The Propriety of Decisions Based on Principles Not Raised in Court

The subject of this comment is the propriety of a court making a decision on principles of law which are not raised or argued by the parties, but which lie within the overall issues of the case itself. The New Brunswick case, *The Carleton Woollen Company, Limited* v. *The Town of Woodstock*,[1] is one of few that deal with this subject. Although the case is somewhat dated, the issue it raises remains contemporary, and for this reason *Carleton Woollen* serves as a worthwhile point of departure.

The *Carleton* case concerned the validity of a taxing by-law. After the case had been heard, Mr. Justice Barker thought of an argument not addressed by either party. At pages 141 and 142 he had this to say:

> There is, however, a point involved in the case which, though not mentioned by Counsel, I think I should mention, because if I am correct in my view, it is fatal to the plaintiff's claim. Ordinarily I should not think it within my province, or at all events necessarily a part of my duty to do more than dispose of the questions which Counsel suggest and argue. But as the Supreme Court of Canada has recently decided in *Miller* v. *Robertson* which was an appeal *per saltum* from this Court, that a decree would be reversed, and the plaintiff's bill dismissed, upon a ground not suggested in the Court below, I think it better in the present case to express my opinion, though I do so without having heard the matter argued. If I am wrong I can be set right on appeal, and if I am right the parties may be saved some expense.

The point not raised or addressed by either party, upon which Mr. Justice Barker decided the issue, was whether the by-law, which purported to give a tax exemption to companies but not individuals, could be struck down for lack of impartiality.

Although Mr. Justice Barker appears to rely upon *Miller* v. *Robertson*[2], that case involved an issue which arose in a different manner. The appellant (defendant) had been granted leave to appeal and, for the first time in the entire proceedings, argued that the New Brunswick Court of Equity had no jurisdiction over the issue in dispute. The case differs from *The Carleton Woollen* case in that the issue of jurisdiction was the main issue before the court. The issue was addressed by both parties and the case decided on that basis. The Chief Justice dissented, taking the position that the court should not consider a point of law not raised in the courts below.

In an adversary system, it is the responsibility of the parties to make certain that issues are relevant and clearly defined for the court. Rules of procedure have traditionally contained various mechanisms to ensure this process; demands for particulars and applications to strike out irrelevant or improper issues, being only two examples. Once issues are properly defined, it is the duty of the court to make a judicial determination on the basis of these issues. The introduction of new issues, which the parties may be deliberately avoiding, can create obvious problems. Unless a miscarriage of justice may result, the court

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[1](1905), 3 N.B. Eq. Rep. 138.

[2](1904), 35 S.C.R. 80.

should not intervene, otherwise there is the risk of unduly interfering with the adversary process.

There is an abundance of case law on the effect of the court entering into the adversarial arena. However, the situation is not quite so clear when a court raises principles or arguments not raised by the parties. We must, therefore, be careful to distinguish between raising entirely new issues, and the application of different principles of law to an issue already before the court. The distinction clearly flows from *The Carleton Woollen* case in which the essential issue before the court was the validity of the by-law. The court did not raise a new issue, but applied a principle of law not raised by the parties to test the validity of the by-law.

It is common for courts to follow a line of reasoning, or to refer to authorities not raised by the parties. It is not likely that by doing so a miscarriage of justice will result. However, courts must be careful not to deprive parties of the opportunity to make meaningful representations. A good example is *Medora* v. *New Brunswick Dental Society*.[3]

One of the issues in *Medora* concerned the by-laws of the Dental Society as applied to disciplinary procedures. When the case reached the New Brunswick Court of Appeal, the Court raised the argument of whether the whole of the by-laws would be invalid if only one part is found invalid. This argument had not been raised by the parties. However, because it went to the heart of the broader issue already before the court, the parties were given the opportunity to make additional submissions. This approach was akin to that in the *Miller* case where the parties had full opportunity to address the issue, even after having failed to do so in the courts below.

There is a notable absence of legal authority or precedent on the question of when a court may raise principles of law not raised by the parties. Perhaps this is to be expected, given the long history of rules of court designed to make certain that issues are clearly defined. Courts commonly raise different approaches to argument which do not raise new issues in the procedural sense. Also of relevance is the mystical and time honoured inherent jurisdiction of the court, which can be used to explain or justify many things done by the courts not otherwise specifically provided for.

In my opinion it does not make sense to lay down precise rules outlining the parameters in which a court may raise or consider legal principles or arguments not raised by the parties. Rules of court and legislation governing hearings and access to the courts already provide general controls in this regard. It would unduly fetter a court's ability to deal with issues, and impede even more the ability to conclude cases, if courts were required to allow an opportunity for parties to address or counter every argument or approach raised by the court. Allowance must be made for inexperienced counsel, oversight, or simple failure to consider all possible arguments. The overriding consideration must always be to achieve a just and reasonable result, following a full and fair hearing.

I have every confidence that courts have the ability to recognize when it is

[3](1984), 56 N.B.R. (2d) 145.

appropriate to allow parties the opportunity to further address issues. The failure of a court to do so on some material point would undoubtedly be appealed on one or more grounds, including failure to provide an opportunity to be heard.

In conclusion, it is my opinion that there is no good reason why a court should not consider principles of law not raised by the parties as long as the principles are:

1. directly relevant to the issues before the court;
2. well accepted in law and free of contention;
3. binding upon the court;
4. determinative of the issues;
5. applicable to the facts and circumstances of the case without need to be further addressed by the parties;
6. not prejudicial to any of the parties by the failure to consider them at an earlier stage;[4]
7. not creating further issues that have implications beyond what the parties may wish to have adjudicated.

If the above criteria cannot be met, then the court should call upon the parties for further submissions as in the *Medora* case.

The following passage by Lord Denning adds support for my views:

> On many occasions I have done my own researches and given an opinion on matters on which the Court has not had the benefit of the arguments of counsel or of the judgment of the Court below. I have done this because counsel vary much in their ability and I do not think that their clients should suffer by any oversight or mistake of counsel. If it is a new point or new matter which could alter the outcome of the case, then the right course is to inform counsel and put the case in the list for further hearing. But if it is just the elaboration of existing points or matters, there is no such need — although I do know of one authority where the defendants failed on every point argued on their behalf, but succeeded on a new point which was taken by the Judges themselves after the argument was concluded. It was *Shaw* v. *Great Western Rly.*[5]

It is my opinion that Mr. Justice Barker should have requested further submissions with respect to the impartiality of the taxing by-law, because the application of such a principle is not so well accepted and free of contention as to be without doubt.

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[4]In the *Miller* appeal, failure to raise issues of jurisdiction in the lower courts resulted in the appellant being deprived of costs in the Supreme Court of Canada.

[5]A.T. Denning, *The Discipline of Law*, (London: Butterworths, 1979), p. 289.

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