JUDGES Speak Out II

By Gerald L. Gall, O.C.
and Charlene Hiller

SINCE THE ENTRENCHMENT OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* IN THE CANADIAN CONSTITUTION IN 1982, THERE HAS BEEN MUCH DISCUSSION ON THE CONSTITUTIONALIZATION OF RIGHTS AND THE POLITICIZATION OF THE JUDICIARY. THE LATTER CHARACTERIZATION HAS, IN TURN, GIVEN RISE TO ALLEGATIONS OF JUDICIAL ACTIVISM AND THE COURTS' USURPTION OF THE POLITICAL MANDATE OF ELECTED OFFICIALS. THE HEATED RHETORIC THAT TYPICALLY ACCOMPANIES SUCH ALLEGATIONS OBSCURES THE ESSENTIAL REALITY OF ENTRENCHMENT. IN 1982, EVERY POLITICIAN OF THE DAY AND EVERY JUDGE KNEW THAT PLACING A CHARTER OF RIGHTS IN THE CONSTITUTION REPRESENTED, AMONG OTHER THINGS, A TRANSFER OF POWER FROM PARLIAMENTARIANS TO THE CONSTITUTION AS INTERPRETED BY THE COURTS. THE SO-CALLED ACTIVISM BY THE COURTS IS NOTHING MORE THAN JUDGES FULFILLING THEIR CONSTITUTIONAL MANDATE. MOREOVER, THERE IS NOTHING REALLY NEW ABOUT THIS.

The authors wish to express their appreciation to the judges of the Supreme Court of Canada for their timely co-operation and assistance in providing copies of several of the addresses they delivered over the past while. In marking the 20th anniversary of the Charter, at least two of the judges are preparing papers to be released in the spring of 2002, including two upcoming papers by Chief Justice McLachlin and one by Mr. Justice Iacobucci.



All rights the Supreme Court of Canada / photographer Philippe Landreville

Since Confederation, judges have always interpreted the constitution. In doing so judges have frequently constructed new doctrine in the interpretation process. For example, one can look to the development of an emergency theory under the peace, order and good government clause. The only thing that has changed since 1982 is the obvious increase in the breadth of this mandate and the fact that more contentious issues have come to the fore. Coincidental with this development is the related phenomenon of journalistic and, by extension, public interest in the type of cases being decided by the courts. Some of the more highly publicised cases have dealt with abortion, pornography, Sunday observances and religious instruction in public schools, etc. This naturally ignites media and public interest in both the institutions and the persons deciding these cases. Judges, therefore, have become the focus of media attention during the last twenty years in a heretofore unprecedented fashion. It is not surprising that judges feel, as part of this process, that they have a duty or obligation to share with the public what they do and how they operate. To that end, the judges of Canada's highest court frequently speak to many professionally related organizations (law schools, bar associations, etc.) and to the public at large.

Traditionally, Canadians have concentrated on what judges say in court. The focus here, however, is on what judges say outside of court and, in particular, what Supreme Court of Canada judges say about the *Charter*. In the Spring 2000 edition of this

magazine, on the occasion of the 125th anniversary of the Supreme Court of Canada, the phenomenon of judges 'speaking out' was addressed. Now, on the occasion of the 20th anniversary of the *Canadian Charter of Rights and Freedoms*, this issue is being re-visited in the context of what Supreme Court of Canada judges say, through various addresses delivered to a broad range of audiences, about the *Canadian Charter of Rights and Freedoms*.

Over the last decade, judges of our highest court have delivered addresses to Canadian universities and law schools (for example, Laurentian, York, Western Ontario, New Brunswick, Concordia, Alberta, Calgary, British Columbia and McGill) and foreign universities and law schools (for example, Georgetown, Fordham, Yale, Harvard and the Hebrew University of Jerusalem). They have spoken at conferences in Canada and abroad (for example, in Australia, Malaysia, France and New Zealand). They have addressed conferences and meetings sponsored by various organizations (such as the Canadian Club, L.E.A.F., the Canadian Bar Association, the Law Society of Upper Canada, the Federation of Law Societies and the Canadian Association of Statutory Human Rights Agencies).

The topics of speeches given by Supreme Court judges are diverse, generally, and, with particular emphasis on the *Charter*, have ranged from a discussion of jurisprudence under specific sections of the *Charter* (s.15 most often, but also s.2 and others) to comparisons with the American Constitution (i.e., the U.S. Bill of Rights) to discussions of the *Charter*'s impact on particular areas of the law and on particular aspects of societal activity (for example, family law, bioethics and education). Judges also talk about the approach to *Charter* litigation (i.e., a substantive versus a formal approach and the importance of social context in interpreting the *Charter*). Not surprisingly, judges have responded to criticism directed at the courts in discussions on judicial activism, the role and purpose of the *Charter* and the politicization of rights. Judges reflect on the moral undertones of the *Charter* and how notions of fraternity are intertwined within the *Charter*. Some judges have been noticeably prolific in their discussions of the *Charter* while others have remained somewhat reticent in speaking about the *Charter*.

Two judges who have significantly addressed the *Charter* in their public addresses are Chief Justice Beverley McLachlin (both before and after her elevation to Chief Justice) and Madam Justice Claire L'Heureux-Dubé. In a speech delivered to the Canadian Club in London, Ontario (November of 1998), Chief Justice McLachlin outlines the various '*Charter* myths' that have obscured a clear understanding of the *Charter*'s status in our legal system. She identifies six myths; namely, that "the *Charter* for the first time bestowed individual rights on Canadians", "that the *Charter* created absolute rights", "that the *Charter* has replaced parliamentary sovereignty", "that judges can decline to decide *Charter* issues", "that criminals 'walk' under the *Charter*" and "that courts and Parliament are adversaries." Justice McLachlin then systematically proceeds to debunk these myths in a cogent, effective fashion.

The last of these myths underscores a central theme in the recent book *The Charter Revolution and the Court Party (Morton and R. Knopff* (eds), Broadview Press, 2000) and is countered by Dean Peter Hogg's thesis that *Charter* challenges to legislation and the legislative responses to *Charter* decisions form the basis of an ongoing dialogue between the bench and parliamentarians ("The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter* of Rights Isn't Such a Bad Thing After All)" [1997] Osgoode Hall L.J. 75.). Justice McLachlin, in dispelling these various myths, premises her discussion on the notion that the *Charter*'s effect, although altering Canada's "legal landscape", is less dramatic than generally perceived. She asserts that "[t]he *Charter* represents the continuation of a rights tradition in Canada, not its birth." She further states that it is "precisely because of Canada's pre-existing rights tradition that the *Charter* has assumed its present importance."

Mr. Justice Gonthier, in his public addresses, emphasizes essentially four interrelated themes – morality, community, responsibility and fraternity. At the University of British Columbia (March, 2001), he speaks about the interdependent relationship of law and morality, emphasizing moral order as a foundation for law. Moreover, law "cannot move far beyond the minimum moral consensus [of society] without losing its legitimacy." The *Charter*, he says, "has brought within the realm of the law a vast area where previously the law did not dare tread except within narrow limits, matters which society left to be governed solely by morality ..." In another address to the University of British Columbia (November, 2000) he similarly states that "moral values should find expression in the law ... the *Canadian Charter of Rights and Freedoms* is the highest expression of this."

With respect to community, the *Charter* defines some fundamental values, reflecting both communitarian and liberal principles. Speaking to the McGill Law Journal Alumni Lecture Series (January, 2000), Mr. Justice Gonthier states that the *Charter* is an expression of community-held shared core values. He comments that individuals must fulfil certain duties and responsibilities to each other and to the community. He also recognizes the importance of fraternity. The *Charter*, he says, is a "vehicle for advancing shared values and fostering shared identities." Fraternity entails not only the advancement of shared values and identities to form a community, but also involves the related notions of "commitment, responsibility and inclusion."

Judges, therefore, have become the focus of media attention during the last twenty years in a heretofore unprecedented fashion. It is not surprising that judges feel, as part of this process, that they have a duty or obligation to share with the public what they do and how they operate.

Mr. Justice Bastarache also reflects on the role of the courts in the *Charter* era at the Annual Meeting of the Canadian Jewish Law Students Association (January 2000). He states that "[t]he activity of the courts in the last twenty years has in fact revolutionized public law and transformed the role of the courts in the eyes of society". Moreover, he states that,

> *[t]he constitutional theory on which interpretation rests is one of balance: the court cannot rewrite the law to secure the effective interpretation of the Charter, nor can the court invent law to force Parliament or legislatures to discharge their obligations to implement human rights.*

Later, in Charlottetown (April 2000), Mr. Justice Bastarache remarks that,

> *[m]ore than ever, the courts are the arbitrators of reforms and the judicial process is seen as the way of assuring that they are implemented fairly and consistently with the safeguard of individual rights. While some decry the judiciarisation of society and constant review of political decision-making, others consider it appropriate that a wider range of recourses be available to citizens in a modern democracy.*

As mentioned earlier, some public addresses by our highest jurists focus on particular sections of the *Charter*. Most frequently, their attention is concentrated in respect of s.15, the dominant equality rights provision in the *Charter*. For example, at the Constitutional Cases Conference in Toronto (April 2001), Chief Justice McLachlin speaks about s.15 as constituting the "most difficult" right. In a thoughtful, wide-ranging discussion, she refers to theories and jurisprudence on equality, making reference to writings and case law from a number of jurisdictions. The Chief Justice points out the difficulty in defining equality and discrimination, and reminds us, despite major cases over the last decade, that Canadian equality law remains "in its infancy".

Madam Justice L'Heureux-Dubé also discusses s.15 in a number of public addresses. Justice L'Heureux-Dubé emphasizes equality rights in her various speeches although she also addresses other substantive issues. For example, in one talk, she discusses the fundamental nature of our *Charter* and the Canadian approach to protecting human rights and civil liberties. However, her main focus lies with section 15. She states that s.15 invites a substantive, as opposed to a formal, approach to egalitarianism. She emphasizes the importance of examining the social context of legislation or government action in determining whether it is violative of the *Charter*.

Justice L'Heureux-Dubé also maintains that s.15 not only confers equality in and of itself but also it informs the Court's interpretation of other rights contained in the *Charter*. Section 15, she said at the LEAF Person's Day Breakfast (October 2001), informs the interpretation of other human rights legislation in the sense that "the Court has embarked on a process of unifying the judicial approach to equality issues under human rights codes and under the *Charter*." And further, s.15 also informs the interpretation of legislation in relation to family law matters. She discusses both the genesis and the evolution of s.15 in *Charter* jurisprudence at Sudbury's Laurentian University (October 2001), emphasizing "that equality cannot be defined as equal treatment." Rather, it has been interpreted in such a way so as "to define equality as equal human rights, dignity, and full membership in society." In a similar vein, she exhorts all Canadians to "endeavour to promote a society in which respect for the inherent dignity of the human person, social justice, and equality prevails in every aspect of our lives."

Not surprisingly, judges have responded to criticism directed at the courts in discussions on judicial activism, the role and purpose of the Charter and the politicization of rights.

At the Annual Meeting of the Canadian Jewish Law Students Association (January 2000), Justice Bastarache reviews the jurisprudence in relation to the application of the *Charter* to educational settings. In discussing the Supreme Court's application of the *Charter* in the school environment, he states that

> *[o]ur Court's approach is meant to be consistent with the schools' duty to foster the respect of students for the constitutional rights of all members of society. Learning to respect those rights is essential to our democratic society and should be part of the education of all students. Those values are best taught by example and may be undermined if Charter rights are ignored by those in authority. At all times, the courts must give a contextual interpretation to Charter rights. They must therefore balance the protection of Charter rights and the public or societal interests at stake in the school context.*

He warns, however, that "...the protection of the *Charter* must not result in irrational or unreasonable rules in the context of institutions involving children, where the State has responsibility for their protection." Finally, he concludes that "conflicting policy considerations in the educational setting will continue to give rise to novel applications of the *Charter* in our schools."

Mr. Justice Binnie, in a paper delivered at the University of Auckland, New Zealand (August 1999), also discusses s.15 but, in addition, sets out a rather comprehensive history surrounding the birth of the *Charter*. As well, he addresses the issue of judicial activism versus judicial inertia, concluding that,

> *Prime Minister Trudeau expressed on behalf of the framers a sweeping vision of human dignity, but it fell to the courts to translate the vision into practice. If the result of the Court's judgments has been to produce tight but manageable anxiety in the minds of both critics of judicial activism and critics of judicial inertia in about equal measure, the*

> *judiciary may have performed one of the great navigational feats of modern jurisprudence.*

An excellent discussion of defamation jurisprudence can be found in Chief Justice McLachlin's paper entitled "Speech and Reputation: The Legal Divide" (Liber Amicorum For Gordon Slynn: Court Review In International Perspective Kluwer Law International, 2000). In the paper she sets out the leading cases in the United States, the United Kingdom, Australia, New Zealand and Canada. With respect to the latter, in referring to the case of *Hill v. Church of Scientology of Toronto* ([1995] 2 S.C.R. 1130) in which s.2, freedom of expression is invoked, she concludes that,

> *the Supreme Court of Canada ... under the influence of constitutional guarantees of free speech, ... suggests that the line between free speech and protection of reputation must be a matter not of applying rules, but of striking the right balance.*

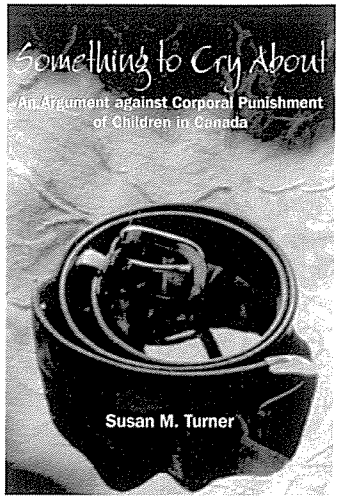
SOME GENERAL OBSERVATIONS

Clearly, the judges of the Supreme Court of Canada regularly address a wide variety of audiences on a broad range of topics. Their audiences consist predominantly of law students, other university students, members of the legal community (both judges and lawyers) other professional groups and the public at large. Of the many topics discussed, judges often defend themselves against unfounded criticism by explaining the role of the courts, particularly in the *Charter* era. In examining their addresses, one is left with the distinct impression that

In examining their addresses, one is left with the distinct impression that judges speaking out represents a major educational function on the part of the Court.

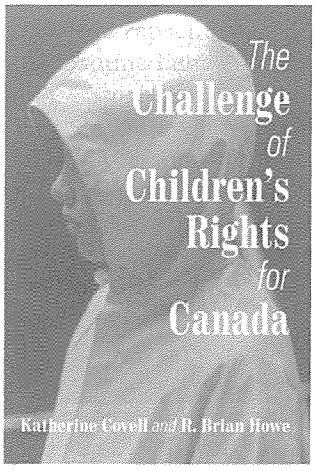
judges speaking out represents a major educational function on the part of the Court. Their audiences view the judges not as icon-like beings dressed in judicial garb, but rather as down-to-earth individuals sharing their views in conversational settings. Undoubtedly, this not only enhances the image of our judiciary but also creates a sense of a shared proprietary interest among Canadians in what our highest court does. Judges are sometimes exhorted, by both the media and others, to explain what they meant in given cases. Judges are very reluctant to do so since, theoretically, the cases speak for themselves through their own words. On a rare occasion, this is done through an essentially explanatory decision (*R. v. Marshall, Motion for Rehearing and Stay,* [1999] 3 S.C.R. 533) or through an equally rare public pronouncement on a particular case. In respect of the latter, one might recall Mr. Justice Cory's remarks to the Canadian Institute for Advanced Legal Studies Cambridge Lectures in relation to the *Askov* case ([1990] 2 S.C.R. 1199.). Despite this reluctance to explain judicial decisions, public addresses by judges do contribute to a better understanding of the philosophical underpinnings and attitudes of the judges. This, in turn, leads to a more informed public that is better able to appraise and scrutinize judicial decision-making. In a sense, public speaking by our judges serves in this way as a useful mechanism for greater judicial accountability.

Gerald Gall is a Professor of Law at the University of Alberta
Charlene Hiller is a law student at the University of Alberta



Something to Cry About
An Argument against Corporal Punishment of Children in Canada
Susan M. Turner
Paper $29.95 • 0-88920-382-2
Studies in Childhood and Family in Canada series

Explores philosophically the many foundations of physical punishment of children and, using recent studies, argues why corporal punishment of children should be abandoned.



Paper $24.95 • ISBN 0-88920-380-6
Studies in Childhood and Family in Canada series

Prompted by the gap between the promise of children's rights and the reality of their continuing denial, Covell and Howe call for changes to existing laws, policies, and practices.

Visit our website at
www.wlupress.wlu.ca

WLU **Wilfrid Laurier University Press**
Phone: 519-884-0710 ext. 6124 • Fax: 519-725-1399
Email: press@wlu.ca