GUN CONTROLS AND DEMOCRACY

To the Prime Minister and Members of Parliament,

Although it is unusual for a member of the Judiciary to comment on Government policies, where they involve breaches of fundamental freedoms, including my own, my intervention is warranted. Thirty years of practice in criminal law as prosecutor, defence counsel and judge and forty years of using guns for recreation, perhaps, give me a realistic perspective.

The Gun Control proposals of our government purport to restrict the criminal use of firearms, a laudable purpose. In fact though, they restrict the lawful use and users of firearms. That is where they conflict with fundamental freedoms. Surely that conflict should be avoided. It is a wasted and expensive effort to control users of firearms who obey the law.

I would guess that more than 98% of firearms used in this country are used legally and for some enjoyable purpose. They provide safe and healthy recreation to millions of people in target shooting sports and hunting. They enable Canadian shooters to excel in competition. Let us remember Myriam Bédard, our famous Canadian gold medalist. The gun proposals would require, amongst other things, the testing of the skills of users and retesting every five years. Does Myriam Bédard need all this testing to shoot her rifle? Guns provide Canadians with a means of self-defence. Many rural citizens feel more secure with a gun at their side when their neighbourhood is threatened by an escaped murderer as was the case in N.B. a few years back.

Unfortunately, too many people have obtained their information about guns from television and that is an unrealistic and distorted view. I, for one, would support every effort to reduce violence on television. As the present proposals stand, it will be the honest law abiding citizens whose rights will be abridged by our government's gun laws.

The proposals abolish property rights without trial, hearing or compensation. That is the effect of the declaration that handguns of certain calibres are illegal. Moreover, that declaration is made retroactive, a move normally used by governments only in emergencies. There is no such emergency with guns of that calibre. There is no justification to forfeit or render useless property which was obtained, possessed and used legally until now.

Property and civil rights are, under our Constitution, matters for the Provinces. Because the situation is different from region to region, perhaps the Provinces should deal with gun controls as they do with automobiles.

It seems to me that those who devised these proposals overlooked the serious infringements of the rights to security and enjoyment of the person and to own property. In that sense, the proposals are oppressive to the vast number of respectable Canadians who own or intend to own a gun. Oppressive laws, as we know, have the effect of turning many honest citizens into law breakers. We do not want that.

It is not my intention, at this time, to comment on the various proposals of our government's action plan, my sole purpose is to suggest a delay. There is no emergency, there is not even a serious gun problem in Canada. There is, however, a lot of misunderstanding and misinformation about the use of guns. Better and more effective schemes exist to prevent the criminal uses of firearms.

Let us not, at this time, penalize the law abiding gun users by hastily enacted legislation promoted at times not by reason and common sense but by emotional reactions to abhorrent crimes. The program can be made more efficient against criminals and less oppressive to conscientious gun users. In this great democracy of ours, should we not pause and strive to attain this ideal?

J.-C. Angers, Justice of the
Court of Appeal of New Brunswick

Dear Mr. Justice Angers:

Our File: 94-147

I write as Chairman of a Panel of Members of the Judicial Conduct Committee of the Canadian Judicial Council, established under its By-Laws, to consider two complaints made against you. The other members of the Panel are the Honourable Pierre Michaud, Chief Justice of Quebec, the Honourable Donald MacPherson, Chief Justice of the Court of Queen's Bench of Saskatchewan, the Honourable Roy McMurtry, Chief Justice of the Ontario Court of Justice (General Division), and the Honourable Claude Couture, Chief Judge of the Tax Court of Canada.

As you know, in January 1995, it was the policy of the Government of Canada, as announced by the Honourable Minister of Justice, to amend the Criminal Code of Canada to provide for the registration of certain firearms in Canada. Legislation for this purpose was introduced into the House of Commons in February 1995.

As you also know, this was a controversial proposal approved by some, but disapproved by others. The traditional Canadian view is clearly that judges should refrain from controversial, partisan, out of court statements or comments, particularly criticisms of government policy. This is because the interpretation of enactments, particularly new legislation, is an important judicial function, and matters relating to both the enforcement of the law, and about firearms generally, often come before the courts for decision.

We note, for example, that Chief Justice Wilson, in *A Book for Judges*, written at the request of the Canadian Judicial Council in 1980, recognized that judges could comment freely on the law as it is, but "less freely on the law as [they] think it should be." He suggested judges should avoid statements made off the bench about current legislation "lest [your] hearers infer criticism of a legislature, federal or provincial." The author's meaning is clear that out of court judicial criticism of proprosed legislation should be avoided.

In 1982, this Council criticized the conduct of Mr. Justice Berger, as he then was, for having criticized omissions in the recently settled constitutional accord that led to the patriation of the constitution. The language of this Council on that occassion was that "it was an indiscretion on the part of Mr. Justice Berger to express his views as to matters of a political nature when such matters were in controversy."

It is not our role to review the decision of the Council in the *Berger* case. In fact, it has been criticized by a number of legal commentators. However, we note that even the most severe critics of the decision in the *Berger* case continue to believe that there should be limits on the freedom of a judge to participate in political discussion. For example, in his text *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, Professor Jeremy Webber concludes his analysis of that case at pp. 384-385:

> 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.

Another commentator, Professor Peter Russell, in *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at p. 87, agrees that Mr. Justice Berger was indeed indiscreet "in permitting his views to be published in a leading national newspaper at the very time when this was the hottest political issue in the country."

Dean Russell Osgood of Cornell Law School said in the course of a seminar at that Law School in 1994 that, "I do not think a sitting judge should engage in overt political discussion." (See *Judicial Independence*, a paper presented at the Cornell Lectures 10-16 July 1994a, at p. 87 soon to be published in the University of Toronto Law Journal).

Even Mr. Justice Sopinka, the most outspoken of all Canadian judges, agrees in a paper he delivered to the Canadian Bar Association that there must be some limits, as suggested by Professor Webber, on out of court statements by judges. (See *Must a Judge be a Monk?* Toronto, 3 March 1989, quoted in McKay *Judicial Free Speech and Accountability: Should Judges Be Seen and Not Heard* (1993) 3 N.J.C.L. 159 at 159.)

Since the *Berger* case, Canada has adopted the *Canadian Charter of Rights and Freedoms*, which garauntees freedom of speech to all Canadians. Notwithstanding this important declaration of individual rights, Canadian judges have largely

continued to confine their out of court statements and comments to questions about the work or management of their courts, or about the administration of justice. Indeed, it may fairly be said that ever since the *Charter*, judges have entirely refrained from out of court, partisan political statements. This Panel therefore concludes that the adoption of the *Charter* has not changed the traditional view described above.

Subsequent to the adoption of the *Charter*, this Council has published *Commentaries on Judicial Conduct* which you say is inconclusive. While the editors of *Commentaries* were unable to pronounce authoritatively on this question, the text strongly recommends a restrained approach. This is because there is no law that says a judge may or may not make controversial, political statements. Standards of judicial conduct, however, are surely different and much, much higher in these matters than for other citizens.

Notwithstanding this history and tradition, you have seen fit to comment publicly upon the proposed firearms legislation. You wrote an "open letter" signed as a Justice of Appeal, to the Prime Minister of Canada, copies of which you sent to the Minister of Justice and to Members of Parliament from your Province of New Brunswick. You also sent copies to local and national newspapers, and the letter was published in New Brunswick. Lastly you consented to be interviewed in the French language by a representative of Radio Canada. Your letter and interview criticized the the Government's proposal for what it called "gun control". Attached is a copy of your letter. We pause to say, that unlike Mr. Justice Berger, who was commenting on matters of high constitutional importance that would rarely come before him as a judge, yours is a highly partisan attack upon a proposal which, if carried forward into legislation, could well come frequently before you for interpretation or enforcement.

This Council has a responsibility under the *Judges Act* to deal with complaints against federally appointed judges. As you have been informed, two complaints against you arising from your out of court statements have been received.

Pursuant to Council By-Laws, these complaints were referred to a Vice-Chairman of the Judicial Conduct Committee, Chief Justice Lorne Clarke of Nova Scotia, who asked for and received your comments. (We are honouring your request that your letter to the Council not be released to the complainants).

Due to the seriousness of this matter, and pursuant to the By-Laws, Chief Justice Lorne Clarke referred the complaints and your reply to this Panel which has given careful consideration to them.

We do not consider it necessary to decide the question of whether, because of the *Charter* or otherwise, a Canadian federally appointed judge may have a legal

defence to formal proceedings brought in consequence of controversial, public statements. That is a matter that is yet to be resolved. However, proper judicial conduct cannot be measured only in terms of strict, individual, legal rights.

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 or comments to the public, which criticize proposals that may be enacted into legislation. We test this against your institutional function. To some, your impartiality may seem to have been compromised.

Accordingly, we must strongly disapprove your conduct in this connection.

Having thus expressed our disapproval of your conduct, we have considered whether we should go further and recommend the initiation of a formal investigation under sections 63-65 of the *Judges Act* to determine whether a recommendation should be made that you be removed from office on any of the grounds specified in s. 65 of the *Act*.

We have concluded that the grounds upon which we have expressed our disapproval, although regrettable, are not sufficiently serious to warrant a formal investigation by an Inquiry Committee. We say this because we do not think the result of such an investigation into facts and circumstances already known, could properly lead to a recommendation that you be removed from your office as a federally appointed judge. In addition, we believe your conduct has not seriously prejudiced the political process and that you should be able to put your partisan feelings aside and judge matters that come before you fairly and impartially.

For these reasons, no further action will be taken in this matter except that a copy of this letter will be sent to the complainants.

Yours sincerely,

Allan McEachern
Chief Justice of British Columbia
Chairman of the Panel

Clarification of Press Comments

Because of innuendoes and misunderstanding of the press release issued by the Canadian Judicial Council and because many people have inquired from me, it has become necessary to make certain clarifications.

First, the fact that I have been transferred to the Court of Queen's Bench from the Court of Appeal has nothing to do with my letter on the gun control proposals. The transfer was effected at my request and is unrelated to the letter. The Judicial Council had nothing to do with such transfers.

Second, the letter which was sent by the Council was not a reprimand as some news media reported. There are no provisions in the Council's bylaws for reprimands.

The issue is more complex than meets the eye. Much has been been written for and against a judge's right to speak publicly. The issue involves the interpretation of traditional and fundamental principles, judicial independence and now, in addition, the effect of the *Charter of Rights and Freedoms* on this right. For example, another organization, the Judges' Conference is presently working on what is hoped will be more precise guidelines to deal with the matter. As it stands, there is no law or regulation preventing judges from making public statements.

A panel of five members of a Conduct Committee was asked for an opinion by two law professors from Fredericton, not practicing lawyers as some news media intimated.

The five judges have delivered their opinion. They, obviously, interpreted the various existing guidelines differently than I have.

Edmunston, N.B.
19 April 1995
Judge J.-C. Angers