JUDICIAL FREE SPEECH AND JUDICIAL ACCOUNTABILITY: STRIKING THE RIGHT BALANCE

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Under the Canadian Constitution, and especially since the adoption of the *Canadian Charter of Rights and Freedoms*[1], the Canadian judiciary constitutes the third branch of the Canadian government. How judges are appointed and how they discharge their mandate are, therefore, of overriding public importance. Not surprisingly, during the past 25 years almost every aspect of the role and functioning of the Canadian judiciary, federal and provincial, has been subjected to close scrutiny in numerous reports, judgments and scholarly studies.[2] In my view, this attention has been wholly beneficial, has done much to improve our understanding of the judicial system and has elevated the quality of justice being administered. This is not to suggest that all problems have been resolved. Far from it. Important challenges remain to be met. I would place at the top of my list the establishment, federally and provincially, of a clearly merit-based system of appointments for trial and appellate judges since it constitutes the indispensable foundation for solving so many other problems.

The focus of this short paper, however, lies elsewhere. The questions for consideration are: what limits should be imposed on a judge's right of free speech, and why, and how such restrictions should be enforced? These are obvious questions, but in Canada they have attracted significant attention only since the early 1980s. This late development is due to several factors. One is the rapid growth in the number of federally and provincially appointed judges (now amounting to over 2500). Another is the establishment of the Canadian Judicial Council (CJC) and its provincial counterparts, one of whose functions is to exercise disciplinary powers over judges. At the same time, Canadians have become much more conscious of the vastly expanded powers of the judiciary in the *Charter* era and have been encouraged to take a much closer look at the performance of individual judges.[3] Equally important, the *Charter* outlaws gender and racial discrimination. Apart from these constitutional developments, changing social attitudes no longer make such biases acceptable, and particularly not when expressed by judges. These factors make up one part of the picture and are

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[1]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, C.11 [hereinafter *Charter*].

[2]The most recent of these studies is that by Professor Friedland for the Canadian Judicial Council: M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa, Can. Judicial Council, 1995).

[3]For their history and current status, see Friedland, *supra* note 2, c. 5.6 and 5.8.

primarily concerned with judicial conduct *on* the bench. Another, and perhaps still more challenging, part concerns the role of judicial speech *off* the bench. The Berger *cause célèbre* still represents the high point in this debate;[4] a more recent example, still before the courts, involves Provincial Court Judge Andrée Ruffo.[5]

An Apparent Paradox?

Before looking more closely at these two aspects of judicial speech, we need to answer a preliminary question. Since the *Act of Settlement*[6] in 1702, the independence of the judiciary from executive interference has been a basic postulate of the English Constitution. It has also been assumed to be incorporated in the preamble to the *Constitution Act, 1867*[7] and is enshrined in sections 99 and 100 of the *Act*. No less importantly, s. 11(d) of the *Charter* guarantees every accused person the right to trial before an independent and impartial tribunal. A judge is also entitled to avail himself of the right to freedom of expression under s. 2(b) of the *Charter*. How, then, can we justify disciplining a judge for objectionable speech without compromising the judge's independence and freedom of expression?

Fortunately, the answers are fairly straightforward, although their application to particular facts may be very troublesome. The *Act of Settlement* did not confer absolute security of tenure; the tenure guaranteed by it and by s. 99 of the *Constitution Act, 1867* only obtains during the judge's "good behaviour". A judge who displays racial and gender biases, the reasoning goes, undermines public confidence in the judge's impartiality and therefore impugns his fitness to remain on the bench. Similarly, it has long been assumed that a judge who engages in political activity off the bench or criticizes existing or prospective legislation raises concerns about her actual or perceived impartiality if the judge is called upon to deal with the same issues in her judicial capacity.[8]

These justifications for imposing restrictions on judicial freedom of speech were recently reaffirmed, without hesitation, in Gonthier J.'s judgment for the

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[4]See "Case Report: Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger and Resolution of the Canadian Judicial Council" (1983) 28 McGill L.J. 378.

[5]See *Ruffo* v. *Conseil de la Magistrature* (1995), 130 D.L.R. (4th) 1 (S.C.C.).

[6]1 Ann. St. 2, c.2.

[7]*Constitution Act, 1867*, being Schedule B to the Canada Act 1982, c.11.

[8]The Berger case and, more recently, the case of Justice Jean-Claude Angers of the New Brunswick Court of Appeal, are two Canadian examples: see T.T. Ha, "N.B. judge chided for remarks" *The Globe & Mail* (13 April 1995) A12.

Supreme Court of Canada in *Ruffo* v. *Conseil de la Magistrature*,[9] so there can be little doubt about their constitutional validity. In short, the requirements of judicial independence and judicial impartiality not only protect a judge from interference by the Executive but also *obligate* the judge to keep herself free from psychological and political entanglements, on and off the bench, that could impair the public's perception of her objectivity.

Off-bench Judicial Speech

These propositions are straightforward. Nevertheless, their practical application has given rise to a wide diversity of opinion, particularly so far as judicial speech off the bench is concerned. Bernard Levin, a distinguished English critic and columnist, has given us one poignant (and colourful) interpretation. He opined that a judge should not indulge himself in public pronouncements more contentious "than to thank the leader of a Scout Patrol which has helped him across the street".[10] Chief Justice Laskin was no less emphatic in his opposition to judges becoming involved in political debates off the bench. He told his lawyerly audience in the aftermath of the Berger affair that "[a] judge has no freedom of speech to address political issues which have nothing to do with his judicial duties. His abstention from political involvement is one of the guarantees of his impartiality, his integrity, his independence ... . He cannot be allowed to speak from the shelter of a Judgeship."[11] On the other side of the line, we have Justice Sopinka's assertion, expressed on several occasions, that judges should not be leading monastic lives but should be free to go into the public domain to discuss the Supreme Court of Canada's judgments, the evolving *Charter*, and other legal issues of contemporary relevance.[12] Professor MacKay also strongly agrees that judges are entitled, indeed should be encouraged, to discuss publicly the many policy issues raised by the *Charter* so that the non-legal community will have a better understanding of the philosophy of the men and women on the Supreme Court who are making these important decisions.[13]

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[9]*Supra* note 5 at 43-45. Sopinka J. dissented but not on this point.

[10]B. Levin, *These Times* (Scepter Books: London, 1986), quoted in Canadian Judicial Council, *Commentaries on Judicial Conduct* (Montreal: Y. Blais, 1991) at 44 [hereinafter *Commentaries*].

[11]B. Laskin, "Berger and Free Speech of the Judge" (Address to Canadian Bar Association Annual Meeting, 2 September 1982), cited in A.W. MacKay, "Judicial Free Speech and Accountability: Should Judges Be Seen but Not Heard?" (1993) 3 N.J.C.L. 159 at 213.

[12]See, e.g., J. Sopinka, "Must the Judge be a Monk?" (Address to Canadian Bar Association, 3 March, 1989), cited in MacKay, *supra* note 11 at 163. See also the *Commentaries*, *supra* note 10 at 44.

[13]*Supra* note 11 at 241-42. An interesting range of views, generally but not exclusively supportive of Sopinka's position, were also expressed by several of the members in a CBA sponsored panel discussion. See C. Schmitz, "Judges can be trusted to decide these things for themselves"; Conduct Code would inhibit free speech: Sopinka", 15:17 LW (8 September 1995) 2, (reporting on panel

Although the question is not free from doubt, the Sopinka/MacKay position does not represent the "establishment" view. The Canadian Judicial Council has responded that the *Charter* provides no licence for broad judicial excursions off the bench. Rather, the CJC sponsored *Commentaries on Judicial Conduct* tells us, that the *Charter*'s arrival should be a warning to judges "to be more, *rather* than less, circumspect than in the past."[14]

Can the majority and minority position be reconciled? I think they can if one or more of the following scenarioes is accepted. The first is that we pay more attention to what judicial councils and senior judges do in practice and less to the verbal formulae to which they subscribe in theory. It has been noted, for example, that judges in England and Canada identified with the majority view have not themselves hesitated to speak out publicly on controversial legal issues.[15] Another way to reconcile the majority and minority views is to ask the question of *when* public speech compromises a judge's independence and impartiality. If both sides agree that the prohibited line is crossed only where there is a serious possibility of this happening and not otherwise, then the two sides are not far apart, and the difference between them is more verbal than substantive. This is because the serious possibility test allows much latitude for offbench activity — speeches, lectures, interviews, articles and books — that will not offend the test.

Yet another means of accommodating the two points of view is to vary the sanctions for compromising types of judicial speeches. Thus, a warning or gentle admonishment will be adequate for a first time offence of limited impact. The ultimate sanction — removal from the bench — would be limited to persistent and clearly compromising speeches and their equivalents that arouse "tumult and controversy". This distinction would be consistent with the test for removal adopted by the Committee of Inquiry in the Marshall case: "Is the conduct alleged so profoundly and manifestly destructive to the concept of impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?"[16]

Speaking personally, I favour a liberal test of acceptable speech offbench, and this for two reasons. First, a liberal test is most consistent with the preeminent status which the Supreme Court has given s. 2(b) of the *Charter*, even to the point

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discussion on "Should Silence Remain the Golden Rule of Judges?"). Panelists: John Sopinka J., McEachern C.J. of the British Columbia Court of Appeal, Diane Marcelin J., of the Quebec Superior Court, and Jamie Saunders J. of the Nova Scotia Supreme Court.

[14]*Supra* note 10 at 42.

[15]*Ibid.* at 43, citing as examples the off-bench speeches in England of Lord Denning, Lord Hewart and Lord Parker.

[16]Friedland, *supra* note 2 at 80-81.

of largely repealing the traditional and long standing rules against prejudicial pretrial publicity in criminal cases.[17] It would be odd if the law treated offbench judicial speechmaking more harshly than pretrial publicity. Second, I believe informed public opinion today has a much more sophisticated view of judges and the writing of judgments, and does not cry foul every time a judge opens his or her mouth outside the court room.

Offensive Speech on the Bench

Most complaints over judicial speech in the past twenty years have in fact involved gender and racial slurs from the bench.[18] My impression is that the judicial councils have reacted much more vigorously to them than to offbench speeches. In part, this may be because there are many more complaints and newspaper reports about offensive remarks from the bench than there are about judicial speech-making outside the court. Still more important reasons may be the vocal reactions of the targeted group (persons of either sex, native people) and the greater immediacy of such judicial comments.

The sensitivity of the judicial councils to such partisan comments is understandable. An offbench discussion of an issue may enrich the public debate whereas a jaundiced remark from the bench will confirm the victims' suspicions that they cannot expect a fair hearing from the judge. Even so, there is need for caution. As Justice Sopinka has reminded us, a failure to meet the standards of political correctness must not be confused with clear evidence of gender and racial bias. Judges are individuals, not robots, and they will not be doing an effective job if they must always check their "correctness" meter before venturing to say something publicly. Even when a judicial observation is deeply offensive to some, it is by no means clear that it warrants disciplinary action. Consider, for example, the case of a provincial court judge who feels the *Criminal Code* is too lenient with drug traffickers and that they should be punished much more harshly because drug trafficking leads teenagers to violent crime.[19] Unless there are reasonable grounds for believing that the judge's views will interfere with the impartial trial of a person accused of drug dealing, the judge's comments should be ignored. It

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[17]*Dagenais* v. *Can. Broadcasting Corp.* 99 D.L.R. (4th) 326 (S.C.C.).

[18]For example, in the 1993-94 year, the CJC received 19 complaints alleging gender bias, (but note also that 11 out of 19 alleged gender bias against men!). C. Schmitz, "Judges Face Record Number of Complaints" 14:38 LW (17 February, 1995) 3. The much publicized Justice Bienvenue case, currently before the CJC, involves alleged gender bias and insensitivity to the victims of the Nazi holocaust. See R. Seguin "Quebec Judge's Conduct Under Investigation" *Globe & Mail* (5 March 1996) A4 and "Judge was Disparaging, Hearing Told", *Globe & Mail* (6 March 1996) A7.

[19]Compare the case of PCJ Gordon McConnell, "Execute drug dealers, judge says" *Winnipeg Free Press*, (11 February, 1995) C11.

is common knowledge that judges have widely differing views about the appropriate punishment for different types of crime and different types of offenders.[20] Accordingly, strongly held views should only become a matter of concern when they have become an obsession for the judge.

Are Codes of Conduct the Right Answer?

There has been a long standing debate in Canada about the desirability of adopting codes of judicial conduct.[21] Only two provinces, Quebec and British Columbia, have a code at the present time. However, two years ago the CBA Task Force on Gender Equality renewed the call for the establishment of a federal code to be administered by a judicial commission.

I am an agnostic on this issue — as befits one who grew up in a country without a written constitution. It is generally conceded that to be really helpful a code of judicial conduct has to be specific; a collection of motherhood principles is unexceptional but also provides insufficient guidance. It is true that many specific norms are also uncontroversial, for example, that a judge may not be a member of a political party or that a judge should disclose to the parties any personal interest he may have in the matters being contested before him and to recuse himself if necessary. I would not have thought it mattered greatly whether these prescriptions appear in a code or are discussed in narrative form in a publication such as CJC's *Commentaries on Judicial Conduct*. The *Commentaries* are eminently readable and, if I were a judge, I would find them much more user friendly than the stilted language of a code.[22]

The real difficulty with codes of judicial conduct lies in the area of judicial speech. It is one thing to say a judge must avoid racial slurs or gender biases. It is quite another to translate these broad propositions into specific rules. It is still more difficult, and dangerous, to adopt firm rules about offbench speeches. As we have seen, there is a wide spectrum of views about the propriety of judges speaking in public, to whom and when. I share Justice Sopinka's concerns. I

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[20]When the writer was a law student in England, Lord Chief Justice Goddard had a well entrenched reputation for being tough on violent criminals and he publicly supported the retention of the death penalty for murder. It was never suggested that these views made him unfit to preside over criminal trials or over appeals as president of the Court of Criminal Appeals.

[21]See Friedland, *supra* note 2 at c. 6.1.

[22]Professor Friedland argues that many professional associations (including of course law societies) long ago adopted rules of conduct for their members and apparently sees no reason why judges should be treated differently. I think there are some salient differences. There are fewer judges and they have been under public scrutiny for a much longer time than the members of most professional associations. Their judgments are regularly appealed. There is also a large body of case-law dealing with the requirements of impartiality by the members of a tribunal which exercises judicial functions.

believe it would be ill advised for a code of judicial conduct to say anything more than that judges should avoid making speeches or engaging in offbench conduct that will provoke political controversy or compromise their impartiality or the appearance thereof. This may not be sufficiently specific for some judges[23], but it is a price we should be willing to pay for that most precious of gifts, freedom of expression.

Greater Transparency for Judicial Councils

Complaints are made intermittently[24] — and were made most recently by the CBA Task Force on Gender Equality — that judicial councils have been too dilatory in dealing with complaints and have been more concerned with protecting the good image of the judiciary than in serving the public. Undoubtedly, there has been some footdragging in the past[25], although Professor Friedland found no evidence of it in examining the recent complaint files of the Canadian Judicial Council.[26] To the extent this still exists at the provincial level, and even if it does not, I see much good in broadening the membership of the judicial councils to include members of the bar and laypersons. In this way, the lay representatives will be able to satisfy themselves that skeletons are not being hidden in the closet. Greater transparency would also be well served by requiring each judicial council to publish an annual report about the complaints it has received and how they have been dealt with. I see no substance in the constitutional argument that judicial independence would be compromised by including non-judges in the disciplinary process.

An Ounce of Prevention ...

Let me conclude on the note with which I began. I believe we would have fewer complaints about judicial misconduct if all the provinces and the federal government adopted a merit system of appointment. I am glad to find that Professor Friedland also recognizes the connection between the system of

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[23]Justice Angers was reported to have said that although he had read the *Commentaries*, *supra* note 10, he did not appreciate that it was wrong for him to write the letter to Mr Chrétien. I find this astonishing.

[24]See C. Schmitz, "Council seeks review of how public complaints against model code of conduct against judges are handled", 15:16 LW (1 September, 1995).

[25]See, for example, the case of PCJ B. McDonald, discussed in editorial, *Winnipeg Free Press*, (8 August 1993) where knowledge about the judge's conduct apparently went back to the mid-1960s but no official complaint was laid until 1987. Even then the judicial council only administered a gentle slap on the wrist.

[26]Friedland, *supra* note 2 at 94-95.

appointment and the number of complaints in his excellent report.[27] Obviously, no selection system is foolproof, but we can be sure that a merit-based system will produce fewer examples of egregious conduct and speech that is offensive by any measure.

[27] *Ibid.* at 128-29.