CANADIAN ISSUES
THÈMES CANADIENS

Printemps 2000 Spring

From influence to controversy
De l'influence à la controverse

The 125th anniversary of the Supreme Court of Canada
Le 125e anniversaire de la Cour suprême du Canada

SUMMARY / SOMMAIRE

CITC acknowledges the financial support of the Government of Canada through the Canadian Studies Programme of the Department of Canadian Heritage.

CITC bénéficie de l'appui financier du Gouvernement du Canada par le biais du Programme d'études canadiennes du ministère du Patrimoine canadien.

ADRESSE CIVIQUE / STREET ADDRESS
209 St. Catherine Street East, Room V-5140
Tél./Tel: (514) 987-7784 - Fax: (514) 987-3481
Courriel/email: acs-aec@uqam.ca

CANADIAN ISSUES / THÈMES CANADIENS (CITC) - ISSN 0318-8442
CONVENTION POSTE PUBLICATION, 1470485

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CITC est une publication trimestrielle de l'Association d'études canadiennes (AEC). Il est distribué gratuitement aux membres de l'Association. CITC est une publication bilingue. Tous les textes émanant de l'Association sont publiés en français et en anglais. Tous les autres textes sont publiés dans la langue d'origine. Les collaborateurs et collaboratrices de CITC sont entièrement responsables des idées et opinions exprimées dans leurs articles. L'Association d'études canadiennes est un organisme pan-canadien à but non lucratif dont l'objectif est de promouvoir l'enseignement, la recherche et les publications sur le Canada. L'AEC est une société savante, membre de la Fédération canadienne des sciences humaines et sociales. Elle est également membre fondateur du Conseil international d'études canadiennes.

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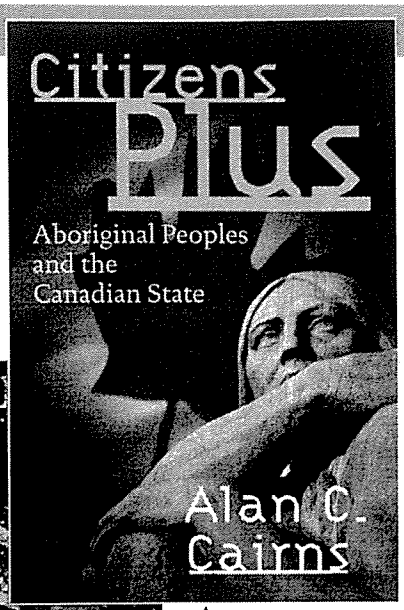

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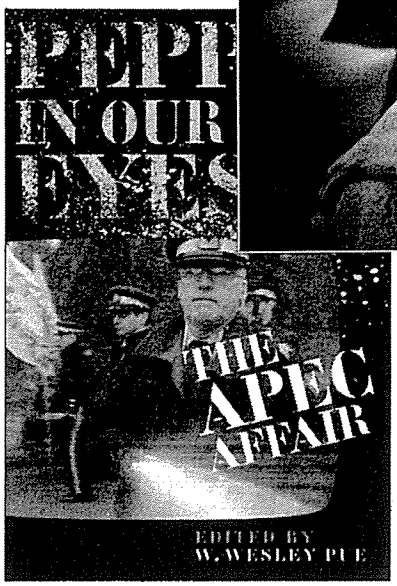

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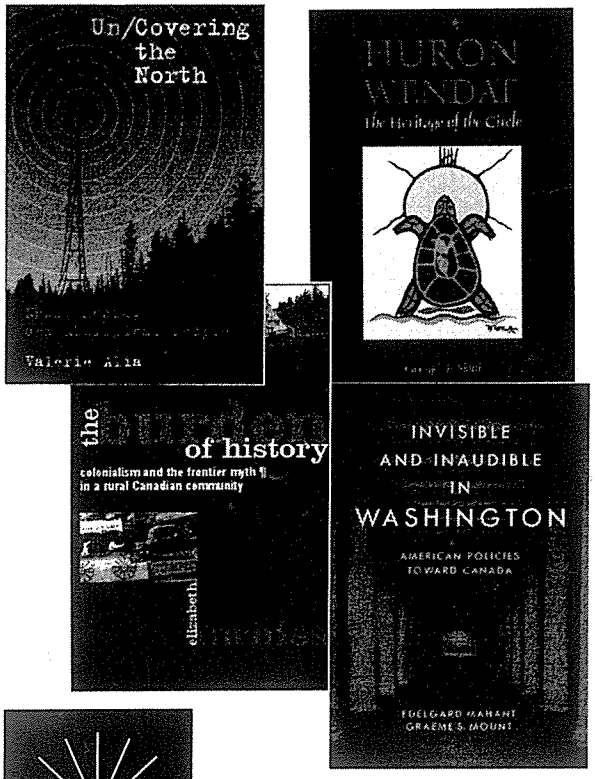

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EDITORIAL

The Journal of Canadian Studies: Still Committed to "Knowing Ourselves"

To concretely highlight the new partnership between the ACS and the JCS we are offering you the opportunity to better know the future objectives of the JCS.

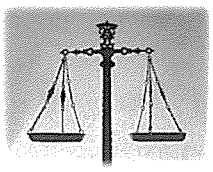
Over the last three decades, the Journal's experience has reflected the interdisciplinary mission of Canadian Studies and the larger "Canada" project. The Journal remains committed at the turn of the century to the cause of "knowing ourselves," in Tom Symons's memorable phrase. But the "ourselves" that we are trying to know has been and is changing rapidly. We at the JCS intend to track and analyse the changed Canadian project, to encourage, exhort and help the development of the appropriate interdisciplinary tools, concepts and approaches required to this end, and to explain and illustrate to ourselves and the world what it is that makes Canada unique.

What are the changing circumstances on which we want to focus? Take, for example, Canada's "nationhood." What is the meaning of the Canadian "nation" at the end of the millennium? Is it Macdonald's "national dream"? Trudeau's vision of a bilingual and bicultural nation? There has been a steady questioning and unpacking of the idea of the two founding nations, an increasing uneasiness about the bilingualism project, a schizophrenia about the meaning of distinct society, a dizzying expansion of Canada's ethnic mosaic, a remarkable political experiment in the north, and an acceptance that aboriginal nationhood is an idea whose time has come. Canada can more easily be characterised as a multiple nation and it expresses a set of nationalisms. Is Canada the first post-modern nation? What is it that others see in us that they find attractive or interesting? We want to help to develop adequate tools and concepts to understand this multiple nation, and to assist the evolution of discourses and institutions—political and otherwise—to serve this emerging reality.

Canada's recent economic experience can be conceptualised in similar fashion. Indeed, what is the Canadian economy? The parade has passed on the national project surrounding Macdonald's National Policy, as a result of the West's political economic muscle, technological change and the national embracing of internationalisation and free trade. The West played the advance guard in disrupting the postwar Keynesian consensus around the welfare state. As deficits, taxes, regulations and Crown corporations dissolve, the notion of the "public" Canada disappears as well, to be replaced by...? In the place of earlier visions, what has emerged are north-south trade flows, cross-border regional economic areas, and an internationalisation so intense (and periodically perverse) that Canadian governments cannot seem to manage their domestic economies and currency. Here, too, we need to develop appropriate interdisciplinary tools, concepts and approaches to analyse these changes and to suggest political economic alternatives.

What do Canada's citizens make of all this? Indeed, who are they? Increasingly, they are not members of our two "founding nations," as Canada has embarked on one of the world's most profound exercises in multicultural existence. This plays out increasingly in cities—and the reality of Canada's urban existence is one of the great unanalyzed dimensions of Canadian life. Race and gender issues loom larger in social and political reality, as does the place and role of aboriginals. More and more, our art, music, literature and theatre reflect these multiple Canadas and their nationalisms.

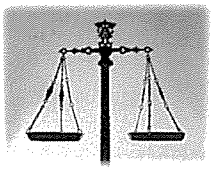
These are the themes, issues and challenges that we want to see reflected in the Journal's pages. We want the JCS to track the great transformation of the Canada project and to contribute to the development of a "Canadian Studies" with appropriate interdisciplinary tools and approaches. We want to contribute to the epistemological debates informing these developments, to advance the evolution of interdisciplinarity, and to firm the foundations of Canadian Studies. We want to shape the contours of the research setting, by presenting the latest developments and by mapping the terrain of future exploration. We want to engage in the pedagogic challenges confronted by teachers of Canadian Studies in their classrooms. These are the issues and projects that will be played out in the pages of the Journal over the next few years, particularly the millennium issues in 2000-01. ■



Robert M. Campbell
For the JCS Board

We want the JCS to track the great transformation of the Canada project and to contribute to the development of a "Canadian Studies" with appropriate interdisciplinary tools and approaches.

La Revue d'études canadiennes: toujours engagée à «mieux se connaître»



par Robert M. Campbell
Pour le conseil d'administration de la REC

Nous voulons que la REC suivre la grande transformation du projet Canadien et contribuer au développement des études canadiennes avec les outils et approches interdisciplinaires appropriés.

Afin de concrètement souligner le nouveau partenariat entre l'AEC et la Revue d'études canadiennes (REC), nous vous offrons l'opportunité de mieux connaître les objectifs futurs de la REC.

Au cours des trois dernières décennies, la Revue a reflété la mission interdisciplinaire des études canadiennes et le projet « Canada ». Au tournant du siècle, la Revue est toujours engagée dans le projet de recherche de « mieux se connaître », selon la maxime mémorable de Tom Symons. Mais ce « nous-mêmes » que nous essayons de connaître a changé et change à un rythme effarant. À la REC, nous avons l'intention de suivre et d'analyser les changements du « projet canadien », pour encourager, recommander et aider le développement d'outils, de concepts et d'approches interdisciplinaires appropriés afin d'expliquer et d'illustrer, à nous-mêmes et aux autres, ce qui rend le Canada unique en son genre.

Quelles sont les circonstances changeantes sur lesquelles nous voulons nous concentrer? Prenons l'exemple du « nationalisme canadien ». Qu'est-ce signifie le concept de « nation canadienne » en cette fin de millénaire? Est-ce le « rêve national » de Macdonald? Est-ce la vision que Trudeau a d'une nation bilingue et biculturelle? Il y a eu une interrogation et une explosion de l'idée des deux nations fondatrices, une difficulté croissante à propos du bilinguisme, une schizophrénie à l'idée d'une société distincte, une expansion vertigineuse de la mosaïque ethnique du Canada, une expérience politique remarquable dans le nord, et une acceptation que l'idée de « nationalisme » autochtone. Le Canada peut être encore plus facilement caractérisé en tant que nation multiple et comme l'ensemble de ses nationalismes. Le Canada est-il la première nation post-moderne? Qu'est-ce que les autres voient en nous qui semble si attrayant ou intéressant? Nous voulons aider à développer des outils et des concepts adéquats pour comprendre cette nation multiple, et pour aider l'évolution des discours et des institutions – politique et autres – afin de répondre à cette réalité qui émerge.

L'expérience économique canadienne récente peut être conceptualisée d'une façon similaire. En effet, qu'est-ce que l'économie canadienne? Le défilé a passé sur le projet national entourant la politique nationale de Macdonald, résultat de la forte politique économique de l'Ouest, du changement technologique et de l'internationalisation et du libre échange. L'Ouest a joué un rôle d'avant plan en perturbant le consensus Keynesian d'après-guerre autour de l'état providence. Comme la question des déficits, des impôts, des règlements et des sociétés de la couronne se résout, la notion d'un Canada « public » disparaît aussi, pour être remplacé par...? À la place des visions précédentes, ont émergé des courants commerciaux nord-sud, des zones économiques régionales transfrontières, et une internationalisation si intense (périodiquement perverse même) que les gouvernements canadiens ne semblent même plus contrôler leurs propres économies et devises. Encore ici, nous devons développer des outils, des concepts et des approches interdisciplinaires appropriés pour analyser ces changements et pour suggérer des politiques économiques alternatives.

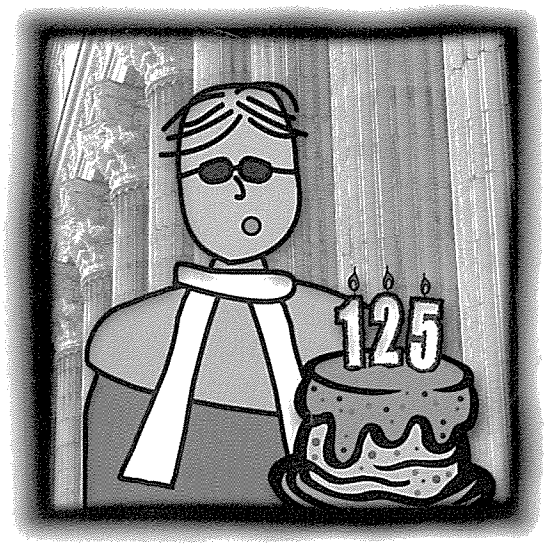
Qu'est-ce que les citoyens canadiens font du tout ça? Qui sont-ils? De plus en plus, ils ne sont pas des membres de nos deux « nations fondatrices », puisque le Canada s'est embarqué dans l'un des plus grands exercices mondiaux de multiculturalisme. Cette réalité se fait sentir de plus en plus dans les villes – et la réalité de l'existence urbaine du Canada est l'une des plus grandes dimensions qui n'a pas encore été analysée sur la vie canadienne. Les questions concernant la « race » et le genre occupent une plus grande place dans une réalité sociale et politique, tout comme la question reliée au rôle et à la place des autochtones. De plus en plus, notre art, musique, littérature et théâtre reflètent ces « Canada multiples » et leurs différents nationalismes.

Ce sont les thèmes, les questions et les défis que nous voulons aborder dans les pages de la Revue. Nous voulons que la REC suivre la grande transformation du projet Canadien et contribuer au développement des études canadiennes avec les outils et approches interdisciplinaires appropriés. Nous voulons contribuer aux discussions épistémologiques éclairant ces développements pour faire avancer l'évolution de l'interdisciplinarité, et pour solidifier les bases des études canadiennes. Nous voulons tracer les contours des avenus des recherches, en présentant les derniers développements et en ouvrant le terrain pour la prochaine exploration. Nous voulons nous engager dans les défis pédagogiques auxquels les professeurs en études canadiennes sont confrontés dans leurs salles de cours. Ce sont ces questions et ces projets qui formeront la trame de la Revue au cours des années à venir, plus particulièrement dans les numéros du millénaire en 2000 et 2001. ■

125th Anniversary of the Supreme Court of Canada

by Marc-André Blanchard
Partner, McCARTHY TÉTRAULT

The turn of the millennium marks the 125th anniversary of the Supreme Court of Canada ("SCC") and the 50th anniversary of the abolition of appeals to the Judicial Committee of the Privy Council in England. In recent years, particularly since the 1982 introduction of the Canadian Charter of Rights and Freedoms, the SCC has become a more active participant in the development of Canadian public policy, and in the shaping of Canadian attitudes. The following collection of articles explores this new found influence of the SCC, along with the issues and controversy that have naturally arisen with its increasing role in defining modern Canadian values.



The article by Andrew J. Hladyshevsky underlines that the role of the SCC in shaping Canadian attitudes, government policy and national consciousness regarding all Aboriginal issues has never had as high a profile or as controversial a role as it does today. Hladyshevsky discusses the SCC's increasingly flexible approach to the interpretation of Aboriginal Rights and Treaties in light of the Charter. The author is optimistic that the SCC will redefine the special fiduciary relationship of the Crown to Aboriginal Peoples on the basis of the principles governing the interpretation of Treaty and Aboriginal Rights that Chief Justice Beverley McLauchlin set out in dissent in R. v. Marshall. These principles include a historical recognition of 500 years of alliance and cohabitation. The article by F. Pearl Eliadis and Reema Khawja discusses the early failures of the SCC to recognize the human rights of women and how the Charter provided the impetus for the SCC to recognize women's human rights as part of the equality equation. The authors argue that the voices of women jurists in the SCC have contributed to an evolution of the legal concept of equality so as to include recognition that certain aspects of women's lives are not similarly experienced by men. The SCC's decisions of the past decade have effectively moved women into a circle of norms that had previously been dominated by a male perspective. William A. Schabas discusses how international law on human rights, specifically the Universal Declaration of Human Rights, has influenced and inspired the SCC's interpretation of the Charter. Schabas points out that, since Trudeau's White Paper of 1969, the protection of economic and social rights has taken a back seat to that of civil and political rights. Change is afoot, Schabas argues, and suggests that international law may provide a rich source of norms that can help the living tree of constitutional law to grow to protect these other basic human rights. Although the SCC has been largely preoccupied with Charter cases, Donald Bisson emphasizes the less obvious yet important influence that its decisions over the past decades have had on commercial law. The SCC appears to have infused the law with a certain "commercial morality" based on equity and fair play.

The SCC's role as final arbiter of the meaning and effect of the Charter has given the SCC, and its individual judges, considerable influence on Canadian politics and policy. Christopher P. Manfredi's article discusses how the SCC has used the Charter as a wedge to assert jurisdiction over policy vacuums. Manfredi shares the concern of many critics that the SCC may be overstepping its bounds and usurping power from the legislatures and executives. Governments increasingly base policy on their predictions of what will survive judicial review, and the wording of legislative amendments often appears to have been borrowed directly from SCC judgements.

The SCC has become a more active participant in the development of Canadian public policy, and in the shaping of Canadian attitudes.

Manfredi claims that external checks on the power of the SCC are necessary, and suggests re-legitimizing the notwithstanding clause of the Charter. Controversy over the formidable power asserted by the SCC has lead Jacob S. Ziegel to contribute to the renewed debate over the suitability of the present system of appointments of judges to the SCC. In his article, Ziegel argues that the present system is incompatible with the values of democracy, accountability and transparency. Zeigel advocates an open confirmation procedure, perhaps involving the House of Commons. Gerald L. Gall and Rebecca Soberl explore how recent controversial decisions have drawn public attention and scrutiny to the judges who sit on the bench of the SCC. The authors highlight the recent public appearances of SCC judges and note that the judges seem far less wary of extra-judicial writing and speeches. Although these extra-judicial pronouncements occasionally attract controversy of their own, Gall and Soberl argue that they largely serve the positive purpose of demystifying the workings of the court and enhancing the administration of justice.

It appears from all of the articles that the SCC's role in defining Canadian values and shaping public policy in this country will only become more important and thus more controversial. The SCC and its members have to be congratulated for the remarkable contributions they have made to our history. The SCC is one of the leading judicial authorities in the world and an international example of integrity and vision which makes all Canadians proud. ■

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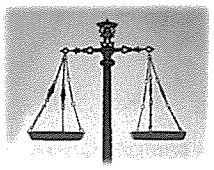
It's Role as "Referee" for Cultural Collision/Cohabitation in the Canadas



By Andrew J. Hladyshevsky

Lawyer and partner in the Edmonton law firm Cruickshank Karvellas.

Member of the Alberta Law Society and chairman of the Alberta Business Corporations Act Committee of the Law Society of Alberta.

In January 2000, the leadership of this country's highest court was placed into the hands of Chief Justice Beverly McLachlin. The Supreme Court of Canada ("S.C.C."), in shaping Canadian attitudes, government policy, and national consciousness regarding all Aboriginal issues, has never had as high a profile or as controversial a role as it does today.

Since the adoption of the *Constitution Act*, 1982, the S.C.C. has demonstrated an increased flexibility in its interpretation of Aboriginal Rights and Treaties. Canadians and young scholars will need to have a comprehensive understanding of Canadian Aboriginal history, including the role of the S.C.C. The Chief Justice has said that both she and her colleagues believe in a broad interpretation of Aboriginal Rights in which the 500 years of cohabitation must be taken into account on a case by case basis, as evidenced in *R. v. Marshall*:

> "The consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with the possible range of interpretations, Courts must rely on the historical context to determine which comes closest to reflecting the parties' intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interest." [*Regina v. Marshall* [1997] S.C.R. 287

The Royal Commission on Aboriginal Peoples and their now famous report (RCAP Report) was based on an exhaustive 178 days of public hearings in some 96 communities. After commissioning a multitude of research studies and consulting with research experts, it concluded that the main policy direction of Canadian Governments over the past 150 years is wrong.

Parliamentary debate on the recent Nisga'a Treaty in Parliament varies from the position of the Reform Party, who would oppose any notion of separate and distinct Aboriginal Nations to that of the Bloc Quebecois, for whom recognition of Aboriginal rights is a critical component of the democratic process. The establishment of rights for separate peoples would set a precedent for a unique, distinct and perhaps independent Quebec.

Why have Canadians forgotten our history with the Aboriginal peoples and Metis? The relationship between the first Europeans and the Aboriginal Communities that would have dominated the 1500's and 1600's were largely based upon the expansionist policies of the major European powers, England and France. Modern Canadian society forgets that the original European Colonists were small in number and were attempting to colonize vast stretches of territory. The maintenance of Aboriginal alliances was critical for both military strategy and our ability to ensure that the vast territories being occupied by the Europeans were held in a continuous fashion. With the defeat of Montcalm on the Plains of Abraham, the British continued to forge a "Special Relationship" with the Aboriginal Peoples.

The Royal Proclamation of 1763 was the defining moment in the relationship with the British Crown and it defines the first two centuries of contact. It would take several centuries before this fiduciary relationship would begin to be re-examined in a fresh light and expanded to the modern context of the S.C.C. interpretation of Aboriginal Rights.

The British imperative at the beginning of the 19th Century was to continue to continue to form alliances with the Aboriginal Peoples. Notwithstanding the remarkable contributions of leaders such as General Isaac Brock, historians now place the contributions of warriors such as Chief Tecumseh on par with or even above that of his British counterparts in ensuring that the self determination of Canada remained out of the control of American expansionism.

However, the introduction of *The British North America Act* in 1867 imposed colonial power by adopting a form of constitution for Canada without any major consultation or input from the Aboriginal Peoples. What followed were the *Indian Acts* of 1876, 1880 and 1884 which began the transformation of Aboriginal Nations to that of a "Conquered People". However, most Aboriginal Nations had no desire for this nor were they ever conquered as evidenced in the 18th and 19th Century Treaties which established the peaceful

Why have Canadians forgotten our history with the Aboriginal peoples and Metis?

and orderly growth of Canada, particularly in the colonization of the West.

From 1867 up to the introduction of the *Constitution Act*, 1982, the interpretation of Aboriginal rights and rights under treaties went through the "Dark Ages" via a series of technical judgments. As explained by Justice Binnie of the S.C.C., in the recent R. v. Marshall case:

> "Until enactment of *Constitution Act*, 1982, the Treaty Rights of Aboriginal Peoples could be overwritten by competent legislation as easily could the rights and liberties of other inhabitants. The hedge offered no special protection, as the Aboriginal People learned in earlier hunting cases such as *Sikyea v. The Queen* [1964] S.C.R. 642, and *R. v. George* [1966] S.C.R. 267. On April 17th, 1982, however, this particular type of "Hedge" was converted by section 35(1) into sterner stuff that could only be broken down when justified according the test laid down in *R. vs. Sparrow*, [1990] 1 S.C.R. 1075, at P.1111 @ et seq., has adapted to apply to Treaties in Badger, Supra, per Cory J.E., @ page 812 @ seq."

From 1867 up to the introduction of the Constitution Act, 1982, the interpretation of Aboriginal rights and rights under treaties went through the "Dark Ages" via a series of technical judgments.

So what followed in the latter half of the 19th Century and the first three quarters of the 20th Century, was a broad policy, supported by our S.C.C., to eventually assimilate the Aboriginal population into that of the greater Canadian society. The disastrous effects of this policy are still being felt to this day and will continue to reverberate throughout the Aboriginal community.

The "Dark Ages" ended with the introduction of the *Constitution Act*, 1982. The Charter of Rights and Freedom protects individuals by preventing the government from imposing laws that are too restrictive of their rights. Section 25 was introduced to protect special Aboriginal laws and status from being destroyed by some other application of the Charter:

> "s.25 - The guarantee in this Charter of certain rights and freedom shall not be construed so as to abrogate from any aboriginal, treaty or other rights and freedoms that pertain to the Aboriginal Peoples of Canada including:
>
> a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> b) any rights or freedoms that may be acquired by the Aboriginal Peoples of Canada by way of land claims settlement."

Even prior to the *Sparrow* case, came the important decision of the S.C.C. in *Guerin v. R.* [1984], D.L.R. (4th) 321. The interpretation of Aboriginal Rights was associated with the term "Sui Generis". The interpretation of Sui Generis is that Aboriginal Rights are unique, different, and distinct. The Guerin case is also considered definitive of the S.C.C.'s attempt to define and confirm the special fiduciary relationship of the Crown to the Aboriginal Peoples.

Later in the *Sparrow* cases, the test for infringement under Section 35(1) of the *Constitution Act*, 1982 was set out:

> "To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of Section 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation".

The pronouncement in Sparrow soon became known as the "justificatory test," as this relates to Aboriginal Rights. The overlay of legislative powers over Aboriginal Peoples must contain within it an inherent limitation of the Crown's exercise of its legislative powers to take into account Aboriginal Rights.

Where are we now and where do we go to from here? As the RCAP Report indicated, there are in excess of some 450 Aboriginal claims that are in various states of negotiation and litigation. Looking forward to the 21st Century, the current Chief Justice, Beverly McLachlin has set out the summary of principles governing interpretation of Treaty and Aboriginal Rights. Although speaking in dissent in *Regina v. Marshall*:

1. "Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, @ para. 24; *R. v. Badger*, [1996], 1 S.C.R. 7701, @ para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, @ pg. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, @ pg. 404., see also [J. Sake] Youngblood Henderson "Interpreting Sui Generis Treaties" [1997], 36 Alta. L. Rev. 46; L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights and the Sparrow Justificatory Test" [1997], 36 Alta. L. Rev. 149.

2. Treaties should be liberally construed and ambiguities or doubtful expression should be resolved in favour of the Aboriginal signatories: *Simon*, supra, @ p. 402; *Sui*, supra @ p. 1035; *Badger*, supra @ p. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sui*, supra, @ pp. 1068 and 1069;

4. In searching for the common intention of the parties, the integrity and honour of Crown is presumed: *Badger*, supra @ p. 41;

5. In determining the signatories' respective understanding and intentions, the Court must be sensitive to any cultural and linguistic differences between the parties: *Badger*, supra @ paras. 52 - 54; *R. v. Horseman*, [1990] 1 S.C.R. 901, @ p. 907.

6. The words of the Treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, supra, @ p. 53 e.t. seq.; *Nowegijick v. The Queen*, [ ] 1 S.C.R. 29 @ p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, supra; *Horseman*, supra; *Nowegijick*, supra.

8. While construing the language generously, Courts cannot alter the terms of the Treaty by exceeding what "is possible on the language" or realistic: Badger, supra, @ p. 76; Sui, supra, @ p. 1069; Horseman, supra, @ p. 908.

9. Treaty rights of aboriginal peoples must not interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting Court must update Treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core Treaty right in its modern context: *Sundown*, supra, @ p. 32; *Simon*, supra, @ p. 402. [paragraph 78 - *R. v. Marshall*]

Justice McLachlin goes on to suggest what a twofold test approach in the interpretation of a Treaty involves. First, the words of a Treaty should be viewed as to their "facial meaning" which brings you to conclude a preliminary one or more possible interpretations. The second step then goes on to the interpretation of the Treaty's historical and cultural background which requires the Court to delve into the historical past. On behalf of the S.C.C., Justice Binnie also takes a well placed shot across the bow of historians, when he states:

> "The Courts attracted a certain amount of criticism from professional historians. These historians see an occasional tendency on the part of judges to assemble a "cut and paste" version of history. ... While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be nuanced....the law sees a finality of interpretation of historical events where finality, according to the professional story, is not possible. In reality, of course, the Courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can...(paras. 36 and 37).

The challenge for future Canadian scholars is to live up to the Court's expectations of accurate, historical analysis of the facts. As we move into the 21st Century, one position is clear, the status quo is broken. First Nations peoples are requesting an agenda for change that is ambitious and far reaching in both their legal and economic implications. As the RCAP Report suggests, changes will have to be negotiated and implemented by Aboriginal Peoples in the way that they choose. The challenge to governments is to develop social policy that will provide a 21st Century framework for solutions with the Aboriginal Community. Since the implementation of the *Constitution Act*, 1982, the S.C.C. has raised the bar on interpreting the relationship of the Aboriginal Peoples to other Canadians. Aboriginal society has waited 500 years for our S.C.C. to reach this point and they are not going to go away. With our new Chief Justice and the illuminated role of the S.C.C., we are only beginning to formulate the reorganization of our relationship with Aboriginals, Metis and Inuit. It remains to be seen whether Canadian Society and it's policy-makers are up to the challenge. ■

As we move into the 21st Century, one position is clear, the status quo is broken... changes will have to be negotiated and implemented by Aboriginal Peoples in the way that they choose.

The Evolution of Women's Human Rights in the Supreme Court of Canada

By F. Pearl Eliadis

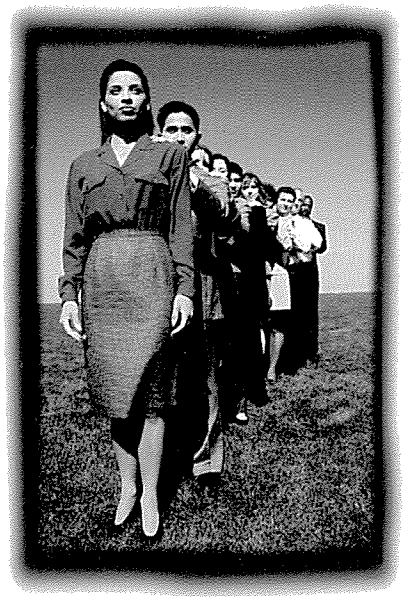
Director of Policy and Education at the Ontario Human Rights Commission and Past President of the Canadian Human Rights Foundation, Canada's first and largest NGO dedicated to human rights training and education.

and Reema Khawja

Senior Policy Analyst at the Ontario Human Rights Commision, Policy and Education Branch and was formerly a litigation lawyer with the law firm of McCarthy Tetrault.

The Court held that women were not "qualified persons" under the Constitution Act, 1867 and therefore could not sit as members of Canada's Senate.

In the late nineteenth century in Canada, women were subject to a host of legal impediments. They were excluded from holding political or professional office, from managing their own property or deciding significant issues of education or religion affecting their children. Married women were virtual legal non-entities with few enforceable rights. By 1875, powerful and complex forces of social, economic and political change were having enormous impact on a new society and on the lives of women in it. But it was the law that crystallized these roiling changes into recognizable patterns of social evolution and served to document, transform, and in some cases, rein in the pace of progress.



In the early years of the Supreme Court of Canada, the law played a role in both creating and reinforcing myths about women and gender-based power imbalances. The first century or so can be dispatched easily, with reference to the Supreme Court's 1928 decision in the famous "persons" case. The Court held that women were not "qualified persons" under the *Constitution Act*, 1867 and therefore could not sit as members of Canada's Senate. It was left to the Privy Council in Britain, Canada's highest appellate court at the time, to reverse the decision.

A similar perspective continued into the second half of the twentieth century, and survived even the enactment of the Canadian *Bill of Rights* in 1960. This was illustrated in the 1974 decision of the Supreme Court in *A.G. Can. v. Lavell*. The Court held that guarantees contained in the *Bill of Rights* extended only to procedural equality and not to substantive rights. A few years later, the Supreme Court concluded in *Bliss v. A.G. Can.* that differential treatment of pregnant women did not amount to discrimination on the basis of sex: "any inequality between the sexes in this area is not created by legislation but by nature", and "[i]f section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women."

This approach to equality could only be coherent in relation to a notion of identical treatment of persons, all of whom happen to be male. Both of these cases had a material impact on the evolution of what was to become the equality guarantees in the Constitution as women advocated strongly against the legacy of *Bliss* and *Lavell* and sought clearer and more compelling constitutional protection for women's rights.

This approach only began to change in the 1980s with two major developments: first was the *Canadian Charter of Rights and Freedoms* in 1982, then the ensuing equality rights provisions three years after that. The second is the appointment of women jurists to the Supreme Court of Canada. In 1989 the Court decided a major equality rights case, *Andrews v. Law Society of British Columbia*. The Supreme Court expressly rejected the "identical treatment" equality paradigm and recognized that substantive equality may require different treatment for those who are differently situated. Equality was recognized as a concept requiring an understanding of "the context of the place of the group in the entire social, political and legal fabric of our society." In fact, it is arguable that the evolution of the concept was more basic than that—it also moved women into the circle of norms that had until then been based on a male perspective.

The next wave of cases shows that the Court recognized the challenge of fashioning legal principles which include all aspects of women's experiences, especially those aspects of women's lives that are not experienced in the same way by men. Three good examples are the Court's decisions in the areas of spousal violence *(Lavallee)*, sexual violability *(McCraw)* and pregnancy *(Brooks)*.

In *R. v. Lavallee*, Madame Justice Wilson recognized that spousal abuse is a type of violence that is foreign to the world inhabited by the hypothetical "reasonable man". Accordingly, when determining what was "reasonable" in the context of Lyn Lavallee's plea of self-defence (Lyn Lavallee had shot and killed her abusive partner), the subjective experiences of a battered woman had to be considered. The Court also identified and rejected persistent myths about wife battering and women in abusive relationships.

In *R. v. McCraw*, the Supreme Court carried this reasoning to whether the threat to rape is a threat to cause serious bodily harm. The Court again took the position that the perspective of women should be part of the analytical framework, rather than an exception that had to be fitted into a male paradigm. In finding that a threat of rape is, in fact, a threat to cause serious bodily harm, the Court considered the overall context of women's social and sexual disadvantage and expressly included women when ascertaining how the ordinary person would react to threatening letters.

Ten years after *Bliss*, the Supreme Court once again considered whether differential treatment of pregnant women constitutes sex discrimination in *Brooks v. Canada Safeway Ltd.* The Court noted that the *Bliss* decision was inconsistent with the *Andrews* approach to equality and other decisions of the Court in the area of human rights. Looking at the social, political and legal context of women in society, the Court noted that pregnancy is one of the most significant ways in which women have been disadvantaged. The decision is significant not only because of the reversal of *Bliss*, but also for the pronouncement that women should no longer disproportionately bear the costs of having and raising children.

An extraordinary example of bringing women into the ambit of the "rule" of inclusive legal reasoning is the concurring decision of Madame Justice Wilson in *R. v. Morgentaler*. She alone found that Criminal Code provisions on abortion violated a woman's right to life, liberty and security of the person in a substantive manner:

> In essence, what [the provision] does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state...This is not, in my view, just a matter of interfering with her right to liberty in the sense ... of her right to personal autonomy in decision-making, it is a direct interference with her physical 'person' as well... Can there be anything that comports less with human dignity and self-respect?

In noting that a man could not understand the dilemma faced by a woman because he could never experience it, she stated:

> It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.

The Supreme Court's 1999 decision *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* is the most recent affirmation of an approach that treats women as part of the norm instead of as an exception which needs to be fitted into the male "mainstream". As a result of failing a fitness test a female firefighter lost her job. The broader legal issue in the case was whether the test unfairly excluded women from firefighting jobs. A unanimous court noted that a standard that may seem "neutral" might in fact entrench a male norm as the "mainstream" into which women must integrate. The result is to shield systemic discrimination, in this case, in the context of a male-dominated profession, from scrutiny. The Court fashioned a new approach to discrimination cases and applying the new approach to the claimant's case, found a *prima facie* case of discrimination which could not be justified by the employer.

Conclusion

While it has become fashionable to decry judicial activism in recent years—particularly that of the Supreme Court of Canada since the *Charter*—the reality of the Supreme Court's history to date has been rather more placid than the alarmists allow. In the early years, where women's human rights have been concerned, judicial conservatism maintained a social structure that was only reluctantly beginning to accept the new roles that women were beginning to play. More recently, the *Charter* has provided the impetus to the Court to recognize women's human rights as part of the equality equation rather than as an exception to it. ■

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* Several texts were reviewed in preparation for this article, but special acknowledgment is due to the thoughts and work of Mary Eberts and Kathleen Mahoney. Any errors are those of the authors.

Source incontournable d'inspiration pour la Cour suprême du Canada

par William A. Schabas

Professeur titulaire de la chaire en droits de la personne et directeur du Centre irlandais des droits de la personne, Université nationale irlandaise, Galway, Irlande.

La Charte canadienne des droits et libertés fait «sienne» cette mise en oeuvre des obligations internationales même si elle ne correspond pas exactement à l'ensemble des traités auxquels le Canada est partie.

Pendant les années 1960 et 1970, la Cour suprême du Canada fut vainement utilisée comme instrument de réforme sociale. La Cour suprême des États-Unis, sous la direction du juge en chef Earl Warren, avait pourtant fourni un modèle excitant avec une série de décisions progressistes sur le racisme dans des écoles (*Brown c. Board of Education*), les garanties judiciaires (*Miranda c. Arizona*), les droits des femmes (*Roe c. Wade*) et la peine capitale (*Furman c. Georgie*). Mais la Cour d'Ottawa ne semblait pas très impressionnée par le dynamisme de sa voisine du sud. Afin de justifier leur conservatisme, les juges de notre Cour blâmèrent « le législateur ». Cependant, lorsque le Parlement canadien donna finalement des outils intéressants, comme ce fut le cas avec la *Déclaration canadienne des droits* de 1960, la Cour adopta, à chaque fois, une interprétation restrictive.

Vingt-cinq ans plus tard, beaucoup de choses ont changé. La Cour suprême du Canada est maintenant innovatrice et radicale à plusieurs égards. Ses jugements sont cités par des cours constitutionnelles à travers le monde. Paradoxalement, pour accompagner ce progrès remarquable, on constate un déclin terrible dans les jugements de la Cour suprême des États-Unis, phénomène provoqué par des batailles politiques à l'intérieur de la Cour même. Le rôle croissant du droit international des droits de la personne constitue sûrement un des éléments expliquant ces développements. En effet, il s'agit d'un système de droit qui a beaucoup inspiré la Cour suprême du Canada ainsi que les tribunaux inférieurs depuis l'adoption de la Charte canadienne des droits et libertés en 1982. En revanche, les États-Unis font preuve d'une grande indifférence envers ce système international.

Depuis la fin de la Deuxième Guerre mondiale, on assiste à l'évolution d'un régime de plus en plus sophistiqué du droit international des droits de la personne. Le véritable point de départ est l'adoption de la Déclaration universelle des droits de l'homme en 1948. Il y a maintenant des centaines de traités, de pactes et de déclarations sur le plan international, ainsi qu'une jurisprudence abondante des tribunaux internationaux tels la Cour européenne des droits de l'homme et le Comité des droits de l'homme des Nations Unies. Le Canada est un participant très actif dans ce système de normes internationales.

Selon notre système parlementaire, une obligation internationale contractée par le gouvernement n'est pas exécutoire en droit interne à défaut d'une initiative législative. La *Charte canadienne des droits et libertés* fait « sienne » cette mise en oeuvre des obligations internationales même si elle ne correspond pas exactement à l'ensemble des traités auxquels le Canada est partie. Il est indiscutable, d'après les travaux préparatoires de la *Charte*, que nos élus se sont grandement inspirés des sources internationales lors du processus rédactionnel. C'est pourquoi, bien souvent, le langage de la *Charte* est analogue à celui des instruments internationaux. À titre d'exemple : la célèbre clause limitative (article premier de la *Charte*) est calquée sur l'article 29 de la *Déclaration universelle des droits de l'homme.*

Reconnaissant cette paternité internationale de la *Charte canadienne*, la Cour suprême a souvent fait appel aux sources internationales pour les fins de son interprétation. Son traitement du débat concernant la propagande haineuse nous fournit un excellent exemple. Pendant les années 1960, afin de donner suite aux recommandations de la commission d'enquête présidée par Maxwell Cohen, le Parlement canadien a modifié le *Code criminel*, créant de ce fait une infraction de diffusion de la propagande haineuse. Il est incontestable que cette disposition porte atteinte à la liberté d'expression.

Mais en l'absence d'une garantie constitutionnelle de la liberté d'expression, elle demeure valide et incontestable.

Lorsque la *Charte* est entrée en vigueur, il est devenu possible de demander une déclaration d'invalidité d'une loi du Parlement pour violation de la *Charte*. Un antisémite notoire, Jim Keegstra, accusé devant les tribunaux albertains de propagande haineuse, contesta d'ailleurs la constitutionnalité de l'infraction. La Cour suprême du Canada déclara alors que le crime de propagande haineuse constituait une limite raisonnable à la liberté d'expression et donc qu'il était compatible avec la *Charte*.

Le résultat du vote fut extrêmement serré : quatre contre trois. La majorité de la Cour fit appel à certaines sources internationales, par exemple, la *Convention internationale pour l'élimination de toutes les formes de discrimination raciale*. Cet instrument, ratifié par le Canada en 1969, oblige les États partis à supprimer la propagande haineuse. Les dissidents, quant à eux, furent moins impressionnés par les sources internationales. Pour eux, la source la plus intéressante au sujet de la liberté de parole était une décision de la Cour suprême des États-Unis, qui adoptait une vision extrême. L'affaire *Keegstra* représente donc un triomphe du droit international des droits de la personne devant la Cour suprême.

Il est intéressant de noter que, dans certains cas, les juges se disputent quant à l'interprétation même des sources internationales. Ce fut le cas à l'occasion d'une trilogie de jugements au sujet du droit à la grève. Certains instruments internationaux, dont le *Pacte international relatif aux droits économiques et sociaux*, reconnaissent un droit de faire la grève, inclus dans les droits des travailleurs, tandis que d'autres demeurent muets sur ce point. La majorité des juges opta pour un courant plus conservateur appuyant, de ce fait, certaines lois provinciales limitant le droit de faire la grève dans différents services essentiels.

Un des thèmes importants en droit international des droits de la personne est celui de l'abolition de la peine de mort. Un jugement célèbre de la Cour européenne des droits de l'homme de 1989 ordonna au Royaume-Uni de ne pas extrader un fugitif vers les États-Unis à défaut d'un engagement de la part des autorités américaines de ne pas imposer la peine capitale. D'autres jugements sont au même effet, dont une ordonnance récente contre la Turquie dans l'affaire Ocalan. Mais appelée à trancher la même question dans une affaire d'extradition du Canada, la plus haute cour eut beaucoup de difficultés avec

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les précédents internationaux. Par une majorité assez mince de quatre contre trois, dans des jugements de septembre 1991 (*Kindler* et *Ng*), la Cour autorisa finalement des extraditions vers la Pennsylvanie et la Californie.

Depuis lors, le mouvement abolitionniste continue de faire du chemin. En 1991, les États qui imposaient la peine capitale étaient encore majoritaires, fait que certains juges remarquèrent dans leur jugement. Mais depuis 1995, c'est la majorité qui n'impose plus la peine capitale. Encore plus, en 1998, lors de l'adoption du *Statut de Rome pour la création d'une Cour pénale internationale*, les États furent d'accord concernant l'incompatibilité de la peine de mort avec le nouveau système de justice internationale. Une cause aujourd'hui pendante devant la Cour suprême du Canada, celle de *Burns et Rafay*, soulève les mêmes questions que celles soulevées par les affaires *Kindler* et *Ng*. Nous pouvons espérer que la Cour ne sera pas indifférente quant à l'évolution des normes sur le plan international.

Enfin, c'est cette évolution constante en droit international des droits de la personne qui doit surtout intéresser les juges de la Cour suprême. Depuis longtemps, on cite un vieux cliché qui déclare que la constitution est un arbre vivant devant évoluer avec le temps. Or, le droit international fournit la source la plus riche de nouvelles normes et de nouvelles valeurs sur le plan des droits de la personne.

Un exemple des possibilités à ce sujet suffit. À l'origine, dans la *Déclaration universelle des droits de l'homme* de 1948, les droits civils, politiques, économiques, sociaux et culturels se trouvaient réunis au sein d'un même instrument, sans distinction. Mais avec la guerre froide est venue l'idée que les droits économiques, sociaux et culturels étaient moins importants, ou certainement moins « justiciables ». Dans son livre blanc sur le projet de charte de 1968, Pierre-Elliot Trudeau avait déclaré qu'il fallait exclure les droits économiques et sociaux pour cette raison. Maintenant, fort est de constater que personne ne conteste le fait que, lors de l'adoption de la *Charte canadienne*, on n'ait pas voulu incorporer ces catégories de droits.

Par conséquent, le texte de la *Charte* se limite à une vision plutôt traditionnelle des droits. Elle est basée essentiellement sur les normes « civiles et politiques ». Or, depuis la conférence de Vienne de 1993, on clame l'indivisibilité des droits de la personne. Le droit international considère la scission qu'a provoquée la guerre froide entre catégories de droits comme étant une erreur. Peut-on donc remédier aux lacunes de la Charte par la voie jurisprudentielle, plutôt que par amendement, en s'inspirant du droit international ?

Il existe bien des portes d'entrée pour les droits économiques et sociaux dans la *Charte*. L'article 7, par exemple, proclamant le droit à la vie, à la liberté et à la sécurité, est plein de potentiel à cet égard. Mais jusqu'à maintenant, les juges ont refusé d'y apporter une interprétation évolutive qui aurait eu l'avantage de tenir compte de la nouvelle importance des droits économiques et sociaux. Il en est ainsi avec l'article 15, qui affirme le droit à l'égalité. C'est probablement un des défis de taille que la Cour suprême du Canada aura à surmonter en ce début de millénaire. ■

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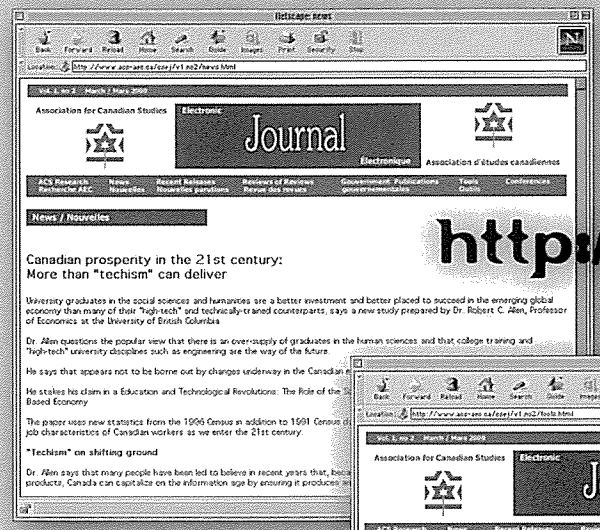

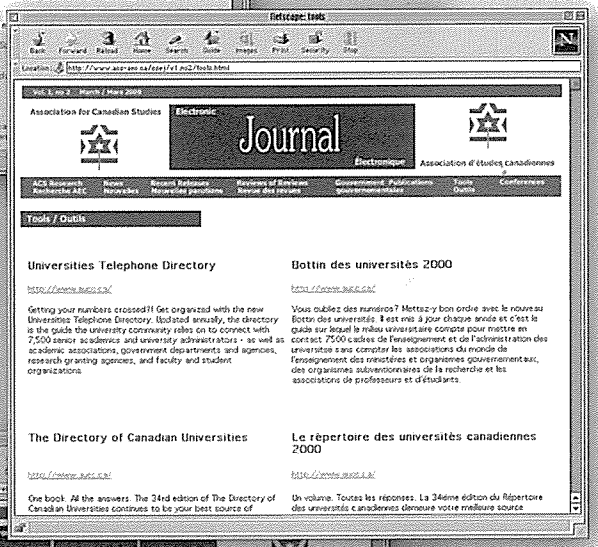

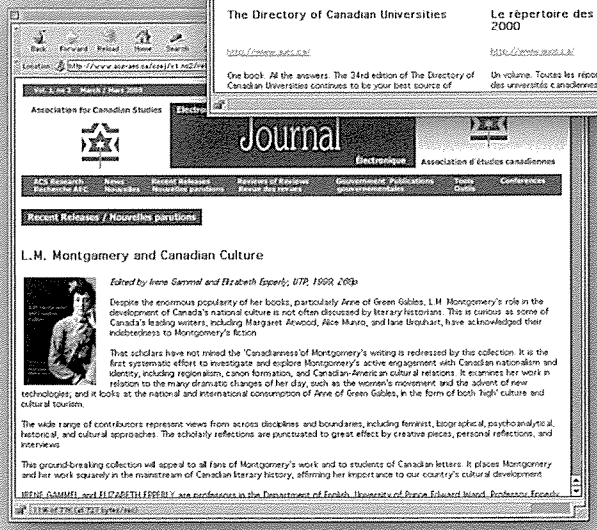

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Le rôle de la Cour suprême du Canada

par Me Donald Bisson
Avocat au bureau de Montréal
de la firme McCARTHY TÉTRAULT

La Cour suprême du Canada a indiqué qu'un des aspects de l'obligation d'agir de bonne foi entre les acteurs commerciaux inclut une obligation de renseignement.

Étant donné l'importance donnée à la *Charte canadienne des droits et libertés*, la Cour suprême du Canada n'entend presque plus de causes en matière commerciale. Néanmoins, elle a rendu au cours des dernières décennies une série d'arrêts qui ont un impact considérable et durable en matière de droit commercial.

En ce qui concerne les différentes sources de responsabilité, tant en droit civil québécois qu'en Common law, la Cour suprême du Canada a clairement favorisé l'option entre les recours. Ainsi, lorsqu'un préjudice permet à première vue d'étayer à la fois une action en responsabilité contractuelle et une action en responsabilité extracontractuelle, la partie demanderesse peut exercer l'un ou l'autre des recours, ou les deux. Cependant, au Québec, le Code civil de 1994 est venu renverser cette tendance, en interdisant formellement l'option.[1]

La Cour a également énoncé les grands principes que doivent suivre les entreprises, les actionnaires et les dirigeants d'entreprises lorsqu'ils transigent entre eux. Dans nombres d'arrêts[2], la Cour est venue indiquer que, tant en Common law qu'en droit civil québécois, les relations entre les parties doivent être empreintes de bonne foi, qu'il s'agisse de relations contractuelles, de relations extracontractuelles ou de simples contacts d'affaires. La Cour a non seulement rappelé l'importance de respecter les obligations prévues à un contrat mais a également affirmé que d'autres obligations pouvaient exister entre des parties même s'il n'y avait pas de contrat entre elles. Ce dernier type d'obligation est, en Common law, une obligation dite fiduciaire, basée sur les rapports de confiance que les parties ont entre elles et la nature des informations échangées. La Cour a ainsi décidé que des hauts dirigeants d'une compagnie possédant des informations à caractère confidentiel ne peuvent se servir de tels renseignements pour en tirer un gain personnel, que ce soit pendant ou après la durée de leurs fonctions auprès de leurs employeurs.

La Cour suprême a non seulement précisé la nature des relations entre les parties, mais également l'identité des individus qui pouvaient être poursuivis pour des actes fautifs ou qui pouvaient poursuivre. La doctrine traditionnelle était à l'effet que les actionnaires d'une compagnie ne pouvaient être poursuivis par des tiers. Or, la Cour a décidé que les actionnaires d'une compagnie pouvaient être poursuivis personnellement s'ils avaient commis à l'égard des tiers une faute distincte en marge de celle commise par la compagnie elle-même. À l'inverse, la Cour a considéré que les actionnaires eux-mêmes avaient le droit de poursuivre un tiers qui aurait causé non seulement un dommage à la compagnie, mais qui aurait également causé un préjudice personnel distinct de celui de la compagnie.[3]

De plus, la Cour suprême du Canada a indiqué qu'un des aspects de l'obligation d'agir de bonne foi entre les acteurs commerciaux inclut une obligation de renseignement. Ainsi, le créancier a une obligation de renseignement à l'égard de la caution et le fabricant à l'égard des utilisateurs de son produit. La Cour a précisé qu'une telle obligation impose un devoir de renseignement dans les cas où une partie se retrouve dans une position informationnelle vulnérable, de laquelle des dommages pourraient découler. Cette obligation de renseignement s'applique non seulement dans le cadre d'une relation contractuelle, mais aussi lorsque les parties sont en train de négocier la conclusion d'un contrat.[4]

La Cour suprême a aussi précisé les limites de la responsabilité civile dans certains domaines du droit des affaires. Par exemple, la Cour a indiqué que les banques peuvent engager leur responsabilité si elles rappellent de façon abusive des prêts qu'elles ont consentis, en cas de défaut de la part des débiteurs de rembourser les intérêts et le capital dûs.[5] De même, la Cour a émis le principe selon lequel des vérificateurs comptables peuvent, dans certaines circonstances précises, engager leur responsabilité

civile à l'égard de tiers qui auraient basé leur investissement dans une compagnie sur la foi du rapport de vérification préparé pour cette compagnie.[6]

Les relations de travail sont également un domaine de droit commercial où la Cour suprême du Canada est intervenue. La Cour est venue clairement mentionner que, pour être valide, une clause de non-concurrence imposant à un ex-employé (cadre ou non) une interdiction de travailler dans son domaine suite à son départ doit être limitée dans le temps et dans l'espace d'une façon raisonnable. Ainsi, les clauses de non-concurrence visant l'ensemble du Canada et s'échelonnant sur des durées supérieures à cinq (5) ans ont été généralement jugées invalides. [7]

Les questions de droit international privé affectent immanquablement la pratique du droit commercial. Ainsi, la Cour suprême énonçait que le fabriquant d'un bien défectueux peut être poursuivi dans la province où réside la victime du préjudice, dans la mesure où il était raisonnablement prévisible que le bien y serait utilisé ou consommé.[8] Quant à la question de la reconnaissance dans une province canadienne des jugements rendus par les tribunaux d'une autre province, La Cour a indiqué que l'intention de la Constitution du Canada est d'établir un seul et même pays et que, dans ces circonstances, les tribunaux d'une province doivent reconnaître les jugements rendus par un tribunal d'une autre province dans la mesure où il existe avec le tribunal de cette province un lien réel et substantiel avec l'action. En d'autres termes, les tribunaux d'une province doivent reconnaître un jugement rendu dans une autre province lorsque cette province a des liens substantiels avec l'objet de l'action intentée.[9] En matière commerciale, ces décisions ont eu pour impact de permettre aux créanciers de poursuivre plus adéquatement leurs débiteurs, qui ne peuvent plus se réfugier derrière les frontières des provinces.

La Cour a également eu l'occasion de clarifier certaines normes en matière de droit de la consommation et d'équité contractuelle. Anisi, il fut décidé que certains droits d'origine contractuelle, telle la garantie contre les vices cachés, se rattachent si étroitement à un bien qu'ils se transmettent automatiquement à tout acquéreur subséquent du même bien.[10] Ce principe fut incorporé dans le nouveau Code civil du Québec. Par ailleurs, la Cour précisait qu'une partie ne peut renoncer par contrat à la protection que lui accorde la loi avant de pouvoir utilement faire valoir cette protection. En effet, y explique-t-on, c'est alors seulement que la partie vulnérable pourra faire un choix éclairé entre la protection que la loi lui confère et les avantages qu'elle compte obtenir en échange de sa renonciation.[11] Ceci peut s'avérer particulièrement pertinent en droit de la consommation, domaine où la loi tente souvent de rétablir un certain équilibre contractuel entre les commerçants et les consommateurs.

Enfin, en matière de droit des sociétés par action, la Cour décidait qu'il était possible de contrecarrer le principe général « d'égalité entre actionnaires » par l'inclusion de clauses de dividende discrétionnaire à l'acte constitutif de société. Exprimé simplement, il sera loisible aux actionnaires d'inclure à l'acte constitutif une clause permettant aux administrateurs, lorsqu'il existe plus d'une catégorie d'actions, de choisir la catégorie qui aura le droit de toucher des dividendes à l'exclusion des autres catégories.[12]

On constate que la Cour suprême du Canada est venue préciser les principes généraux devant s'appliquer en matière commerciale, sans pour autant passer en revue toutes les situations factuelles possibles. Malgré un corpus jurisprudentiel hétérogène, le plus haut tribunal paraît viser l'établissement d'une certaine « moralité commerciale », fondée sur l'équité et le *fair play*. Les éléments marquants de ces décisions sont la confirmation par la Cour de l'obligation de bonne foi et de l'obligation de loyauté qui doivent exister entre les parties, quelles qu'elles soient et peu importe la nature et le niveau de leurs relations. ■

Les éléments marquants de ces décisions sont la confirmation par la Cour de l'obligation de bonne foi et de l'obligation de loyauté qui doivent exister entre les parties.

Références

1 Wabasso Ltd. c. National Drying Machinery Co. (1981) et Central Trust Co. c. Rafuse (1986)

2 Canadian Aeroservice Ltd. c. O'Malley (1974), Banque de Montréal c. Kuet Leong Ng (1989), Lac Minerals Ltd. c. International Corona Resources Ltd. (1989) et Hodgkinson c. Simms (1994)

3 Banque Canadienne Nationale c. Houle (1990) et Trudel c. Clairol du Canada Ltée (1975)

4 Voir Banque Nationale c. Soucisse (1981) et Banque de Montréal c. Bail Ltée (1992)

5 Banque Canadienne Nationale c. Houle (1990)

6 Hercules Management Ltd. c. Ernst & Young (1997)

7 Cameron c. Canadian Factors Corporation Ltd. (1971)

8 Moran v. Pyle (1975)

9 Morguard Investments Ltd. c. De Savoye (1990)

10 General Motors c. Kravitz (1979)

11 Garcia Transport Ltée c. Cie Royal Trust (1992)

12 McClurg c. Canada (1990)

The Supreme Court's Political Role

By Christopher P. Manfredi
Political Science Professor
McGill University

Not surprisingly, judicial policy making of this sort has generated criticism of the Court's political role. Critics charge that the Court has undemocratically usurped power from legislatures and executives.

Canadians are not accustomed to thinking about the Supreme Court's political role, but it is one that the Court has played almost from its inception. Most obviously, the Court's position as the umpire of federal-provincial relations has given it tremendous influence over the development of Canadian politics. The Court was responsible for making the provinces more powerful than Canada's original constitutional design provided for, it is responsible for restoring some of the federal government's supremacy, and it has played an important role in defining the rules governing constitutional change. Most recently, the Court's 1998 decision in the *Québec Secession Reference* established the framework within which our most important national question will be resolved.

With the possible exception of its decisions concerning constitutional change and national unity, the Court has been able to perform its political role in relative obscurity. That changed, of course, in 1982, when the Court assumed responsibility for interpreting and applying the Charter of Rights and Freedoms. The Charter's impact on Canadian law and politics has been so extensive over such a short period of time that it is perhaps easy to miss its truly revolutionary character. Consider, for example, that over 22 years (1960-1982), the federal Bill of Rights generated 34 Supreme Court decisions, 5 successful claims, and only one partial nullification of a federal statute.[1] By contrast, over its first 15 years of operation (1982-1997) the Charter generated 352 Supreme Court decisions, 117 successful claims, and 54 nullifications of federal and provincial statutes.[2] There is no question that the Charter, whether intentionally or not, has transformed the Supreme Court into a more active participant in the development of Canadian public policy.

The Court's political role under the Charter does not differ markedly from the role of other political institutions: it makes policy on the basis of a judgment about what rules will produce socially beneficial results. The principal difference is that the Court articulates those rules in the form of constitutional law rather than legislation. Its decisions concerning sexual orientation in *Vriend v. Alberta* (1998) and *M. v. H.* (1999) are good illustrations of the dynamic of judicial policy making. In each case, the Court saw a policy vacuum, used the Charter's equality-rights section to assert jurisdiction over it, and created a new policy to fill the perceived gap.

Not surprisingly, judicial policy making of this sort has generated criticism of the Court's political role. Critics charge that the Court has undemocratically usurped power from legislatures and executives. The Court has responded that its enhanced role under the Charter *cannot* be anti-democratic because it is the product of the "deliberate choice of our provincial and federal legislatures" and "promotes democratic values." As "trustee" of the Charter, the Court argues that it must "scrutinize the work of legislatures and executives not in the name of the courts, but in the interests of the new social contract that was democratically chosen." At the core of this conscious redefinition of Canadian democracy is "a more dynamic interaction among the branches of government." According to this argument, Charter-based judicial review enhances rather than undermines democratic discourse in Canada.[3]

This "dialogue" metaphor, adopted by the Court to describe its political role under the Charter has quickly become the dominant paradigm for understanding the relationship between judicial review and democratic governance.[4] For example, in its November 1999 decision upholding the "privacy shield" amendments to the Criminal Code (R v. Mills), the Court wrote that its willingness to accept legislation that "differs significantly" from an earlier judgment proves that "courts do not hold a monopoly on the protection and promotion of rights and freedoms." Unfortunately, this interpretation of Mills cannot withstand close scrutiny.

To understand why, one must revisit the *O'Connor* judgment, from which the "privacy shield" allegedly departs so significantly. In *O'Connor* the entire Court agreed that sexual assault defendants should have some access to the medical and therapeutic records of sexual assault victims, but it split 5-4 on the rules governing access. The *O'Connor* judgment thus articulated two separate regimes concerning access to medical and therapeutic records. In enacting the "privacy shield" amendments, the government simply followed the strict regime authored by Justice L'Heureux-Dubé. Indeed, the amendments repeat almost word for word important elements of her judgment. It is hardly surprising, then, that in *Mills* Justice McLachlin would uphold a policy regime that she "entirely" concurred with in *O'Connor*. If any dialogue occurred in *Mills*, it was an internal one among the justices about which *O'Connor* regime should prevail. The Court did not

defer to legislative judgment in the *Mills* decision, but merely affirmed a policy that four of its own members had constructed in 1995.

As the *Mills* example indicates, the growing political role of the Court has had a profound impact on legislative and executive behaviour. Rather than simply searching for the "best" policy, governments increasingly find themselves trying to predict which policy will survive judicial review. This should be cause for concern, for two reasons.[5] First, it distorts public policy by substituting constitutional defensibility for effectiveness as the principal criterion for choosing among alternative policies. Second, it debilitates democracy by removing the serious discussion of rights and liberties from the ordinary political realm and placing it exclusively in the less accessible legal realm. Genuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation.

The Supreme Court's political role under the Charter brings to the surface a tension between constitutional supremacy and judicial review. Constitutional supremacy requires that political power be exercised only according to the procedural and substantive rules laid down in a constitution. Judicial review means that one of the institutions in which political power is located bears primary responsibility for interpreting and applying those rules. The tension derives from the fact that judicial power to define constitutional language decreases the effective relevance of the constitutional text as the authoritative source of rules governing political power. As the speed and scope with which courts exercise this power increase, the eventual displacement of constitutional supremacy by judicial supremacy becomes more possible.

Fortunately, the Charter gives governments a tool for checking the Court's political power: the so-called "notwithstanding clause" found in section 33. The notwithstanding clause is controversial because of its use by Québec in 1988 to override the Supreme Court's decision on Bill 101, and the subsequent role that this played in the demise of the Meech Lake Accord on the constitution. However, we ought not to let this historical accident detract unduly from the clause's legitimacy. Its inclusion in the Charter initially made it more difficult for the Court to assert final authority over constitutional rights because it provided a clear institutional mechanism for governments to resist assertions of judicial power. Section 33 generated uncertainty about the locus of constitutional supremacy, which encouraged strategic moderation of judicial review to avoid a political confrontation that might undermine the Court's long-term institutional status. However, with this institutional check on judicial power now significantly weakened as a result of 1988, it is reasonable for the Court to assume that this constraint on its authority has become largely ineffective. The result is the more adventurous use of the Court's political power.

Why is the notwithstanding clause not such a bad thing? If constitutionalism means anything, it means that political power must be limited. Although we might rely on judicial self-restraint to limit the Court's political role, both experience and the political theory of liberal constitutionalism suggest that external checks are necessary. By inviting governments to invoke the notwithstanding clause in response to recent controversial judgments, the Court itself has recognized the importance of not leaving its political power unchecked by other branches of government. A re-legitimized notwithstanding clause would also prevent governments from ducking controversial issues on the pretext that the Court must have the last word on rights and liberties. In the final analysis the political role of the Supreme Court requires that it be integrated into the new regime of constitutional supremacy established in 1982, rather than elevated above it. ■

As the speed and scope with which courts exercise this power increase, the eventual displacement of constitutional supremacy by judicial supremacy becomes more possible.

Notes

1. Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), 343.
2. James Kelly, *Charter Activism and Canadian Federalism: Rebalancing Liberal Constitutionalism in Canada, 1982-1997*. Unpublished Ph.D. dissertation, McGill University, 1998.
3. See *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 562-67.
4. The source of this metaphor is a 1997 article in the *Osgoode Hall Law Journal*, cited favourably in *Vriend*. See Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures," *Osgoode Hall Law Journal* 35 (1997), 75-124
5. Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty," *Michigan Law Review* 94 (1995), 250, 261 n.60.

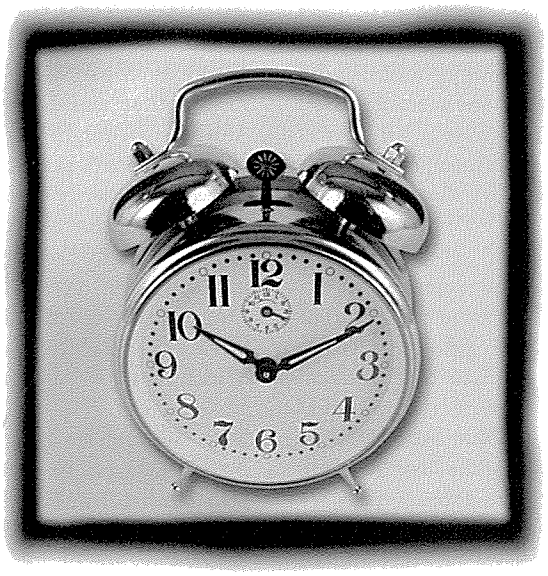
APPOINTMENTS TO THE SUPREME COURT OF CANADA:

The Time is Ripe for Change

Jacob S. Ziegel
Professor of Law Emeritus
University of Toronto

The disarmingly simple Canadian procedure has come under increasing criticism... because it lacks accountability and transparency.

Decisions of the Supreme Court of Canada over the past several years—particularly those dealing with the equality rights of gays and lesbians and the aboriginal rights of native Indians—have drawn the ire of right wing politicians. They have belatedly discovered the bite in the Supreme Court's powers as the final arbiter of the meaning and effect of Canada's constitution and especially of the Charter of Rights and Freedoms. Not surprisingly, controversy over the Supreme Court's rulings has also generated renewed debate over the present system for appointment members of that Court and whether it needs to be changed to reflect the formidable powers exercised by the Court.



Broadly speaking, democratic societies in the Western hemisphere adopt one of four methods (or a combination of the features of several of them) to select the members of their highest courts: (a) appointment by the Executive; (b) appointment by the legislature; (c) election by popular vote; and (d) nomination by the Executive followed by confirmation by the legislature.

Appointment by the Executive is the system in place in Canada with respect to the Supreme Court of Canada and is also used by the federal government for the appointment of judges to the lower courts. We inherited the system from England at the time of Confederation, though the system is subject to institutional and political constraints in England that are not followed in Canada. It is also important to appreciate that this system of appointment has its roots in the Middle Ages when most governmental powers resided in the Crown and concepts of accountability and participatory democracy were an oxymoron.

The system of appointment by the members of the legislature is used in Germany and several other continental European countries. The method of election by popular votes is or was followed in most of the U.S. states and is rooted in nineteenth century concepts of Jacksonian democracy. However, it has been diluted in many of the states by the adoption of the "Missouri Plan" entitling the governor of the state to fill vacancies in judicial posts arising between elections on the recommendation of a judicial nomination commission although renewal of the appointment requires confirmation by popular vote at the next regular election of state office holders.

The fourth method—nomination by the Executive followed by confirmation by a legislative chamber—is most closely associated with appointments to the U.S. Supreme Court, though the same procedure is used for all federal judicial appointments in the U.S. The confirmation procedure was consciously written into the US constitution as part of a system of checks and balances between the three arms of government to prevent abuse of powers by the Executive. Another justification for a confirmation procedure is to ensure that appointments to the highest judicial office enjoy widespread support. The effectiveness of the confirmation procedure in accomplishing these goals is seen by the fact by the fact that between 1789 and 1992, the US Senate refused to confirm 28 of the Supreme Court nominees, or nearly one out of five nominees, whose names were submitted by the President.

The disarmingly simple Canadian procedure has come under increasing criticism not only because it easily lends itself to abuse but more importantly because it lacks accountability and transparency. In practice, it means that the incumbent prime minister—Jean Chretien at the present time—is free to fill vacancies in the nine member Court as he sees fit subject only to honoring Quebec's statutory entitlement to three judges and to Ontario's entitlement to an equal number, though the latter convention is established by tradition and not by law. By conven-

tion, the Maritime and Prairie provinces, and British Columbia, are usually also each represented by one judge on the Court.

The Prime Minister, or the Minister of Justice on his behalf, may consult the provinces and with members of the legal profession but they are not obliged to. As late as the 1960s, it was common for Supreme Court judges to be appointed as much for their political affiliations and friendship with the Prime Minister or other senior cabinet minister as on the basis of their intrinsic merits as jurists. In the early history of the Court, there were even examples of federal ministers of justice promoting their own appointments to the Court!

This paternalistic and patronage-driven system was never compatible with Canada's democratic structure. It has become even less so since the adoption of the Canadian Charter in 1982. Critics argue that judges who have the power to strike down federal — — should be subject to public scrutiny or at least to a non-partisan selection system before their appointment and that the decision of whom to appoint should not rest with the prime minister alone.

Over the past 20 years, two vehicles in particular have been proposed to bring about this result. The first is the establishment of a nomination commission for appointments to the Supreme Court. The commission's members would be drawn from a wide spectrum of Canadian society and would include provincial nominees. The second proposed vehicle is a confirmation procedure similar to the American system for appointments to the U.S. Supreme Court.

There are strong precedents in Canada at the provincial level for the use of nomination or advisory committees for the selection of provincial court judges. The committees have proven their immense superiority over the old and thoroughly discredited patronage system that was in place before then. Nevertheless, successive federal governments refuse to adopt the advisory committee system at the federal level basically for two reasons. So far as appointments to the lower courts are concerned, the patronage plums for party loyalists (a very substantial salary, tenure until age 75, an excellent pension scheme, and considerable prestige) are perceived as too attractive to be surrendered lightly. Second, so far as appointments to the Supreme Court are concerned, the resistance arises because prime ministers like to think they can leave their own stamp on the Court.

This paternalistic and patronage-driven system was never compatible with Canada's democratic structure.

Given the long foot dragging by federal governments, Canadians should not be satisfied now with anything less than an open confirmation procedure.

Nevertheless, there is widespread support within and outside the legal community for the establishment of a nomination commission for appointments to the Supreme Court. There is less support for a U.S. style confirmation procedure. Existing members of the Court, among others, have expressed their opposition because of what they have seen or heard about confirmation hearings before the US. Senate Judiciary Committee. I believe their fears are considerably exaggerated and are extrapolations from such exceptional cases as the Robert Bork and Clarence Thomas nomination hearings in the U.S. A confirmation procedure for appointments to the Supreme Court was enshrined in Bill C-60 introduced by then Justice Minister Jean Chretien in 1978 for the restructuring of the Senate, and also enjoys the support of many political scientists.

Given the long foot dragging by federal governments, my own view is that Canadians should not be satisfied now with anything less than an open confirmation procedure, one perhaps only involving members of the House of Commons until such time as the Senate becomes an elective body. This would not preclude the federal government from also establishing a nomination commission although some may think that this would make the appointment procedure too complex. What seems to me remarkable is the continuing Canadian tolerance for a system of appointments to the Supreme Court so obviously incompatible with the values of democracy, accountability, and transparency that the Court is called upon to interpret in the Charter and apply almost daily. ■

Note

* Those interested in a more detailed exposition of the issues discussed in this article will find it in a longer article by Prof. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada" in vol. 5, no.2, June 1999, of *Choices* published by the Institute of Research and Public Policy in Montreal.

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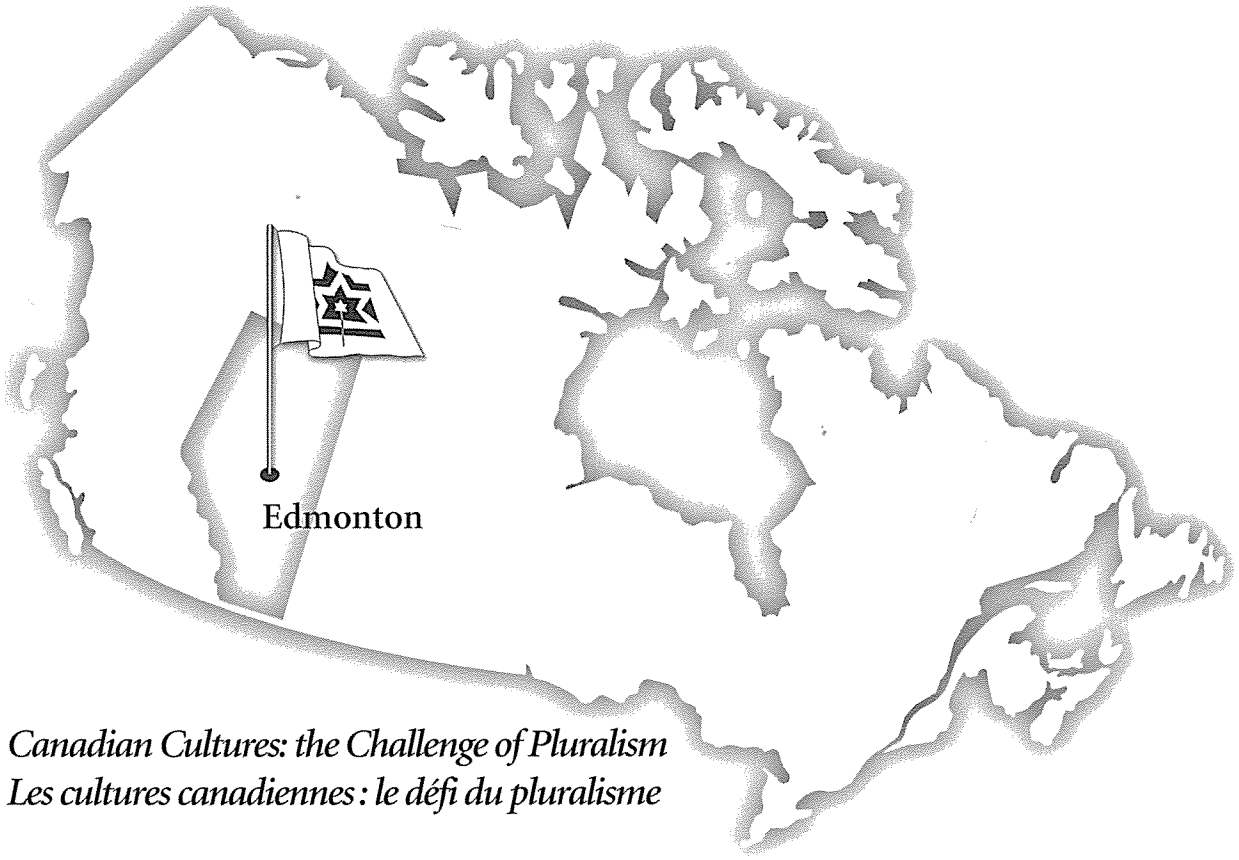

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Judges Speak Out!

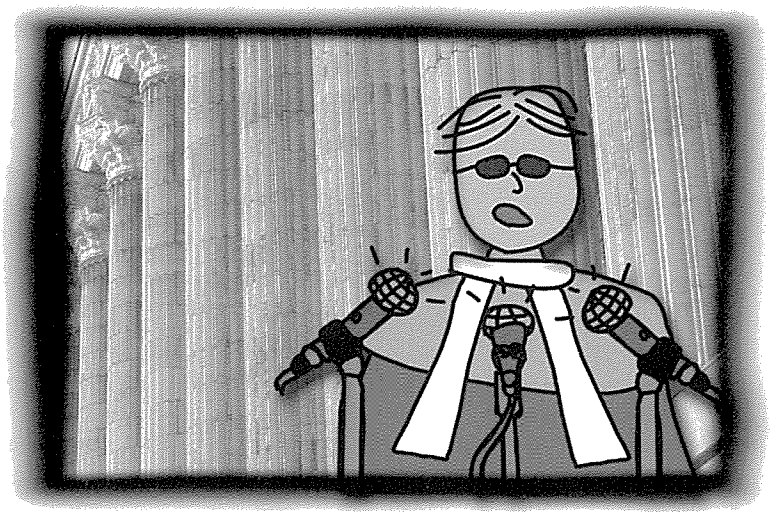
by Gerald L. Gall

Professor of Law at the University of Alberta and a former Executive Director of the Canadian Institute for the Administration of Justice.

and Rebecca Sober

Law student at the University of Alberta.

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.

Moreover, some judges, unfortunately, have made inappropriate statements in open court that have attracted much public attention.

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

The previously 'prohibited' practice of giving personal opinions on specific areas of law or social justice issues has dramatically declined.

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]

When discussing sensitive legal or social issues, it is imperative that members of the Supreme Court refrain from endorsing or supporting a particular policy.

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]

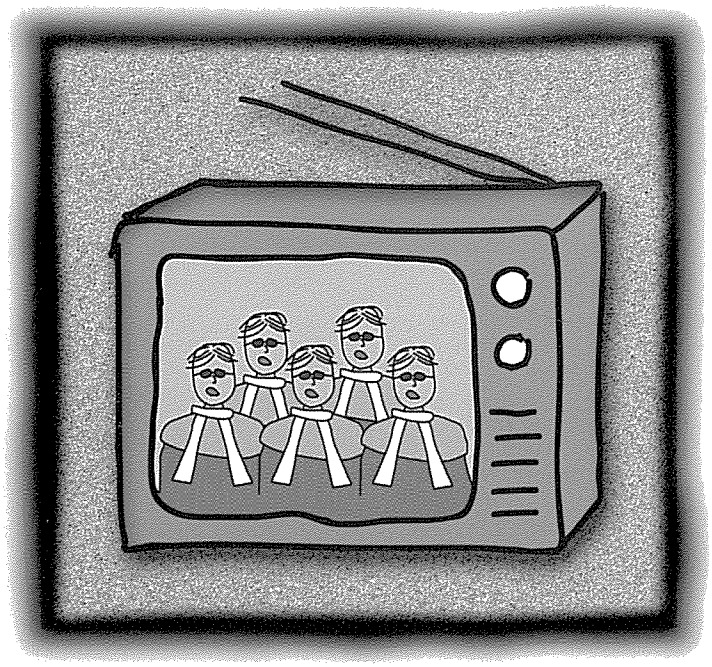
There can be no doubt that the freedom of judges to speak on a variety of topics, including social justice issues, has increase in recent years. An example is contained in an address given to the Faculty of Law at the University of Ottawa by Justice Bastarache entitled "Does Affirmative Action have a 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.

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 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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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.