MUST A JUDGE BE A MONK – REVISITED

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Almost seven years have passed since I first gave this speech. It has been discussed, debated, and referred to in at least one decision of the Judicial Conduct Committee of the Canadian Judicial Council. I have been described by some as "the most outspoken of all Canadian judges." Since giving that speech I have continued to conduct myself in accordance with what I concluded were the restraints on judicial activity. Based on that experience and that of other judges, it is time to revisit the topic.

I gave that speech at the time of my appointment because during my 28 years at the bar I had observed a remarkable variation in the views of judges as to their freedom of action. Some had withdrawn completely from society. They would not be seen in a public place such as a bar, would not speak in public and even refrained from socializing with counsel. Often these same judges would complain about the difficulty of adjusting to this monastic lifestyle. At the same time, other judges behaved more or less like ordinary citizens. In particular, they accepted some public speaking engagements and even appeared to be interviewed on television.

I decided to look into the legal restraints which permitted this disparity, and discovered that, in reality, no legal restraints existed. Various so-called rules were instead based on the opinions of individual judges which varied with the particular school to which the judge belonged. The old school adhered to the maxim that a judge should speak only in reasons for judgment. The more modern school admitted of no such restriction.

The Canadian Judicial Council had not clarified matters, being limited, of course, by the fact that its only statutory power of a disciplinary nature under ss. 63-65 of the *Judges Act* is a recommendation of removal.[1] No such recommendation has ever been made based on public utterances of a judge. Four complaints with which the Canadian Judicial Council has dealt are:

(1) Bertha Wilson, while a member of the Supreme Court of Canada, spoke at Osgoode Hall concerning gender bias of the criminal law;

(2) Beverley McLachlin, a Supreme Court of Canada justice, spoke to the Elizabeth Fry Society about crime and women;

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[1]*Judges Act*, R.S.C. 1985, c. J-1.

(3) Thomas Berger, while a judge of the British Columbia Supreme Court, publicly criticized the First Ministers for abandoning the rights of aboriginals during the 1981 constitutional negotiations; and

(4) More recently, Jean-Claude Angers, formerly of the New Brunswick Court of Appeal, wrote an open letter to the Prime Minister criticizing the Government's proposed gun-control legislation.

Complaints (1) and (2) were dismissed, the latter with a commendation for speaking out. Although disapproval was expressed with respect to Berger and Angers, the Canadian Judicial Council expressly refrained from recommending removal – the only disciplinary action available. In the Berger matter, the Council expressed an opinion that judges "should avoid taking part in controversial political discussion except only in respect of matters that directly affect the operation of the courts."[2] In the Angers situation, the Chairman, speaking for the panel, acknowledged that:

> While recognizing a possible exception with relation to matters which might affect the proper administration of justice, there can be no doubt that the great majority of Canadian judges, and indeed most members of the public, do not believe that it is proper, or appropriate, for Canadian judges to make partisan, controversial out-of-court statements... [there exists a] possible exception with relation to matters which might affect the proper adminstration of justice.[3]

He quotes Professor Jeremy Webber with apparent approval:

> The line is crossed, I believe, when the judge identifies himself closely with a particular faction in the legislature or executive, or when he lobbies consistently and forcefully for a specific political goal – in short, when his activities become partisan in nature. When this occurs, many of the considerations which lead the legislature or the executive to pay insufficient attention to individual interests begin to operate on the judge. If he joins the day-to-day struggle for a particular policy outcome, he may increasingly be tempted to decide matters solely on the basis of whether they conduce to that end, taking insufficient account of other interests involved in the decision. And in order to muster popular support for the desired policy or party, the judge may, in his adjudication of controversial disputes, be eager to appease public opinion.[4]

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[2]*Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger and Resolution of the Canadian Judicial Council*, (1983) 28 McGill L.J. 378 at 379.

[3]Letter to Mr. Justice Angers, 10 April 1995, from the Chairman of the Panel of the Canadian Judicial Council's Judicial Conduct Committee (Chief Justice of British Columbia, Allan McEachern) at 4. This letter forms part of the *Candian Judicial Council Press Release re Complaint concerning Mr. Justice Angers*, Ottawa, 12 April 1995.

[4]J. Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Honourable Mr. Justice Berger" (1984) 29 McGill L.J. 369 at 384-85.

On April 11, 1992, an article appeared in *La Presse* entitled "Des juges plus loquaces" by Yves Boisvert in which he points out that judges are speaking out publicly more often and are redefining the traditional notions of restraint. He then quotes Chief Justice Lamer, "'Peut-être bien qu'il y a un lien avec la Charte,' répond Antonio Lamer, qui, malgré une charge de travail titanesque, est sans doute le juge en chef le plus disponible de l'histoire de la Cour suprême."[5]

In the absence of any legal restriction, or indeed well-defined guidelines, judges must determine for themselves what is appropriate. Surely judges who daily make decisions affecting the lives of others can be trusted to determine this matter for themselves.

While there are no actual rules, there are consequences and a price to be paid for speaking out:

(1) a challenge of impartiality may require the judge to recuse himself or herself;

(2) a complaint to the Canadian Judicial Council will cause pain and embarrassment even if no disciplinary action is taken;

(3) some colleagues and the Chief Justice may give you the cold shoulder;

(4) some courageous members of the bar may write to criticize your conduct; and

(5) the media will either applaud or criticize, depending on which makes the better story.

The safest course is to refrain from any public statement. Then, you may ask, why speak at all? For some this approach would not be a problem. Not everyone is sought after as a public speaker. I suspect that many who adhere to the old school fall into this category. To refrain is, however, a personal decision which should be respected. I happen to believe that accepting speaking engagements is important for the image of the judiciary. Under the *Charter*, we are entrusted with the task of making judgments that were previously the exclusive prerogative of elected representatives. These decisions were made after debate in Parliament or the legislature. No longer can we expect the public to respect decisions from a process that is shrouded in mystery and made by people who have withdrawn from society. The public is demanding to know more about the workings of the courts and about judges.

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[5]Yves Boisvert, "Des juges plus loquaces" *La Presse*, (11 avril 1992).

As observed by Professor Leon Dion, total abstention from political discussion will transform judges into social eunuchs.[6] United States Supreme Court Justice Oliver Wendell Holmes stated, "[it] is required that a man take part in the actions and passions of his time at the peril of being judged not to have lived at all."[7]

If a matter is troubling a judge and relates to the work of the court, a public discussion will often serve not only to clear the air, but will also result in a happier, more effective judge. Recently, our Chief Justice spoke out about criticism of the court. In particular he responded to the criticism that judges are intruding into the legislative sphere. In commenting on the speech, one political commentator concluded:

> No doubt some observers will fault the chief justice as crying in his champagne. But is it in fact fair to blame the judiciary for what Pierre Trudeau wrought, with wide public support, in 1982?
>
> Our Supreme Court justices are uniquely placed as the ultimate in-basket for some of our country's most sensitive problems.
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> We should encourage them to speak out like this, to help keep us all better informed about what's really happening in Ottawa, on and off the Hill.[8]

A judge who decides to accept public speaking engagements must consider the limits of his or her pronouncements in order to avoid the consequences to which I have referred. There is much discussion about creating standardized limits in a Code of Conduct for judges. In this area, I do not favour adoption of a code. I believe that this should be left to the discretion of judges. In the absence of any clear rule, judges have in fact been exercising a discretion. In over 25 years there have been only two serious complaints. This does not strike me as a situation which calls for a Code of Conduct. Moreover, a code may not be sufficiently specific to provide useful guidance. The existence of a code is no guarantee that it will be applied in the same way by all judges.

The following are the guidelines that I try to follow:

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[6]L. Dion, "Plus de démocratie pour les juges" (1981) 41 R. du B. 199.

[7]O.W. Holmes, Memorial Day Address [1884], as quoted in J. Bartlett, *Familiar Quotations*, 14th ed. (Boston: Little, Brown & Co., 1968).

[8]J. Miller, "Chief justice encourages the public to take ownership of its legal system" (1995) 15:3 Lawyer's Weekly 3.

1. Controversial Current Political Issues

These are to be avoided. Invariably, involvement in such issues gives the appearance of taking sides and partisanship. I would, however, make an exception with respect to matters directly affecting the administration of justice and concerning which judges are particularly knowledgeable. Preferably, these matters should then be left to the Chief Judge or Justice for comment. For example, proposed legislation affecting the jurisdiction of the court would be a subject upon which judges can publicly comment. Our judges, including our Chief Justice, have commented on the proposal to eliminate preliminary hearings. Judge J.B. Weinstein, senior judge on the U.S. District Court for the Eastern District of New York, refers to public statements by federal judges, including Chief Justice Rehnquist, criticizing legislation imposing mandatory minimum sentences. I place in this category a speech about restrictions on legal aid and the problems which that creates for the conduct of trials.

This is, however, a sensitive area which requires careful consideration and considerable restraint. Before embarking on a public speech containing statements of a controversial political nature, a judge must fully appreciate that he or she is entering an open arena and can therefore expect the blows that are encountered in that forum.

2. Commenting on Cases

Another area to be avoided is cases before the court or cases about to come before the court. Apart from explaining the issues, no comment should be made.

I do not subscribe to the view expressed by some that a judge cannot comment on decided cases written by the judge or members of his or her court. For years, it has been accepted that judges can give prestigious lectures on the law at law schools and to professional bodies. This would be impossible if commenting on decided cases were prohibited. If, however, a decided case has raised a controversy as to its interpretation, a judge should avoid trying to clarify it through extra-judicial interpretation.

Some support a rule of total silence on the basis that almost any issue may in future come before the court. My response to this is that it is accepted that judges have views with respect to issues of the day. The fact that these views are not expressed in the context of a specific case should not be a basis for recusal. If judges are expected to set aside their unexpressed personal views, the situation is no different when these views have been expressed. For example, many judges have commented on the subject of television in the courtroom, both pro and con. This issue has and will again come up in the context of a *Charter* challenge either

by the media or a party. In my view, a judge's comments about how the presence of cameras may affect the proceedings would not be the basis for recusal in a case raising the issue.

3. Appearance on Radio and Television

Greater care must here be exercised by reason of the uncontrolled nature of the process. Before agreeing to the interview, satisfy yourself that the interviewer is responsible and will not try to embarrass you. The ground rules for the interview should be firmly laid down before agreeing to it. It is preferable if editing is to be approved by the judge. Public speaking is just one, albeit the most important, aspect of a judge's extra-judicial conduct. I turn briefly to other aspects.

4. Outside Activity

(A) Social

Section 55 of the *Judges Act* does not touch upon social restrictions.[9] The standard guidelines simply caution a judge to refrain from conduct which would bring the judiciary into disrepute. A former Minister of Justice, commenting on the ministry publication, said that a judge should not be seen dancing with the wife of a litigant who will appear before him the next morning. These opportunities will be rare. This is an area where good taste is perhaps the only guideline, subject to the law relating to appearance of conflict of interest.

(B) Business

The *Judges Act* leaves unaffected activities such as writing books, receiving royalties and lecturing, which are permitted unless they conflict with judicial duties. A reasonable honorarium, it would seem, can be accepted for lectures.

Participation in educational, religious, charitable, cultural or civic organizations, so long as not designed for the economic or political advantage of their members, seems perfectly acceptable, although active participation in fund-raising activities should be avoided for fear that potential donors may feel compelled to donate or may expect future favours.

Extra-judicial public service on commissions, inquiries and the like is widespread in Canada and, at least in the current climate, there is no need to refuse such appointments. It should be noted, however, that there exists room for

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[9] *Supra* note 1.

concern about judges assuming these roles because of the potential for conflict between policy-making functions and future adjudicative responsibilities.

5. Conduct after Ceasing to be a Judge

When two retired Supreme Court of Canada justices spoke out on the effects of the Canada-U.S. Free Trade Accord, it focused attention on the issue of the limits on free speech of retired judges. Some were openly critical – suggesting that this was a misuse of their office for political purposes. They argued that the public might think they were speaking for the court. If a judge may resign in order to engage in political debate, as was suggested by Chief Justice Laskin in the Berger affair, surely a retired judge is in no different position.

Frankly, although I have found that I thoroughly enjoy the job, one of my concerns in considering a judicial appointment was the finality of the decision. Many provinces, including Ontario, have restrictions on judges rejoining the bar after resignation or retirement. For example, Saskatchewan forbids a former judge from appearing before a court in the province for one or two years depending on the length of judicial service.[10] Similarly, New Brunswick imposes a waiting period of five years before a former judge can practise "at the bar of the court of which he was a member or of any lower court".[11] The Law Society of Upper Canada, in contrast, has different rules depending upon the court of service. For judges of the Supreme Court of Canada, the Federal Court of Appeal or the Court of Appeal for Ontario, the express approval of convocation is required before the judge may appear before any court or tribunal. For lower court judges, approval is only required if the judge wishes to appear before the court of service or a lower court or tribunal within two years of retirement or resignation.[12] The apparent concern is that a former judge will be in a preferred position before the courts, or at least litigants might think so. This is less than convincing. I am told by retired justices of the Supreme Court that when a former colleague appeared before them for the first time after resigning, the only difficulty was knowing what to call him. It was a motion for leave and the retired judge was for the applicant. The dilemma was resolved by Chief Justice Cartwright stating "You begin" to his former colleague.

Under the U.S. *Code of Judicial Conduct*, only retired federal judges who are eligible for recall to judicial service are restricted from the practice of law under

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[10] *Legal Profession Act*, S.S. 1990, c. L-10.1.

[11] *Law Society Act*, S.N.B. 1973, c. 80.

[12] *Law Society Act*, R.S.O. 1990, c. L.8.

Canon 4(g).[13] Federal judges who have resigned and retired judges not eligible for recall are exempted from the *Code*'s application, and are therefore apparently not restricted in the practice of law.

Individual American states impose their own rules. In Maryland, the Court of Appeals held that a statutory provision restricting retired judges who accepted pensions from engaging in the practice of law for compensation was unconstitutional on the basis that it was in violation of equal protection guarantees.[14]

I think it important that we re-examine the restraints on activities of judges who resign or retire. I believe that many candidates who have had a concern similar to my own are deterred from accepting a judicial appointment. Conversely, there are a number of examples of judges who, after appointment, decided it was not for them. By reason of the restrictions, they stay on – unhappy with the job. Why should we keep them there? This and other aspects of the subject which I have touched on are matters that are worthy of our anxious consideration and debate. While judges must of necessity give up some freedom, we should not do so except for very good reasons.

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[13]ABA *Model Code of Judicial Conduct* (1990).

[14]*Attorney General of Maryland et al.* v. *Waldron*, 426 A.2d 929 (1981).