

# To Know Ourselves: Exploring the Secret Life of Canadian Legal Scholarship

Harry W. Arthurs

*Osgoode Hall Law School of York University, harthurs@osgoode.yorku.ca*

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>  
Special Issue Article

---

## Citation Information

Arthurs, Harry W.. "To Know Ourselves: Exploring the Secret Life of Canadian Legal Scholarship." *Osgoode Hall Law Journal* 23.3 (1985) : 403-410.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol23/iss3/2>

This Special Issue Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

# TO KNOW OURSELVES: EXPLORING THE SECRET LIFE OF CANADIAN LEGAL SCHOLARSHIP<sup>1</sup>

BY H.W. ARTHURS\*

In everyone's life (and in some lives more than others) there comes a moment of self-assessment. In that moment, we embark upon an occasionally satisfying, often disturbing, process of matching our aspirations against our achievements. If we can muster sufficient candour and clarity of vision, we can sense how far aspiration has outrun achievement. In order to measure ourselves, however, we must first become explicit about what we really deep-down hoped to accomplish, how we came to set ourselves particular goals, and why it is that we failed to reach them. Armed with this self-knowledge, we can opt for a fantasy of what we yet may become or for frank acceptance of what we already are, redouble our efforts or reduce our expectations, surge into our best work or subside into comfortable competence.

As with each of us, so with our common enterprise of legal scholarship: for the Canadian legal academic community, this is a moment of self-assessment. These Symposium issues of the Osgoode Hall Law Journal, in their own right an important attempt at self-assessment, were prompted by the Report to the Social Sciences and Humanities Research Council of Canada of its Consultative Group on Research and Education in Law, another such attempt. That Report, entitled *Law and Learning*,<sup>2</sup> offered an extensive indictment. Canadian legal scholarship, it said, is too monolithically committed to traditional analytical methods, too preoccupied with an agenda of issues defined by professional priorities, too deeply immersed in formal legal documentation, and too firmly implicated in the value structures and mind-set of the practising bar and government law reform activities. This was not a new bill of particulars.

---

© Copyright, 1985, H.W. Arthurs.

\* Professor of Law, Osgoode Hall Law School, and President, York University.

<sup>1</sup> I have adopted this title by way of homage to the seminal Symons Report of the same name (Report of the Commission on Canadian Studies, *To Know Ourselves* (Chair: T.H.B. Symons) (1975)). The Symons Report was one of the important influences upon *Law and Learning* (Consultative Group on Research and Education in Law, (1983)) and upon me as Chair of the Consultative Group.

<sup>2</sup> Consultative Group on Research and Education in Law, *ibid.*

Somewhat similar criticisms have been current at least since the 1950s,<sup>3</sup> and have informed law review articles, faculty curriculum reports, and common room conversation for the past thirty or forty years. What distinguished *Law and Learning*, however, was the attempt to document empirically what had previously been an impressionistic assessment, and to offer a factually-grounded explanation of the phenomenon.

In a study undertaken by Alice Janisch for the Consultative Group,<sup>4</sup> considerable evidence was indeed generated to support the indictment. Analysis of both the most recent publications, and publications sampled at periodic intervals over the past twenty years, appeared to show that even in what many believed (and wished) to be a period of radical advance in legal scholarship, relatively little had changed. To be sure, the methodology adopted in the Janisch study was not unimpeachable. In defiance of the Consultative Group's own strictures (but constrained by limited time and money), the study only included books in law library collections and articles in legal periodicals. It thus understandably failed to take account of some important work of scholars who published in other types of journals, and of those whose work was thought to be more suitably lodged in other types of libraries. Moreover, speculation concerning the influences that shaped legal scholarship was based upon another study of its principal producers, law professors.<sup>5</sup> The failure of the Consultative Group (again because of the constraints mentioned) to conduct comparative studies of either practising lawyers or academics in other disciplines makes its conclusions as to causes and effects somewhat vulnerable.

The present Symposium extends the process of self-assessment in several senses. It offers qualitative — rather than merely quantitative — judgments about research and writing in particular fields of law; it focusses especially upon the productive five-year period following that examined in the Janisch study; and to some extent it encompasses writing about law that would not have been included in that study.

It would not be surprising, therefore, to find that those who have examined Canadian legal scholarship in the context of the present Symposium have a rather different view of its condition and prospects. But, as a matter of fact, the views of most contributors to this Symposium do not differ greatly from those of the Consultative Group. Even some who find *Law and Learning's* indictment "not proven" hesitate to make

---

<sup>3</sup> See, e.g., M. Cohen, "The Condition of Legal Education in Canada" (1950) 28 Can. Bar Rev. 267 at 287; Committee on Legal Research, "Report" (Chair: F.R. Scott) (1956) 34 Can. Bar Rev. 999.

<sup>4</sup> A. Janisch, *Profile of Published Legal Research* (1982).

<sup>5</sup> J. McKennirey, *Canadian Law Professors* (1982).

an unequivocal finding of "not guilty."<sup>6</sup> Notwithstanding this similarity of views, there is some evidence that suggests that our collective achievements — especially our recent achievements — may have been somewhat understated. More importantly, in the Symposium contributions — and because of them — there are signs and portents of a new beginning for Canadian legal scholarship that has as its most important elements the willingness to seek both self-knowledge and the existence of vehicles expressly designed for that purpose. Will and way are both essential, of course, if achievements are to move closer to aspirations. Let me explain why I detect the presence of both in this Symposium, and in other contemporaneous developments.

Until now, it has been possible to pick up almost any law review article (or, although they are still *rara avis*, most scholarly books on law) and to read it from beginning to end without ever once sensing that the author had made a conscious and articulate decision to pursue one theoretical or methodological approach to the subject rather than another.<sup>7</sup> This sense of inevitability, this apparent acquiescence in our scholarly fate, is the result of a failure of imagination about ourselves and our own potential. This failure manifests itself, as well, in the notorious reluctance of legal scholars to engage in controversy involving direct disagreement with other scholars or, except in rather respectful tones, even with the judges or legislators whose handiwork we so obsessively discuss. But if we reflect neither upon ourselves nor upon others, how can we — why should we — develop, test, and refine explanatory hypotheses or the deep theoretical assumptions from which such hypotheses proceed?

Fortunately, as the Symposium papers themselves show, this incurious and uncritical attitude may now be dissipating. Moreover, the papers also give evidence that we are now becoming aware of the unexploited capacity within Canadian legal scholarship for very explicit articulation

---

<sup>6</sup> M. Gold, "Constitutional Scholarship in Canada" (1985) 23 Osgoode Hall L.J. 495.

<sup>7</sup> A recent review of two books by Profs. Waddams and Sharpe concludes by inviting the authors of *Law and Learning* to "issue and publish clarifying statements" to the effect that they had no intention to "denigrate[]" doctrinal and theoretical work" of the sort typified by the work of Profs. Waddams and Sharpe. See T.A. Cromwell, "In the Matter of an Arbitration Between the Union of Doctrinal and Theoretical Legal Scholars and the Consultative Group on Research and Education in Law" (1984) 22 Osgoode Hall L.J. 761 at 771. As the Consultative Group and its chair are *functus officio*, the moment for official "clarifying statements" has passed. However, I am pleased to state for the record that there never was in the mind of at least one of the authors any such intention: we believed, as the reviewer suggests, that "all forms of legal scholarship have been undervalued and deserve encouragement" (*ibid.* at 770), while stressing the particular dearth of what we called 'fundamental' legal research and the consequent impoverishment of all legal scholarship. For an excellent analysis of the standards by which to evaluate doctrinal and theoretical writing in its own terms, see N. Brooks, "New Directions in Canadian Tax Law Scholarship" (1985) 23 Osgoode Hall L.J. 441 at 446-47.

of theories of law, for rigorous application of those theories to one's own work and to the work of others, and for spirited controversy fueled by theory and using theory as an instrument of conflict.

Nor does this revelation depend solely upon the evidence of this volume of the Osgoode Hall Law Journal. A rather similar conclusion might be drawn from perusal of recent issues of other leading legal periodicals, of publishers' lists, and even of some of the studies prepared for the Macdonald Commission.<sup>8</sup> There are still more signs and portents: the establishment of a Canadian Law and Society Association and its learned journal; the funding of a major, multifaceted interdisciplinary legal research initiative at the University of Toronto, of an important law and computers project at the University of British Columbia, and of research projects of lesser scope but similar ambition elsewhere; the initiation by the Canadian Institute of Advanced Research of a major and imaginative programme of legal research; and other evidence. Many of these developments are very recent, and some are as yet mere statements of future intention. It is too early to take their full measure. But the essays in this Symposium are available and deserve close attention: they take as primary data recent Canadian legal scholarship, display its pertinent characteristics, deal with these critically, and project some overall impression of the state of the art.

Most of the essayists attempt a taxonomic approach to legal scholarship, borrowing from *Law and Learning* the classificatory labels of 'conventional', 'theoretical', 'law reform', and 'fundamental' research. While this may seem rather unambitious, the taxonomic exercise does have considerable potential significance in itself. Typification can obscure subtle differences and generate unintended controversy, but it may also constitute the first step on the road to clarification. For example, when we pursue more closely the question of what we mean by 'conventional' legal research, or why it is that 'fundamental' research differs from legal 'theory' which is imbricated in doctrinal analysis, we are asking questions that can lead us backwards into a series of intellectual problems almost infinite in their challenges and possibilities.

Some of the essays, however, demonstrate greater theoretical virtuosity. For example, Dean Macdonald's account of civil law scholarship in Quebec is obviously the first instalment of a major intellectual history of the subject.<sup>9</sup> Professor Gold's integrative accounts of current constitutional scholarship, wherever and by whomsoever undertaken, properly

---

<sup>8</sup> Royal Commission on the Economic Union and Developing Prospects for Canada, *Challenges and Choices* (Chair: D. Macdonald) (1984).

<sup>9</sup> R.A. Macdonald, "Understanding Civil-Law Scholarship in Quebec" (1985) 23 Osgoode Hall L. J. 573.

remind us of the arbitrariness of the disciplinary divisions adopted in the Janisch study, and presumably of other typifications as well.<sup>10</sup> The unlikely purlieu of tax law provides the setting for a far-ranging, integrative, and critical essay by Professor Brooks.<sup>11</sup> And contributions by Professors Boyle, Mossman, Lahey, and Salter, from the perspective of feminist legal theory, provide a critical counterpoint to conventional interpretations of the role and function, respectively, of criminal,<sup>12</sup> property,<sup>13</sup> and corporation law.<sup>14</sup>

Mention of the feminist contributions reminds us that there is more involved in these essays than a bloodless attempt to define Canadian legal scholarship in terms of its theoretical rigour or lack thereof. The essays also proceed from ideological premises. Professors Mossman, Boyle, Lahey, and Salter all argue (albeit with varying degrees of explicitness) that law is ideology, used to justify or conceal the advancement of some interests to the prejudice of others. The 'decoding' of law, the exposure of its assumptions, and the demonstration of how these contribute to its effects, is not, of course, a feminist project alone. This approach is brilliantly sketched by Professor Brooks in a mini-essay on "Economic Justice and the Role of Values in Tax Scholarship." However, it is unfortunate that the Symposium does not include a fully developed theoretical critique of Canadian legal scholarship from the perspective of the Critical Legal Studies movement,<sup>15</sup> and indeed that its ideological antithesis, the law and economics movement, is but glimpsed through a glass and darkly.<sup>16</sup>

---

<sup>10</sup> *Supra*, note 6.

<sup>11</sup> N. Brooks, *supra*, note 7.

<sup>12</sup> C. Boyle, "Criminal Law and Procedure: Who Needs Tenure?" (1985) 23 Osgoode Hall L.J. 427.

<sup>13</sup> M.J. Mossman, "Toward 'New Property' and 'New Scholarship': An Assessment of Canadian Property Scholarship" (1985) 23 Osgoode Hall L.J. 633.

<sup>14</sup> K.A. Lahey & S.W. Salter, "Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism" (1985) 23 Osgoode Hall L.J. 543.

<sup>15</sup> Prof. Gold, *supra*, note 6, at footnote 46, makes reference to one of the few examples of the Critical Legal Studies perspectives in Canadian public law scholarship; Prof. Lahey, " . . . Until Women Themselves Have Told All They Have To Tell . . ." (1985) 23 Osgoode Hall L.J. 519, in developing the notion of a feminist jurisprudence, refers extensively — and with qualified praise — to the American Critical Legal Studies literature; and as Prof. Brooks demonstrates in his own article, *supra*, note 7, and through the pages of *Canadian Taxation*, of which he is the founding editor, he too is well acquainted with this legal-political perspective. The absence of an organized Canadian Critical Legal Studies movement (when such movements exist in Europe, the United Kingdom, Australia, and the United States) in itself raises interesting questions about legal scholarship in this country.

<sup>16</sup> See K.A. Lahey and S.W. Salter, *supra*, note 14, at footnotes 66-70 and accompanying text.

On the other hand, this search for the ideological significance of law does not itself escape criticism. Professor Parker remarks, in a Whiggish contribution characterised, however, by modest humanism: "The legal scholar will not make great intellectual breakthroughs by having epochal thoughts about political philosophy."<sup>17</sup> This puts the issue squarely. How or whether Canadian public law scholars are going to make "great intellectual breakthroughs" without thinking "epochally" or otherwise about political philosophy is by no means clear. Nor is it clear that we can afford to eschew "breakthroughs" in this Charter-inspired second adolescence of our constitutional development. Such thinking was hardly in evidence during the protracted debates over the entrenchment of the Charter. To the limited extent that Canadian legal academics contributed to the entrenchment debates, they spoke primarily to technical issues — the wording of the protections to be gained; the formula for striking a balance between the claims of the state and those of its constituent groups and individuals; and the way in which the courts handled the litigation that the protagonists launched for tactical gains. Even Professor Gold, generally temperate in his critique of our constitutional law scholarship, hesitates to identify any major theoretically-grounded contributions to the entrenchment debate, and qualifies his praise for several such contributions post-entrenchment with the observation that much of the recent legal writing is highly expository and somewhat pedestrian in ambition and execution.<sup>18</sup>

Whether the course of Canada's constitutional history hinged solely upon the philosophical taciturnity of its legal academics is doubtful. But we can at least say that public debate over a radical change in our politico-legal culture was impoverished by the absence of "epochal" contributions from those who might have been thought most likely to inform and stimulate it — our law professors. As we move towards further and possibly more important changes — such as the legislative dismantling of long-standing regulatory policies and institutions and the negotiation of a new trading relationship with the United States — we can only hope that academic lawyers will contribute more than technical commentary, *ex post facto* analysis, and uncontroversial narrative.

How can we explain the limited participation of our legal scholars in events that may well change the fundamental nature of our public institutions, public policies, and public law?

---

<sup>17</sup> G. Parker, "Legal Scholarship and Legal Education" (1985) 23 Osgoode Hall L.J. 653.

<sup>18</sup> *Supra*, note 6 at 509. Perhaps Prof. Parker would applaud this body of work for the very reason that Prof. Gold disparages it.

*Law and Learning* offered several hypotheses that warrant only the merest mention in this context: the pervasive professional preoccupations of our law faculties; the limited exposure of our academics-in-training to scholarly traditions and scholarly activity; our Canadian dependency upon foreign graduate schools and legal theorists; and the diseconomies of small scale in a scholarly community spread across two languages and legal cultures, ten jurisdictions, and 3,000 miles. Elements of this analysis reappear in several of the Symposium essays.<sup>19</sup> But if the analysis is sound, how can we explain the formidable achievement of the Symposium itself, and the other recent important developments referred to earlier?

Surely the lesson of the Symposium is that concerted and focussed effort to elicit reflective and self-critical scholarship is more likely to bear fruit than individual and uncoordinated effort. The same can be said of the research programmes and organizational and publishing activities that form part of the recent encouraging developments that escaped detection by the *Law and Learning* study (or that have transpired since). If the editors of the Osgoode Hall Law Journal had not taken the initiative in convening a Symposium on Canadian legal scholarship, and in publishing a number of the contributions to it, how many of these papers would have seen the light of day? If the new Canadian Law and Society Association and its journal had not been created, what opportunities and incentives would exist for aspiring socio-legal scholars to pursue their chosen intellectual priorities? And if integrated and interactive research programmes were not sponsored by universities and other agencies, would individual scholars somehow still find the means to attempt research into large and open-ended themes, and above all to pursue serious theoretical questions of interest to fellow specialists?

In short, if *Law and Learning* indeed failed to describe developments in Canadian legal scholarship with complete accuracy or prescience, its

---

<sup>19</sup> Eg, J.E. Clayton and D.M. McRae, "International Legal Scholarship in Canada" (1985) 23 Osgoode Hall L.J. 477 at 486, observe that "[f]ew, if any, Canadian academics have been able to devote their careers to international law . . . [and] . . . [i]ncentives for research in international law are limited." J. McLaren, "The Theoretical and Policy Challenges In Canadian Compensation Law" (1985) 23 Osgoode Hall L.J. 609 at 613, attributes the limited achievement of our torts scholars (who, unlike international law scholars, are relatively numerous) in part to "the relative immaturity of academic legal education and scholarship in Canada." M.J. Mossman, *supra*, note 13, at 635, suggests that the multiplicity of jurisdictions and the variety of juridical sources which must be considered in any analysis of Canadian property law "may provide at least a partial explanation for the absence of property scholarship that advances beyond explication . . ." G. Parker, *supra*, note 17, at 662, argues that ". . . the whole question of a 'scholarly' approach to the law is dependent on the need to protect Canadian legal culture," and "find[s] it very sad that young scholars in Canada are so insensitive to the local cultural scene that they are prepared to embrace any ideas that are spawned in Cambridge, Mass. without giving much thought to their application to the Canadian situation."

prescriptions would nonetheless seem to be valid. *Law and Learning* placed great stress upon the need to extricate the academic enterprise from the all-encompassing professional milieu in which it usually struggles to survive. As a quintessential academic enterprise, the project of typifying, evaluating, and theorizing about legal scholarship can only be carried on with seriousness and intensity when it is recognized as having the need for its own context, its own rhythm, its own standards, and its own readership. That is why so little work of this type has appeared previously. And that is why *Law and Learning* proposes that we establish new structures to stimulate and sustain it on an ongoing basis.

Context is not all; structure is not all; distance from professional values and activities is not all. But, as *Law and Learning* suggests, without context, without structure, without distance we cannot release the latent capabilities and energies which may — just may — invigorate Canadian legal scholarship in its next stimulating phase.