On Blackstone, California Divorces and the Retrospectivity of the Common and Civil Laws: *Edward* v. *Edward*

H. Patrick Glenn*

In *Edward* v. *Edward (Estate)*[1] the Saskatchewan Court of Appeal recognized a 1955 California divorce on the ground that a "real and substantial connection"[2] existed between the parties and the State of California. The connection existed in the form of the residence of both husband and wife in California at the time of the decree, and the Court reached its decision notwithstanding the absence of proof of acquisition of a California domicile by the husband. In so doing, the Court aligned itself with other provincial courts[3] in following the decision of the House of Lords in *Indyka* v. *Indyka*,[4] and in refusing to follow previous decisions of the Judicial Committee of the Privy Council[5] and the Supreme Court of Canada[6] to the effect that the domicile of the husband was the only acceptable ground of jurisdiction for a foreign court in matters of divorce. The Supreme Court in 1976 had expressly left open the question of whether a "real and substantial connection" test should be adopted and had not itself overruled previous law.[7]

Speaking for the Saskatchewan Court of Appeal, Bayda C.J.S. expressly rejected the argument that this change in the law should be of prospective effect only and unavailable to the applicant in *Edward*. He cited Blackstone ("For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not the law"),[8] acknowledged recent academic writing on the subject of prospective

*Peter M. Laing Professor of Law, McGill University.

[1](1987), 39 D.L.R. (4th) 654, [1987] 5 W.W.R. 289 [hereinafter *Edward* cited to D.L.R.].

[2]*Supra*, note 1 at 661.

[3]In Manitoba, see *Holub* v. *Holub* (1976), 71 D.L.R. (3d) 698, [1976] 5 W.W.R. 527, 26 R.F.L. 263 (C.A.); in Ontario, see *Bevington (Hewitson)* v. *Hewitson* (1974), 47 D.L.R. (3d) 510, 4 O.R. (2d) 226 (H.C.).

[4](1967) [1969] 1 A.C. 33, [1967] 3 W.L.R. 510, [1967] 2 All E.R. 689 [hereinafter *Indyka* cited to A.C.].

[5]*Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517.

[6]*Stephens* v. *Falchi*, [1938] S.C.R 354, [1938] 3 D.L.R. 590.

[7]*Powell* v. *Cockburn*, [1977] 2 S.C.R. 218, 8 N.R. 215, 68 D.L.R. (3d) 700, 22 R.F.L. 155.

[8]*Commentaries on the Laws of England*, vol. 1, 4th ed. (Oxford: Clarendon Press, 1771) at 69-70.

overruling, and declined to follow U.S. authorities on what is there widely known as "Sunbursting."[9] He described the principle of retrospectivity as "part of the declaratory theory of law"[10] and stated that "...the principle has become so elementary that most courts now readily apply it without making reference to it and perhaps without even recognizing that they are using it."[11] He concluded that "...the most cogent reason for rejecting [the technique of prospective overruling] is the necessity for courts to maintain their independent, neutral and non-legislative role.... By deciding an existing case under the old rule but warning that future cases will be decided under a new rule now being announced, a court is really usurping the function of the legislature."[12] Elaboration of common law grounds of recognition of foreign divorces thus continues to supplement the specific grounds of recognition established by federal divorce legislation, and the recognition of all past divorces as well as the recognition of future ones.[13]

The decision is a good indication of the continuing vitality of the declaratory theory of law and of the rather precarious hold which nineteenth century concepts of precedent have had in this country, formal pronouncements notwithstanding.[14] The declaratory theory of law teaches that law is sought, and not made. If a better solution is sought and found, it represents the law as it is perceived, and previous perceptions have no claim to permanence as law then "made." Bayda C.J.S. thus rejected the application, in his words, of "the law of Saskatchewan as it was perceived in 1957."[15] While the declaratory theory has been much criticized by those who prefer to make or, with increasing frequency, to unmake law, it is receiving new and unexpected support in jurisdictions which have placed great reliance on legislative sources of law,[16] and from contemporary cybernetics and com-

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[9]From the decision of Cardozo J. in the case of *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), upholding a decision of the Supreme Court of Montana refusing to make its ruling retrospective. Of prospective overruling in the U.S.A., Professor Dickerson has concluded that "[a]lthough occasionally used, it has not been widely and freely adopted." R. Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown, 1975) at 256 n. 43.

[10]*Supra*, note 1 at 661.

[11]*Ibid.*

[12]*Supra*, note 1 at 664.

[13]See the *Divorce Act, 1985*, S.C. 1986, c. 4, s. 22, expressly preserving non-statutory grounds of recognition.

[14]See further H.P. Glenn, "Persuasive Authority" (1987) 32 McGill L.J. 261 at 293-94.

[15]*Supra*, note 1 at 660. His language is similar to that of Lord Reid in *Indyka, supra*, note 4 at 69: "... it is well recognised that we ought not to alter [readily] what is presently understood to be the law... ."

[16]For France, see C. Mouly, "La doctrine, source d'unification internationale du droit" R.I.D.C. 1986. 351 at 364: "Le droit est variable et diffus. Il est donc une matière à découvrir et non pas à créer."

munications theory (as a means of obtaining decentralized, non-hierarchical and yet co-ordinated decision-making).[17] The retrospectivity implicit in the doctrine is rarely unsettling, since concepts of *res judicata*, limitations, time-limited rights of appeal, and vested rights (no recovery of money paid under mistake of law) have yielded what may be more appropriately called a principle of "beneficial retrospectivity" (in an institutional sense), the exceptions to which have their own autonomy. Judges thus *can* change contemporary perceptions of the law, but they are reminded constantly that law is rooted in the past, and that they must look to the past as well as to the future in declaring present law.

The declaratory theory of law appears increasingly of interest in federal or confederal jurisdictions. Separate juridical hierarchies operating on formal theories of *stare decisis* do not easily yield a common law, and may contribute significantly to the balkanization of what is meant to be uniform legislation. That this may occur with respect to federal legislation is evident from the concept of "intercircuit heterogeneity" in the United States, where the frequency of differing interpretations of federal law by federal circuit courts has led to calls for a national appellate jurisdiction to resolve intercircuit conflict. There has been less evidence of this in Canada, where decisional law floats more freely over borders, but regional variation in application of federal law is documented.[18] This is not in itself a bad thing, but variation, like uniformity, can be taken to extremes. In many matters, such as divorce, uniformity is further complicated by the fact that federal legislation does not purport to occupy the field but assumes a background of common or civil law.

The retrospective effect of case law has the enormous advantage in this country of being common to both the civil and common law.[19] In federal fields, agreement on the law of the present thus also represents agreement on the law of the past. The Quebec Court of Appeal has indicated that

[17]See M. Shapiro, "Toward a Theory of *Stare Decisis*" (1972) 1 J. Leg. St. 125 at 131: The concept of *stare decisis* which is designated would allow "decision-makers to cooperate — to substitute, somehow, mutual influence for command from above." Blackstone would have had no problem with this, though the idea that decisions themselves could be retrospective or prospective in application might have troubled him more. Judicial decisions were, after all, merely evidence of a common law which had to be constantly re-searched and re-sought as new problems arose.

[18]See L. Arbour, "Comparative Judicial Styles: The Development of the Law of Murder in Quebec and Ontario Courts of Appeal" (1980) 11 R.D.U.S. 197, and G.F. Murray & P.G. Erickson, "Regional Variation in Criminal Justice System Practices: Cannabis Possession in Ontario" (1983) 26 Crim. L.Q. 74.

[19]For the necessarily retrospective effect of decisional law in the civil law tradition, see J. Ghestin & G. Goubeaux, *Traité de droit civil*, vol. 1, *Introduction générale*, 2d ed. (Paris: L.G.D.J., 1982) at 370 *et seq.*, with references.

although it does not consider itself formally bound by the decision of the House of Lords in *Indyka*,[20] it is willing to consider expansion of the grounds of recognition of foreign divorces.[21] This turns out to be the same position as that of the Saskatchewan Court of Appeal, and allows both courts to adapt their common law to changing circumstances while benefiting from common experience.

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[20]*Supra*, note 4.

[21]*Claus* v. *Sonderegger* (1978), [1979] C.A. 60 (refusing recognition of a Swiss divorce obtained by a Swiss national shortly after re-acquiring Swiss nationality and while domiciled either in Italy or Quebec).