Judges Speak Out!



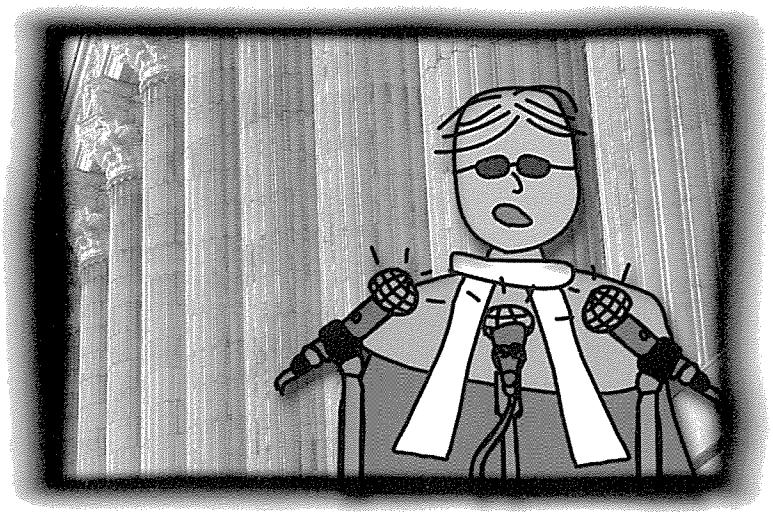
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Until recently, the judiciary, as an institution in society, has long been immune from public scrutiny. Columnists and editorialists have largely ignored the courts; judges were rarely interviewed on television, radio or in magazines. Outside of the law schools, little was written about the courts with the result that the public's understanding of the judicial system largely came from television and motion pictures, and those were, for the most part, American productions. All of that is changing. The North American public now has a hunger, it seems, for television programs that feature actual trials. Most bookstores have a section on 'law'. There are a growing number of political scientists in Canada that specialize in studying the judiciary. In short, the public's interest in law, and in those who administer it, has significantly increased in recent years.



At the same time, newspapers and politicians are often critical of judicial decisions. And in academic circles, especially faculties of law, judgments are regularly scrutinized. Moreover, some judges, unfortunately, have made inappropriate statements in open court that have attracted much public attention[1]. In short, judges are subject now to a new form of accountability—public vigilance. But almost all of this scrutiny and vigilance relates to what judges do and say in the courtroom. More particularly, what the judges of the Supreme Court of Canada do and say in court are more closely scrutinized than any other judges in Canada. But there is another side to their public persona and that relates to what Supreme Court judges say outside the court, particularly in their extra-judicial speeches and writing. This article will focus on this other component in the professional lives of these judges.

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Traditionally, judges were limited in the extent to which they were allowed to make public remarks. For example, where judges make certain comments in connection with a case which has already been decided, their remarks must be very tactfully expressed and within the bounds of propriety. Because of this requirement, most judges chose not to make any public remarks in connection with particular cases decided.

However, there do not seem to be any constraints on a judge against making remarks in an anecdotal manner concerning the judge's experiences on the bench. In fact, if there were constraints of this nature, a tradition of many after-dinner speeches at bar association meetings would be lost. Nor are there any constraints upon a judge in making public remarks concerning reform of the law and the administration of justice generally. However, it is very unwise and imprudent for a judge to extend his or her remarks into the political realm, suggesting, for example, that judicial reform and changes in the administration of justice would best be accomplished by the political action of a given party.

Judges, especially Supreme Court judges, are no longer camera or radio shy. Before his retirement, Chief Justice Antonio Lamer was interviewed on the Canadian Broadcasting Corporation (C.B.C.) radio programme, "As It Happens", and appeared on C.B.C. television's "In Conversation With Peter Gzowski". Chief Justice Beverly McLachlin, on assuming her new position, was interviewed on C.B.C. Newsworld and several other broadcasts and was interviewed in the various print media. Justice Frank Iacobucci recently explained the workings of the Supreme Court of Canada in an excellent program broadcast on the Cable Public Affairs Channel (C.P.A.C). And former Supreme Court Justice Willard Estey appeared on a panel with Ontario Chief Justice R. Roy McMurtry on C.B.C. Newsworld's "Pamela Wallin & Company" on January 30th of this year.

The barriers preventing Supreme Court justices from speaking publicly have decreased substantially in recent years. The previously 'prohibited' practice of giving personal opinions on specific areas of law or social justice issues has dramatically declined. However, there remains a high standard of maintaining impartiality by not commenting on current cases, or issues likely to come before the court.

The new openness of Supreme Court judges probably dates back to a ground-breaking interview the late Chief Justice Bora Laskin gave to the Financial Post in the mid-seventies. This greater transparency was strongly supported by other judges, including Mr. Justice John Sopinka. For example, in respect of the debate relating to confirmation hearings, Justice Sopinka noted

> I recognize that judges are public figures, and I think that an important part of what motivates those who call for public confirmation hearings for judicial appointments is the perceived mystery, that surrounds our judiciary. The best way of dispelling this mystery, in my view, is to loosen the restraints that many judges feel bind them in their public statement.2

In commenting on the self-imposed reticence in public speaking by judges, Justice Sopinka stated "... a judge can and ought to speak on the work of the court. It is absolutely essential that the workings of the court be demystified."[3]

Justice Iacobucci recently noted that he is always very conscious not to appear to be prejudging an issue. The exception to this rule for Justice Iacobucci occurs when a matter concerns the rules and procedures involved in the administration of justice. Rather than advocating changes to the law, this form of commentary sheds light on areas where judges see room for improvement in the justice system. Many judges feel they are in a better position than most commentators to address these issues. For example, in an address given to a meeting of the Canadian Institute for the Administration of Justice in Saskatoon, Justice Ian Binnie remarked that a partial cause of the rising costs in the justice system was the "runaway use of experts and pseudo-experts on every conceivable issue [which] adds time and costs to the general quagmire".[4]

In the past, Supreme Court judges have primarily addressed legal and academic audiences, such as the law schools and bar associations. While the majority of public addresses still occur at conferences and meetings sponsored by such groups, the audiences today, as well as the topics discussed, are increasingly varied. It appears that not all Supreme Court judges feel this is appropriate and therefore some restrict their audiences to members of the legal profession. But clearly, justices are increasingly allowing the public into their 'living rooms' by agreeing to be interviewed in the media and through public addresses. The primary focus here, however, is the latter.

In respect of the diversity of the various audiences, judges of the Supreme Court of Canada have, for example, recently made presentations to the following meetings. Justice Ian Binnie spoke at the Conference on Courthouse Design in Toronto and at the "Liberty, Equality, Community" Conference in Auckland, New Zealand[5]; Chief Justice McLachlin at the Conference of Ontario Boards and Agencies in Toronto and at the 4th Joint Seminar on Women and the Law in Beijing[6]; Justice Gonthier spoke at the 1997 Media Conference in Calgary and the Symposium entitled, "Is our Moral Environment Protected?" organized by the Departments of Philosophy and Theology at Concordia University; and Madam Justice L'Heureux-Dubé spoke on the topic of "Volatile Times: Balancing Human Rights, Responsibilities and Resources" at the 1996 annual conference of the Canadian Association of Statutory Human Rights Agencies held in Victoria, B.C. Notwithstanding the diversity of their audiences, typically Supreme Court judges most often speak to law faculties, bar associations and judicial conferences.

The topics Supreme Court judges choose to address are as varied as the backgrounds of the judges themselves. Issues which would have seemed unlikely only a few years ago are today frequently addressed. While many of the speeches remain focused on the role and function of lawyers and the judiciary, judges also speak on a wide range of issues regarding democracy and social justice. However, their primary focus recently appears to be on the balancing of individual rights and the impact of the Charter of Rights and Freedoms in Canadian society. The Charter has undoubtedly provided the primary 'ingredient' of public addresses. This is manifested through speeches addressing such topics as affirmative action and equality rights (including feminism and racism). A Supreme Court justice will often mention, in a speech discussing the Charter, the fact that judges did not ask for the responsibility of interpreting the Charter, but were granted this additional responsibility by duly elected politicians.

The introduction of the Canadian Charter of Rights and Freedoms in 1982 has led to both an increased

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awareness and criticism by the media regarding the Supreme Court of Canada. Judges have responded to this criticism through public addresses often containing remarks in their own defence.

Chief Justice McLachlin, in particular, has made a number of public remarks in defence of the Court. In one address, she notes

> [m]ore and more, the headlines of our newspapers are concerned with judicial decisions. More and more, courts are being called upon to decide questions of central importance to great numbers of individuals in our society; questions which go far beyond the traditional areas of legal scrutiny into the uncharted waters of central social issues.[7]

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In discussing the changing relationship between Parliament and the judiciary, Chief Justice McLachlin notes that she sees an "increasing tendency" to transform social and political issues into legal questions, "thus placing the task of their resolution on the shoulders of the courts".[8]

In a speech delivered to the Faculty of Law at the University of Alberta[9], recently retired Supreme Court Justice Peter Cory remarked that what the media terms 'judicial activism' is often a misinterpretation by the media of the reasons set out in a judgment. He also referred to the decision of the Supreme Court of the United States in Brown v. Board of Education as an example where courts have made decisions overturning decisions of democratically elected bodies in order to further social change. He notes that this kind of 'judicial activism' is not a new phenomenon nor is it unelected, unaccountable judges running amok. When recently asked his opinion of justices speaking to a wider variety of audiences than was previously the norm, he responded that in his opinion, the practice was a healthy one because it served to "de-mystify" the Court to a certain degree. In addition, Mr. Justice Cory stated that he believed it was also healthy to comment on social conditions, and, in particular, conditions which have resulted from previous Supreme Court decisions.

Supreme Court justices often refer to their role and function and the significance attached to that responsibility. Justice Gonthier noted in one public address

> [t]he function of a judge is unique. His fellow citizens have confided in him their greatest trust, namely that of judging their acts. He must be impartial, independent and should be exemplary in his way of life. He may be in the limelight of the media but must not seek it nor respond to criticism. He is not allowed to speak in his defence though he may on occasion speak in furtherance of the administration of justice.[10]

In a 1998 speech delivered to the Canadian Bar Association, Chief Justice Lamer remarked that "[j]udge-bashing must stop".[11]

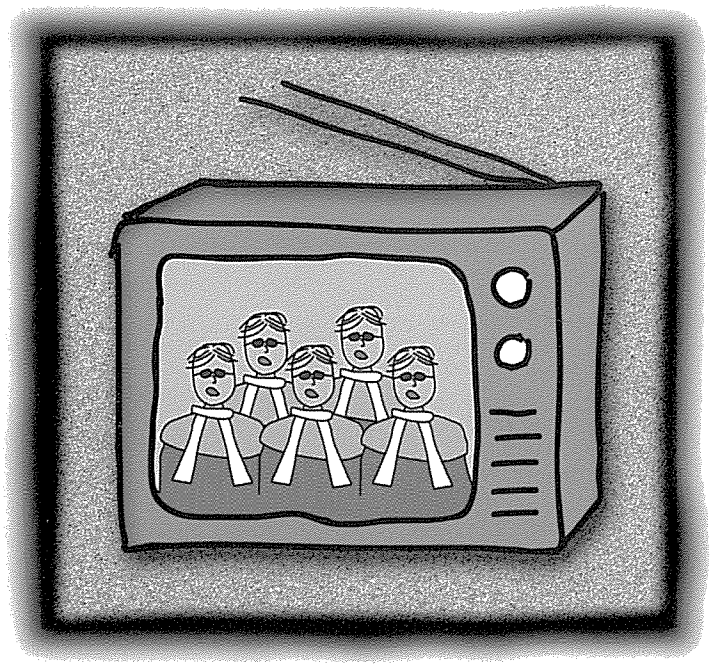
There can be no doubt that the freedom of judges to speak on a variety of topics, including social justice issues, has increase in recent years. An example is contained in an address given to the Faculty of Law at the University of Ottawa by Justice Bastarache entitled "Does Affirmative Action have a Future as an Instrument of Social Justice?" In his address, Justice Bastarache discusses section 15(2) of the Charter and lays out both sides of the debate surrounding affirmative action, carefully refraining from stating his own personal opinion. In discussing the principles that should guide the Court, Justice Bastarache gives his audience a glimpse into what the Court will examine when and if these issues come before the Supreme Court of Canada.[12]

When discussing sensitive legal or social issues, it is imperative that members of the Supreme Court refrain from endorsing or supporting a particular policy. This tradition is best summed up by Chief Justice McLachlin's remarks during an address titled "Spousal Support: is it fair to apply new-style rules to old-style marriages?". In discussing how to remedy the problem of competing philosophies of marriage she noted "[j]udges, happily for me, are not permitted to suggest solutions to the difficult, sometimes seemingly intractable problems of the law in forums such as this".[13]

The restriction regarding commenting on a case or issue that is either before the court, or likely to come before the court remains firmly in place today. Judges of the Supreme Court remain very conscious of not appearing to pre-judge an issue. This is particularly true of cases on which the judge sat. There is a strong feeling that unless using general terms, judges should not talk or write about the cases on which they have decided. The theory is that the law, through the cases, should speak for itself. But, in one obvious exception, Mr. Justice Cory, at a meeting of the Canadian Institute for Advanced Legal Studies in Cambridge, England, clarified the meaning of the Supreme Court of Canada's decision in the Askov case. His explanation was subsequently widely reported in the Canadian media. Notwithstanding

this, judges rigorously avoid any specific discussion of the cases on which they have sat.

The Supreme Court judges obviously receive a great number of invitations to speak. And many of those invitations are accepted with the result that the body of extra-judicial speeches delivered is significant. In the past few years, Supreme Court judges have delivered scores of speeches.[14]



In this regard, justices of the Supreme Court of Canada have addressed a variety of audiences on a variety of topics. Some examples not mentioned elsewhere in this article including the following. Chief Justice McLachlin addressed a conference in Ottawa sponsored by the Institute for Research on Public Policy with a speech titled "Courts, Legislatures and Executives in the Post-Charter Era".[15] She also gave a speech titled "Judges and Enforcement of Human Rights" to the 12th Commonwealth Law Conference in Kuala Lumpur on September 13, 1999. Justice Binnie addressed the Criminal Lawyers' Association in Toronto with a speech titled "A Survivors Guide to Advocacy in the Supreme Court of Canada" on November 27, 1998. He also gave a speech to the Communications Law and Policy Symposium in Ottawa, titled "Confessions of a Sometime Communications Lawyer" (an area in which he has extensive practice experience). Justice Gonthier addressed the McGill Law Faculty on January 11, 2000 on "Fraternity: The Unspoken Third Pillar of Democracy". He also delivered opening remarks at the Conference on Alternative Dispute Resolution for Judges and Businesses presented by the NAFTA Advisory Committee on Private Commercial Disputes and the US-Mexico Conflict Resolution Center.

Many of the judges' speeches are eventually published in scholarly journals. Consider, for example, some of the recent addresses delivered by Madam Justice L'Heureux-Dubé that were subsequently published: "The importance of dialogue: globalization and the international impact of the Rehnquist Court" (1998) 34(1) Tulsa Law Journal 15; "Making equality work in family law" (1997) 14(2) Cdn J. of Family L. 103; "Making a difference: the pursuit of a compassionate justice" (1997) 31(1) U.B.C. Law Rev. 1; «La marche vers l'égalité» (1995) 8(2) Cdn J. of Women & the Law 275 and "By reason of authority or by authority of reason" (1993) 27(1) U.B.C. Law Rev. 1. Examples may be drawn with respect to the addresses delivered by all of the judges—it clearly demonstrates the significant contribution of the members of the Supreme Court of Canada to periodical legal literature.

Despite their traditional long-standing reticence, Supreme Court judges probably now feel the pressure, if not an obligation, to publicly establish a presence outside of the courtroom. The Supreme Court, as an institution is often the lightning rod when it comes to criticism about the so-called 'rights culture'. 'Judicial activism' is the battle cry of neo-conservatism. And references to the perceived power of 'nine unelected, unknown' policy-makers in Ottawa is the irritant that must motivate Supreme Court incumbents into some form of responsive mode. It is abundantly clear that judicial activism is a reality. But it is not a new phenomenon. It has existed since Confederation. When a court invented the emergency doctrine in interpreting the peace, order and good government clause in section 91 of the Constitution and specified which kinds of emergencies qualify under that category or when a court invents a doctrine of necessity, that is activism. When a court declares a matter is moot and refuses to deal with the matter, that too is activism. All judicial action is activism and that is the proper role of the judiciary.

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Since 1982 and the so-called 'constitutionalization of rights', different kinds of issues, the kinds that ignite emotional debate, have come to the forefront; namely, abortion, Sunday closing, pornography, etc. This, in turn, has propelled scrutiny of the courts to a new high. Repeatedly, politicians speak of the courts usurping the roles of Parliament and the provincial legislatures when, in fact, Parliament and the provincial legislatures may be accused of legal passivism. And the media has given the judiciary unprecedented scrutiny through news stories, editorials and other journalistic writings.

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It is not surprising that all of the foregoing has led to misconceptions, misunderstandings, inaccuracies, distortions and biases penetrating the public mind. The judges must feel that the true story ought to get out—the truth about the role of the Supreme Court and its members, the independence of the institution and of each independent judge, the mandate given the Court by duly elected politicians in 1982 and the fact that litigants bring cases and issues to Court and not the reverse. Indeed, governments often refer matters, sometimes politically sensitive matters having a legal content, to the Court. In their speeches, the judges explain who they are, what they do and why they do it. The 'nine unknown' judges naturally feel an obligation to become more known, not just in legal circles, but throughout society. If there were a job description for a justice of the Supreme Court of Canada, public relations would now clearly be a skill required for a successful candidate. It has become an imperative to which judges of the Supreme Court of Canada must comply. In short, they are, through extra-judicial speeches, simply doing their job.



In their extra-judicial speeches, judges do expose themselves to the possibility of criticism. Because of the wider audience (both within and outside of the legal profession) when the media is present, the exposure can be instantaneous and uncomfortable. An obvious for example is Justice Binnie's remarks to the Phi Delta Phi legal fraternity initiation and subsequent apology to the Dean of Osgoode Hall Law School.[16] Some speeches attract harsh editorial reaction. Speaking at a Domestic Partnership Conference held at Queen's University at Kingston in October of 1999, Madam Justice Claire L'Heureux-Dubé's remarks led to an editorial attack in the National Post. [17]

Consider also the controversy around the Osgoode Hall Law School speech delivered by Madam Justice Wilson. The R.E.A.L. Women of Canada organization lodged a complaint with the Canadian Judicial Council against her in respect of a speech in which she said that some aspects of Canadian law are so biased in favour of men, they are "little short of ludicrous" and "cry out for change". The complaint was subsequently dismissed. The same speech resulted in a feminist organization calling "for a national task force to examine sex discrimination in the Canadian legal system"[18]

These examples are, in fact, rare occurrences. The vast majority of extra-judicial writing and speeches do not lead to controversy or even, for that matter, publicity. Moreover, the occasional complaint does not seem to deter the practice of expanded extra-judicial pronouncements. Presumably, a complaint might deter the individual who is the

subject of the complaint, but overall, the occasional controversy or misadventure does not seem to inhibit the expanding practice of extra-judicial exposure.

The issue of public speaking by judges, generally, was dramatically addressed, at least in respect of federally-appointed judges, in a recent report prepared by the Canadian Judicial Council Special Committee on Public Information and approved by the Council in September of 1999.[19] That report endorses the notion that judges ought to respond to "unfair personal attack or serious errors in reporting" in "an aggressive new approach to communications". It recommended a proactive approach to media relations and recognized that "it can be appropriate at times for judges to seek interviews". As one of the report's authors, Jeff Oliphant, the Associate Chief Justice of the Manitoba Court of Queen's Bench remarked, "[i]t's a paradigm shift in how judges have operated". The report recommends professional media training for chief justices or designated spokespersons. Essentially, the report proposes a public information plan. Interestingly, the report makes reference to speeches given by Chief Justice Beverley McLachlin and Ontario Court of Appeal Justice Rosalie Abella. The Canadian Judicial Council report and the plan it advocates mark a dramatic departure from the traditional reticence, and indeed, silence that has been the characteristic norm of the Canadian judiciary.[20]

There are some concluding observations that can be made. Supreme Court judges receive a vast number of invitations from within and outside the legal profession, to speak both domestically and abroad. Many of these invitations are accepted. Their audiences range from lawyers and legal colleagues to those in unrelated fields, such as architects. Their topics range from the explanation of their judicial role or the defence of the Court and the judiciary in general, to courthouse architecture, morality and theology. Their topics, however, do not specifically include discussions of the cases on which they have rendered judgment. The judges are no longer media shy as increasingly they participate in various media interviews. In short, their public image is being transformed from a cloistered, secretive invisibility to an emerging openness. On occasion, but rarely, extra-judicial pronouncements lead to controversy; in most instances, however, their pronouncements cause no controversy nor do they lead to substantial publicity. Most judges, in fact most observers, point to the positive contributions of extra-judicial pronouncements in making the Supreme Court, its members and its role in society, better understood to the public. Essentially, these pronouncements serve to de-mystify the highest court in Canada. In short, speeches by the judges of the Supreme Court of Canada serve to enhance the judicial work of the Court and the administration of justice in Canada. ■

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References

1 See Gall, G. L. The Canadian Legal System, 4th ed. Toronto: Carswell, 1995, pp.287-291.

2 Sopinka, "Confirmation Hearings and the Proper Role for Judges in the Public Sphere", Address to the Graduating Class, University of Windsor Law School, June 9, 1990 (May 1991) 3 Windsor Rev. Legal & Social Issues, 139 at 142.

3 Ibid., p 143.

4 October 17, 1998.

5 "Equality Rights in Canada: Judicial Usurption or Missed Opportunities?", August, 1999.

6 "Judicial Neutrality and Equality", November 29, 1999.

7 "The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?", Vol. 39, U.N.B.L.J. 1990 43. Speech given to the Faculty of Law, University of New Brunswick, October 26, 1989.

8 Ibid., 49.

9 "The Work of Judges and Lawyers in the New Century", January 11, 2000.

10 Lecture delivered to the Faculty of Law, University of New Brunswick, February 7, 1991 in Vol. 40, U.N.B.L.J. 1991, 193 at 207.

11 See The Lawyers Weekly, February 4, 2000.

12 March 4, 1998. See also (1997-98) 29 Ottawa Law Review 497.

13 Keynote address given July 2, 1990 at the National Family Law Program in Calgary, cited in (Fall 1990) 9 Can. J.Fam. L.131-142.

14 The authors wish to sincerely thank the members of the Supreme Court of Canada for their kind and timely cooperation in providing copies of many of their speeches.

15 Policy Options, vol. 20, no. 3, April 1999, 41.

16 See Globe & Mail, March 13, 1998. A more striking example (although not at the Supreme Court level) is Alberta Court of Appeal's Justice John McClung's now infamous letter to the editor of the National Post).

17 See the National Post, October 25, 1999 and a response to this attack in a letter to the editor on October 30, 1999.

18 See Gall, supra, p. 286.

19 The Judicial Role in Public Education. Ottawa: The Canadian Judicial Council, 1999.

20 See The Lawyers Weekly, February 4, 2000, the National Post, January 31, 2000 and the Globe and Mail, February 7, 2000.