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SHOULD THE SUPREME COURT CITE LIVING JUDGES? A COMMENT ON PROFESSOR MOHAMMED

In a stimulating recent paper in this journal, Emir Mohammed urges the Supreme Court of Canada to return to the "time-honoured rule that text-books and other writing by living authors should not be cited as authoritative references in considering a question of law".[1] I find his argument suggestive but I wonder whether it does not, in the end, prove too much. In this brief comment I would like to explain why.

It pays to note at the outset, however, that there are really two issues, or practices, implicated here. First, there is the judicial practice of citing the work of living authors in the course of formulating a judicial argument, or reaching a judicial conclusion. And second, there is the judicial practice of treating statements of law made by living authors as authoritative. The two practices are distinct. It may be that judges should not treat statements of law made by living authors as authoritative, but this would not show that it is impermissible for judges to cite or refer to the work of living authors in arriving at judicial decisions.

My impression is that Mohammed is more concerned with the second practice, namely, the practice that treats statements of law made by living authors as authoritative. Still, the issue is not absolutely clear. As Mohammed variously puts it, the Supreme Court of Canada has become notorious for "its citation of, and reliance upon, many academic commentators in fashioning its judgments" and that this dangerous practice ignores the "wisdom of earlier courts that the views of living authors should not be cited by courts".[2] These two passages seem to be criticisms of the first practice. But the quote cited in the opening paragraph above, and Lord Buckmaster's remarks in *Donoghue v. Stevenson* that "law books give no assistance [in determining the common law] because the work of living authors, however deservedly eminent, cannot be used as authority"[3] — both of

1. *Estate of Annette Frenza Beaudoin v. Minister of National Revenue*, 70 DTC 1462 (quoted by Mohammed).
2. Emir A.C. Mohammed, "How Many Times Have You Been Cited by the Supreme Court?" (2009), 35 Adv. Q. 170 at p. 170.
3. *Donoghue v. Stevenson*, [1932] A.C. 562 at p. 567 (H.L.). Note, however, that Lord Buckmaster immediately went on to say that while the work of living

which are cited with approval by Mohammed — suggest that it is really the practice of treating the writings of living academics as *authoritative* that is troubling Mohammed. No matter; my worries apply regardless of which practice is at issue.

Mohammed provides several rationales for what he calls the "common sense" view articulated by Lord Buckmaster in *Donoghue v. Stevenson*. The first rationale is that because "a living author may change his or her views", an author's views "should not be adopted by the nation's highest court for time immemorial as if it were the unshakeable truth".[4] However, while this is certainly true of authors, it is equally true of jurists: their views can, and do, change over time. Thus, if this rationale counts against the practice of citing the works of living authors, it should also count against the practice of citing the reasons of living jurists when those jurists are making pronouncements on the proper interpretation of the law.

Similarly, Mohammed refers with approval to the Rt. Hon. Sir Robert Megarry's opinion that the problem with citing the works of living authors is that their views improve with age and that ". . . the works of later authors often represent a lifetime of learning, experience and confidence. They are 'mature' writings."[5] This is a second rationale for the common sense rule, again related to the likelihood of change over time. But again, this rationale applies equally to jurists, since judicial thinking and decision-making surely also improves over time, and the decisions rendered by a judge who has been on the bench for decades are, other things being equal, to be preferred and respected more than decisions made early in her judicial tenure. So it would seem that if we take Megarry's rationale to heart, we ought also be skeptical about the authority of statements of law made by living jurists early in their career.

A third rationale for the common sense rule concerns the idea that, as Mohammed puts it, academic authors are biased and that, as a result, "Citing a particular article or textbook with reverent regularity adopts the temperament, funding influences, personal preferences and other biases that have shaped that particular work."[6] Setting aside the reference to funding sources, it seems to me that the very same complaint could be made against citing a particular judicial decision with "reverent authority", for surely that too would result in

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authors cannot be used as authority, "the opinions they express may demand attention". That suggests that he was not opposed to the practice of citing or referring to the works of living authors.

4. Mohammed, *supra*, footnote 2, at p. 177.
5. *Ibid.*, at p. 179.
6. *Ibid.*, at p. 178.

the adoption of the effect of temperament, personal preferences and other biases that have shaped that particular decision. One does not have to be a legal realist to acknowledge that judges are human beings, that judging does not take place in a vacuum, and that judicial decisions can be influenced by a judge's temperament or personal preferences. If we take this third rationale to heart, it would again seem to follow that the reasons of living judges should not be cited, or treated as authoritative, by the Supreme Court.

Mohammed also points out that problems can arise where a living author is also a practitioner who regularly appears before the court. This concern, and it does seem to me to be a genuine one, obviously would not apply to judges. On the other hand, Mohammed also worries that in "adopting the works (and writing style) of practicing lawyers in their decisions, the Supreme Court has implicitly endorsed the dispositions and views of such writers".[7] But if we replace "works" with "judgments", and "practicing lawyers" with "sitting judges", we get the following: in adopting the reasons (and writing style) of sitting judges in their decisions, the Supreme Court has implicitly endorsed the dispositions and views of such writers. Since, however, it is hard to find anything objectionable in that practice, we are again left wondering what it is about adopting the works of living *authors* that is particularly worrisome.

Perhaps in the end all that can be said is that the writing and reasoning of jurists should be more valued by the Supreme Court of Canada than the writing and reasoning of authors who are typically, but not always, academics. But, if so, then we lack an *argument* for the "time-honoured" and "common sense" rule that the writings of living authors should not be cited, or treated as authoritative, by the Supreme Court. What we have is the rule itself; what we lack is an understanding of why the Supreme Court's practice of referring to the work of living jurists is acceptable while similar references to the works of living authors is not.

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7. *Ibid.*

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