JUDICIAL FREE SPEECH AND JUDICIAL DISCIPLINE: A TRIAL JUDGE'S PERSPECTIVE ON JUDICIAL INDEPENDENCE

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Each year, judges are disciplined by the Canadian Judicial Council for exceeding vaguely defined limitations upon judicial expression. This has consequences for judicial independence. Justice David Marshall's book, *Judicial Conduct and Accountability*,[1] the report of Professor Martin Friedland for the Canadian Judicial Council, entitled *A Place Apart: Judicial Independence and Accountability in Canada*,[2] and the Supreme Court of Canada decision in *Ruffo* v. *Conseil de la Magistrature*[3] have all in the past year dealt with the problem of achieving the proper balance between judicial independence and judicial accountability. This is a trial judge's perspective on the issue.

The Importance of Freedom of Expression

Free expression is an essential ingredient of a democratic society. As Alan Borovoy stated in last year's Forum:

> To be sure, free speech is not an absolute. But it is nevertheless the lifeblood of the democratic system in general and the universities in particular. It is the road to improvement: in the community, it enables non-violent pressure for change; in the universities, it facilitates the search for truth. In this sense, freedom of speech is a strategic freedom – a freedom on which other freedoms depend. Democrats believe that injustice and error are less likely to occur or endure in an atmosphere of free public debate. As a wise old trade unionist once observed, freedom of speech is the 'grievance procedure' of a democratic society.[4]

In the specific context of the judiciary, freedom of expression is also of consequence. In a previous article I discussed why explicit reasons for judicial decisions are important.[5] They discourage arbitrary decisions. They improve clarity in decision-making by encouraging increased empirical reference. They promote certainty in the law. By permitting the monitoring of articulated judicial

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[1]D. Marshall J., *Judicial Conduct and Accountability* (Toronto: Carswell, 1995).

[2]Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada* by M.L. Friedland (Ottawa: Canadian Judicial Council, 1995).

[3]*Ruffo* v. *Conseil de la Magistrature* (1995), 130 D.L.R. (4th) 1 (S.C.C.).

[4]A. Borovoy, "When Rights Collide" (1995) 44 U.N.B.L.J. 49 at 50.

[5]L.D. Barry J., "Law, Policy and Statutory Interpretation under a Constitutionally Entrenched Canadian *Charter of Rights and Freedoms*" (1982) 60 Can. Bar Rev. 237.

values to ensure correspondence with community values, they strengthen Parliament's ability to control the development of the law and thus ensure respect for the concept of parliamentary supremacy. If the limitations upon judicial expression evoke a fear of unpredictable discipline, there may be a chilling effect upon the frank delivery of reasons for decision. This may result in a resort by judges to "smokescreens of doctrinal ambiguity", with a consequential erosion of majoritarian democracy by surreptitious substitution of the judiciary's own values and policy for that of the community as expressed by Parliament.[6] What, then, are the limitations upon judicial expression?

Limitations upon Judicial Expression

In *Ruffo*, Gonthier J. for the majority, accepting that the duty of judges to "act in a reserved manner" is a fundamental principle and not void for vagueness, quoted with approval from the *Universal Declaration on the Independence of Justice*:[7]

> 2.10. Judges shall always conduct themselves *in such a manner as to preserve the dignity of their office* and the impartiality and independence of the judiciary. *Subject to this principle*, judges shall be entitled to freedom of belief, expression, association and assembly.[8]

He also approved the following, from *Basic Principles on the Independence of the Judiciary*:[9]

> 8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like citizens entitled to freedom of expression, belief, association and assembly: *provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.*[10]

Gonthier J. stressed that these standards of judicial conduct are needed to maintain public confidence in the judiciary and ensure the continuity of the rule of law. He recognized that there is no consensus on how the standards can be translated into the appropriate conduct for judges, either in court or in public.[11] His decision makes clear, however, that judicial freedom of expression stops where

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[6]Hancock, "Fallacy of the Transplanted Category" (1957) 37 Can. Bar Rev. 535 at 558.

[7]Adopted at the final plenary session of the World Conference on the Independence of Justice, held in Montreal on 10 June, 1983.

[8]*Supra* note 3 at 61-2. [Emphasis added by Gonthier J.]

[9]Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985.

[10]*Supra* note 3 at 62. [Emphasis added by Gonthier J.]

[11]*Ibid.* at 63.

serious undermining of public confidence in the judiciary begins. Is this limitation compatible with judicial independence and, if not, is there a problem?

The Concept of Judicial Independence

Justice Marshall's book gives a good review of the historical development of the concept of judicial independence.[12] The most important recent decisions of the Supreme Court of Canada on the topic, apart from *Ruffo*, are *R.* v. *Valente*,[13] *R.* v. *Beauregard*,[14] *MacKeigan* v. *Hickman*[15] and *R.* v. *Lippé*.[16] In *Valente*, the Court held Provincial Courts are independent tribunals under s. 11(d) of the *Canadian Charter of Rights and Freedoms*, which reads:

> 11. Any person charged with an offence has the right
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> . . .
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> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

LeDain J., for the Court, concluded that "independent" and "impartial" are separate and distinct concepts. He stated that "impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case, while "independent" refers not only to the state of mind or attitude but also a status or relationship to others – particularly to the executive branch of government – that rests on objective conditions or guarantees.[17]

The Court distinguished individual independence from institutional independence.[18] It noted that opinions differ on what is necessary, desirable or feasible for securing judicial independence, and on the extent to which extra-judicial activity may be perceived as impairing the reality or perception of judicial independence.[19] The Court identified security of tenure, financial security and institutional independence in adjudication (not administration) as three essential conditions of judicial independence.

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[12]*Supra* note 1, especially c. 1.

[13][1985] 2 S.C.R. 673.

[14][1986] 2 S.C.R. 56; (1986), 70 N.R. 1 (S.C.C.).

[15][1989] 2 S.C.R. 796; (1989), 100 N.R. 81 (S.C.C.).

[16][1991] 2 S.C.R. 114.

[17]*Supra* note 13 at 685.

[18]*Ibid.* at 687.

[19]*Ibid.* at 692.

In *Beauregard*, the Court upheld the authority of Parliament to amend legislative provisions relating to judicial pensions. On judicial independence the Court stated:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.[20]

The Supreme Court in *MacKeigan* held that judges have immunity from testifying to defend the grounds for their decisions. Members of the Court commented upon the principle of judicial independence and recognized the authority of Parliament to legislate concerning inquiries into the conduct and integrity of the judiciary.[21] LaForest J. stated:

> I do not mean to suggest that there is no constitutional room for mechanisms for dealing with inquiries or complaints relating to the performance of judicial functions that are either not sufficiently serious as to warrant proceedings for removal, or which may precede or assist the conduct but not constitute an impediment to the proper functioning of such proceedings, or effectively amount to a substitute for them. The size and complexity of the judicial system have now become too substantial to consider each judge to be completely independent or 'sovereign'... Sole reliance on the power of removal to deal with such issues is no longer realistic. Though... every judge must work in an institutional setting that supports judicial independence, even from other judges, I agree with Cory J., that there is need for a credible complaint procedure to ensure continued public confidence in the administration of justice.[22]

In *Lippé*, the Supreme Court found the Municipal Court of Québec, which has part-time judges who practise law, to be an "independent and impartial tribunal" under s. 11(d) of the *Charter*. Lamer C.J. defined "judicial independence" as independence from government, but interpreted "government" broadly enough to include "any person or body, which can exert pressure on the judiciary through authority under the state."[23] Justice Marshall points out that this would encompass the Canadian Judicial Council or any judge with hierarchial power over another judge.[24] Note, however, that in *Ruffo* the Court held a chief judge's supervisory powers over ethics inherent to the exercise of his or her functions, considering the power to lay a complaint an intrinsic part of his or her responsibility without specific statutory authority. Gonthier J. made it clear in

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[20]*Supra* note 14 at 13.

[21]*Supra* note 15 at 106 (McLachlin J.), 113 (Lamer J.), and 115 (LaForest J.).

[22]*Ibid.* at 115.

[23]*Supra* note 16 at 138.

[24]*Supra* note 1 at 28.

Ruffo that the primary objective must be to ensure the continuity of the rule of law by maintaining public confidence in the judiciary.[25] Confidence can be maintained only if the public sees individual and institutional impartiality in the judiciary. Judicial independence is but a means to this end. Gonthier J. quoted Lamer C.J. from *Lippé*, as follows:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end"... Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.[26]

More than impartiality is required to maintain public confidence in the judiciary. Substandard judicial behaviour must be kept to a minimum. Discipline is a mechanism for this. If interference with judicial independence results, this has to be balanced against the loss of public confidence which would result from an absence of discipline. Let us look at how this balance is presently sought.

The Canadian Judicial Council

The *Judges Act* gives the Canadian Judicial Council a statutory mandate "to promote efficiency and uniformity, and to improve the quality of judicial service".[27] The *Act* authorizes the Council to conduct inquiries as to whether superior court judges should be removed from office and also authorizes its investigation of any complaint or allegation made in respect of a superior court judge.[28] The four grounds on which a recommendation for removal may be based are: (1) age or infirmity, (2) misconduct, (3) having failed in the due execution of office or (4) having been placed, by conduct or otherwise, in a position incompatible with the due execution of office.[29] The *Act* does not, however, expressly provide for any disciplinary action short of removal.

The approach of the Council to complaints can be found in the *1993-94 Annual Report of the Canadian Judicial Council*, which states:

> The principle of judicial independence is a basic element of Canada's democratic process. It guarantees that each judge may make decisions, however unpopular they may be, according to the law and his or her conscience, without fear of adverse consequences. In Canada, judicial decisions may be reviewed, for the purpose of changing such decisions, only through the appeal process; judges need

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[25] *Supra* note 3 at 23-4.

[26] *Supra* note 16 at 139.

[27] R.S.C. 1985, c. J-1, s. 60.

[28] *Ibid.*, subsections 63(1) and (2).

[29] *Ibid.*, s. 65(2).

> not fear reprisal from governments or any other source for unpopular or even erroneous decisions.
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> However, judges are held accountable for improper conduct which is clearly incompatible with the judicial office.
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> . . .
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> Since [the] removal process is the only formal sanction for federally appointed judges recognized in the *Constitution*, it is the ultimate focus of the procedures in the *Judges Act* which form the basis for the Canadian Judicial Council's complaints process.
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> The Council is aware of the need for a credible process to deal with complaints which will both address problems and ensure continued public confidence in the administration of justice, especially at a time when Canadians are demanding accountability from public institutions, professions and the judiciary. Members of the public must have confidence that complaints against judges are treated seriously and addressed thoroughly. The Council strives to achieve this objective.
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> The Council has no disciplinary powers, such as the power to formally reprimand a judge. Nevertheless, in appropriate circumstances the Council may express its disapproval of the conduct of a judge even though there is no basis for removal.[30]

The comments of Sopinka J., dissenting in *Ruffo*, are worth noting on the matter of reprimands:

> Regardless of the question of removal, it must be recognized that a reprimand is an extremely serious punishment for a judge. A reprimanded judge is a weakened judge: such a judge will find it difficult to perform judicial duties and will be faced with a loss of confidence on the part of the public and litigants.[31]

Professor Friedland's *Report*, in a chapter on discipline, notes the number of complaints filed for each year from 1986 to 1994; they total 746.[32] He states the Council received a legal opinion that it has authority to criticize a judge's conduct though no removal is warranted.[33] A review of the Council's *Annual Reports* between 1990 and 1994 sheds light on the Council's practice of reprimanding.

In its 1990-1991 *Report*, the Council detailed its inquiry into the way judges of the Nova Scotia Court of Appeal had expressed themselves in the Donald Marshall case.[34] Seeking a test for when a judge should be removed from office, the Inquiry committee of the Council referred to the following principles:

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[30] *1993-93 Annual Report of the Canadian Judicial Council* at 13.

[31] *Supra* note 3 at 9.

[32] *Supra* note 2 at 93-105.

[33] *Ibid.* at 95.

[34] *R.* v. *Marshall* (1983), 57 N.S.R. (2d) 286 (C.A.).

> Judicial independence requires, among other things "that the expression of views honestly held by judges in their adjudication of the relevant law, evidence or policy in a specific case will not endanger their tenure";
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> A judge should be removed only if the misconduct is "of sufficient gravity to justify interference with the sanctity of judicial independence"; and
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> Judicial independence is not merely or even mainly for the benefit of the judiciary; "it is also a fundamental benefit to the public served by the judiciary".[35]

The Committee then adopted this test for removal:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to make the judge incapable of executing the judicial office.[36]

The majority of the Committee concluded that the appeal judges had committed legal error by mischaracterizing evidence on credibility. Also, the majority put on record "its strong disapproval" of some of the language used by the judges, although they concluded no grounds for removal of the judges from office existed.

McEachern C.J. filed a minority report, finding no legal error and stating that, while it was both inaccurate and inappropriate to characterize the miscarriage of justice as "more apparent than real", this was "only one unfortunate error of language in a long and otherwise correct legal decision" which did not deserve the retrospective analysis given it by the majority of the Committee.[37] He also stressed that the public expected judges "to speak directly, even bluntly, so that there will be no misunderstanding of what they mean".[38]

In other cases dealt with by the Judicial Conduct Committee in 1990-91, the Committee "disapproved" of a judge's language in terming certain legislation "fascist", advised a complainant that it viewed certain remarks outside the courtroom by a judge to counsel concerning his aboriginal client as "ill-advised", and "disapproved" of the discussion by a judge outside the courtroom of cases in which he was involved.[39]

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[35] *1990-91 Annual Report of the Canadian Judicial Council* at 14.

[36] *Ibid.*

[37] *Ibid.*

[38] Quoted in Friedland, *supra* note 2 at 105.

[39] *Supra* note 35 at 15-16.

That same year the Chairperson of the Committee "put his disagreement with the judge's opinion on the record", after a judge had acknowledged giving women lighter sentences; labelled as "unfortunate" a judge's comment on a bail review that "if she's prepared to put up with these beatings, I don't see why I should worry about it"; and characterized as "unfortunate" and "inappropriate" a comment by a judge at a dinner, in complimenting a hard-working woman, that she was the kind of person he would have liked to date when young, since she never said "no".[40]

In 1991-92, the Committee commented upon the "thoughtless" and "stupid" conduct of a judge involved in the moving of antique doorknobs from one courthouse to another. The Chairperson labelled a judge's alleged sexist remarks at a roast as "unfortunate", expressed "disapproval", and noted the "regret" of the judge that there had been an "indiscretion" on his part. The Chairperson also characterized as "gratuitous and regrettable" remarks in a written judgment in a sexual assault case that "at times no may mean maybe, or wait awhile". However, he said removal of the judge from office for such remarks would be an indication that the concept of an independent judiciary was "fragile". In two other cases the Chairperson characterized judges' remarks as "unnecessary and unfortunate" and "highly unusual and unwise", respectively.[41]

In 1992-93, the Committee in one case stated that a judge's conduct in court and in chambers "showed a lack of respect for counsel" and was "most regrettable"; in another, it expressed "regrets" that a law professor had found a judge's comments to her over lunch at a conference "unsettling" and noted that, as a result of the complaint, "the judge would perhaps be more sensitive about how his remarks might affect others"; in a third, the Committee chastised a judge for sexist and racist remarks which were "improper and simply unacceptable".[42]

In 1993-94, the Chairperson of a Council discipline panel labelled expressions used by one judge in a spousal support case as "inappropriate and improper". Panels expressed disapproval of comments made by a judge who had been accused of "flirting" with a plaintiff in a negligence suit, characterized as "inappropriate and regrettable" a comment by a judge that a party's motion was "silly", and expressed "disapproval" of the conduct of a judge who, in a case involving an aboriginal accused, had "displayed an insensitivity to cultural and religious differences", been "discourteous, sharp and abrasive" towards defence counsel and exhibited "arrogance".[43]

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[40] *Ibid.* at 17.

[41] *1991-92 Annual Report*, at 12 - 15.

[42] *1992-93 Annual Report*, at 15 - 16.

[43] *1993-94 Annual Report*, at 18 - 22.

Because insufficient details have been published on most of them, the above discipline cases do not permit thorough analysis. They do, however, give rise to some general questions. Accepting that judges, like all members of society, should be reprimanded for clearly sexist or racist remarks, or for dealing rudely with individuals before them, is there not an unwarranted threat to judicial independence when discipline panels resort to reprimanding for "insensitivity"? Is the proper balance being kept between judicial accountability and judicial independence when a reprimand arises for "unsettling" a law professor by one's remarks over lunch? In order to maintain public confidence in the administration of justice, must judges always be reprimanded for "regrettable" or "unfortunate" choices of words? Attempting to answer these questions would require joining the debate between those who advocate codes of judicial conduct and those who fear that static codes would result in an eventual gap between the codes and social values.[44] This must be left for another occasion. My remaining remarks will consider whether there should be reprimands for ambiguous judicial language – language which may be taken out of context and savaged by the media as politically incorrect merely because the ambiguity has led to controversy.

"Political Correctness" and the Judiciary

In last year's Forum, Professor Julius Grey defined "political correctness" as follows:

> It can best be described as those prescribed opinions with which it is dangerous to differ, not because of physical repression, but because of the effect on one's career.[45]

Today, militant members of interest groups regularly scrutinize the comments of judges for remarks which they believe are not "politically correct". Moderate members of such groups, possibly because they see strategic value in the promotion of the group's interest, often remain silent when their more extreme spokespersons publicly distort the positions taken by judges or report judicial comments out of their proper context.

Members of the judiciary who allegedly exhibit a lack of sensitivity to such issues as gender and race will be criticized as part of the ongoing process of media and academic analysis of judicial pronouncements. Whether or not that lack of sensitivity actually is present often depends upon proper consideration of the remarks *in context*. Militants pay scant attention to context; moderates, more but often, unfortunately, in silence.

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[44]See Marshall, *supra* note 1 at 68, and Friedland, *supra* note 2 at 143 ff.

[45]J. Grey, "Freedom of Expression in a Canadian University Context" (1995) 44 U.N.B.L.J. 119 at 127.

The significance of judicial independence for a proper system of justice is regularly ignored or played down in the media when controversies arise concerning the alleged use of "inappropriate" language. The chilling effect of extremist public criticism upon one aspect of judicial independence, namely the ability to deliver frank reasons for decision, rarely receives attention during these controversies. The same may be said for the standard applied. To use as the test of "inappropriateness" the mere fact that a controversy has arisen is to assume that all commentators will be reasonable and moderate. *Ruffo* indicates that the test should be what is necessary to maintain public confidence. One need not cater to extremist fringes to accomplish this.

Conclusion

Recognizing the difficult task the Canadian Judicial Council has in seeking to balance accountability with judicial independence, one might still be excused for suggesting that discipline panels of the Canadian Judicial Council should resist the tendency, which might arise from immediate public relations concerns, to issue expressions of disapproval whenever a public controversy has arisen. These expressions may be viewed by some as relatively mild; for example, labelling a judge's language as "regrettable" or "insensitive". Yet one should keep in mind Sopinka J.'s comment in *Ruffo* that "[a] reprimanded judge is a weakened judge". I agree with Professor Friedland that there is not much difference between the words disapprove, criticize, admonish, warn or reprimand.[46] There is also little difference – in the effect on a judge – between referring to his language or conduct as "regrettable" and referring to it as "improper". In both cases, public confidence in that judge is weakened.

If the Canadian Judicial Council issues a reprimand merely because words have led to controversy, there will be, I respectfully submit, comfort and encouragement issued to those who are willing to sacrifice judicial independence to the promotion of their particular cause (which cause in itself may be highly meritorious). Whether the reprimand is merely communicated to the judge and the complainant, or made "public" as the Council reserves the right to do in "appropriate cases", does not make much difference.[47] In either case the result will probably become known, at least locally.

The Canadian Judicial Council, in performing its statutory mandate – "to promote efficiency and uniformity, and to improve the quality of judicial services", as well as to investigate complaints – should resist any tendency to defuse public

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[46]See *supra* note 2 at 139.

[47]*Ibid.*

controversy by issuing "mild" rebukes. If there is no case for removal from office, no risk of a continuing problem, and if ambiguous language may be innocently explained, complainants (and the public if appropriate) can be so informed. Coupled with an explanation of the concept of judicial independence, this should be sufficient to "give complainants [and the public] a reasonable understanding of the thinking that underlies the Committee's decision."[48] If it is considered "useful to the judge to know how comments or conduct that give rise to complaints appear in the eyes of fellow judges", this can be done privately.[49] This approach should be sufficient to maintain public confidence in the administration of justice over the long-term even if, occasionally, it results in short-term criticism.

I recognize the need for proper public relations in avoiding the appearance of "whitewash" where judges judge judges. Accountability is the other face of the judicial independence coin. However, education of the media and the public are key here. Members of the bar should be encouraged to ensure that there is a proper media focus upon judicial independence at all times. However, the Canadian Judicial Council will have the most important role in education. That role will require, at times, acceptance of ill-informed criticism, rather than ignoring the importance of an independent judiciary in ensuring a high quality of judicial service. The objective in Canada should be, as the judiciary has adopted in the United States, to determine the effect of judicial conduct upon "reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose", in deciding whether public confidence is threatened.[50]

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[48]*Supra* note 35 at 15.

[49]*Ibid.*

[50]*Code of Conduct for United States Judges*, reported in Friedland, *supra* note 2 at 147-8.