JUDICIAL FREE SPEECH IN CANADA

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A topic having a legal content of some nature usually has within it the potential for more than one viewpoint. The present topic is no exception. In such instances it is often helpful to define the topic's description. In the spirit of aiding in a digestion of the comments to follow, some definitions and a description of the title above are accordingly offered.

The word "free" includes within its several definitions: "...exempt from external authority, interference, or restriction" and "independent,...able to do something at will...".[1] The word "speech" is defined as, *inter alia*, "...the ability to express one's thoughts and emotions by speech sounds...something that is spoken; an utterance...".[2] In relation to the subject under consideration, this definition should be extended to written communications as well, as this is a usual manner in which Canadian judges express themselves.

A description of our topic may therefore begin to emerge when one combines its wording with the meanings of the words which have been suggested. "Judicial free speech in Canada" may mean the spoken and written words uttered by a duly appointed judge of a Canadian court (and not to overlook intrinsic political correctness: in one, other or both of Canada's official languages), free from external authority, interference or restriction. Inherent in such a definition or description is the fact that such free speech may be uttered, to give that word its own broad sense, in virtually any locus and on virtually any occasion.

Continuing our definitional concept, one considers potential circumstances in which judicial speech may occur. Included would be the obvious: speech uttered within the courtroom during the conduct of a case being litigated. A refinement would be the judgement ultimately rendered, both as to *ratio decidendi* and *obiter dicta*. Beyond the courtroom lie many other such circumstances: judicial writings on legal and other topics, interviews by the media, communications directed to the media and others, and addresses given are but a few such instances. Casual comments offered on social and other occasions must also be included.

It is notable that the *Canadian Charter of Rights and Freedoms* seeks to institute or preserve many rights, but in most cases does not impose correlative responsibilities.[3] Notwithstanding this feature of the *Charter*, it must be admitted

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[1]Webster's College Dictionary (Toronto: Random House of Canada Limited, 1991).

[2]*Ibid.*

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

that the right to freedom of speech contained in section 2(b) thereof does not lead to an unrestricted licence of speech, as is noted through appropriate sections of the *Criminal Code of Canada*.[4] While not engaging in the polemic as to whether the *Charter* applies to Canadian judges in this context, it would appear by analogy at least that the free speech of Canadian judges must be circumscribed in some ways and perhaps by agencies other than the *Charter* and the Criminal Code.

A threshold question is raised at this point. *Should* Canadian judges be singled out for special treatment with respect to their freedom of speech within the suggested definitions of that term? Arguably the answer must be in the affirmative, because of what may be colloquially referred to as their *supercitizen* status. They are appointed to their positions, not elected. At least in the broad sense they are not accountable for what they say, despite having awesome authority over the lives and affairs of their fellow citizens. They are regarded by many – both lawyers and non-lawyers – as having attained the pinnacle of the legal profession. They are considered by most Canadians as being learned and serious persons. Hence, anything they say has additional weight in the view of many constituencies. Accordingly, the very status of judges and the consequences of their utterances may call for some constraints. Parenthetically, it should be noted that Canadian judges are not unprepared for the placement of some sort of restraint upon their freedom of speech. Major tools in meeting some standards whereby freedom of speech is restrained from becoming licence include their extensive experience in expressing themselves in a variety of situations, legal and otherwise. Underlying that experience is training in a profession in which carefulness in speech of every type is a watchword.

GUIDES

Are there presently any rules or conventions in place which suggest some parameters on the freedom of speech of Canadian judges? If so, are they valid in at least two senses: are they equitable, and are they enforceable?

The codes of professional legal conduct adopted by law societies in Canadian jurisdictions do not speak directly to the foregoing. However, the two major works prepared for judges in this country do address the matter. In *A Book for Judges* the author treats with the following issues:

– the expression of biased views from the Bench (a ground for disqualification);

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[4]R.S.C. 1985, chapter c-46. See e.g., sections 264.1 (uttering threats); 296 (publishing blasphemous libel); 319 (wilful promotion of hatred).

– judges setting the example of the courteous speech they require during proceedings before them;

– the "overspeaking judge" who may be reproved by a higher tribunal for doing so;

– the requirement that "no prejudicial words be spoken or written out of court during the course of litigation";

– the right, when a judge deems it necessary, to elucidate on a public lack of understanding of some part of the proceedings then before the court;

– the "No comment" answer to media inquiries on new legislation or on current judicial decisions;

– matters pertaining to good writing habits involving wording in judgements; and

– speeches made to legal and other organizations.[5]

The allowance of freedom of discussion amongst judges of the same court is mentioned.[6]

The second of the two works prepared for Canadian judges is the more recent *Commentaries On Judicial Conduct*.[7] It uses concepts from the previous work and enlarges on several aspects of judicial free speech. Amongst the matters raised are:

– "Each judge must make a personal decision about ventures into the world of courtroom humour."[8] Interjections of a witty nature may be tellingly used to relieve stress or tension but these times are "extremely rare".

– Allied with the point immediately above is the avoidance of the use of intemperate language in times of courtroom tension.[9]

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[5]Hon. J.O. Wilson (Ottawa: Minister of Supply and Services Canada, 1980), at pp. 11, 28, 39-40, 44, 57, 58, 81-82.

[6]*Ibid.* p. 14.

[7]Prepared under the sponsorship of the Canadian Judicial Council (Cowansville, Quebec: Les Éditions Yvon Blais, Inc., 1991).

[8]*Ibid.* p. 76.

[9]*Ibid.* p. 77.

– Admonishments or reprimands to counsel should be used only in exceptional circumstances.[10]

– Criticism of parties or witnesses not before the court should be resisted.[11]

On their face, the foregoing constraints on the freedom of speech of Canadian judges appear to be fair and reasonable. Their enforceability will be addressed in other contexts to follow.

HISTORICAL

When considering whether there have been any serious departures by our judiciary from accepted norms of freedom of judicial speech, it is interesting to note from our English court heritage a possible cause for, and manner of, dealing with intemperate use of speech by certain judges in the courtrooms of that country, at least insofar as counsel were concerned. Certainly England has had its share of judges who may be described, somewhat charitably, as having been outspoken in this regard.[12] A theory as to why some English judges were overly free with their speech in at least the courtroom setting is drawn from the socio-economic background from which many of the Bench came.

During at least the seventeenth and eighteenth centuries, many judges came from the landed gentry class with its assumed privileges – including a wide freedom of speech. As recorded by Duman, however:

> The slow severing of social and occupational connections with the landed classes...finds a corresponding expression in the changes in the attitudes and ideals of the judges. While they continued to see themselves as gentlemen, based on evidence of life style and family structure, the members of the judiciary no longer associated that status with a need to assimilate the style and values of the landed gentry.[13]

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[10]*Ibid.* p. 81.

[11]*Ibid.* p. 82.

[12]See e.g., Herman Cohen, "The Spirit Of Our Laws..British Justice At Work" (3rd ed.) (London: Methuen & Co.Ltd., 1932) who at p. 266 reports on a deputation of the court of Leach M.R. about 1840, complaining of his "intemperate deportment" toward counsel of the court. In 1859 one Bethell, apparently counsel in a case, is reported to have told the judge: "Your lordship will hear the case first, and if your lordship thinks it right you can express surprise afterwards...". He was rewarded by "the thanks of the inner bar" in that court. Cohen refers also to the historic "tiffs" between Cockburn C.J. and Jessel S-G.

[13]Daniel Duman, "The English and Colonial Bars in the Nineteenth Century" (Beckenham, Kent: Croom Helm Ltd., 1983) at 180.

It is unlikely that a great deal of weight could be placed upon a similar theory respecting the speech conduct of Canadian judges, other than as it pertains to the concept of the conduct of the Bench to be the conduct of a gentleperson.

Turning to the Canadian experience, the case of the 1981 public statements of Mr. Justice T.R. Berger, as he then was, is on point. He offered criticisms of the proposed Canadian *Charter of Rights and Freedoms*, the result of which was a resolution of the Canadian Judicial Council which reads in part:

> 3. The Judicial Council is of the opinion that members of the Judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the Courts.[14]

As the Canadian *Charter of Rights and Freedoms* has tended to blur the distinction between political and legal issues, the Council has stated:

> We see that as a reason for judges to be more, rather than less, circumspect than in the past.[15]

Not contained in either of the Canadian texts previously mentioned – because of the time of its occurrence in 1995 – is the situation caused by a letter sent to the Prime Minister of Canada and released to the media by Mr. Justice J.-C. Angers, then of the Court of Appeal of New Brunswick. In this letter His Lordship expressed concerns regarding a bill dealing with gun control in Canada, then before the House of Commons. Complaints were made to the Canadian Judicial Council alleging a loss of impartiality on the part of the judge, and the view was expressed that His Lordship was essentially interfering with the legislative arm of government from his position on the judicial arm of the same government. An investigation of the circumstances was carried out through a committee of the Council which led to what may fairly be described as a criticism of His Lordship's actions.[16]

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[14]*Supra* note 7 at 39.

[15]*Ibid.* at 42.

[16]Recent situations involving Canadian judges' freedom of speech include those involving Judge Andrée Ruffo of the Québec Youth Court (respecting public statements allegedly made by her in relation to children's rights), and Québec Superior Court Judge Jean Bienvenue (suspended pending an inquiry into controversial comments allegedly made by him during a sentencing hearing). In an appeal to the Supreme Court of Canada by Judge Ruffo, the Court in December, 1995 indicated that judges do have a duty to behave with reserve in public but declined to state what limits, if any, that duty places upon the right to freedom of expression under section 2(b) of the *Charter*.

CONCLUSION

Few would disagree with the small number of fairly general restraints, previously discussed, which have been placed through Canadian sources upon judicial freedom of speech in this country. Are these effective for the present and the foreseeable future? In light of the few high profile items with which the Canadian Judicial Council has been seized over a period of some fifteen years – a question of numbers – they seem to be working reasonably well. It is suggested however that the comfort of small numbers should not be relied upon for at least two reasons. The first is that *any* deviation from acceptable norms of judicial speech which results in public scrutiny serves to erode public respect for the administration of justice. The second is that as the judicial population increases to meet the legal requirements of the public, so increases the possibility of a judicial comment which goes beyond written or unwritten bounds. While direction as presently set out is helpful, it may be advisable for the Canadian Judicial Council to include further direction and alternative sanctions for dealing with cases of improper judicial speech as they arise. The current initiative of the Council with respect to a new code of judicial conduct affords an opportunity in this regard.