Canadian Bill of Rights. Enacted in 1960, it took some years for it to make a significant impact upon the Canadian legal scene. At first it was regarded with a measure of scepticism. Even in the courts it failed, with occasional exceptions, to receive broad and sympathetic judicial treatment. What was needed was a pronouncement by the Supreme Court of Canada, in bold and unequivocal terms, that the Canadian Bill of Rights meant exactly what it said; that it enshrined a recognition by Parliament of

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<sup>33</sup> See Walter Surma Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell, 1966) at 53.

<sup>34</sup> *The Human Rights Act*, SM 1974, c H175, now *The Human Rights Code*, CCSM 1997, c H175.

certain human rights and fundamental freedoms, to be enjoyed by all Canadians without discrimination by reason of race, national origin, colour, religion or sex. That pronouncement came in 1970 in the *Drybones* case: *R. v. Drybones*.<sup>35</sup>

On the evening of April 8, 1967, in the Old Stope Hotel at Yellowknife in the Northwest Territories, Joseph Drybones, an Indian, was seen in the lobby, manifestly and unmistakably drunk. He was charged under a section of the *Indian Act* that made it an offence for an Indian to be drunk off a reserve.<sup>36</sup> There are no reserves in the Northwest Territories. The effect of the section therefore was that an Indian who was intoxicated even in his own home—"off a reserve"—would be guilty of an offence. But a white man who was drunk elsewhere than in a public place would not be guilty of anything. Moreover, even if drunk in a public place he would be subject, under the Liquor Ordinance of the Northwest Territories,<sup>37</sup> to less severe penalties than an Indian would be under the *Indian Act*. Did this constitute discrimination by reason of race?

The answer of the Supreme Court of Canada was a ringing affirmation of the Bill of Rights. Rejecting the argument that Drybones suffered no discrimination because he had the same rights as all other Indians, the majority of the Court declared that the section of the *Indian Act* denied to Indians "equality before the law" with their fellow Canadians. It was legislation that infringed one of the rights in the Bill of Rights; and it was accordingly declared inoperative.

In the development of law in Canada, *Drybones* is a landmark decision. I am not unaware that in the later case of *Lavell (Attorney General of Canada v. Lavell and Bedard* [1974]), the Supreme Court of Canada, in a 5 to 4 judgment, rejected the claim of an Indian woman that, under a section of the *Indian Act* (12(1)(b)), she had been denied "equality before the law ... by reason of sex."<sup>38</sup> Under that section an Indian woman who married a non-Indian man lost her status in the Indian band. But an Indian man who married a non-Indian woman did not lose his status. Was this wrongful discrimination on the basis of sex, and therefore a violation of the Bill of Rights? Our Supreme Court said no. The majority said that this case was not like *Drybones*. It was concerned only with the "internal regulation of the lives

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<sup>35</sup> *R. v. Drybones* (1970), SCR 282.

<sup>36</sup> *Indian Act*, RSC 1952, c 149, s 94 (b); RSC 1970, c I 6, s 95 (b) [repealed RSC 1985, c 32, s 17].

<sup>37</sup> RONWT 1957, c 60, s 19(1).

<sup>38</sup> *Attorney General of Canada v. Lavell and Bedard*, [1974] SCR 1349.

of Indians on Reserves.” Personally I preferred the judgment of the minority. But in the present context the point of significance is that even the majority reaffirmed the decision in *Drybones* and then sought to distinguish it. So *Drybones* still stands, pointing the way, we may hope, to the future.

## *2. Technicalities and the Law*

I move now into another area, one in which critics of the law claim to perceive a sharp divergence between law and justice. It is the area of technicalities, and I am bound to acknowledge that the record of the law is rather spotty here. But I am heartened by a clearly perceptible trend, in current times, away from technicalities and in the direction of substantial justice.

What is a technicality? It is not easy to define with precision, for it may take many forms, but if hard to define, it is at least easy to recognize when encountered. We know how it arises and how it lives. Its dominant characteristic is an exaltation of form over substance. It puts procedural rules ahead of the purpose or object which those rules are designed to attain. It emphasizes formal legalism even at the expense of the right and justice of the case.

When a case is decided on the basis of a technicality rather than on merit, the law itself suffers and is placed in disrepute. So, for example, if a claim is dismissed because counsel inadvertently forgot to establish that the intersection of Portage Avenue and Kennedy Street (where the automobile accident occurred) was in the City of Winnipeg, the defeated plaintiff will not be alone in regarding the law as a frail and inadequate instrument for the securing of justice. So too if a man accused of rape escapes conviction only because Crown counsel had omitted to prove that the victim was not the wife of the accused. Or too if a case is lost because counsel for the plaintiff forgot to establish that the adult defendant was the owner of the automobile involved in the accident.

In all these cases the Court has an essential role to fill. It is to plug the gap left by counsel's inadvertence. Does that mean that the judge is taking sides and ceasing to be impartial? By no means. The judge is not presiding over a debating contest. His task is not to decide which counsel did the better job. Rather it is to do justice in the case before him. So if the judge sees that Crown counsel in the rape case is about to complete his examination of the female involved, without having asked her if she was the wife of the accused, the judge in my view is fully justified in reminding counsel of this point. Similarly if counsel for the plaintiff in a civil action has forgotten to establish

that the intersection of Portage Avenue and Kennedy Street is in the City of Winnipeg, the trial judge in my opinion is again justified in intervening to draw the point to his attention. In that way justice will be done. In any other way justice will be defeated.

My colleague Mr. Justice [Robert DuVal] Guy has told me of a case in his office many years ago. It involved a claim against their client, the St. Boniface General Hospital. The plaintiff's lawyer launched an action in the County Court. He named as defendant "The St. Boniface General Hospital". Now, in the popular sense he was right, because that's just how the hospital was generally known. But in the legal sense he was wrong, or at least inexact, because the true name of the institution was "Les Soeurs de la Charité de l'Hôpital Générale de St. Boniface". The lawyer in the Guy office who was handling the matter was Rex McCrea. In a pixie-like fashion he filed a statement of defence reading thus: "In answer to the statement of claim a plea is entered of *nul tiel* defendant."

In other words, there is "no such defendant". That was thirty-five or forty years ago, and nothing has been heard of the action since. Mr. Justice Guy paints an imaginary picture of counsel for the plaintiff telling his client, "It's too bad but we're stuck. They've filed one of these *nul tiel* pleas, so it's all over for us." Alas, that's how the matter ended.

I venture to suggest that the present-day approach to the treatment of technicalities is more sensible and more realistic. A very good illustration of how such matters will be handled is found in a Manitoba case, *The Queen v. Little and Wolski* (1973), which went all the way to the Supreme Court of Canada.<sup>39</sup> Two men were charged with theft of two diamond rings, "the property of Westwood Jewellers Limited, situated at 3298 Portage Avenue in the City of Winnipeg." The trial judge had no trouble in concluding that the two accused had indeed stolen the diamond rings. He said, "I am satisfied that the accused Little acted as a decoy while Wolski made his way to the jewel case and removed the rings from the case, after which time both accused fled the scene." But the trial judge felt compelled to acquit the accused on the ground that, while the charge described the owner of the rings as Westwood Jewellers Limited, the evidence showed that the owner was Westwood Jewellers (without the "Limited"), or was a Mr. Nuytten carrying on business as Westwood Jewellers.

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<sup>39</sup> *The Queen v Little and Wolski* (1973), 23 CRNS 352; and *Little and Wolski v The Queen* (1975), 30 CRNS 90, (1976) SCR 20.

In fairness to the trial judge I must indicate that in theft cases ownership as alleged in the charge is one of the ingredients to be proved at the trial. The point in question has a long history. If A is charged with stealing Brown's cow, and the evidence indicates that it was Robinson's cow that he stole, can A still be convicted of having stolen Brown's cow? Put that way, and assuming that there are no other circumstances to indicate to the accused the true nature of the charge, the case for acquittal, albeit on a technicality, becomes at least understandable. But suppose that A is charged with stealing Brown's cow, and the evidence shows that it was Browne's cow (Brown with an "e" at the end), surely we then have a mere misdescription of the owner, and an acquittal in such a case would be hard to justify. When the case reached our court, my brother Matas, J.A. pointed out that under sec. 512(g) of the *Criminal Code* no charge is insufficient by reason only that it does not name or describe with precision any person, place, or thing.<sup>40</sup> The two accused had in no way been misled or prejudiced by the use of the term "Limited" in the charge. They had reasonable information to identify the transaction and to know the offence with which they were charged. In these circumstances an acquittal would be in direct contravention of sec. 512(g) of the *Criminal Code* and would negate the clear intention of Parliament.

Our court accordingly allowed the Crown's appeal and convicted both accused. And that decision was later affirmed by the Supreme Court of Canada.

Less than a year ago Dickson, J., delivering the unanimous judgment of the Supreme Court of Canada in the British Columbia case of *R. v. Harrison* (1976), expressed the contemporary reaction of the judges of that Court—and I would like to think of the overwhelming majority of all Canadian judges—to purely technical pleas.<sup>41</sup> The point there in issue was whether a notice of appeal by the Crown was sufficient in form having regard to the person who signed it. Under sec. 605 (1) of the *Criminal Code*, a Crown appeal may be brought by "The Attorney General or counsel instructed by him for the purpose..." In the *Harrison* case the notice of appeal had been signed "J.E. Spencer, Counsel for the Attorney General." Mr. Spencer's authority was derived from a letter bearing the letterhead "Attorney General, Province of British Columbia", signed by an official of that Department, Mr. N.A. McDiarmid, "Director, Criminal Law". It was argued that Mr. Spencer's instructions had to come directly from the Attorney General or the Deputy Attorney General, otherwise there was no valid appeal.

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<sup>40</sup> (1974) 24 CRNS 326.

<sup>41</sup> *R v Harrison* (1976), 66 DLR (3rd) 660.

In rejecting this submission Dickson, J. said:

The tasks of a Minister of the crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally. It is to be supposed that the Minister will select deputies and departmental officials of experience and competence, and that such appointees ... will act on behalf of the Minister .... Any other approach would but lead to administrative chaos and inefficiency.

And he added: "Technical challenges to jurisdiction based upon alleged insufficiency of signature to notices of appeal can be wasteful of time and money." The Court held that the Crown's appeal was in valid form and should be proceeded with.

I suggest that technicalities are finding more and more difficulty in winning judicial approval. Form is very properly being subordinated to substance. In civil cases the rule for judges is that a proceeding should not be defeated by any formal objection and that all necessary amendments may be made so that judgment be given according to the very right and justice of the case.<sup>42</sup> And in criminal cases the powers of the court with regard to amendments can only be exercised after considering whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.<sup>43</sup> In increasing measure the dictum that "procedure with its rules is the handmaid and not the mistress of justice" is receiving judicial recognition, approval, and application.

### 3. *Women and the Law*

The third and last of the subtopics I propose to discuss, women and the law, is an area in which much change has already occurred and in which there is intense activity directed towards further change.

It may be well to remind ourselves of just how far we have come. For under a common-law principle historically recognized in England, husband and wife were in law one person rather than two. Under the fictional notion of the unity of the spouses the wife's legal status was not one of independence; rather she spoke, acted, and functioned through her husband. That was the common-law position, though in equity the wife's separate existence in respect of her separate estate was recognized. The *Married Women's Property Act*, 1882, effectively put an end to the doctrine of the unity

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<sup>42</sup> Formerly *Queen's Bench Rule* 156, now *Court of Queen's Bench Rules*, Man Reg 553/88 s 2.01(1).

<sup>43</sup> *Criminal Code*, RSC 1985, c C-46 s 601(4)(e).



of the spouses. But disabilities of various kinds still continued for women, both married and unmarried.

Near the turn of the century there was much agitation on behalf of women in the political sphere. We recall in that connection the suffragette movement. The suffragettes, it has been said, knew that they were yearning for something and thought it was the vote. The denial to women of the right to vote was an injustice that clamoured for rectification. But rectification came all too slowly. Manitoba was the first Canadian province to provide for votes to women, and that did not come until 1916, just over sixty years ago. Getting the vote was one thing, but entitlement to hold public office was quite another. Some of us will remember the contest that took place in the late 1920s concerning the right of women to be appointed to the Senate of Canada. Was a woman a “person” within the meaning of section 24 of the BNA Act, the governing section on that matter? No, said the Supreme Court of Canada. Yes, said the Privy Council, which at that time was still the ultimate court for Canada.<sup>44</sup> There were restrictions operating in other fields as well. Was a woman, for example, entitled to hold judicial office? There are a few instances in the England of the 1700s of women having held such office, but these have been described as “exceptional”—which may mean unusual rather than illegal. In 1917 in Alberta a judgment of a woman who had recently been appointed a police magistrate for Calgary was challenged on the ground that, being a woman, she lacked the legal capacity to hold judicial office. I am glad to say that the Court of Appeal of that province, in a carefully reasoned judgment, rejected that contention.<sup>45</sup> In considering the common-law position Stuart, J. said that the court could take cognizance of the current public attitude in regard to the status of women. He concluded thus:

I therefore think that applying the general principle upon which the common law rests, namely that of reason and good sense as applied to new conditions, this court ought to declare that in this province and at this time ... there is at common law no legal disqualification for holding public office in the government of the country arising from any distinction of sex.

That is a pronouncement deserving of high marks, especially when made as long ago as 1917.

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<sup>44</sup> *Edwards et al v The Attorney General for Canada, et al*, [1929] 3 WWR 479, rev’g (1928) SCR 276.

<sup>45</sup> *R v Cyr* (1917), 3 WWR 849.

I remind you too that until fairly recently women were excluded from serving on juries. In Ontario this disability was removed in 1951 and in Manitoba a short time later.<sup>46</sup>

I cannot deal with the theme of women and the law without a few words on the case of *Murdoch v. Murdoch* (1975) and its aftermath.<sup>47</sup> And first we should be clear on what was in issue in that case and what the Supreme Court of Canada decided. That Court was not asked to decide that Mrs. Murdoch was entitled to a half-interest in her husband's ranch on the simple ground that she was his wife. Nor did the dissenting judgment of Laskin, J. (now C.J.C.) rest upon any view that marriage alone would confer such entitlement. Some of the discussion among laymen (or should I say laypersons) suggests a degree of misconception on this point.

It is not the law—certainly not yet the law—that one spouse is entitled to a half-interest in all the assets of the other spouse acquired during the marriage. Nor did Mrs. Murdoch assert such a claim. Rather her claim rested on the nature and extent of her contribution over many years to the acquisition of those assets. A wife's contribution can take more than one form. It can be financial, by direct money payments. The majority of the Supreme Court of Canada upheld the finding of the trial judge that such a financial contribution had not been established on the facts of that case. Laskin, J. felt that Mrs. Murdoch did make a financial contribution "that was more than nominal," but that was not the main ground on which he based his decision. For a wife's contribution can take the form of work and services. It was in that area that the battle was really waged. The majority of the Supreme Court affirmed the trial judge's conclusion that Mrs. Murdoch's work and services amounted to nothing more than an ordinary rancher's wife would do. Laskin, J. disagreed, describing her labours as extraordinary. Mrs. Murdoch herself had testified at the trial on what she had done—namely, "haying, raking, swathings, mowing, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, anything that was to be done. I worked outside with him, just as a man would, anything that was to be done." More than that. For five months in every year the husband was away, working for the Stock Association in the Forestry Service. In those periods Mrs. Murdoch continued to work on the ranch, but without her husband at her side. It is not difficult to see why Laskin, J. characterized Mrs. Murdoch's labours as extraordinary.

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<sup>46</sup> Gail Brent, "The Development of the Law Relating to the Participation of Canadian Women in Public Life" (1975) UTLJ 358.

<sup>47</sup> *Murdoch v Murdoch* (1975), 1 SCR 423.

A further point of controversy arose in the *Murdoch* case. Was there a common intention between husband and wife that their labours would be carried on in partnership for their joint benefit? The trial judge was unable to infer such an intention from the facts before him, and the majority of the Supreme Court agreed with him. Laskin, J. did not expressly declare that there was such a common intention but he did say that the evidence was “consistent with a pooling of effort by the spouses to establish themselves in a ranch operation.”

The *Murdoch* case had to be considered by our court in the case of *Kowalchuk v. Kowalchuk* (1975) on appeal from a judgment of Chief Justice [Archibald Stewart] Dewar in the Queen’s Bench.<sup>48</sup> In *Kowalchuk* the trial judge found that the wife had made a significant contribution to the acquisition and growth of the farm assets. That contribution resulted both from her provision of animals (starting with four cows) to the farm operation and from her personal labours on the farm, which amounted to “more than the housekeeping chores.” The total farm income was regarded by both parties “as a single fund” going into “a common purse”. Moreover until the parties separated, their understanding and intention expressed by their conduct were in terms of working together for the benefit of both. Clearly the *Kowalchuk* case was different on its facts from *Murdoch*. The trial judge so found, and, in a judgment written by my brother Hall, J.A., we agreed.

I need hardly remind you that the *Murdoch* case has brought in its wake a demand for legislative action to protect a spouse in similar situations. Some people said: “If it’s the law that marriage itself does not give a right to equality in the assets, then the law should be changed.” The matter has received the attention of various law reform commissions, including that of Canada and of our own province. I think it safe to predict that we are standing on the threshold of new legislation in this field. What its exact nature will be is something we do not yet know and concerning which a member of the judiciary should perhaps not publicly speculate.

There is an interesting and important footnote to the *Murdoch* litigation. The first proceedings had arisen on the separation of the parties. They resulted in a decision that the husband alone owned the entire ranch. More recently divorce proceedings between them took place. The court is entitled on such proceedings to make an order for maintenance in favour of the wife, and the order can be in the form of a lump sum award. The judge on the

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<sup>48</sup> *Kowalchuk v Kowalchuk* (1975) 2 WWR 735, on appeal from a judgment of Chief Justice Dewar in the Queen’s Bench (1974), 4 WWR 287.

divorce proceedings made an award of \$65,000 in favour of Mrs. Murdoch.<sup>49</sup> So that litigation, assuming there is no further appeal, has had a happier ending than at first appeared to be the case.

There is just one more matter to which I wish to refer in connection with the theme of women and the law. It concerns a woman's right to an abortion and the conditions or limits pertaining to the exercise of that right. Inevitably we confront the *Morgentaler* case, concerning which some degree of misunderstanding still exists.<sup>50</sup>

Dr. Henry Morgentaler had been charged with performing an illegal abortion. Under sec. 251 of the *Criminal Code* abortion is illegal unless done by a qualified medical practitioner in an accredited or approved hospital after obtaining an authorizing certificate from the hospital's therapeutic abortion committee stating its opinion that continuation of the pregnancy would be likely to endanger the woman's life or health. It was admitted that Dr. Morgentaler had not followed the procedure of seeking authority from any hospital committee. At his trial he relied on two defences. One was based on sec. 45 of the *Criminal Code*, which protects a person who performs a surgical operation with reasonable care and skill, the operation itself being reasonable having regard to the state of health of the patient. The other was based on the common-law defence of necessity. You will recall that the jury acquitted Dr. Morgentaler. The Crown then appealed. The Court of Appeal of Quebec reached the conclusion that neither of the two defences relied on was available—the one, because sec. 45, a general section, could not displace the requirements of sec. 251, a specific section dealing with abortion; the other, because the defence of necessity, if there be one, was not supported by any evidence in this case. The court allowed the appeal and, exercising a power given by sec. 613(4)(b)(1) of the *Criminal Code*, substituted a verdict of guilty for the jury's verdict of not guilty. And that quickly evoked a public outcry. The power was there but no recorded case of its exercise could be found. This was a first. It also became a last, because in response to the tremendous public agitation against a court convicting a person of a charge on which a jury had already acquitted him, Parliament amended the law by removing that power.

Morgentaler launched an appeal to the Supreme Court of Canada against the decision of the Quebec Court of Appeal. In due course that appeal was dismissed on a 6 to 3 division. The opening lines of the judgment of my

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<sup>49</sup> (1977), 1 WWR 16.

<sup>50</sup> *Morgentaler v The Queen* (1975) 30 CRNS 209; 20 CCC (2d) 449; 53 DLR (3d) 161.

former colleague Dickson, J., one of the majority judges, are worth quoting. He said:

It seems to me to be of importance, at the outset, to indicate what the court is called upon to decide in this appeal and, equally important, what it has not been called upon to decide. It has not been called upon to decide, or even to enter, the loud and continuous public debate on abortion which has been going on in this country between, at the two extremes: (i) those who would have abortion regarded in law as an act purely personal and private, of concern only to the woman and her physician, in which the state has no legitimate right to interfere; and (ii) those who speak in terms of moral absolutes and, for religious or other reasons, regard an induced abortion and destruction of a foetus, viable or not, as destruction of a human life and tantamount to murder.

That was what the Court was not called upon to decide. What it did have to decide was the availability of the two defences on which Dr. Morgentaler relied. The majority concluded that these defences were not available, sec. 45 not having any application to abortion, a subject specifically and fully covered in sec. 251, and the defence of necessity not having any support in the evidence. The minority of three judges, whose views were expressed in the judgment of Chief Justice Laskin, took the opposite view. They declared that both defences were available to Dr. Morgentaler and had in fact been established, that his appeal should therefore be allowed and the jury's verdict of acquittal restored. But in law it is the majority judgment which counts.

In law perhaps, but not necessarily in the court of public opinion. The aftermath of the decision of the Supreme Court of Canada revealed a deep sense of disquiet among the public, accompanied in many cases by outright expressions of dissatisfaction with the majority judgment. Dr. Morgentaler, in jail as a result of the decision, was regarded by many sections of the public as a kind of folk hero and certainly not as a criminal. The jury's acquittal of him was probably at the base of this attitude. But further prosecutions for illegal abortions were launched against him. His defence now was necessity, a defence that had not been legally foreclosed against him by the earlier decisions. Twice more he was acquitted by a jury. These acquittals may indicate one of three things. First, that the jury believed that Dr. Morgentaler could not comply with the abortion law on account of necessity. Secondly, they may indicate public dissatisfaction with the abortion law. Or thirdly, they may simply reflect the jury's refusal to brand Dr. Morgentaler's conduct as criminal. Last month [December 1976] the Attorney General of Quebec announced that there would be no more prosecutions of Dr. Morgentaler. At the same time he called upon the Minister of Justice, the Hon. Ron Basford (who had released Dr. Morgentaler from prison) to amend the provisions of the *Criminal Code* relating to abortion. Dr. Morgentaler applauded that

request, saying that he too had for a long time been urging that these provisions be amended. But one may question whether the Attorney General's desired amendment and that of Dr. Morgentaler would be heading in the same direction. In the meantime the law remains as it was.

### III. CONCLUSION

Here then are three aspects of the theme, "Law and Justice: Two Concepts or One?" In my treatment of the theme I have not hesitated to portray the errors and the limitations of the legal system and the judicial process. But I have done so in the spirit of Mr. Justice Holmes, who said that one may criticize even what one reveres. To express dissatisfaction with what exists need not connote either cynicism or despondency. Rather it may be the dissatisfaction which is purposeful and continuous because the goal is high. In quests of this kind, man's portion is the road and not the goal. Performance will often lag behind aspiration.

But the aspiration is there and it should not be forgotten or thrust aside. In the spirit of that aspiration I would give to the question posed in my theme a cautious and qualified answer—that law and justice are not two concepts, but in the main are one. To make them truly one is a task for many people—not least of all, for judges who look to the spirit and not the letter of the law, for lawyers who take pride in their profession as an instrument for civilized and orderly living, for law teachers speaking and writing objectively on the law without fear except of error, and for law students who will have the wisdom to see the profession as something more than a vehicle for attaining material wealth, but as a medium for the realization of the ideal of the free man in a free society. All these have an honourable role to play, and perhaps the future belongs to them.