The Application and Impact of Judicial Discretion in Commercial Litigation

The Honourable Mr. Justice Robert J. SHARPE*

* Ontario Court of Justice (General Division), Toronto, Ontario.

> *Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful; but legal and regular.*[1]

> *The discretion of a Judge is the law of tyrants : It is always unknown : It is different in different men : It is casual, and depends upon constitution, temper, passion. In the best it is oftentimes caprice : In the worst it is every vice, folly, and passion, to which human nature is liable.*[2]

There is a tension between the need for legal rules that are certain and capable of producing predictable results and the desire for sufficient flexibility to ensure that just results are reached in individual cases. Lawyers, judges and legislators are engaged in a continuous search for the right balance between insisting upon observance of strict rules of general and universal application and focusing on the details of a particular case to ensure that justice is done. The variety and complexity of the human condition is such that it is a virtual certainty that the legal regime will never be at a steady point on the certainty — flexibility continuum.

In this paper, I consider the role judicial discretion has to play in this search for general rules and particular justice in common law jurisdictions. I suggest that in many respects, modern commercial law doctrine has moved decidedly towards flexibility. There appears to be a marked trend away from rigid rules in favour of more flexible principles in defining legal rights and duties in the commercial context. To what extent do these modern doctrines confer discretion on the judge charged with the responsibility of deciding a commercial case? To what extent does the discretion conferred by these doctrines confer a choice upon the judge? Do these doctrines produce a situation in which there is no right or wrong answer, but rather a range of acceptable alternatives?

My basic argument is that it is wrong to infer from the flexibility of many doctrines applicable in commercial cases that there is a judicial discretion in the sense that the decision-making function can be accurately described as choosing from a range of equally acceptable results. I suggest that judicial choice is constrained in that the judge is duty bound to find the result which best comports with identifiable legal rules and principles. In making this argument, I do not pretend to engage in philosophical speculation on the nature of law or the extent to which it is or is not indeterminate, although I readily concede that debate has an impact on my subject. I speak rather from the perspective of a trial judge, attempting to articulate the legitimate expectations of litigants who come before our courts and the standards I believe our legal regime imposes upon those charged with the responsibility of deciding. In other words, I am attempting

---

1. *R.* v. *Wilkes* (1770), 4 Burr. 2527 at 2539 Lord Mansfield.

2. *Hindson* v. *Kersey* (1765), 8 How. St. Tr. 57 Lord Camden.

to state what I believe to be the working hypothesis of the legal regime and the standard for decision making to which judges should aspire.

I. CERTAINTY AND FLEXIBILITY IN COMMERCIAL LAW

The arguments for certainty and predictability are particularly strong in commercial law. Commercial actors must be able to order their affairs and plan for the future. They need the assurance provided by a reliable legal regime that their contracts will be enforced and that in the event of dispute, their relationships will be governed by known and established rules. The efficient functioning of market economy depends upon there being a set of clear rules that govern the conduct of market actors.

Certainty and predictability, however, come with a price. Fixed rules work most of the time, but the variety and complexity of commercial life makes it seemingly impossible to devise precise rules that will produce just results in every case. Discretion is thought to arise at both ends of the certainty — flexibility spectrum. The more rules are fixed and certain, the more likely they will fail to meet the demands of justice in a particular case, and the more likely the court will be called upon to exercise discretion to either fill a gap or relieve against the rigours of strict rules. The more the rules are flexible and open-textured, the more likely it is that the result in a particular case will be uncertain and that the court will have to exercise its discretion to decide the case.

In recent years, there has been a marked trend away from strict rules and towards flexibility and importing into the law what can be described as broad moral principles of reasonableness, fair dealing and good conscience. These principles point the judge deciding a case in a certain direction, but they lack the precision and certainty of black-letter rules of law. Most of these doctrines spring from the tradition of equity. Historically, the common law was characterized by its relatively rigid rule-based approach, while equity, the "court of conscience" came along to relieve against the rigours of the common law. But it was never quite as simple as that because the common law method of developing rules in a case by case fashion has an inherent flexibility. The common law has gone through periods characterized by strict adherence to black letter doctrine and rigid application of rules, while at other times, it has emphasized the need for flexibility, growth and renewal. Equity as well has moved back and forth along the continuum. In its origins, equity was based on broad principles of morality and good conscience, but as experience was gained with the application of those principles, they tended to crystallize into rules and equity itself became rigid. By the late nineteenth and early twentieth century, both the common law and equity appear to have reached this point. The spirit of equity was thought to have been lost and both common law and equitable doctrine, particularly in the commercial law context, emphasized the need for certainty and predictability and insisted upon adherence to a body of relatively precise and strict rules.[3]

In the latter part of the twentieth century, there has been something of a resurgence of the spirit of equity. In large measure, this has resulted from judicial decisions, but legislation in the commercial law area also commonly defines rights and

3. See P.S. Atiyah, *From Principles to Pragmatism* (Oxford : Clarendon Press, 1978) at 5-7.

duties in broad terms, leaving it to the courts to work out the details in particular cases. It is beyond the scope of this paper to provide a detailed account of these doctrines, but let me mention a few.

In the law of contract, there is a greater willingness to protect weak or vulnerable parties through the doctrine of unconscionability. Professor Stephen Waddams, a leading scholar in this area, describes this shift from a more certainty-oriented approach :

> *The law of contracts, like the legal system itself, involves a balance between competing sets of values. Freedom of contract emphasizes the need for stability, certainty, and predictability. But, important as these values are, they are not absolute, and there comes a point where they "face a serious challenge". Against them must be set the value of protecting the weak, the foolish, and the thoughtless from imposition and oppression. Naturally, in one age, one set of values tends to be emphasized at the expense of the others. We have just passed through a period in which the values of certainty and predictability in contract law have been emphasized over all others, and we now seem to be entering a period in which opposing values are beginning to reassert themselves.*[4]

The Canadian law of restitution has developed at a rapid pace in the later half of this century. The leading study on the subject[5] describes how the Supreme Court of Canada, following the pattern set forth in the American Law Institute's *Restatement of the Law of Restitution* :

> *adopted the view that the law of quasi-contract and certain equitable doctrines arising, in the main, from the law of constructive trust can usefully be brought together to constitute a unified body of law which derives its structure and coherence as a field of law from the analytic framework of the unjust enrichment principle.*

The Supreme Court has elaborated the unjust enrichment principle in broad terms, calling for the exercise of considerable interpretation and judgment to arrive at a result in any particular case : an unjust enrichment occurs when there has been a benefit conferred, a corresponding deprivation on the part of the party asserting the claim and the absence of any juristic reason, such as contract or disposition of law, which entitles the other party to retain the benefit.[6]

The Court has used similarly sweeping language to describe the equitable remedy of constructive trust, describing it as a "third head of obligation, quite distinct from

---

4. S.M. Waddams, *The Law of Contracts*, 3d ed. (Toronto : Canada Law Book, 1993) at 295-296 (footnotes omitted).

5. P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora : Canada Law Book, 1990) at 13.

6. *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 [hereinafter *Pettkus* cited to S.C.R.].

contract and tort [...] an obligation of great elasticity and generality".[7] The Court has stressed the element of flexibility this remedy brings to the law :

> *The great advantage of ancient principles of equity is their flexibility : the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury*.[8]

Despite a "natural reluctance to impose upon parties in a commercial relationship who are in a relatively equal position of strength the higher standards of conduct which equity prescribes",[9] claims based upon fiduciary duties have now become a familiar aspect of commercial litigation. Once again, the test for this important source of duty is general and flexible : a fiduciary duty is said by the Supreme Court to exist where the relationship between the parties is one whose essence is discretion, influence over another party's interests and inherent vulnerability.[10]

A reputed judge, Sir Anthony Mason, retired Chief Justice of Australia, reviewed this trend and, noting that Canadian courts appeared to have been especially active in creating or expanding these doctrines, concluded that :

> *The underlying values of equity centred on good conscience will almost certainly continue to be a driving force in the shaping of the law unless the underlying values and expectations of society undergo a fairly radical alteration* [...]. *The recent decade might be regarded as a period of legal transition in which we have been moving from an era of strict law to one which gives greater emphasis to equity and natural law. As Roscoe Pound said* [...] *the endeavour to make morals and law coincide will be an important future goal*.[11]

It might be noted that this preference for broadly worded principles over narrowly framed rules is not restricted to the commercial law setting. It appears to be part of a much wider trend encompassing all areas of the law. One need only refer to the apparent abandonment of the highly technical hearsay rule with its long list of exceptions and the adoption of principles of reliability and necessity to guide courts in deciding on the admissibility of second-hand evidence.[12] Similarly, in the conflict of laws, rigid and

---

7. *Rathwell* v. *Rathwell*, [1978] 2 S.C.R. 436 at 453-454, 83 D.L.R. (3d) 289.

8. *Pettkus* v. *Becker*, *supra* note 6 at 847-848.

9. A. Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 L.Q.R. 238 at 245.

10. *Hodgkinson* v. *Simms*, (1994) 117 D.L.R. (4th) 161 (S.C.C.).

11. *Supra* note 9 at 258-259.

12. *R.* v. *K.G.B.*, [1993] 1 S.C.R. 740.

precise rules for the recognition and enforcement of judgments have been replaced by the "substantial connection" test.[13]

The expansion of doctrines based upon good faith and the protection of weaker parties is not solely attributable to judicial decision. Remedial legislation takes on a similar hue. The Ontario *Unconscionable Transactions Relief Act*[14] provides for relief where "in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable". The *Business Practices Act*[15] forbids anyone from engaging in an "unfair practice" which is defined to include "an unconscionable consumer representation made in respect of a particular transaction". Company law legislation protects minority interests through the statutory oppression remedy.[16] The *Bankruptcy and Insolvency Act*[17] confers wide discretion on judges deciding discharge applications. The generality of the language and the broad discretion conferred by the *Companies Creditors Arrangements Act*[18] has allowed judges to supervise the restructuring of major commercial entities.

Reliance on broad statements of principle rather than strict rules arises not only from the desire for flexibility and the need to ensure justice in the particular case. It is also characteristic of the first step in a fundamental change in the law. When a new doctrine emerges, it may only be possible to sketch it out in general terms. Over time, cases are decided, gaps are filled and there develops a body of doctrine.[19] The good neighbour duty of care principle in negligence law pronounced by Lord Atkin in *Donohue* v. *Stephenson*[20] provides an example of a common law rule which began as a broad statement of principle. Lord Atkin was able to identify an overarching principle that should guide judges in determining when a duty of care is owed. The implications of Lord Atkin's principle are still being worked out by the courts, but gradually the general principle takes on the more precise form of a body of rules. I would suggest that the modern principles relating to fiduciary duties, unjust enrichment and constructive trust fall into a similar category. The Supreme Court has stated general principles in deliberately broad brush fashion, boldly charting a new course for the law, and leaving the principles to be refined and more clearly defined over time as they are applied to concrete fact situations.

II. DISCRETION

13. *Morguard Investments* v. *De Savoye*, [1990] 3 S.C.R. 1077.

14. *Unconscionable Transactions Relief Act*, R.S.O. 1990, c. U.2, s. 2.

15. *Business Practices Act*, R.S.O. 1990, c. B.18, s. 2. For discussion of this and similar legislation in other provinces, see P.D. Maddaugh & J.D. McCamus, *supra* note 5 at 640-646.

16. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 241.

17. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 173.

18. *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36.

19. See D.J. Galligan, *Discretionary Powers* (Oxford : Clarendon Press, 1986) at 43.

20. *Donohue* v. *Stephenson*, [1932] A.C. 562.

A. Discretion : Choice or Judgment?

The Shorter Oxford English Dictionary definition of "discretion" includes the following :

> *The action of discerning or judging; judgement; discrimination.*
>
> *Liberty or power of deciding, or acting according to one's own judgement; uncontrolled power of disposal.*

In legal discourse, we have become accustomed to using discretion in the second sense as connoting "the power to choose between two or more courses of action each of which is thought of as permissible".[21] I suggest that this meaning of discretion is useful when considering limitations on the reviewability of decisions by higher authority, a matter discussed in greater detail below, but not apt to describe the task assigned to the decision-maker at first instance or on appeal where the grounds for review are not restricted. I further suggest that the first meaning of discretion, that of judgment, discrimination and the action of discerning is appropriate to describe the task of deciding legal questions we describe as discretionary.[22]

B. Discretion and Immunity from Review

To most lawyers, the concept of discretion indicates first and foremost that a decision-maker has the right to decide among a number of possible results, all of which are acceptable and none of which can be challenged on judicial review or appeal. This concept of discretion is particularly significant where a line has to be drawn between the role of the first instance decision maker and the role of a reviewing or appellate court.

In his classic study of discretion in administrative law, Kenneth Culp Davis defines discretion as follows : "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction".[23] One can see how such a definition is appropriate in the administrative law context. Legislatures confer powers on officials and create specialized agencies and tribunals to deal with particular matters. While courts have the inherent right to supervise the exercise of discretionary powers, it is recognized that a complex modern society could not function without the exercise of discretion by public officials.

---

21. H.M. Hart & A.M. Sacks, *The Legal Process : Basic Problems in the Making and Application of Law* (Cambridge : Tentative Edition, 1958) at 162.

22. Galligan, *supra* note 19 at 8 :

    "According to its etymological origins, the idea of discretion is judgment, in particular good judgment. In its modern legal usage, however, discretion has come to connote, perhaps unfortunately, rather autonomy in judgment and decision".

23. K.C. Davis, *Discretionary Justice : A Preliminary Inquiry* (Baton Rouge : Louisiana State University Press, 1969) at 4.

The difficult issue is to determine the extent to which that discretion ought to be controlled. Modern administrative law doctrine is characterized by judicial restraint and deference. Subject to review for jurisdictional excess and "patent unreasona-bleness",[24] those who have been give discretionary powers have the right to decide and, so far as the reviewing court is concerned, the right to be wrong.

The idea of discretion as a way to identify decisions that are immune from review is also used with respect to judicial decisions. There are many decisions made by trial judges that the court of appeal will not review because they are said to fall within the discretion of the trial judge. Most of the decisions that fall into this category are procedural in nature — decisions on pre-trial matters, many evidential rulings, and routine decisions made during the course of the trial process.

The discretion entailed by immunity from review or appeal draws a distinction between correctness and reviewability but in so doing, does not obliterate the standard of correctness as that to which the first level decision maker must aspire. It is quite appropriate for judges declining judicial review of an administrative decision to make it clear that they are not saying that the decision was correct. A judge might even say that the decision under review is wrong. This only emphasizes that simple error does not permit the court to interfere. Similar statements can be found in appellate judgments refusing to reverse trial judges on discretionary matters. My point here is that restricting the right of review or appeal to egregious errors does not alter the litigant's legitimate expectation of the first instance decision-maker. Immunity from review does not relieve the decision-maker of the obligation to be right. It simply means that right or wrong, the decision will not be reversed.

An analogy is commonly drawn to referees or umpires in sports on this point. There is no review of a called third strike, yet no doubt about the obligation of the umpire to be right in his decision. The absence of a right of review of the called third strike may be explained for reasons other than that the umpire has a choice about what is a ball, what is a strike. There is a need for an immediate and final decision so that the game can proceed. A similar concern motivates the restriction of rights of appeal on interlocutory procedural matters or rulings made during the course of trial.[25] The judicial system would become paralyzed if parties could appeal every decision along the way. A stronger, richer party could beat an opponent into submission with a never-ending series of appeals. The demands of finality and efficiency prevail and sole responsibility to decide certain issues resides with the trial judge. Another factor is that for certain decisions, the trial judge is simply better placed to make the decision and hence is given final say. An obvious example is assessing the credibility of witnesses. Plainly, the absence of an appeal from the trial judge's assessment of credibility does not mean that the trial judge is free to do as she pleases. She is still required to do her best to get it right. To say that her decision is discretionary is to say no more than that she has the final say.

---

24. *C.U.P.E.* v. *New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227.

25. In many jurisdictions, Ontario included, there is no appeal without leave from an interlocutory decision, whether discretionary or not.

C. Discretion and Flexibility in Legal Rules

In Part II of this paper, I outlined the resurgence of equitable principles in modern commercial law doctrine and the move towards the elaboration of flexible principles to define rights and duties in preference to strict rules. I suggested that this development was not peculiar to commercial law, but rather a widespread trend. What are the implications of this trend for judicial decision-making? Do flexible principles confer a discretion on the decision-maker? Does a judge who is called upon to decide whether a fiduciary duty exists or whether there has been oppression of a minority shareholder have a discretion in the sense of having the right to select any one of a range of possible outcomes?

A judge who must decide a case under such broad and general principles has a difficult task. The result is not neatly supplied by mechanical operation of a fixed rule. But in the end, is it not the method and the objective of the judge deciding a "discretionary" case precisely the same as that of the judge deciding a rule-bound case? In both instances, the judge must carefully consider and weigh the facts and delve deeply into the applicable legal rules and principles. He will do his utmost to come up with a result that can be defended as the correct, or at the very least, the best possible result. The judge cannot say to the loser, "the law provided me with no more guidance than this : among the legally acceptable outcomes, there were several. I could have decided the case either for or against you. I have chosen to decide it against you". As Professor Galligan explains :

> *Discretionary power is often characterized in terms of the authority to choose amongst alternative courses of action* [...] *on the assumption that one's choices must be reasoned, discretion consists not in the authority to choose amongst different actions, but to choose amongst different courses of action* for good reasons.[26]

The judge is expected to give a reasoned decision, justifying the result upon some identifiable standard. The judge knows that the reasons for decision will be closely scrutinized by the parties and by the legal community of which he is part with a view to assessing whether he got it right or wrong. The judge will further be aware that the public at large will take an interest in the case with a view to predicting how a similar case might be decided in the future. These private and public expectations and the standards of the legal community in which the judge functions compel the judge to do his very best to decide the case in accordance with applicable legal rules and principles. These expectations and aspirations control what might otherwise appear to be open-ended discretion.[27]

---

26. *Supra* note 19 at 7.

27. Case, *Understanding Judicial Reasoning* (Thompson Educational Publishing, 1997) especially at 45.

The moral authority of the courts and the judiciary rests upon the assumption that disputes are decided in a controlled manner. As Professor Atiyah has observed, a measure of discretion to ensure that just results are reached in each case is acceptable, but there comes a point at which discretion can deprive the courts of their authority :

> [I]*f the element of law and principle declines beyond a certain point, if the trend towards individualized justice, and dispute-settlement goes beyond a certain point, is there not a real danger that the moral authority of the judges themselves will be greatly weakened?*[28]

Dean Anthony Kronman has observed that the perception of the existence of discretion in the sense of unconstrained and undisciplined choice results in part from a narrow view of law :

> *If one thinks that the law is made up of nothing but relatively hard-edged and unambiguous rules, then the problem of judicial discretion is bound to seem both unavoidable and unresolvable*.[29]

Ronald Dworkin's exposition of the legal regime as including policies and principles as well as rules sheds considerable light on how courts decide controverted issues of law where the strict rules provide no clear answer.[30] In Dworkin's analysis, legal rules apply in an all-or-nothing fashion.

> *If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision*.[31]

There may be controversy about what the rule stipulates, whether there are exceptions, but if accurately formulated, a legal rule produces a yes or no answer. Games provide the clearest examples of rules. Baseball's three strike rule leaves no room for manoeuvre. However sorry he may feel for the batter who has taken three swings, the umpire cannot give him another chance.

In commercial law, one might take as an example of rules the regime of priorities established by personal property security legislation. That body of law has many complexities and subtleties and it may be difficult to provide a complete statement of the rules, but no one would argue against the proposition that there are rules which, once identified, provide answers, leaving little or no room for the application of judicial discretion.

---

28. *Supra* note 3 at 29.

29. A.T. Kronman, "The Problem of Judicial Discretion" (1986) 36 Journal of Legal Education at 481-482.

30. R. Dworkin, *Taking Rights Seriously* (London : Duckworth, 1977), especially at 22-28.

31. *Ibid.* at 24.

Problems occur when there are gaps in the rules. What does the judge do when the black black-letter rules provide no clear answer? Dworkin rejects the proposition that in such cases the judge has discretion to decide the case as she sees fit, and he advances the notion of legal policies and principles the judge must draw on to determine the result which comports with the legal order.

A policy is "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community".[32] One of the policies of commercial law is to foster efficiency. A principle is "a standard to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality".[33] The maxims of equity, for example the doctrines of "clean hands" and laches, are examples of principles. The "clean hands" maxim has been described by a leading equity scholar as "not peculiar to equity, but [...] *a picturesque phrase applied by equity judges to a general principle running through damage actions as well as suits for specific relief* [...] that the plaintiff's fault is often an important element in the judicial settlement of disputes".[34] A principle of this kind plainly forms part of our law and points to a resolution, but not in the categoric manner of rules. A principle is only one factor to be taken into account. It may conflict with another policy or principle on any given question and may have to be weighed by the decision-maker with a view to determining which should prevail. But it does have operative force in that it represents an identifiable value, capable of supporting rational discussion with a view to arriving at an objectively just resolution of disputes.

Again, to quote Dean Kronman :

> *By adding these policies and principles to our conception of what a legal order includes we advance a long way toward a view in which the problem of discretion no longer seems so difficult or terrifying. Principles and policies provide guidance in the interpretation of hard-edged rules in situations where different and conflicting interpretations of the rules are themselves possible, and they also fill in much of the discretionary space which is left over even after all the rules have been taken into account. So a judge who is bound to apply the law, where the law means not just rules but principles and policies too, has considerably less discretion than he might be said to have if the law he were responsible for administering consisted of rules and rules alone.*[35]

The modern commercial law doctrines such as unjust enrichment, constructive trusts and fiduciary obligation are perhaps more akin to principles than to rules. They express over-arching legal values that must be considered in resolving disputes, but they do not yield clear-cut, open and shut answers. The Supreme Court seems to be deliberately

---

32. *Ibid.* at 22.

33. *Ibid.* at 22.

34. Chafee, *Some Problems of Equity* (University of Michigan Law School, 1950) at 94.

35. *Ibid.* at 482.

avoiding a rule-based approach, preferring to chart a general course for the law to follow in the expectation that the details will be worked out over time in a case-by-case fashion.

There is an interesting parallel to be drawn between the level of generality of Dworkin's principles and what the Supreme Court of Canada has said counts as a law under the *Charter of Rights and Freedoms*. Although the legal context is very different from that of commercial law, I suggest that the thinking of the Court sheds some light on the nature of legal rules and principles that shape judicial decision-making in general. The issue arises under two sections of the Charter. The first is whether a legal rule is sufficiently precise to qualify as a "law" under section 1 which permits reasonable limits on rights that are "prescribed by law". The second is whether a standard is sufficiently precise to provide the guidance required by the guarantee of fundamental justice under section 7. The Court has consistently resisted the argument that to be a law, a legal norm or standard must provide crystal clear and immediate answers. On the other hand, the Court has insisted that the standard supplied must be intelligible and capable of providing a basis for legal debate and rational decision making.

In *Irwin Toy*,[36] a 1989 decision challenging a restraint on advertising as an infringement of freedom of expression, the majority wrote :

> *Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".*

The notion of "an intelligible standard" is echoed in the judgment of Lamer J. in the *Prostitution Reference* where he speaks of "an ascertainable standard of conduct, a standard that has been given sensible meaning by courts".[37] The theme was taken up again by Gonthier J. in *R.* v. *Nova Scotia Pharmaceutical Society*.[38] There the Court had to contend with the offence of conspiracy to unduly lessen competition under the *Competition Act* :

> *Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority* [...].
>
> *By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for discussion*

---

36. *Irwin Toy Ltd.* v. *Quebec (Attorney-General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 at 617.

37. *Reference re Sections 193 and 195.1(1)(c) of the Criminal Code (Man.)* (1990), 56 C.C.C. (3d) 65 at 91.

38. *R.* v. *Nova Scotia Pharmaceutical Society* (1992), 93 D.L.R. (4th) 36 (S.C.C.).

> *as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.*
>
> *Indeed, no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective* [...].
>
> *A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria* [...]. [I]*t fails to give sufficient indications that could fuel legal debate*.[39]

These statements indicate a judicial recognition that the problem of uncertainty of result in any given case is pervasive and inherent in any standard phrased broadly enough to provide us with guidance in more than one fact situation. The objective of law is not and cannot be complete predictability of results — that must be left to judgment in each case. At the same time however, the idea of law does require a minimum "intelligible standard", "an ascertainable standard of conduct", a norm which "give[s] rise to legal debate", or "provide[s] an adequate basis for legal debate", and "give[s] sufficient indication that could fuel legal debate".

This broad conception of law elaborated in the constitutional setting is, I would suggest, consistent with and supportive of the argument I have been attempting to make in relation to the exercise of discretion in commercial cases. The uncertainty inherent in the modern doctrines that rest on concepts of fairness, reasonableness, good faith, and the protection of vulnerable parties is not so unique as to invite a departure from reasoned decision-making. All legal rules provide a general framework and certainty is only reached in instant cases where law is actualized by a judicial decision.

I mentioned earlier that discretion is thought to arise at both ends of the certainty-flexibility continuum. I have been considering the nature of decision-making where the law consists of broad statements of principle. A similar argument can be made where the problem is rigidity of rules which appear to point to a result which does not comport with justice. Here, equity or discretion is deployed not to depart from the fundamental norms of the legal regime but rather to bring the case within those standards. As Professor Nussbaum has argued :

> *Nor, in a deep sense, do we have to choose between equity and the rule of law as understandings of what justice demands. The point of the rule of law is to bring us as close as possible to what equity would discern in a variety of cases, given the dangers*

---

39. *Ibid.* at 56-57.

> *of carelessness, bias, and arbitrariness endemic to any totally discretionary procedure. But no such rules can be precise or sensitive enough, and when they have manifestly erred, it is justice itself, not a departure from justice, to use equity's flexible standard*.[40]

It is my contention, then, that in deciding commercial law, judges do not have a choice or the right to be wrong, but rather that they are always under an obligation to decide cases in accordance with legal principle. In making this argument, I do certainly not advocate a return to a rigid rule-based approach to deciding commercial cases. I welcome the flexibility afforded by the doctrines I have outlined and the direction commercial law has taken to ensure justice in the particular case. I argue, however, that while the flexible, principle-based approach of modern commercial law allows the judge a significant degree of freedom in tailoring the result to meet the justice of the case, the judge is still required to base the decision on legal principle and that legal principle points the judge to the correct, or at least the best, result. In short, I argue that to understand discretion as it applies to the adjudication of commercial cases, we should return to the meaning of discretion as judgment, discrimination and discernment.

III. DISCRETION AND THE JUDICIAL "HUNCH"

The foregoing discussion of discretion might be thought by those who actually argue and decide commercial cases to be excessively theoretical. Many will argue that whatever the jurisprudential niceties, what really counts is the manner in which judges actually behave. It is well and good to argue for the disciplined exercise of discretion, but if, in fact, the judge pays no heed to theses arguments and decides the case as he or she likes, the theory does not correspond with reality.

In a famous article, a respected American judge, writing in the realist tradition, described how he decided cases :

> *I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch — that intuitive flash of understanding which makes the jump spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way*.[41]

Jerome Frank, another reputed American judge writing in the realist tradition extolled "judicial intuition" and the "judicial hunch" as a way of describing how decisions are made, adding that they "are not and cannot be described in terms of legal rules and

---

40. M. Nussbaum, "Equity and Mercy" (1993) 22 Philosophy and Public Affairs 83 at 96, quoted in and discussed by J. Tasioulas, "The Paradox of Equity" (1996) 55 Cambridge L. J. 456.

41. J.C. Hutcheson, "The Judgment Intuitive : The Function of 'Hunch' in Judicial Decision" (1929) 14 Cornell Law Review 274 at 278, quoted and discussed in C.M. Yablon, "Justifying the Judge's Hunch : An Essay on Discretion" (1990) 41 Hastings Law Journal 231.

principles".[42] These views, expressed almost fifty years ago, are still heard today.[43] Lawyers and judges frequently minimize the importance of legal doctrine in the way cases are actually decided. Seasoned advocates often say : "Only the facts count. Let me put the facts of the case forward in a sympathetic way from my client's perspective and then we will find some law that allows the judge to do what seems right". I hear my judicial colleagues say : "When I am asked to decide a case, don't tell me about the law. I want to know the facts and where the equities lie. I am not looking for some formal, technical, jurisprudentially correct solution. I just want something that works for these people. It is my instinct that counts. How does it hit me. What is my gut reaction?" Such views are honestly held and expressed, but in my view, they represent a very misleading description of the decision-making process.

First of all, there is a legitimate expectation on the part of counsel and the parties who come before the courts that the judge will *not* decide the case on a personal whim but in accordance with legal principles. The judge takes an oath to decide cases according to the law and is aware of the awesome responsibility that flows from the litigants' expectations and the obligation to follow the law. Second, while there may be no legal obligation to justify every decision with reasons, it is also the legitimate expectation that the judge will give a reasoned explanation of how he or she decided the case. The discipline of reasoned decision-making should not be underestimated. The expectation that the case will not only be decided on legal principles but that those principles will be exposed to all in the reasons for decision compels the judge to justify the result on some ground other than hunch, intuition, gut reaction, or vague appeal to the "equities". The reasoned justification for the decision simply will not work if it fails to correspond to some standard external to the judge's own sense of morality or right and wrong. Coherence and consistency with legal doctrine is the hallmark of a good or bad decision and the obligation to give reasons swiftly and surely exposes an uninformed hunch.

More generally, I would suggest that when lawyers and judges talk about intuition, equities, common sense and practical solutions they are, in fact, referring to something quite sophisticated. The perceptions of judges and lawyers of the equities of the case are judgments of educated legal minds. Here, an analogy might be drawn to Northrop Frye's concept of the "Educated Imagination" of literary appreciation. A literary creation is not the product of rare imagination. It is something far more subtle — the product of a mind which is imbued with the images and models of a literary tradition.[44] Now I do not pretend that every judgment of our trial courts can fairly be described as the product of an educated imagination, but neither do judgments spring out of thin air. Lawyers and judges have lived the law and are imbued with its principles and values.

---

42. J. Frank, "What the Courts Do in Fact" (1932) 26 Illinois Law Review 645 at 655.

43. In the part that follows, I am drawing freely on my Yves Pratte Lecture, given at the Faculty of Law, University of Toronto, November 6, 1996, "From Classroom to Courtroom : Two Perspectives on the Law".

44. The argument that legal discourse is constrained by the understandings of an interpretive community is discussed by R. Dworkin, *Law's Empire* (Cambridge : Harvard University Press, 1986) at 45-86; O.M. Fiss, "Objectivity and Interpretation" (1982) 34 Stanford L. R. 739; S. Fish, *Doing What Comes Naturally* (Durham : Duke University Press, 1989).

Their instincts do not come from a vacuum and their common sense is not the common sense of a layperson unschooled in the law.

Indeed, I would argue that, upon analysis, the "judicial hunch" school of jurisprudence reflects something that is quite healthy in judicial decision-making and is entirely consistent with the argument that discretionary decisions must be grounded in legal principle. The judicial hunch reflects a willingness to stand at the flexibility end of the certainty-flexibility spectrum, an unwillingness to base decisions on purely technical or formal legal rules, and an insistence that decisions cohere and accord with the underlying fundamental principles and values of the law.

CONCLUSION

Perhaps I overstate the case that judicial hunches always reflect an appeal to the highest ideals of legal principle, but the failure of judges to achieve perfection should not obscure the reality of the aspiration. Judging is a human process, and judges, whether they be trial judges or judges of the Supreme Court of Canada are people who have good days and bad days, biases and prejudices, strengths and weaknesses. Anyone who comes before our courts will know that those human traits and failings will make a difference. Sometimes a complex phenomena can be best explained in simple terms. The point I have been trying to make is neatly summed up in a provision of the Massachusetts Constitution of 1780 : "it is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit". We can do no better than the lot that humanity will admit, but we must still aspire to impartial justice, and decisions based upon reason and principle.