Forum: The Role of the Judge in Canadian Society

The following commentaries were presented for the Canadian Bar Association in Edmundston, New Brunswick February 2000.

Forum: Le rôle du juge dans la société canadienne

Les commentaires suivantes ont étaient présente pour l'Association du Barreau canadien à Edmundston, Nouveau Brunswick en février 2000.

LE RÔLE DU JUGE DANS LA SOCIÉTÉ CANADIENNE

L'honorable Camille A. Dumas*

The provincial court has evolved enormously from what it was 30 years ago when the *Provincial Court Act* of 1969 replaced the *Magistrate Court Act*. Since then there have been numerous amendments to the *Provincial Court Act* and a tremendous increase in the jurisdiction given to the court. The federal government, by amending the Criminal Code and giving more jurisdiction to the provincial court, is slowly creating a unified criminal court by indirect means. Add to this the *Canadian Charter of Rights and Freedoms*, enacted in 1982 and declared supreme law of Canada, and judges are now required by law to address issues heretofore never envisioned. Judges have always been called upon to interpret laws and give meaning to laws. However, when we call upon judges to interpret *Charter* principles that guide Canadian lives, from Sunday shopping to access to abortion, a dimension has been added to the work that makes the judicial system and judges easier targets of criticism.

The inevitable ever-increasing attack on all institutions and figures of authority is upon us and courts and judges are not immune. Governments did recognize that this new dimension would be placed on the shoulders of the judiciary and that some laws would not be consistent with the *Charter* values. For example in New Brunswick, the year after the *Charter* became law, the legislative assembly passed a law entitled *An Act Respecting Compliance of Acts of the Legislature with the Canadian Charter of Rights and Freedoms*, whereby they amended some provincial laws where the most obvious problems would arise.

Today, because judges are doing what they are now mandated to do, critics assert that judges are ideologically driven, constitutionally hyperactive or that unelected judges are now choosing to legislate, etc. It seems that the bulk of attacks are directed more toward the Supreme Court of Canada and to a lesser extent the Courts of Appeal, probably because of the finality of their decisions as opposed to those of trial courts such as the provincial court. My remarks will focus principally on our role in informing the public about our work, hopefully to foster a better

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* Graduated from UNB spring of 1972. Admitted to the Bar June 1972. Named Judge of the Provincial Court April 1981, Associate Chief Judge May 1991 and Chief Judge June 1997.

understanding of the operation of the courts and the workings of the judiciary.

There will always be public discussions about our work. The level of support for certain decisions will often depend, if it is a *Charter* issue for example, on which side of the issue one is standing. For everyone who agrees with a decision one can usually find someone who will criticize the same decision. For example, one of the most vocal critics of judicial activism actually praised a judge who ruled that a law was unconstitutional. The judge ruled that a certain law in that province, which allowed the police to issue immediately a 90-day licence suspension to any driver who failed the breathalyser test or refused to take a breath-test, was unconstitutional. The suspension was done on the spot by the police and without the benefit of a trial. One can imagine the consequences of this on anyone who required a licence to earn a living. I believe that they changed the law in that province to allow for a 24-hour or 48-hour suspension instead of the 90-day suspension. In defending the decision, this critic wrote "the right to be heard and defend yourself is perhaps one of the most important principles in a democracy." In the same case, they quoted a spokesperson for the Mothers Against Drunk Driving as calling the judge's ruling "infuriating."

In a democracy, good constructive criticism based on the facts is necessary and healthy for the system. Parliament still has a right and the ability, even without using the notwithstanding clause, to amend legislation that it feels needs redressing due to a court decision. For example, in the case just mentioned, government reduced the duration of the immediate suspension. In *R. v. Daviault* [1994] 3 S.C.R. 63, parliament amended the Criminal Code in response to the Supreme Court of Canada decision and s.33(3) was added to the Criminal Code outlining when a defense of self-induced intoxication would not be available. After Madame Justice McLaughlin struck down the previous rape shield provisions of the Criminal Code in *R. v. Seaboyer* [1991] 2 S.C.R. 577, parliament introduced new legislation.

Que nous le voulons ou non, les choses changent et la magistrature doit s'adapter à ces changements. Nous devons favoriser la confiance dans les tribunaux en faisant notre possible pour s'assurer que le public comprendra, non seulement ce que nous faisons, mais pourquoi et comment les tribunaux fonctionnent. La magistrature indépendante existe pour servir et protéger les gens et les gens ont un intérêt légitime dans l'administration de la justice. La justice est publique, elle est transparente et les gens ont la possibilité d'observer le travail des tribunaux d'eux-même. Le fonctionnement de notre système juridique et le maintien de l'indépendance de la magistrature dépendent du respect et de l'appui que le public apporte à tout ce processus judiciaire. C'est-à-dire, notre système judiciaire compte sur l'appui et la confiance de ceux à qui il demande de se conformer à ses décisions.

Il est accepté depuis longtemps que les juges doivent se comporter officiellement et dans la vie privée d'une manière qui ne mine pas la confiance du public en leur fonction. Aussi en exerçant leurs fonctions, les juges doivent agir de façon à ce que les gens, en voyant ce qui est fait, puissent avoir confiance en le fait que la justice est rendue. Lord Hewart a très bien énoncé ce principe en écrivant en *The King v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, "it is of fundamental importance that justice should not only be done but should manifestly and undoubtably be seen to be done."

Most people do not have the opportunity to observe for themselves the work of the courts. What they hear through the media largely shapes their understanding and perception of what we do and of how and why we arrive at certain decisions. Every year, judges who sit in trial courts deal with thousands of cases which pass through the system. These cases reflect the bulk of human experience. These are the cases in which the probative value of evidence is weighed, the issues are deliberated upon and the case is decided by dedicated and conscientious judges whose goal is to arrive at a just and equitable conclusion. This is done regularly and without real notice by the public. On the other hand, the media makes the public aware of the cases that it deems newsworthy. These are the cases with sensational factual situations usually involving violence or sex or both, or involving sensitive *Charter* issues or the case where the judge may have made an unfortunate remark that fits well into a ten or fifteen second sound bite.

Traditionally, the Attorney General would defend the courts against unfair criticism. But today, the Attorney General and government may be a party to the litigation in question or his or her department may have sponsored the legislation being interpreted or, based upon the circumstances at hand, defending the courts on a certain issue may be politically unpopular. Today courts must take an active role to build public trust and confidence in the justice system. How can judges take a more active role? Traditionally, judges have spoken only through their decisions. Therefore, if judges speak through their decisions we must remember clarity is important. The decision should be clear and concise. The decisions of the late Chief Justice Brian Dickson of the Supreme Court of Canada had these qualities. If confidence in the courts is to be fostered, the judiciary should be involved in informing the public about its work, taking part in public forums and, in New Brunswick, through the Judicial Speakers' Bureau. For two years now, the court has tried to have judges available to address students in post-secondary educational institutions on the role of the judiciary, the law and how our courts operate. We also

try to facilitate school visits to the courts.

A l'automne 1988, nous avons eu un atelier pour les médias concernant la procédure en poursuites criminelles. L'atelier était offert par le ministère de la justice et avec la participation des juges au niveau de la Cour provinciale et de la Cour du Banc de la Reine. Cet atelier avait pour but de renseigner les journalistes sur la procédure en matière criminelle, en espérant que l'information recueillie leur permettrait de rapporter les faits juridiques avec exactitude et une certaine familiarité du sujet. Par exemple, nous avons discuté de l'accès des médias aux documents relatifs aux procédures judiciaires, l'accès aux dénonciations, l'accès aux mandats de perquisition, les ordonnances d'interdiction de publier certaines preuves, etc. Les commentaires que nous avons reçus concernant cet atelier étaient très favorables. Le premier atelier était destiné aux médias anglais. Un deuxième atelier en 1991 était destiné aux médias français et je crois qu'il y en a eu un autre récemment. Je crois qu'il serait utile, pour nous et aussi pour les médias, une autre institution essentielle dans notre société libre et démocratique, de tenir des ateliers de ce genre sur une base régulière.

In addition to being involved in the educational programs just identified, the judiciary should help the media improve the quality of information that it provides to the public. Although media reports are not usually ill-informed, there are mistakes made. At times, they could say more by way of explanation to capture the essence of what occurred. The time has come seriously to consider a court official to facilitate the flow of information between the courts and the media. In Nova Scotia this is done through what they call a media relations officer. The responsibilities of this person include assisting the media in obtaining timely access to court documentation and proceedings plus information on the justice system. The queries answered range from practical issues about when the court will hear a case, when a decision will be available, how to get access to a document in a court in an area of the province rarely frequented by the media, and whether there is a publication ban in place, etc.

In conclusion, improving the quality of information given to the public should foster a better understanding of the work of the courts and I am convinced that a well-informed public will have greater confidence in the justice system and the administration of justice.