JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

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This conference comes at a very interesting time for me. I am just completing a year at the Yale Law School, and I have therefore had some opportunity to observe American judicial life. As with everything else, they do things very differently. America, I have learned, is a land where judges write books: *Why Are Confessed Murderers and Rapists Going Free? Guilty, The Collapse of Criminal Justice* by Judge Harold J. Rothwax. Judges give interviews:

> Judge Duckman and Wife Speak Out: We Wept for Galina. Couple cried when abuser killed lover. He vows not to resign. Wife says he never beat her. His records show another side to story.[1]

Judges write letters to the editor of the *New York Times*.[2] Judges give speeches.

In fairness, I should note that while judges in the U.S. seem to speak out more, the level of vitriolic criticism levelled at them astounded me. Perhaps this is an anomaly because it is an election year, but at least some American judges seem to be under incredible attack from the likes of Newt Gingrich, Pat Buchanan and New York Governor George Pataki. Even the President's press secretary said recently that the White House might ask for the resignation of a life-tenured New York judge unless he reversed a controversial ruling which had thrown out drug evidence. Sure enough, the judge reversed.

So what is the situation in Canada? Well, it will come as a surprise to no one that I have discovered Canada to be a little kinder and gentler than our neighbours to the south. I do not believe there is a golden rule of silence for Canadian judges. Or perhaps the rule is, in the words of always understated Lord Ackner of the House of Lords: "The mother whale said to the baby whale: if you

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[1]*New York Daily News* (28 February 1996) 1.

[2]See Letter of Alice Schlesinger, Justice, N.Y. State Supreme Court to *The New York Times* (31 January 1996): "A Jan. 30 news article describes Governor George E. Pataki's efforts at legislation to facilitate criminal convictions, thought necessary to counteract recent decisions of the New York Court of Appeals, a tribunal with which the Governor is unhappy. ... These men and their supporters are allegedly conservative. Yet the core principle of conservatism is the preservation of cherished values and historical precedence. The Constitution, more than 200 years old, spells out those values. It is truly dismaying when "conservatives" want to dismember our past and compromise the independence of the judiciary, the relevance of Congress and our birthright".

don't go to the surface and spout, you can't get harpooned." The rule, Ackner continued, is designed to stop judges from making fools of themselves, something they can do very easily. If there is such a golden rule of silence, then many Canadian judges are guilty of breaking it.

Most of the Supremes, as I like to call them, make occasional public speeches, some of them on controversial topics. Witness the brouhaha – and complaints to the Canadian Judicial Council – over past remarks by Justices Bertha Wilson and Beverley McLachlin on gender bias. Mr. Justice John Bouck of the British Columbia Supreme Court recently spoke out on the new rape shield provisions of the *Criminal Code*, first in a judgment , then in a follow-up interview in *The Globe and Mail*. Madame Justice Mary Southin of the British Columbia Court of Appeal wrote an article critical of the *Young Offenders Act* in a legal publication which was then picked up by the *Globe & Mail*. Mr. Justice David Marshall, former head of the National Judicial Institute, in one of the most popular speeches in recent times, lamented the "absolute powers" of chief judges.

And then of course there was the public letter last year by Jean-Claude Angers of the New Brunswick Court of Queen's Bench, formerly of the New Brunswick Court of Appeal, about federal gun control plans. I should say I am disappointed Justice Angers is not here today for he would obviously go much further than Justice John Sopinka, the leading advocate of judicial free speech in Canada, in removing the traditional constraints on judges. It would be interesting to hear his defence, and I know from talking to him that he feels strongly about what he did.

It should come as no surprise to you then, that like Justice Sopinka, I too favour a relaxing of the traditional rules governing judges and public speaking. In fact, not only is greater freedom of speech by judges desirable, but I would argue that judges have an obligation to be more open, upfront, and accessible. The traditional "monastic view" of the judiciary is simply no longer acceptable given the modern-day, post-*Charter* role of judges.

Admittedly, knowing where to draw the line is not always a simple matter. It is easy to suggest judges should avoid subjects that are likely to come before them in court. But in Charterland it is often very difficult to predict with any degree of certainty what sort of issues which were traditionally not justiciable will find their way into the courts. For example, and I mean absolutely no disrespect to a man I admire greatly, Mr. Justice Mark MacGuigan of the Federal Court of Appeal recently wrote a book on the Catholic legal view of abortion. When I questioned Justice MacGuigan on the propriety of the matter, he assured me that no potential problem existed since he is a Federal Court judge and abortion is a Criminal Code matter not in his court's jurisdiction. While this may be true, his court will be hearing a challenge in the upcoming months to Revenue Canada's decision to deny charitable status to an anti-abortion, pro-life organization. Should Justice

MacGuigan sit on that case? Are his very publicly expressed views on abortion a bar to his participation in that appeal? I do not know the answer to that question, but I raise it as an example of how difficult it is to draw a line.

Consider yet another example. Justice Sopinka has written a text on the law of evidence which I am sure is standard reading in most law school courses on evidence. Though I have never read it, I can only presume he has expressed opinions in it not only on what the law is in certain areas, but also on what it should be. Should he be precluded from sitting on cases before the Supreme Court where those very issues are the central question up for decision? This is not an easy matter. Yet, I do not want what I have said to be taken as an excuse for judges to say absolutely nothing. For is that not what modern-day judging, especially in *Charter* cases is all about: an exercise in line drawing? Is that not what judges do all the time: try to determine where the line should be drawn between acceptable and unacceptable conduct? Is that not why judges get paid such big bucks? Perhaps one commentator said it best: "If you come too close to fire, you get burnt. If you stray too far, you'll be cold. The art of judgment is to find the right distance."

I prefer, though, not to address this issue from the perspective of judges making public speeches to rotary clubs, legal conferences or writing legal texts and the like. In fact, I do encourage this, though I acknowledge right from the outset that extreme caution must be used in selecting both topic and message. I will leave it to others to discuss what are appropriate subject areas while accepting of course that some areas such as politics are clearly off limits. I prefer to deal with another side of how judges should escape from the judicial monastery: judges' dealings with the media. The traditional view was indeed a golden rule of silence; you simply did not have any dealings with the reporter on the beat other than perhaps a hello in the hall or a drink at the bar. I am pleased to report that attitudes on the part of many judges seem to be changing. I can state from personal experience that I have a fine working relationship with many judges across the country, at all levels of court.

I would now like to examine three examples of judicial speech: explanation of judgments, requests for interviews and responses to criticism. Former Supreme Court justice William McIntyre echoed the traditional view when he said upon his retirement: "Judges should speak on a subject but once and then only in his reasons for judgment." This would be acceptable if we knew what it is judges were actually saying in their judgments, but often that is not the case. A good deal of the blame lies on my side; most reporters covering courts have absolutely no legal training or adequate background and quite frankly are simply not equipped to report on many of the subjects they cover. That is another speech for another day, but I assure you I have done my utmost to impress upon the people in my industry how dangerous a practice this is.

Still, in my opinion a large part of the blame lies with the judges. Often, judgments are simply not written in English or French or whatever language the case was heard in, but rather in that most impenetrable of languages, legalese. In many cases, judges are simply not writing for lawyers, law professors, other judges, or even the individual litigants. Instead, and despite the fact that in many instances there is tremendous public interest in a case, judgments are frequently rendered in Greek or Latin. Might I humbly suggest, then, that judges take a little extra time to reread their judgments from the layperson's vantage point, especially in those cases which are likely to generate publicity. I know this is difficult and takes a little extra time – extra time I am sure many judges do not have, but it will help ensure that their message does not get misconstrued. I commend to you, in particular, some of the judgments of Mr. Justice Peter Cory of the Supreme Court which can easily be understood by anyone.

Moreover, I think judges should go one step further, and here I point again to Mr. Justice Sopinka's practice. After a ruling is handed down in which he wrote or participated, he is often available informally to select reporters to explain, clarify or discuss certain points. We are not talking here about an interview or quotes, we are talking about helping reporters, and through them the public, to understand what are very complex issues even for lawyers. More judges should make themselves available and break their silence to assist the public in understanding the process. Some courts, including the Supreme Court, have legal officers available to help reporters and brief them on the content of judgments. I applaud this practice and urge its extension to all courts at all levels. Many of you will ask, "Why not consult a lawyer?" Well, the problem is that lawyers directly involved in the case will often put their own favourable spin on the ruling, and other so-called independent lawyers and academics will not have had a chance to read the judgment in time for media deadlines. Admittedly, this informal process which I am suggesting will not work for all judges and all reporters. There must be a certain relationship of trust between the two which takes time to develop. But I think it is worth considering if we are to accomplish the very desirable goal of making the justice system more understandable to its constituency: the public.

What of more formal "on the record" interviews? Here too, judges should be more willing to agree to such interviews. Of course, different ground rules apply in different circumstances. There may be circumstances where it is appropriate for judges to explain or clarify their rulings in formal interviews. Note that I am not using the word defend. We do not necessarily want judges to give interviews defending why they ruled a particular way in a case, but often there is room for some amplification or clarification. For example, I covered a trial on the day the *Young Offender's Act* came into force, in which magazines such as Playboy and Penthouse were found to have played a key role in the sex killing of a young boy. At the end of the trial, Guy Goulard, now Commissioner for Federal Judicial

Affairs and then a youth court judge, gave me an interview in which he expressed his concern about the availability of such material and its impact on children. The resulting story sparked a useful public debate and in my view in no way compromised his ability to hear future cases. There are many other instances where the public expression of a judge's concerns after a trial can serve a useful societal purpose.

Many other types of interviews are even more harmless and cry out for judicial comment. For instance, consider a reporter who is doing a story on the *Young Offender's Act* or life on the bench or the principles of sentencing or native justice or the jury system. Who better to hear from than a judge? Who better to shed a little reasoned light on the current debate over youth crime than the very people we trust to administer justice? More than anyone in society, judges are singularly well equipped and located to identify inequalities in the law and the system; they should not be deterred from doing so. Once again, this is an exercise in line drawing. Yet, I hope we have enough faith in the people we appoint to the bench to be able to decide when it is appropriate to comment and when it is not. As Justice Sopinka has said: "If you trust judges to make these decisions, some of them virtually life and death, do we have to be lectured to by the chief judge as to whether we can make a speech or appear on television?"

To judges who do give interviews, I offer a number of suggestions. First, ensure that you set the ground rules at the beginning of the interview and not at the end. Recently, after talking at length to a judge about life on the bench for a woman, she said, "You're not going to quote me, are you?" Second, if the interview is "off the record", define what that term means. It can mean a lot of different things to different people. Third, if you are talking on the telephone, assume you are being tape recorded. Interviewers just find this an easier and more accurate way to take notes and ensure that you will not be misquoted.

Finally, let me comment on the appropriateness of judges responding to criticism. I should make it clear at the outset that judges, like all public officials, should expect a certain amount of criticism and scrutiny of their work and their lives. After all, judges are called upon to decide some of the most difficult issues facing us. They are unelected and have tenure, and it is virtually impossible to get rid of them once they are appointed. Moreover, there are always going to be winners and losers in every case and that makes judges an easy target. Nonetheless, I certainly do not expect judges to regularly jump into the fray and join the public debate over their contentious rulings. For example, I did not expect Justice Francis Kovacs to give interviews defending the publication ban he imposed in the Karla Homolka case.

That having been stated, I do believe it may be appropriate in some cases for a judge to participate in a panel discussion on a controversial case which has been

decided, explaining and perhaps clarifying a ruling. Furthermore, there may be rare (I hope) times where the media has completely misinterpreted or misread a ruling, and I do not see anything wrong with the judge merely setting the record straight, either through an interview or a media statement, in essence stating: "Look, this is what I really said, or this is what I really meant." I can tell you that in this day and age of computer-based research, an error will be continually repeated unless it is corrected at its source.

Similarly, occasionally a judge will do something stupid on the bench or say something inappropriate in a judgment. I do not think there is anything wrong with a judge saying "I'm sorry. I made a mistake. I was wrong." Such a public admission of humility would increase public confidence in the system, not diminish respect for it. As well, there are sometimes more personal attacks made on a judge, sometimes for activities on the bench and sometimes for incidents off the bench. In such instances, I do not believe a judge must simply sit there, grin and bear it, all in the name of judicial independence. The judge should not have to stand in the line of unfair fire until a member of the bar comes to his or her defence. Why should a judge not speak out, either to set the record straight or to apologize if necessary?

Two examples will demonstrate what I believe are the right way and the wrong way to handle things. First the wrong way. A friend of mine is a judge of the Ontario Court (Provincial Division). She was recently involved in two controversial rulings. One involved the sentencing of a young offender in the brutal killing of a taxi driver and the second led to the throwing out of cocaine and weapons charges against a man caught fleeing because she ruled police did not have reasonable grounds to arrest and search him. Naturally she came under a great deal of criticism, much of which I think was fair game. But in my view the tabloid *Ottawa Sun* hit below the belt when it wrote the following editorial:

> How did Judge Dianne Nicholas lose her way? For a woman from humble beginnings, for a woman whose father supported his family by managing the diner at Ottawa's Voyageur bus terminal, we would have thought she would have had more compassion for the everyday working stiff and more sense of justice's true course. But she let us down... . This often happens with NDP appointments, of which Judge Nicholas is one, but we can only hope she can regather her sensibilities and find her way back.[3]

Now, maybe the best thing to have done was to sit back and say nothing. But I think it would not have been inappropriate for Judge Nicholas to write a letter to the editor stating something like: "Criticize me and my judgments all you want, but it is highly inappropriate and unfair to involve my father."

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[3](8 March 1995) 10.

As well, there is the case of Justice Wally Oppal of the British Columbia Supreme Court, a person who has a reputation as a most progressive, even handed judge. Somehow, someone in the media gained access to a two-year-old tape of a speech he had given to a private, all-male dinner in honour of the Vancouver police pipe band in which he read a portion of a rape trial transcript. It was suggested afterwards that Justice Oppal was joking about the female victim in the matter when in fact he was attempting to illustrate the insensitivity and ineffectiveness of some lawyers' cross-examinations. Even the premier of the province got into the picture and publicly called the remarks "inappropriate and crude".

Rather than sit back in silence, Justice Oppal explained his remarks in interviews and even appeared live on the six o'clock CBC television news. He later issued a formal apology through the court spokesperson. I guess Justice Oppal could have waited for a lawyer to write a letter defending him, but what is wrong with speaking up for himself? In the end, Justice Oppal weathered the storm in part because the public recognized what kind of judge he really was and in part because he spoke up and explained and exposed the human face of justice.

I do not expect judges to be on the six o'clock news every day, but once in a while certainly would not hurt.