SILENCE IS GOLDEN (BUT MY HEART STILL CRIES): THE CASE AGAINST *EX TEMPORA* JUDICIAL COMMENTARY

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Lord Denning was heard to say that "the whole difference between a judicial decision and an arbitrary one [lies in the fact that the former] is supported by reasons."[1] To the contrary, Mark Twain was heard to say, "[k]eep your mouth shut and people may not think you're a fool. Open it, and they'll know you're a fool."[2]

Unlike some professions, the legal profession has to live with its mistakes. As a result, the profession is replete with red faces. When a case is determined by a single judge, one of the lawyers may have a red face. If that judgment is appealed and the Court of Appeal overturns the original trial judge, you have one judicial red face. If that case is appealed further to the Supreme Court of Canada and it reverses the Court of Appeal's decision, then you have three red faces at the Court of Appeal. If many legal scholars write learned treatises clearly depicting how the Supreme Court of Canada erroneously determined the law, you have between five and nine additional red faces. Once the decision is made and the reasons for it are rendered, "the deed is done" except for the rights of appeal. The judges who render those decisions are not called upon to explain their rationales, to speak openly, or to defend their decisions; rather, the reasons for the decisions alone are published.

Aristotle called the judge: "the incarnation of justice".[3] U.S. Supreme Court Justice Robert H. Jackson urged:

> To participate as advocate in supplying the basis for decisional law making calls for the vision of the prophet, as well as a profound appreciation of the continuity between the law of today and that of the past. [The lawyer] will be sharing the task of reworking decisional law by which every generation seeks to preserve its essential character and at the same time to adapt it to contemporary needs. At such a moment, the lawyer's case ceases to be an episode in the affairs of a client and becomes a stone in the edifice of the law.[4]

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[1]Lord A.T. Denning, *Freedom under the Law* (London: Stevens & Sons Limited, 1949) at 91.

[2]Hal Holbrook, *Mark Twain Tonight* (New York: Ives Washburn, 1959) at 117.

[3]Aristotle, *The Nicomachean Ethics*, trans. J.A.K. Thomson (London: George Allen & Unwin, 1953) at 129.

[4]Ruggero J. Aldisert, *Winning on Appeal, Better Briefs and Oral Arguments* (Deerfield, Ill.: Clark Boardman Callaghan, 1992) at xii.

That stone is carved by the judge in rendering a legal decision.

At no time in our history has the judicial system been under more attack. Hence, at no time has the legal profession been required to be more resolute in its defence of the judicial system, while simultaneously acting as its harshest critic. "For the judicial officer, the appearance of integrity is almost as important as integrity itself."[5] It is almost trite to state that every judicial officer must demonstrate dispassionate impartiality, sound judicial evaluation, and still appear to be, and actually be, fair. In fact, the judicial system depends upon the perception that those involved in it display high moral character, honesty, good faith, patience, and are knowledgeable in the law.

When asked why courts exist, the Honourable Emmett M. Hall, in his *Report on the Survey of the Court Structure in Saskatchewan and its Utilization* of 1974, stated that:

> The courts are civilized society's substitute for the naked power of force. The prime purpose of the courts is the impartial adjudication of disputes and the maintenance of public order without resort to violence. ... They apply the concept of the "rule of law" rather than the "rule of men" to the controversies which men and women cannot otherwise settle peacefully. They represent the substitution of the authorative power of reason, knowledge, wisdom and experience to the settlement of conflicts between citizens and between the state and its citizens.[6]

As such, the courts form the heart of the Canadian legal system and operate to protect the rights and freedoms of citizens. The general public are the people for whom the courts are designed and are the parties primarily affected by the quality of justice. The courts have both an adjudicative role in determining facts and a determinative role in declaring the legal consequences of such facts. They also have a limited policy role in implementing rules established by legislatures. The combination of these roles is commonly referred to as the exercise of judicial power, and the end product is referred to as "justice".[7]

The general public appear in courts at all levels as participants, accused, witnesses, jurors or interested followers of cases. While the public may not be concerned with the prestige of any given court, they are intensely interested in the quality of justice those courts dispense. The sole purpose of the concept of

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[5]American Bar Association Special Committee on Evaluation of Judicial Performance, *Guidelines for the Evaluation of Judicial Performance* (Washington: The Special Committee on Evaluation of Judicial Performance, 1985) at 21.

[6]E.M. Hall, *Report on the Survey of the Court Structure in Saskatchewan and its Utilization* (done pursuant to Order-in-Council 474-73, 23 December 1974) at 4 [unpublished].

[7]Ontario Law Reform Commission, *Report on Administration of Ontario Courts*, Part I (Toronto: Ministry of the Attorney General, 1973) at 1.

judicial impartiality is to ensure that everyone who comes before the court will have his or her case heard by a judge who is free of governmental or private pressures which may impugn his or her ability to render an unbiased opinion.[8] Impartiality refers to a state of mind or attitude of a judge or tribunal in relation to the issues or the parties, and connotes an absence of bias, actual or perceived.[9] The courts have stated that the test for bias is not the existence of a real likelihood of bias, but rather the existence of an "apprehension of bias". In *Committee for Justice and Liberty* v. *National Energy Board*, de Grandpré J. stated:

> The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude."[10]

The importance of an appearance of impartiality was further recognized by the entrenchment of the right to a public hearing by an independent and impartial tribunal in the *Canadian Charter of Rights and Freedoms*.[11]

Although the use of Latin is not in vogue, there are certain phrases that capture the essence of an idea. *Res ipsa loquitur* is one such phrase, and it should be applied to all judicial decisions. Literally, it means the thing speaks for itself. Whenever a judge attempts to explain, to elaborate, or to otherwise give the rationale behind the reasons for his or her decision, it reminds one of someone attempting to explain a joke. When a person does not understand a joke, an explanation does not make the joke funny or funnier. In fact, such an explanation acts as an insult to the hearer, and the person who uttered the joke, by explaining it, is brought into either contempt or ridicule. Similarly, judicial decisions must speak for themselves. The determination of what they mean in the grand scheme of building the edifice of the law should be left to commentators, either from the press or academia. The judge serves justice by producing the brick or the stone for the creation of the edifice of the law. Then, the judge must allow others to place that stone in its proper place, no matter how difficult it may be for that judge to remain silent when he or she sees his or her judgment being quoted or relied upon improperly.

However, every poet has experienced the same problem of misinterpretation and perhaps that is to be expected when "the house burns up" and "the house

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[8]P.H. Russell & G.S. Watson, "A Quiet Revolution in the Administration of Justice" (1977) 11 Gaz. L. Soc. of Upper Canada 111 at 114-115.

[9]*Valente* v. *R.*, [1985] 2 S.C.R. 673 at 685, 23 C.C.C. (3d) 193 at 201.

[10][1978] 1 S.C.R. 369 at 394.

[11]*Canadian Charter of Rights and Freedoms*, s. 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

burns down" mean the same thing in the English language. Some commentators might determine that the house really could not have burnt down if the fire started in the basement. Others might well say the house could not have burnt up if the fire started in the attic. Nevertheless, whether the house burnt up or the house burnt down, the house certainly is not there anymore. Similarly, the courts and society are involved in deciding issues that are often controversial, and to which there are no right or wrong answers, and no absolute "truth" to apply. Depending upon the perspective of the viewer, versions of the "truth" can appear to be conflicting and accordingly can lead to paradoxical results.

Someone once suggested that this parallax view can best be understood by considering an analogy between conflicting solutions to societal issues and the quantum and the wave theories of light.[12] One of these theories depicts light as a particle, and the other depicts it as a wave. Although the two are inconsistent, neither is untrue or "wrong". Similar paradoxes exist in society. Lawyers and judges participating in the judicial process have a major role to play in developing structures to accommodate paradoxes arising from controversial societal issues to which there are often no right or wrong answers.

The legal profession, more than any other, is trained to work with knowledge and material from areas in which neither the lawyers nor the judges are expert (in fact, they may know very little or nothing of the matter at issue at the commencement of their involvement). What lawyers and judges do is structure the knowledge and information so that experts in the relevant discipline can form the frameworks of concepts necessary to examine the values, attitudes and beliefs that form the basis of an expert opinion. This structuring of knowledge exemplifies the judicial system's role in attempting to pre-empt problems. The law's secondary function, the decision-making function, operates only when the judicial system has failed in its primary function of resolving conflicts or avoiding problems.[13]

Accordingly, although the judge and each of the lawyers involved in a case may become experts during the process, the personal opinions of either the lawyers or the judge are no more deserving of consideration than those of any other elector in a democracy. Since there are no right or wrong answers, a judge, in making a decision, may offend as many people as he or she pleases. Take, for example, the subject of mandatory Sunday closings. If democratic surveys are correct, about one-half of the population believes they are a good idea, and the other half believes they are an anachronism.

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[12]M. Somerville, "Dreams, Visions, Sherpas and the Law" (1989) 23 Gaz. L. Soc. of Upper Canada 123 at 126.

[13]*Ibid.* at 127.

Knut Hammarskjold, as quoted by Margaret Sommerville, compared lawyers to sherpas. He stated that "[l]awyers are the sherpas of the new ideas for the next generation; they must not limit themselves to mending fences, broken in the past."[14] I believe all lawyers would like to think they are sherpas. Sherpas are the trusted and skilled guides on the mountain ranges that are the most difficult and treacherous inclines in the world. Sherpas are not only competent; they open up new vistas, they rescue people, they carry the burden of the trek, and they work in a highly rarified atmosphere. They enjoy a long tradition of honour, integrity and loyalty. It is always the person whom they guide to the peak who is recognized as the "hero", but it is undoubtedly the sherpas who enabled him or her to reach those new heights.[15]

It is this role that the courts must play. The judges, in rendering their decisions, should not attempt to extend their influence by embellishing their judicial decisions. Knut Hammarskjold may not have been quite correct. It is not the lawyers who are the sherpas of the new ideas, but rather the courts speaking through judges. Although a judge may be swayed by the advocacy of a lawyer it is ultimately the judge who renders the decision. No doubt, it is the judge who is still the trusted, skilled expert, and it is the judge who must live with the burden of the decision. Notwithstanding the rarified atmosphere of a courtroom where a judge renders justice, to be respected, a decision must be comprehensible to everyone. Judges should not explain themselves. Every judgment rendered should be *res ipsa loquitur.*

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[14] *Ibid.* at 124.

[15] *Ibid.*