

BOOK REVIEW

THE LAST WORD: MEDIA COVERAGE OF THE SUPREME COURT OF CANADA

BY FLORIAN SAUVAGEAU, DAVID SCHNEIDERMAN, AND DAVID TARAS

Reviewed By Michael James*

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The public often perceives the law as inscrutable. In *The Trial*, Franz Kafka tells the parable of a man from the country who comes before the law, desiring admittance. The imposing doorkeeper tells him that he cannot be admitted now, but adds that it may be possible later. The man from the country is surprised, thinking the law should be accessible to all. Nevertheless, he takes up a stool and sits and waits for years. When his life is nearly spent, he beckons the doorkeeper, asking why no others have come. As he dies, the man hears the doorkeeper's reply: "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it."¹ Though the parable admits of many interpretations, a key point that Kafka raises is that there is a wall separating the public from the law.

Today, journalists are the doorkeepers to the law. *The Last Word: Media Coverage of the Supreme Court of Canada*,² written by Florian Sauvageau, David Schneiderman, and David Taras, considers the relationship between the Canadian news media and the Supreme Court of Canada. Unlike Kafka's doorkeeper, journalists have the job of transmitting and interpreting the law's judgments to the world outside the legal profession. *The Last Word* ably scrutinises that considerable power and how it is wielded.

The authors come from different universities and backgrounds: Sauvageau is a Professor of Communications at Laval; Schneiderman is an Associate Professor of Law at Toronto; Taras is a Professor in the Faculty of Communication and Culture at Calgary. Rather than a strictly legal work, the book is written from a legally-informed social sciences perspective. Eschewing the deferential tone favoured by some legal commentators, the authors deal critically with both the media and the court.³

The authors of *The Last Word* set themselves two principal tasks: to describe Supreme Court reporting and to examine the relationship between the court and journalists. To these ends, they survey and analyse coverage of Supreme Court judgments. The book opens with a vignette personifying the pressures of reporting on the court as a television journalist. Following

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1 Franz Kafka, *The Trial*, trans. by Willa & Edwin Muir (New York: Schocken Books, 1995) at 213-215.

2 Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006) ["*The Last Word*"].

3 For example: the authors refer to 'the court' without capitalisation, in contrast to its rendering in legal works (i.e. 'the Court').

an introduction to the court-media relationship, the authors look generally at one year (September 2000 to September 2001) in the life of the court.⁴ The next four chapters each delve in detail into a different decision: *Vriend*⁵ (1998), the *Québec Secession Reference*⁶ (1998), *Marshall*⁷ (1999), and *Sharpe*⁸ (2001). They chose these cases not only because they represent critical issues, but also because they speak forcefully to the legitimacy and integrity of the Supreme Court.

Their methodology is both quantitative and qualitative – they consider frequency and manner of coverage. Relevant social science literature provides context, but the focus of the analysis lies in newspaper and televised news reporting. The authors surveyed the two major English national dailies (the *Globe and Mail* and the *National Post*), several major French newspapers (*Le Devoir*, *La Presse*, and *Le Journal de Montréal*), the *Toronto Sun* and other local papers, and the major English and French national television newscasts (CBC, CTV, Radio-Canada and TVA). Tallying all the stories, editorials and commentaries that deal with the Supreme Court and its judgments is no mean task; altogether, it is a collection of an impressive array of media reports. The authors give the data some necessary order by categorising the reporting: by specific subject matter, by how the news is framed, and by tone.

What emerges, *The Last Word* argues, is that media coverage of the Supreme Court is seriously wanting. In the 25 years since the *Charter* came into effect, the Supreme Court has been thrust into a crucial and extremely influential role in Canadian democratic life. While the court has opened itself to the media to a greater extent than ever before and the media spotlight on it has brightened, the authors conclude that it is yet far too dim and poorly aimed. With comprehensive and lucid analysis, they argue that the very nature of news reporting too often lends itself to “highly abbreviated, sporadic, sensationalized, and intensely political coverage”⁹ of the Supreme Court and its decisions.

A recurring theme in the work is a criticism of framing. The media rely on ‘strategic’, as opposed to ‘issue’, framing: stories are most often told in terms of winners and losers, rather than by presenting the reasons behind judgments that usually give something to both sides. A striking example is the coverage of the *Québec Secession Reference*. This was probably the most important decision in the history of the Supreme Court, not the least for deciding whether and under what conditions Québec might leave Confederation. Though the decision received wide acclaim, the court and its judgement quickly faded from media consideration. The authors found that reporting focussed instead on portraying political actors in battle: federalist vs. sovereigntist.

The authors clearly demonstrate this tendency throughout their analysis of the other three cases. In *Marshall*, the Supreme Court found the Mi’kmaq to have a limited treaty right to fish. The authors found that the abiding media image was of combat between Aboriginal and non-Aboriginal fishers. Though the use of visuals in *The Last Word* is sparing, several images are effective in showing how the media sometimes frame a story. In the *Marshall* chapter there is a picture of a Mi’kmaq man, framed by a broken window, holding aloft a Warrior Society flag. The authors also found that the first sources quoted in a story were often Aboriginal speakers, portrayed in an aggressive, negative light.

4 Their reasons for choosing that particular year: several emotionally-charged, high-profile cases (e.g. *Latimer* and *Sharpe*); a new chief justice in Beverley McLachlin; and the 125th anniversary of the court -- though they ironically note that the last point was observed by few news organisations and sparingly at that.

5 *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [“*Vriend*”].

6 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [“*Québec Secession Reference*”].

7 *R. v. Marshall*, [1999] 3 S.C.R. 456, 179 D.L.R. (4th) 193 [“*Marshall*”].

8 *R. v. Sharpe*, [2001] 1 S.C.R. 45, 194 D.L.R. (4th) 1 [“*Sharpe*”].

9 *The Last Word*, *supra* note 2 at 236.

If the media tend to focus on the opposite poles of an issue, it is perhaps unavoidable that the authors of *The Last Word* must follow suit. The data suggest that the majority of media reporting in all four cases treated the judgments, the relevant figures and actors, and the Supreme Court as an institution neutrally. Nevertheless, the articles that the authors considered in detail and quoted from greatly over-represent both the positive and negative extremes. Noteworthy examples are focussing on negative treatments of the Supreme Court by Alberta media in the wake of the *Vriend* decision (that read-in sexual orientation as a prohibited ground of discrimination in that province) and on praise of the court in *Sharpe* (for carving out narrow exceptions to child pornography prohibitions). While broad, these were still minority trends. Admittedly, if the book were simply a litany of neutral commentary it might bore to extremes. However, by so concentrating their analysis, the authors distort to some degree the impression that their survey results otherwise make: the media by and large maintain a neutral stance.

Whenever the media take a stance at all, that is. As the authors wryly put it: “The irony is that the journalists who cover the court almost never write about it.”¹⁰ In their survey of a year in the life of the Supreme Court, they found media coverage dominated by few decisions: cases that carried great general interest like *Latimer* and *Sharpe*, that had celebrity villains (or heroes), and especially that attracted the attention of politicians. The authors posit that the importance of the latter point stems from the fact that almost all journalists who cover the Supreme Court do so as a minor adjunct to the Parliament Hill beat. Ottawa bureau reporters are attuned to political themes, always looking for the pithy quote that is the foundation of political news. When they can’t find it in the Supreme Court building, they often turn to the foyer outside the House of Commons where they unerringly can.

Though journalists bear the brunt of criticism for the dominance of political frames in court reporting, the Supreme Court and its decisions are not beyond reproach. Of the four cases, *Marshall* leaps out as an instance where the authors (and many other legal commentators) find the Supreme Court to have stumbled badly. That case involved two decisions two months apart. The later decision was in effect a ‘clarification’ of the earlier ruling. This was a “stunning departure”¹¹ from the judicial convention of speaking only through decisions. Media coverage of the mayhem resulting from the first decision was particularly critical of the court, labelling it removed and unaccountable. The second *Marshall* decision¹² was damage control. The authors conclude that the Supreme Court was responding to political pressure: it appeared to be playing to public opinion.

Though the ‘clarification’ quenched the fires, the authors wonder at the long-term harm of drawing back the judicial curtains and passing through into the political fray. They argue that the Supreme Court is an inherently political institution. One of the more intriguing findings of *The Last Word* is what may be termed an Openness Paradox: the more the Supreme Court engages with the media and tries to navigate political currents, the greater it risks foundering and losing its aura of credibility, respect, prestige, and most of all impartiality. The court has traditionally adopted a reserved attitude to media engagement. The authors track the court’s transformation by noting in particular the creation of an office specifically tasked with media relations. While this and other measures have led to better coverage of late,¹³ the authors conclude that the Supreme Court will continue to face criticism the further it wades into coverage and controversy.

The authors also conclude that more legal training of journalists is necessary to avoid mis-

10 *The Last Word*, *supra* note 2 at 228.

11 *Ibid.* at 137.

12 *R. v. Marshall*, [1999] 3 S.C.R. 533, 179 D.L.R. (4th) 193.

13 Contrast the *Québec Secession Reference* with a humorous 1970s headline from the venerable *Globe and Mail*: ‘Supreme Court against beards and kitchens’.

representing what a decision actually says. However, they strongly imply that the Supreme Court needs to write clearer judgments. Contrast the chaos following *Marshall* with the great praise of *Québec Secession Reference*. While many Mi'kmaq and non-Aboriginal fishers and many in the media misinterpreted what the Supreme Court actually said, the authors ascribe some of the blame to loose language about treaty rights. Regarding the *Reference* case, former Justice Iacobucci thought the court did a great job by producing a clear and easy-to-read decision and the media did a great job reporting it.

Nevertheless, scrutiny of the Supreme Court is unlikely to abate any time soon. *The Last Word* notes the close examination of the appointments of Justices Abella and Charron; recently, the examination got closer yet. Coached by a noted constitutional law scholar who moderated the carefully-controlled event, appointee Marshall Rothstein appeared before an *ad hoc* parliamentary panel in 2006. While MPs could ask questions, they were admonished to limit their range of inquiry. When asked what he thought of the process, Rothstein replied that it reminded him of something Zhou Enlai once said: asked what he thought about the French Revolution, the Chinese Premier is said to have replied that "it's too soon to say."

The Last Word is appropriately titled. In the final analysis it is journalists who have the last word: they are the doorkeepers to the law. Perhaps the title also echoes the comments of Justice Iacobucci in *Vriend*: in the relationship of dialogue between Parliament and the Supreme Court, it is the legislature that has "the final word".¹⁴ Sauvageau, Schneiderman and Taras argue that the media are the filters through which the Supreme Court is seen and heard. Through deep and broad analysis of that translation, *The Last Word* speaks to the need for more and better reporting of the Supreme Court and its judgments. It is a fascinating read, sound in its research and unrelenting in its conclusions.

14 *Vriend*, *supra* note 5 at para. 137.