THE CANADIAN FOUNDATION FOR LEGAL RESEARCH

WALTER OWEN BOOK PRIZE

Sharpe, Robert J., *Good Judgment: Making Judicial Decisions*

(Toronto: University of Toronto Press, 2018),
i-viii; 342 pp.

A candidate for a 2019 Walter Owen Book Prize
reviewed by David C. Day, Q.C. of Walter Owen Book Prize Jury

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Introduction

[1] In 1918 a Cornell University professor of English, William Strunk Jr., completed, and self-published, *the Elements of Style*; a concise primer of rules and prescriptions informing proper English grammar. His enterprise was, eventually, memorialised commercially in numerous editions. It earned respect as an opus of English language usage and style; attracting more than 10-million purchasers to date.

[2] Precisely a century later an Ontario Court of Appeal Justice—formerly a Barrister and University of Toronto professor and Dean of Law—Robert J. Sharpe completed, and arranged to be published, *Good Judgment: Making Judicial Decisions.* The book deserves regard as pre-eminent among English language writing on the subject of its title. Like Strunk Jr.'s guide in the athenaeum of language expression, Justice Sharpe's book—in the cathedral of law literature—is worthy of the imprimatur: 'a classic'.

[3] To impartially assess this candidate—one of five candidates (shortlisted from 35 entries)—for a 2019 Walter Owen Book Prize, the reviewer first needed overcome jagged edges of envy. Fuelling his envy was recognition that Justice Sharpe, as law student, law clerk (a Chief Justice of Canada Executive Legal Officer), law practitioner, law teacher and Dean, law lord—not to mention, law and legal theme books' author (a Fellow of the Royal Society of Canada)—[pp. 4-12] has forged durable professional footprints difficult to duplicate. Yet, he has not (quite) reached the calendar date (in 2020) for his compulsory exit from the Bench that would end a 25-year judicial career. (In contrast, the reviewer's 51 continuous years of law practice, to date, seem pedestrian.)

Walter Owen Book Prize

[4] The Book Prize (awarded annually for first ($15,000.00), and at least in 2019, for second ($10,000.00) and third ($5,000.00) places) commemorates the career of Walter Stewart Owen, O.C., Q.C. (1904-1981), son of a three-term Vancouver mayor. Admitted to the British Columbia Bar in 1928, he served as Canada's then-youngest prosecutor until 1933 when he established the still-dynamic Vancouver law firm, Owen Bird. He privately practised law for 40 years (concurrently, from 1956, with ownership of a New Westminster radio station and, from 1958 to 1959, with service as Canadian Bar Association president). From 1973 to 1978 he was British Columbia's 22nd Lieutenant Governor.

[5] The annual Prize—awarded, in alternate years, to English language and French language books—is funded by The Canadian Foundation For Legal Research, of which Owen was first president in 1959.

[6] The Prize recipients are chosen by a six-member jury, whose foreperson is John N. Davis. A former lawyer (Cayuga, Ontario), the indefatigable Mr. Davis was, from 2000 to 2005, Law Librarian of Osgoode Hall (York University) Law School, where he has also taught Intensive Legal Research. His publications embrace legal research (co-author of a handbook: 5th edition, 2003), and the history of digital storage, retrieval and transmission of case law reports in Canada. Joining him on the jury are: Kenneth Mackenzie (formerly a Justice of British Columbia Court of Appeal), Vancouver; Arthur Close, Q.C., Vancouver; Timothy C. Matthews, Q.C., Halifax; John-Paul E. Boyd, Calgary, and the reviewer, St. John's.

Candidate

[7] *Good Judgment: Making Judicial Decisions* furnishes insightful comprehension of the cerebrally- and emotively-arduous duties of making and authoring judicial decisions. As Justice Sharpe writes, he is [p. 13],

> confronted with the mess and confusion of the human condition. I must do my best to make sense of it all, decide the case, and then get on with the next one.

[8] No less formidable, one surmises, was Justice Sharpe's self-engagement to write this book. Since 2012, Justice Sharpe dwelled on its conception; then researched, reflected (on personal law

practice and Bench experience), structured, drafted, endlessly re-wrote, and edited what is a singular literary achievement.

[9] Was he—driven to create a polished text—the solitary, pre-occupied figure, hunched over a computer keyboard during countless Toronto nocturns, in a sole alight window of his daytime work environment, Osgoode Hall? (A copy of a rendering of that structure's resplendent exterior, painted by former Ontario Chief Justice Roy McMurtry, is embossed on the book's cover.)

[10] In the Introduction to his book [p. 3], Justice Sharpe proposes,

> … to explore the role of the judge and the art of judging. What exactly do judges do? What is properly within their role, and what falls outside? How do judges approach their decision-making task? I can only speak for myself, but I will speak as frankly as I can. I will do my best to provide insight into the mind of one working judge. I hope that my account will be of interest and accessible not only to judges, lawyers, and law students, but also to non-specialist readers who are interested in the legal process.

[11] The Preface [p. vii] promises that his book

> … explores the nature and extent of judicial choice in the common law legal tradition and the structural features of that tradition that control and constrain that element of choice.

[12] Much more expansively, in the Conclusion [pp. 270-274], does he articulate the objects of the mandate he set for himself; especially in his ultimate sentence [p. 274]:

> My aim … has been to open a window on judicial decision-making and to encourage a healthy conversation between judges, lawyers, and the public at large about the nature of the judicial role.

[See, also: pp. 67-68.]

[13] Nonetheless, Justice Sharpe understates the embrace of the book. Or, in fulfilling the book's stated objectives, he collaterally bequeaths considerably more than the experience of one judge's judgment-making journey.

[14] Skeletally, the book's Contents—12 chapters [précised at pp. 15-17] together with a Conclusion and Glossary—reflect the ambitious reach of his work product:

1 Introduction

2 A Judge's Work

3 Is the Law Uncertain?

4 Do Judges Make Law?

5 Rules, Principles and Policies

6 Disciplined Judicial Decision-Making

7 Working with Precedent

8 Authority: What Counts?

9 Judicial Decision-Making: A Case Study

10 Standard of Review and Discretion

11 Role of the Judge in a Constitutional Democracy

12 A Judicial State of Mind

Conclusion

Glossary

[15] A supplementary table of contents, or a content table introducing each chapter—that details the chapters' sub-headings—would have increased accessibility to, consequently utility of, the book (notwithstanding the comprehensive index). The reason? The book harbours promise to serve—if not already serving—as a pragmatic, dependable tool, daily, for countless consumers. They include law apprentices, advocates and academics besides, of course, judicial and quasi-judicial adjudicators, and audiences of law's applications (e.g., media, commentators, and the public).

[16] For example, Chapter 2—A Judge's Work [pp. 18-52]—comprises these constituents, expressly-identified in the text's sub-headings:

The Appointment Process [p. 18]

Supreme Court of Canada Appointments [p. 21]

Improving the Appointments Process [p. 23]

Diversity [p. 25]

Trial Judge [p. 27]

Presiding in Court [p. 27]

Making Prompt Decisions [p. 29]

Motions and Applications [p. 30]

Divisional Court [Ontario] [p. 31]

Criminal Trials and Sentencing [p. 32]

Settlement Conferences and Case-Management Conferences [p. 32]

Private Alternate Dispute Resolution [p. 35]

The Generalist Judge [p. 36]

Court of Appeal [p. 36]

A Generalist Court [p. 39]

Law Clerks and Legal Officers [p. 40]

Pre-hearing Preparation [p. 41]

Oral Argument [p. 42]

Deciding the Appeal [p. 44]

Dissenting and Concurring Reasons [p. 48]

Book Prize Criteria

[17] To merit a 2019 English language Walter Owen Book Prize, a candidate must (i) be an entirely new work (or a previous title's complete revision); (ii) contributing to Canadian legal literature; (iii) thereby enhancing the quality of legal research in Canada; (iv) substantial in nature; (v) containing excellent English language writing; (vi) published in 2017 or 2018; (vii) about a topic of current interest in law practice; (viii) which is, or is likely to be, highly valued by both law practitioners and academics.

[18] Manifesting, in any book, all the paints on this criteria palette may appear unattainable. The Book Prize is, however, intended to recognize Canadian legal scholarship of exceptional calibre. Prize standards are demanding.

[19] To deserve a Prize, therefore, a nominated candidate must meet its criteria more faithfully than other short-listed nominees.

Application Of Book Prize Criteria

[a] Entirely New Work Or Previous Title's Complete Revision

[20] The candidate is an entirely new work.

[b] Contributing To Canadian Legal Literature

[21] Moreover, the candidate is the first title, in Canada, dedicated to judicial judgment formation and writing.

[c] Enhancing Quality Of Legal Research In Canada

[22] The quality, value and extent of legal research in Canada is, unquestionably, advanced by the candidate. Justice Sharpe's book incorporates a cornucopia of legal citation: decisions, books, and journal articles published, and conventions and statutes promulgated, in Canada, the United Kingdom, the United States, Israel, Italy, or South Africa. Enriching the text is reliance on philosophers Aristotle, Francis Bacon, Jeremy Benthan, Ronald Dworkin, Lon Fuller, H.L.A. Hart, John Stuart Mill, and Roscoe Pound; innumerable academy authors, and a host of justices: Canadian, British, American and Israeli. Included among the justices is former Supreme Court of Canada Chief Justice Brian Dickson, who was Justice Sharpe's mentor. Even Hercules, Nelson

Mandela, Claude Monet, Yogi Berra, Maurice Duplessis and Augusto Pinochet make cameo appearances.

[23] Justice Sharpe's first substantive undertaking in the book is to consider, critically, the judicial appointment process [pp. 18-25]:

> I have been involved in various international initiatives concerning judicial education and judicial independence. I am generally very proud of the administration of justice in Canada, but the question I always dread is "How are judges appointed in Canada?" On that very important aspect of ensuring a strong and independent judiciary, I am afraid that at the level of federal judicial appointments we have nothing to teach the rest of the world and much to learn. [p.23.]

He lingers, instructively, on reform of the process [pp. 23-25].

[24] A full chapter—Judicial Decision-Making: A Case Study [pp. 188-202] —is devoted to *Jones v. Tsige* [2012 ONCA 32], which forged the tort often described as 'intrusion upon seclusion'. That decision, Justice Sharpe writes [p. 188],

> posed an issue with which common law courts had been wrestling for over 100 years: Is there a common law right to personal privacy that can be remedied by an award of damages?

[d] Substantial In Nature

[25] From two perspectives, at minimum, the book is substantial in nature. First, its subject is a crucial—perhaps the most essential—process in a free and democratic society. And, secondly, its content is the product of a distinguished life in law. Granted, as Justice Sharpe writes [p. 270], the book

> represents one judge's view of the art of judicial decision-making in the common law tradition.

Needs be emphasized, however, is that this "one judge's" life embodies an unique half century of law practice, academic, and judicial, commitment and intimacy.

[e] Containing Excellent English Language Writing

[26] The writing technique is economical, crisp, precise, cogent, and transparent. Concepts—both their elements and substance—are seamlessly linked. One suspects Justice Sharpe carefully fashioned, crafted, chiselled, honed and burnished each sentence. (He may be a disciple of William Strunk Jr.), The only error in the text is a publisher's editing oversight: the spelling of "child" [p. 106, last para., line 2].

[27] There may be no clearer exposition of the facts, result, reasons and subsequent judicial treatment, in the United Kingdom and Canada, of *Donoghue v. Stevenson* [[1932] AC 562] than in Justice Sharpe's concise treatment of the law of negligence [pp. 110-115; 55-57; 151; 176].

[28] His writing, though candid, is tactful. In recounting how he and his appellate colleagues cope with (infrequent) instances of "an important point that was not addressed in argument," he explains [pp. 47-48]:

> This might be a relevant case on point that was decided after argument, or it may simply be a point the parties failed to deal with. We will not ordinarily decide an appeal on a point that was not argued. To do so infuriates the lawyers who lose the case and who may feel that, if given the chance, they could have answered the point. However, it is not unheard of for the Supreme Court of Canada to decide appeals

> on points not addressed by the parties. In our court, if we think that an unaddressed point could be decisive, we will ask the parties for further written argument. On the other hand, if we come across an authority that was not mentioned in argument but that merely adds to or supplements the law we were given, we consider it appropriate to cite the authority in our reasons.

[See, also: pp. 133-134.]

[29] All of which is to say, Justice Sharpe's writing is disciplined. Nonetheless, he grants himself, occasionally, licence for a (disciplined) editorial flourish [p. 144]:

> The judicial hunch, when combined with the need to justify the result, reflects a willingness to decide cases in a manner that coheres with the grand panorama of the basic rules, principles, and values that undergird our system of justice.

[30] He surrenders, but once, to the temptation to be jocular. He speculates—surely in jest—[p. 280, endnote 14 to Chapter 1 – Introduction] that the mental hard drive of Yogi Berra (baseball catcher, later team manager) cobbled together the statement [p. 13]:

> [I]n theory there is no difference between theory and practice but in practice there is.

(This reviewer, as owner of a complete collection of the 'bon mots' of Yogi Berra, assures Justice Sharpe that Berra is not the statement's source; but that a Newfoundland fish harvester may be.)

[31] On the subject of judgment writing, Justice Sharpe concedes [p. 140]:

> Every judge has had an "it just won't write" moment.

He notes, four lines later, that:

> There are many documented cases of Supreme Court of Canada judges changing their minds after expressing their views at the post-hearing conference.

[32] (Even when a decision is eventually written by Supreme Court of Canada, the Court's involvement does not then, always, end. In 1981, the Court wrote a decision, and deposited it in the Court Registry. The Registry telephoned counsel (the reviewer included) and invited them appear days later to hear the result pronounced from the bench (then the practise). That invitation was withdrawn on the eve of the decision's scheduled release. Several months later, a fresh decision—with an opposite result—was published.

[33] Judges Sharpe acknowledges [pp. 271-272] that

> [t]he law does not always provide clear answers to the cases that come before the courts, and judges are left with difficult choices to make. I have argued that the law leaves judges room for choice in its application in particular cases for two reasons. Legal rules and doctrines are necessarily general in nature. That is what gives rules the universal character that qualifies them as law. Legal rules also have to be interpreted and applied to different facts and to changing contexts. The generality and contextual nature of law confers significant power on judges. It affords them room to reach just results in specific cases, and, when combined with the idea of precedent, it gives judges the power to make law.

[34] In the context of judgment (rather than book) authorship [p. 85], Justice Sharpe contends that:

> …, judges making pronouncements that have precedential value should approach the task from the viewpoint of starting a conversation, an "ongoing, always provisional and never-completed dialogue between judges and lawyers, bench and bar, about what the law is and what it ought to be" [Peter Cane, "The

Common Law, the High Court of Australia and the United States Supreme Court"]. The judge is a participant in a complex process that will likely involve future litigation, review by higher courts, and scrutiny from external critics. It is a process that will involve many participants, probably take unforeseen twists and turns, and may take years to unfold.

[35] And [pp. 137-138], regards the necessity for written reasons, Justice Sharpe writes:

Reasons for judicial decisions are necessary to bridge the gap between judicial power and democratic legitimacy: reasons allow unelected judges to demonstrate to the public that the judicial process is legitimate and based on sound principle and rationality. By providing reasons, judges expose to public view the basis for their decisions and provide the means for public scrutiny, accountability, and, where appropriate, criticism.

[36] And [pp. 71-72], in being expected to scrupulously make and author decisions, Justice Sharpe queries:

If the law is less than certain, imbued with moral, political, and social values, and to be shaped in terms of the broader social, political, and economic context, then what disciplines the judge's decision?

I think it is important for judges to confront this difficult issue rather than hide behind the myth of strict legalism. The role of a judge, especially a Supreme Court judge, is not, as Chief Justice John Roberts infamously claimed, nothing more than that of the baseball umpire who simply calls balls and strikes. Myths and fictions of that kind are dangerous, not only because they are wrong, but also because they discourage judges from being honest and reflective about the values they bring to judging.

If judges really believe that their personal views cannot influence their decisions, they will fail to make the necessary effort to put those personal biases and prejudices aside. The conscientious judge should not hide behind a façade of judicial neutrality but should engage in self-reflection, conscientiously striving to confront the influence of personal views and attitudes when making decisions. The judge should not pretend to be an amoral and apolitical automaton.

[f] Published In 2017 Or 2018

[37] The candidate (printed in the United States) was published in Canada in 2018.

[g] About A Topic Of Current Interest In Law Practice

[38] The book, beyond question, is of current—indeed, should be of perennial—interest to law practitioners; especially those who plead in trial or appellate courts; including what Justice Sharpe terms [p. 52] an "apex" court – Supreme Court of Canada. Expectations of courts, guiding preparation for, and conduct of, trials and appeals, are explicitly articulated by him.

[39] Precious oral advocacy advice—qualifying to be prominently exhibited on a partition in every litigation law firm office—is afforded chambers-attired and gowned practitioners by Justice Sharpe, when he writes [p. 141]:

> The cardinal rule of legal advocacy is to present—at the earliest possible opportunity—a simple, clear, and compelling overview that presents the client's case in the most attractive light. The effective advocate will whet the appetite by planting the "hunch" or "instinctive flash" in the judge's mind to frame a favourable hypothesis into which the judge can readily assimilate the evidence and the arguments.

[See, also: pp. 42-43.]

In so stating, Justice Sharpe is mindful [p. 31]

> that …, as … [a] relatively junior [judge], …. I was inspired by some of my senior colleagues who presided with patience, efficiency, and dignity [in listening to counsel]. I was also surprised by what I thought to be overly aggressive and unduly controlling behavior of others. The only saving grace was that this behavior often seemed to disturb me more than counsel who, I suppose, knew what was coming and were ready to face the fire.

[See, also: p. 29.]

[40] Equally invaluable is Justice Sharpe's brief counsel [pp. 38; 42-43] about the specie of legal advocacy engaged in preparing *facta*:

> We have an enormous amount of reading [at the appellate stage], and most cases can be boiled down to one or two crucial points. For me, a short, concise factum that zeroes in on those crucial points is almost always more effective.
>
> . . . .
>
> Lawyers often ask me about the relative importance of written and oral argument. The written argument is very important. It is our introduction to the case, and first impressions are often difficult to shake. However, oral argument remains very important in our court, and cases are sometimes won or lost on the day of the hearing.

(The reviewer's senior partner, who practiced more than 68 years, submitted an appeal-successful factum to Supreme Court of Canada, in 1961, comprised of four-and-one-half pages.)

[41] Nonetheless, Justice Sharpe recognizes that advocacy communicated by *facta* and from the 'well' of a court have, recently, been discouraged by case managements and settlement conferences [p. 34]:

> …. I question whether the power and prestige of judicial office should be used to push parties to a non-rights-based resolution of their dispute. The judge who conducts a mediation remains, in the eyes of the litigants, a judge. The views the judge expresses will be perceived as reflecting the rights and wrongs of the situation. Yet that is precisely contrary to the role of the mediator-judge, namely to get an agreement based on interests, not rights. At the end of a long day of mediation, there is often some serious arm-twisting. I am not persuaded that judges should be twisting arms.
>
> I also think we need to be cautious about unduly diverting our scarce judicial resources away from adjudication and towards settlement and mediation. The most effective tool we can offer is the immediate availability of a courtroom and a judge to try the case. Many will argue that settlement at the courtroom door is too late and too costly. However, it is important not to overlook the fact that front-end loading civil litigation with elaborate case-management and settlement conferences also

> imposes costs and causes delay. Settlements do not come for free. Parties must devote considerable resources to the investigation of the factual and legal foundation for their own case, and that of their opponent, to be in a position to make an informed decision on settlement, Counsel have to prepare written briefs and be ready to present effective oral submissions in order to provide the information that the judge conducting the settlement conference requires. It is not uncommon, particularly in family matters, to find parties facing trial unrepresented because their resources have been swallowed up in elaborate case-management and unsuccessful settlement conferences.

[h] Is, Or Likely To Be, Highly Valued By Both Law Practitioners And Academics

[42] It is the capacity of this book—considering its subject and scope—to be highly valued by persons functioning in law practice or the academy which especially distinguishes it from the other short-listed Prize candidates. The other exceptional candidates will prove invaluable to practitioners or academics in one or another legal speciality or process, or to those with interest in constitutional or legal history. This book, however is likely to be highly valued by most, if not all, law practitioners, whether barristers or solicitors, and academics, whether law teachers or researchers. Moreover, this book is also likely to be highly valued by law students, law media, and perhaps those among the general public desiring to better apprise themselves about the judicial processes for resolution of legal disputes.

[43] Beyond price, the book will, additionally, serve judges. Justice Sharpe cautions [p. 30]:

> To survive on the bench, every judge must learn to cope with the awesome responsibility of deciding the fate of one's fellow citizens without being paralyzed by the responsibility.
>
> . . . .
>
> …. Judgments are not like wine; they do not improve with age. Judgments will almost always be better if they are delivered promptly, when the case is fresh in the

> mind of the judge. A common feature of problematic trial decisions, the ones that end up being reversed on appeal, is that the trial judge had the decision under reserve for a lengthy period.

Conclusion

[44] Globally, the book overcomes an impediment articulated by American jurist Benjamin Cardozo in another classic, *The Nature of the Judicial Process*:

> [A]ny judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth.

[45] Not that Justice Sharpe, for a moment, reckoned he would produce a volume that surmounts Cardozo's reservation. Safe to say, however, he has managed.

[46] In evaluating the degree to which this book is compliant with each of the Book Prize criteria, the reviewer performed two complete readings, followed by a facial reconnaissance. He concluded this book is more fastidiously-congruent with the benchmarks prescribed for a Walter Owen Book Prize than any other he has appraised in 28 years of deliberations on the Prize Jury.

[*The reviewer is a member of the Newfoundland and Labrador Bar (since 1968) and a Master of Supreme Court of Newfoundland and Labrador and Court of Appeal of Newfoundland and Labrador (since 2011). Whereabouts information: Suite A, 84 Airport Road, St. John's, NL A1A 4Y3, 1.709.753.3545 (Senior Legal Assistant Kelly A. Hall); dcdqc@lewisday.ca*]