THE ROLE OF ACADEMICS AND LEGAL THEORY IN JUDICIAL DECISION-MAKING

The Honourable Mr. Justice Michel Bastarache*

If you pick up any major Supreme Court judgment, you will observe that in the course of expressing their reasons, the judges commonly refer to and rely on books and articles written by academics.[1] This is not surprising given that academic writings contain information, arguments and opinions that are pertinent to the decisions that the Court must make, and that lawyers increasingly refer to such works in the written and oral arguments that they present to the Court. Books of authority are no longer limited to case law and statutes as the Court increasingly recognizes the importance of academic writing and legal theory in judicial decision-making. Moreover, a large volume of academic writing is specifically directed at judges, suggesting how they should decide cases that are about to come before them. One example of this was the abundance of articles on *Vriend* v. *Alberta*.[2]

This reliance on both legal and non-legal academic work has increased significantly since the implementation of the *Canadian Charter of Rights and Freedoms*.[3] The introduction of the *Charter* compelled the Court to take on a greater law making function than ever before. The *Charter* also made it increasingly obvious that competing policy considerations frequently underlie the Court's decisions and that the effects of a case can reach far beyond the immediate parties to the dispute. The Court has also accepted the value of academic social science studies in non-constitutional contexts, which also raise broad questions of public policy.

The work of academics and legal theory grounds analytical jurisprudence in terms of abstract, logically coherent, formal conceptual systems. It promotes stability and coherent changeability by affecting the substantive content of rights and by providing a rational basis for judicial decision-making. Both legal and non-legal scholars have made substantial contributions to all areas of law. Consider the impact of Stanley A. de Smith's work on judicial review in administrative law or the impact of Dean J.D. Falconbridge on the development of banking law in Canada. As for non-legal scholars, consider the studies leading up to the recognition of battered women's syndrome as a relevant factor in determining whether a woman accused of killing her partner was "reasonably" acting in self-defence.[4]

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1 For a statistical review of the citation of academic authority at the Supreme Court, see V. Black and N. Richter, "Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990" (1993), 16 Dalhousie L. J. 376.

2 [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

4 *R.* v. *Lavallee*, [1990] 1 S.C.R. 852.

Nevertheless, there are three major objections to the idea that judges should decide cases on the basis of a legal theory.[5] The first is that legal theory presupposes a metaphysically untenable idea of objective moral truth. The second is that legal theory is impractical in that it does not sufficiently attend to what works in real life. The third is that legal theory does not accurately describe what judges actually do when they reason through cases, which is essentially reason by analogy. In my view, these objections may be valid if judges were being guided by legal theory alone. However, judicial decision-making is guided by a search for the correct balance of all relevant factors.

Given the obvious merits of the work of academics and legal theory, I would like to explore with you whether we, as judges, are using that work effectively.

I attended a conference of the Canadian Institute for the Administration of Justice last Fall in Toronto. At this conference, Professor Roderick MacDonald, President of the new Law Commission of Canada, spoke about the importance of legal theory. He made a distinction, which I support, between two different kinds of legal theory. First, there is explicit legal theory which is generally found in jurisprudence textbooks. Here, academics are trying to explain whole fields of law with a small number of broad theories. For example, Richard Posner's *Economic Analysis of Law*[6] asserts that most private law is driven by reference to the concept of wealth maximization through markets. This use of legal theory relates to the criticisms I just related. The second type of legal theory, and the one that I want to focus on today, is what may be called implicit legal theory. It is that body of doctrinal legal knowledge that is contained in the pages of treatises and law review articles and that is the result of academic conferences where the true meaning of concepts and principles that we have long taken for granted is discussed.

When I talk about academic commentary or legal theory, I do not mean writings that are simple inventories of judicial decisions. These works may be useful in first year law courses driven by the case method of learning but they are of little use to judges. Academic commentary that is useful to judges is that which assembles and rationalizes judicial decisions in a given field of law, draws out the general principles that these decisions imply, criticizes judicial decisions and suggests different approaches to particular areas of law.

Academics take a number of different approaches to this type of theory.[7] Each of these approaches contributes in its own way to judicial decision-making. The first approach is explanatory in nature. This work attempts to describe facts, identify causes for positive phenomenon and explain how things function. The second approach is

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5 For a critique of the use of legal theory by judges see P. de Marneffe, "But Does Theory Lead to Better Legal Decisions?: Response to Donald Dworkin's in Praise of Theory" (1997) 29 Ariz. St. L.J. 427.

6 R. Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little, Brown & Company, 1992).

7 D.R. Korobkin, "The Role of Normative Theory in Bankruptcy Debates" (1996) 82 Iowa L. Rev. 75.

concerned more with critical reform. This theory is predictive in that it attempts to determine how a particular area of the law could be improved by means of achieving certain ideal purposes. It in effect creates a legal laboratory where academics can predict the consequences of rules and legal decisions under hypothetical situations and possible future conditions. The third approach, which is normative, seeks to determine what judges should ultimately value when confronted with particular legal issues.

In what way, though, do we, as judges, most effectively make use of academic writings and theoretical approaches in our development of jurisprudence? Look at any major decision from the Supreme Court and it becomes obvious that judges draw on academic writings and various legal theories when they write their reasons for decision. Often, a judge will use a series of academic writings to support his or her view in a particular case. The question this raises is whether judges simply use academic writings and legal theories to support views they already hold or whether judges draw on legal theory and academic writings when they make their initial decisions and form their preliminary opinions about the nature of a case. Take for example the work of Professor John McCamus and Professor A.H. Oosterhoff in the area of fiduciary obligations. Any judge who has heard arguments on the definition of fiduciary duty can appreciate the complexities that have developed in the case law in this area of law. Professors McCamus and Oosterhoff, in a series of writings, analyze recent decisions and conclude that courts are recognizing an ever-expanding list of categories of fiduciary relationships in the commercial context in order to provide doctrinal devices which allow them to impose constructive trust remedies and consequently achieve just results. They argue that the courts would have been better advised to preserve the integrity of basic contract and tort law and instead revise the common law rules of recovery and indemnity applicable to cases falling squarely within those two areas.

The high water mark of this form of creativity is said to be the English decision of *Chase Manhattan Bank N.A.* v. *Israel-British Bank (London) Ltd.*[8] In that case, the plaintiff bank paid more than 2 million U.S. dollars to the defendant bank in error. Before the plaintiff took steps to recover the payment, the defendant became insolvent. The plaintiff was clearly entitled to recover its moneys through a restitutionary or unjust enrichment claim. Under traditional English doctrine, however, this remedy would only operate *in personam.* The plaintiff, of course, preferred relief *in rem* and sought to have a constructive trust imposed on the moneys. The court was able to impose a constructive trust. The refusal to return the money gave rise to an unjust enrichment resulting in what Professor McCamus calls a "fictional" fiduciary obligation.

According to Professor McCamus, this marriage of constructive trust to fiduciary relationship underlies the courts' expansive definition of fiduciary. He suggests that judges' desire to achieve just results in particular cases has a distorting effect on the evolution of the fiduciary concept. Having read Professor McCamus' views on this issue, judges will now be aware that their approach to the definition of fiduciary duty relates to a desired remedy. Is this the proper use of academic writings in the development of jurisprudence? Should we, as judges, be cognizant only of the strict

[8] [1981] Ch. 105.

legal issue before us and the incremental evolution of the common law through precedent, or should we be open to new approaches and commentary by academics who monitor the law in a given area and reconcile it with broader social and legal issues?

This discussion must be widened to take into account other types of academic contributions to the development of law. To that end, I wish to explore an area of law that has been greatly impacted by the work of legal scholars and academics involved in social science research — family law. In the course of my discussion, I will examine how academic writings and social science data have both served to make sense of this complex area of jurisprudence and offered coherent suggestions for reform. By "making sense," I do not mean reconciling different interpretations of the law, nor do I mean assembling and sorting cases. Rather, I mean the act of drawing out implicit legal policy and seeking higher levels of comprehension and articulation of legal ideas. I will also examine how the doctrine of judicial notice has allowed for the recognition of academic studies and research in individual family law cases. Although the scope of the use of social science research is far from settled in the Supreme Court, the contribution of social science academia to decisions in family law cannot be discounted.

During the past thirty years, revolutionary changes have occurred with respect to the legal rights and obligations of family members.[9] There is no other area of law that has gone through so much change. Before the *Divorce Act*[10] of 1968, the primary ground for divorce was adultery. At that time, support consisted of a unilateral obligation on a husband guilty of adultery to maintain his innocent wife upon the breakdown of their marriage caused by his indiscretion. Since the *Divorce Acts* of 1968 and 1985,[11] grounds for divorce, as well as the right to spousal support, have changed significantly. Now, the right to support is no longer gender-based and a new primary ground for divorce has emerged — marriage breakdown. I have outlined this brief background to demonstrate how significantly statutory family law has changed. With these legislative changes comes the continuous evolution of judicial interpretation. This is where academics have had a profound impact. Consider that it was only in 1973 that the Supreme Court of Canada denied Irene Murdoch any interest in a ranch held in her husband's name, even though she had worked alongside her husband in the fields.[12]

There are endless examples of fundamental changes in family law. I have chosen to focus on the impact of academic writing on the approach the law takes to the variation of spousal support. The *Pelech* trilogy, in 1987, dealt with the variation of support flowing from a settlement agreement.[13] *Pelech* involved an attempt by a former spouse to obtain continued spousal support after the expiration of a limited-duration support award and the delivery of a full and final release of all claims to spousal support. In the trilogy, the Supreme Court imposed an onerous hurdle on individuals seeking to

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9 For a brief history of the changes in family law, see J.D. Payne & M.A. Payne, *Introduction to Canadian Family Law* (Toronto: Carswell, 1994).

10 *Divorce Act*, R.S.C. 1967-68, c. 24, as rep. by *Divorce Act*, R.S.C. 1985, c. 3.

11 *Divorce Act*, R.S.C. 1985, c. 3.

12 *Murdoch* v. *Murdoch*, [1975] 1 S.C.R. 423.

13 *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801 [hereinafter *Pelech*]; *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857; *Caron* v. *Caron*, [1987] 1 S.C.R. 892.

reopen support agreements — to demonstrate a radical change in circumstances flowing from an economic pattern of dependency caused by the marriage. This was the birth of the "causal connection" test.

There was immediate controversy in academic writings and judicial decisions in the wake of what some viewed as a new model of support under the *Divorce Act*. Some judges and commentators saw this new model as one requiring claimants to prove that their need arose for a legally acceptable reason which is causally connected to the marriage.[14] Others confined the decisions to support obligations in domestic contracts. The trilogy, although itself stemming from a time when the state of the law was unclear, created further confusion among trial judges and practitioners. Some courts concluded that the causal connection test should be applied to all spousal support applications — whether initial applications or applications for variance, whether there was a prior existing agreement or not, and whether the proceedings before the court were taken under the *Divorce Act* or a provincial statute. Other courts applied the trilogy much more narrowly. Another source of confusion emerged because the decisions rendered in the trilogy were decided under the *Divorce Act*, 1968, while most applications before courts after the trilogy were made under the *Divorce Act*, 1985.[15]

For the most part, academics were immediately critical of the trilogy. The seemingly endless amount of academic commentary generated by the *Pelech* trilogy contributed to the level of judicial debate about the decision and helped to shape the legal framework from which evolving legal principles could be drawn. The legal commentary and analysis of academics in this area generated explanatory, predictive and normative theory about spousal support. The commentary further served to catalogue and explain the reasoning behind a number of conflicting judicial applications of the trilogy, to analyze the consequences of new approaches to spousal support and to offer numerous principles upon which future decisions should be based.[16]

At the outset, commentator T.A. Heeney objected to the broad interpretation given to the trilogy. He wrote:

> In the trilogy, the Supreme Court of Canada has more or less stated that what is done should not be undone. Finality is the pervasive judicial objective that runs through *Pelech*, *Caron* and *Richardson*.... Rarely, however, has a case been more misunderstood than *Pelech*, and rarely have courts been so willing to extract principles out of context, and apply them to fact situations where they simply do not fit. The quest for finality has led judges to cast to stone agreements that were never intended to be permanent and inflexible, and to impose constraints of finality on ongoing maintenance relationships, where finality is impossible.[17]

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14 See J.G. McLeod in an annotation to the trilogy, *Pelech* v. *Pelech* (1987), 7 R.F.L. (3d) 225.

15 T.A. Heeney in "From *Pelech* to *Moge* and Beyond: The Test for Variation of a Consensual Spousal Support Order" (1996-97) 14 C.F.L.Q. 81, provides a review of the case law dealing with the trilogy.

16 For a good catalogue of articles written about the trilogy, see *Moge* v. *Moge*, [1992] 3 S.C.R. 813, [hereinafter *Moge*] and *G.(L.)* v. *B.(G.)*, [1995] 3 S.C.R. 370.

17 T.A. Heeney, "The Application of *Pelech* to the Variation of an Ongoing Support Order: Respecting the Intention of the Parties" (1989) 5 C.F.L.Q. 217 at 217.

Professor Payne also identified flaws in the early interpretation of the trilogy.[18] He pointed out that the proposed extension of these decisions to non-consensual situations and to provincial statutes virtually eliminated the significance of statutory criteria, whatever their form and substance, and at the same time closed the door to judicial discretion needed to accommodate the diverse range of economic variables resulting from marriage breakdown. He reminded us that the current spousal support laws are statutory and not part of the common law.

Professor Bala also sent out a caution to the courts when he said:

> ...while the promotion of finality is desirable, this should not be used as a justification for precluding the judicial overriding of unfair agreements. Rather than discouraging the parties from entering into such agreements, knowledge that the courts may intervene to set aide unfair agreements should encourage the parties to initially enter into agreements which are unfair.[19]

As a final example of academic response to the trilogy, many writers, such as Professor Rogerson, pointed out that discussion about the philosophy behind the trilogy brings the very concept of marriage and its economic consequences into question. She noted that we must realize that the debate about causal connection is really a debate about the purposes of spousal support in general, a debate which ultimately raises questions about our understanding of marriage as an institution.[20] Professor Rogerson asserted that the causal connection test is aligned with the clean break model of spousal support. Just as the clean break theory arbitrarily deems self-sufficiency to exist, the causal connection theory arbitrarily deems the causal link to have been broken, with the result that the claimant spouse is deemed responsible for his or her own support. Instead of presuming a causal connection between the spouse's inability to meet his or her needs and what went on during the marriage, the causal connection test presumes the reverse.

The work of academics who were dissatisfied with the way the trilogy had been interpreted surfaced in Madame Justice L'Heureux-Dubé's majority decision in *Moge*[21] and her concurring reasons in *G.(L.)* v. *B.(G.)*.[22] *Moge* was not directly on point with *Pelech* because it did not involve the variation of support flowing from a settlement agreement. Instead, it involved an application for termination of court-ordered support. At the outset, Madame Justice L'Heureux-Dubé reviewed the academic writings that emerged after the trilogy. She began her analysis by rejecting the notions that *Pelech* had application beyond its fact situation, and that it espoused a new model of spousal support under the *Divorce Act*. Madame Justice L'Heureux-Dubé left for another case whether the *Pelech* trilogy was good law at all under the new *Divorce Act*. It is difficult

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18 J.D. Payne, "Further Reflections on Spousal and Child Support After *Pelech*, *Caron* and *Richardson*" (1989) 20 R.G.D. 477 at 487.

19 N. Bala, "Domestic Contracts in Ontario and the Supreme Court Trilogy: 'A Deal is a Deal'" (1988) 13 Queen's L.J. 1 at 61.

20 C.J. Rogerson, "The Causal Connection Test in Spousal Support Law" (1989) 8 Can J. Fam. L. 95.

21 *Moge*, *supra* note 16.

22 *Supra* note 16.

to speculate whether academic commentaries drove the Court's initial decision in *Moge* or whether they simply provided a foundation upon which the judgment could rest. What is certain, however, is that the Court heard and responded to the calls from academic commentators that the trilogy was in danger of being misapplied and overstated by practitioners and lower court judges.

Critics of the *Pelech* trilogy in academic circles were not silenced by the decision in *Moge* because the question of whether *Pelech* remained good law under the *Divorce Act*, 1985, was left answered. The issue arose, again for the minority of the Court, at least, in *G.(L.)* v. *B.(G.)*. In that case, the parties had a corollary relief agreement which stipulated that spousal support would not be reduced unless the former wife earned wages of more than $15,000 a year. At the time the parties entered into the agreement, the wife was seeing a friend with whom she later began living in a common law relationship. The husband, seeking a declaration that the wife was self-sufficient, applied to vary the agreement and terminate spousal support.

Again, Madame Justice L'Heureux-Dubé thoroughly examined academic analysis of the trilogy, this time in the context of the *Divorce Act*, 1985. She examined the context in which the trilogy was decided and determined that the clean break model of the *Divorce Act*, 1968, no longer exists under the new Act. She concluded that *Pelech* had been superseded by the *Divorce Act*, 1985. Although four of the seven judges found that, on the facts of the case, they did not have to make a firm statement on the status of *Pelech* under the *Divorce Act*, 1985, Mr. Justice Sopinka, for this group, nevertheless seems to have provided an answer to an important point raised by academics in the trilogy debate. He agreed that the Court of Appeal erred in applying a presumption of self-sufficiency.

Some may see the contributions of academics to this area of family law more modestly than others. However, it is undoubtable that the academic debate has served to raise the level of judicial understanding and consciousness in the area of family law. Legal scholars and social scientists alike contribute to judicial understanding of, and appreciation for, this complex area of the law which affects people's everyday lives.

Social scientists have served the courts by bringing social reality to the courtroom in the family law context.[23] The extent of the use of these materials, however, continues to be the subject of judicial debate. The issue of how active the Court should be in taking judicial notice of social science materials was raised in *Moge*. The majority relied extensively on social science and theoretical materials about the relative poverty of women and children after the break-up of marriages. The scope of this reliance, however, was questioned by the Court in later decisions.

Apart from the debate about the admissibility and relative use of social science materials through judicial notice, I must say that if there is an area of the law where

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[21] For a review of the potential uses of judicial notice of social science evidence in family law, see L'Heureux-Dubé J., "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 Ottawa L. Rev. 551.

social scientists can be helpful to judges, it is family law. In this field, judges are often asked to perform an active law and policy making function, rather than passively discovering law that is dictated by precedent and incremental advances. In family law, judges are called upon to interpret provisions of statutes that profoundly affect people's daily lives. Many judges will not have had any direct experience with the issues before them — most have not been primary caregivers and do not have any experience with the social and economic costs of being a custodial parent. Social science research can serve to set the background against which the particular details and consequences of parties' relationships are established.[24] The adjudication of disputes in family law is a value laden exercise. Until recently, courts failed to recognize the worth of women's work in the home and failed to take into account the barriers that women faced when trying to re-enter the workforce after years of absence. The courts were not cognizant of the lost opportunities suffered by women who chose to raise children and further their husbands' careers. Social science research, along with gradual shifts in attitude, have served to combat popular misconceptions about the role of individuals within families and the consequences of marriage breakdown. There is certainly a need for courts to consider social science research in family law cases to, at the very least, provide a contextual background to the dispute between the parties before the court.

I have chosen but a few examples of the role of academics and legal theory in judicial decision-making. There are countless others in the past and undoubtedly will be more to come in the future. Academics are busy writing about decisions that have not even been written yet and are doing studies of issues that have not yet been addressed by the courts. The question remains as to the extent to which judges rely on academics in their initial decisions and approaches to particular cases, and the debate continues about the use of judicial notice of social science research. In the American context, there has been a significant increase in the citation of non-legal documents, but only since 1991.[25] According to Frederick Schauer and Virginia Wise,[26] the question is whether informational changes are sufficient to uproot centuries of law as a limited domain. I personally would say that the contribution of academics is invaluable to the development of legal principles and coherent judicial decisions. The nature of the law itself is being transformed. The work of academics serves to provide a contextual social background for legal disputes, helps to make judges aware of the underlying reasons for the decisions that they make and offers useful suggestions for reform. No principled approach to decision-making can ignore the contribution of academics.

I have recently come across a discussion concerning the use of academic materials in the case of *Hunter* v. *Canary Wharf Ltd.*[27] It sheds light on what other judges think.

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[24] See L'Heureux-Dubé J.'s article, *supra* note 21, in which she notes that evidence being used for background purposes is subject to a wider margin of acceptable error than evidence central to the dispute. See also K. Swinton, "What Do the Courts Want from the Social Sciences?" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 187 at 204.

[25] W.M. Manz, "The Citation Practices of the New York Court of Appeals 1850-1993" (1995), 43 Buff. L. Rev. 121.

[26] F.F. Schauer & V.J. Wise, "Legal Positivism as Legal Information" (1997) 82 Cornell L. Rev. 1080 at 1109.

[27] [1997] 2 W.L.R. 684.

In his decision, Lord Cooke of Thorndon cited academic publications as authority for the proposition that the right to sue in nuisance for interference with amenities should not be restricted to plaintiffs having proprietary interests in land. He referred to Fleming, Clerk and Lindsell, Linden, Winfield and Jolowicz, Markesinis and Deakin, as well as Salmond and Heuston and Todd (a New Zealand author). His opinion was that where the law is unsettled, the general trend of legal opinion must not be condemned. He said he agreed with the "doyen of living tort writers" because his opinion gave better effect to widespread conceptions concerning the home and family.[28] Lord Goff of Chieveley was annoyed. He said his practice was to consult academic writings, but to cite only those authors that are of assistance. In his opinion, the assertion of the desirability to extend tort law is not of assistance where there is no true analysis: "a crumb of analysis is worth a loaf of opinion."[29]

This case raised an important theoretical issue: should the tort of nuisance be viewed as an adjunct to property law or to the law of obligations? Here, interference with television reception could only be remedied if it flowed from an unreasonable use of the land and damages were proven or if it could be considered a trespass, where liability is strict. In a case comment, Professor Peter Cane considered the various contributions of academics that I have discussed earlier and concluded:

> Most academics cannot expect to be taken seriously by judges if they merely express opinions unsupported by analysis. On the other hand, careful rehearsal of arguments for and against particular rules can only take us so far: it can, in Lord Cooke's words, 'expose the alternatives' (p. 719). But having stated the pros and cons, deciding on which side the balance of arguments falls is, in the absence of an agreed and precise form of measurement, inevitably a matter of personal opinion, preference and conviction. At this level, the opinions of academics are not inherently less valuable than those of judges, despite lacking constitutional weight.[30]

In the end, judges decide. Decisions are not legal articles. I agree with Professor Cane that there is danger in quoting "unhelpful" academic materials and thereby suggesting they are more valid because they are adjuncts to the judicial process. But then again, we must not ignore academic contributions by concluding too rapidly that they are only "opinions."

In closing, I wish to thank you for this opportunity to meet with you. I am very honoured by your invitation and thankful for your attention to my presentation.

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[28] *Ibid.* at 718-19.

[29] *Ibid.* at 697.

[30] P. Cane, "What a Nuisance!" (1997) 113 L.Q. Rev. 515 at 519.