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JUDGES AND THE MEDIA

JUDGES' DAY

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JUDGES AND THE MEDIA

"Where there is no publicity, there is no justice. Publicity is the very soul of justice."
– Jeremy Bentham, 18th century British philosopher

For some years Canada's judicial system has been the focus of greater public attention. The courts play a larger role in our society, partly due to the *Canadian Charter of Rights and Freedoms,* but for other reasons as well. A judge's principal task is still to settle disputes but added to that, under the keen eye of the media, the courts now play a role in developing law concerning matters of social policy and the legality of legislative measures. These new tasks impose upon judges greater accountability to the public and, it must be said, such accountability is underscored by the role now played by the media with regard to the judicial system.

Nothing is taboo today and no person or organization escapes criticism. This can be explained by a decline in the "culture of deference" that leads, as we see every day, to constant criticism of public institutions, including the courts. Public opinion is now considered "the court of courts" and in this regard the media plays a key role. There is no shortage of examples over the past few years of news coverage that demonstrates great enthusiasm for analysing and criticising judicial decisions and judges.

And yet the roles of the courts and the media are very different. The courts aim to ensure that impartial justice is rendered while the media aspire chiefly to inform the general public, in an equally impartial manner, about various topics or issues, including justice.

But the public nature of court proceedings is not, strictly speaking, guaranteed by media coverage of the matters that come before our courts. Indeed, the main objective in making court hearings open is not to inform or educate the public but to call upon the public to witness the process and thus guarantee its transparency and the independence of the judicial system.

Whether there are 40 members of the public in a court room, or 200,000 spectators listening to a report on a hearing covered by the media, does not change in any way the public nature of cases before the courts. The presence of the public (or the public's opportunity to be present) is essential in order to ensure the legitimacy of the judicial process. The presence of the media within the judicial landscape is equally essential, but for different reasons. Contrary to those who support the argument that only extensive media coverage is the best guarantee of an efficient, effective and independent judicial system, I would say that the media does not have a decisive role to play in the judicial process. By definition, that role is reserved for the public itself. To say the contrary would amount to a claim that the basic guarantee granted to all citizens, to be judged publicly by an independent judge, would be dependent on media coverage in a given case. Notwithstanding the interest or ability of the media to ensure appropriate coverage of court proceedings wherever they might be heard, I prefer to believe that justice of equal quality is rendered with or without media coverage in Medicine Hat, Digby, Nelson, Amos, Montreal, Vancouver or Calgary.

As previously mentioned, the roles of these two institutions — the judiciary and what we now call the fourth branch or the "Fourth Estate" — are very different. It must be recalled as well that while the media's ultimate objective is to inform the public about a given situation, it does so with constraints that go well beyond those of the judicial system. I am thinking here of concerns

of efficiency, performance and results-based management – all of these now being requirements of a journalist's profession. And so the introduction of "continuous news" on television, specialized channels and the CNN effect give rise in the media to a new *rapport* with time as well ways of providing information. While responding to the demand for news, the media must satisfy other considerations, such as deadlines for broadcasting news, the priority given to types of news stories, and even the development of innovative and competitive approaches with other media covering the same interests. The media is actually the "watchdog of democracy", and even though our democracy is being watched, it is not necessarily all of democracy that is interesting. A small-claims case might be far less exciting than some criminal cases that are given a lot of media coverage but both have as their objective that justice is done.

We must recognise that media coverage of judicial decisions effectively constrains judges to be more accountable, as long as that coverage is well informed with respect to the facts and circumstances of the case.

But as the Right Honourable Antonio Lamer pointed out, when he was Chief Justice of the Supreme Court of Canada : "News gathering and judging have some serious cultural differences."[1]

Despite an ever-changing social context, the judge's role continues to be basically the same. Judges must decide without fear or favour. Judges must render judgement and not advertise or promote any cause. And, lastly, judges must obey rules of law and not concede to outside pressures. Although judges are public figures, their objective in carrying out their responsibilities is not, and must not be, to be popular. That is a concern that prompted Chief Justice Lamer to say that he was wary of the "popular judge".

As for judgements, they are the outcome of a process of deliberation, during which the judge weighs competing arguments, applies rules of law with which he must comply and justifies his decision. Although a judge's decisions might sometimes be unpopular, they are not necessarily wrong for this reason. In an ideal world they are meant to be the expression of law and the intention of the lawmaker. The lawmaker therefore has the responsibility of taking action if the law is no longer in keeping with the interests of the society that is subject to it.

In addition to ensuring that justice is done, the objective of the judicial system is to promote and increase public confidence in the administration of justice by observing the following specific points:

a) promoting judicial independence;
b) strict enforcement of the *Canadian Charter of Rights and Freedoms;*
c) the judge's obligation to act strictly within the rule of law; and
d) the judge's obligation to strictly respect the code of ethics governing his position

The reporter's world is totally different. The court reporter has to produce a report quickly, in a few words, on a decision that occasionally he has not had the time to analyse. In addition to informing the public, he is obviously concerned about feeding an insatiable machine that forces him to provide news within an extremely limited deadline. Under these conditions he runs the risk of deviating from canons of conduct that are supposed to govern his profession.

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[1] Antonio LAMER, "The Role of the Judge in the 20th Century", *Canadian Institute for the Administration of Justice*, Éditions Thémis, 1994, p. 1, page 9.

The media has to feed a society that craves more and more news. With the introduction of electronic media, continuous news and a proliferating number of broadcasters, news is now a form of entertainment and a fast-consumption commodity. Readers who no longer take the time to read all the news, or even listen to it, make do with a quick overview and draw their own conclusions from that. Thus from the concrete basis, (like a court decision) we then move toward the hazardous and uncertain world of perception.

The hazards are great especially because, as I have just said, there is a strong temptation to present the news in a more spectacular way to satisfy a public that is hungry for everything sensational.

And we must not forget that the media are firms that have business and commercial interests in a competitive market. The firm's profitability therefore becomes one of the considerations taken into account in the choices that are made in handling news. Of course, reporters are obliged to abide by their code of ethics, but it must be acknowledged that the rigour of professional ethics can sometimes vary with a firm's priorities.

Some describe relations between judges and the media as a chaotic but necessary encounter of two worlds in which, as I explained in my introduction, one cannot and must not alter the basic role of the other. At the Conference of Canadian Court Administrators in 2004, Michel Robert, the Chief Justice of Québec, described the relations between judges and the media in these terms: "We're a couple troubled with profound mutual distrust. If we were to consult a marriage counsellor, it would be recommended that we rebuild the bridges and communicate more"[2]. “[TRANSLATION:] "We're a couple troubled with profound mutual distrust. If we were to consult a marriage counsellor, it would be recommended that we rebuild the bridges and communicate more"[3]. To this, I would add that in my opinion, without necessarily talking about "a couple", there is good reason to build up communications with the media, but within the firm framework of a settled process. Otherwise the very principle of judicial independence is at risk of being called into question.

Judges now must transform their traditionally distant relations with the public by sustained communications so as to remove the mystery that characterizes their daily functions. I believe I can affirm that for the past decade or so this transformation has been slowly taking place, thus encouraging a greater openness with regard to what judges have to say. Yet I want to stress that this new transparency must be built on real and apparent impartiality, within a well-defined framework and through "institutional" means.

A – A REMINDER OF KEY ETHICAL PRINCIPLES

With the increasing presence of a press (the Fourth Estate) that is more curious and hungry for news, there is increasing media coverage of court cases. As I mentioned above, this adds to the transparency of the process.

In fact, freedom of the press and judicial independence are actually somewhat related notions. Despite different objectives, one favours what the other is seeking; that is, improvement in the

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[2] Yvon POULIN, "Relations médias et justice – Je t'aime… moi non plus!", *Journal Ensemble – Relations médias et justice*, consulted online, November 10, 2004.
[3] Yvon POULIN, "Relations médias et justice – Je t'aime… moi non plus!", *Journal Ensemble – Relations médias et justice*, consulted online, November 10, 2004.

administration of justice. By making the public aware of what is happening in the courts, the press protects the integrity of the judicial process because it reduces the risks of hidden pressures.

Judicial independence is not an end in itself. Nor is it a privilege from which judges personally benefit. Instead, judicial independence is a basic component of impartial justice. It provides an anchor for public confidence in the administration of justice. In this regard, Chief Justice Bayda of Saskatchewan's Court of Appeal, during his farewell speech, accurately summarized what should be the duty of the judiciary:

> "A judge must always think of himself or herself not as a person with power, but as a person in service. A person who serves all of the people is answerable to all of the people. And the best way for her to be answerable to all of the people is to be totally impartial and totally independent."[4]

Judicial independence is a "meal" made up of a number of ingredients that can be served with a number of different "sauces." But the ultimate objective of judicial independence is to maintain public confidence in the judicial system through a constant demonstration of impartiality and respect for the supremacy of law.

This essential principle of judicial independence allows the judge to settle disputes within a well-defined framework, but he must avoid any situation that might raise an objection. Under these conditions the judge can render a decision according to conscience, without fear of external pressure or retaliation from other branches of the State, lobby groups, the public or the media. The judge must be able to carry out his decision-making responsibilities free from all psychological constraints, free from any fear or favouritism that might affect the basis of his decision in the face of criticism. The mere risk that a judge could be swayed by outside pressure from any source undermines one of the basic elements of democracy.

Here we are concerned specifically about the impartiality that must be shown by the judge. Judicial independence must be reflected both in the absence of any relationship of subordination (on the part of the judge) with the various organs of the State, and in the judge's total independence in the face of public pressure from litigants, from influential groups, or from other (even higher-ranking) judges.

Judicial impartiality is first and foremost an ethical obligation imposed on each judge. He must not only maintain his impartiality but be seen to maintain it. Judges are therefore bound by a duty of reserve, and this greatly moderates their freedom of expression.

The duty of reserve requires that the judge abstain from speaking in public about topics that might eventually become a matter of dispute before his court or even before him. This includes political and social matters, controversial subjects, pending cases, and secret deliberations concerning matters on which the judge has not yet rendered a decision. There is an outright prohibition concerning comment on such matters. The judge, by his actions and speech, cannot jeopardize his own independence or that of his court. Since a judge speaks only through his judgements, it is axiomatic that he cannot comment on them.

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[4] The Honourable Edward BAYDA, in his retirement speech, Regina, Saskatchewan, September 9, 2006.

Reserve is also required in the judge's attitude. In public, he is expected to show moderation and good taste.

Yet the judge's duty of reserve must not cause him to be perceived as an alien from another planet! He may maintain an interest in political and social matters and form his own opinions on matters of interest to society. But he must never debate such matters in public. And in private he must do so sparingly and with moderation. As we cannot always control the interpretation of remarks we make to others, the risk of being "misunderstood" increases with the enthusiasm that we express in asserting a point of view on a controversial subject.

In order to administer justice effectively a judge must still keep in touch with current events so that his decisions can take into account changes in moral standards as well as changes in the ideas of society around him – to the extent that the law does not bar him from such considerations. In this respect it is in the interest of our courts to develop training programs dealing with social realities so that judges can maintain a good understanding of social issues.

The duty of judicial reserve can therefore be defined from various angles. But essentially it aims at assuring litigants that the judge will render a decision within the rule of law and without interference from personal opinions on the matter submitted to him.

The duty of judicial reserve must give way, however, in the face of attacks if a failure to respond could undermine the authority of the courts. Indeed, in the past few years we have seen a greater openness among writers and ethicists, among others, who accept that judges can to some extent express themselves freely in relation to matters concerning the administration of justice. In this respect, for example, Luc Huppé is of the opinion that “[TRANSLATION:] a rule preventing judges from speaking out on these topics might reinforce litigants' ignorance of the real issues relating to the operation of the courts, and that such a situation would be bound to contribute toward an uncritical dependency on these institutions”.[5]

Collaboration between the courts and the media might therefore be useful and even necessary for several reasons: to make sure that the public properly understands the judicial process, to see that it becomes better acquainted with the role and obligations of judges, and lastly to promote the strength and effectiveness of Canada's judicial system.

B – WHO IN THE JUDICIARY SHOULD COME INTO CONTACT WITH THE MEDIA?

To improve the public's perception of the judicial system, of judges and the work they do, a court administrator could develop contacts with the media to publicize reports on the court's accomplishments, explain its mission and make comments on matters under its authority. These matters would include court operations, the administration of justice, and even reform of the judicial system. Contacts with the media might take the form of bulletins, or even interviews, meetings with editors and journalists, and other activities making it possible to explain through the media the role of courts and judges.

The Chief Judge is in charge of managing the court. As the official representative of the court, it is his responsibility to look after communications with the media to ensure objective, complete and balanced coverage. However, he may delegate this task and, depending on the matter at

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[5] *Le régime juridique du pouvoir judiciaire*, Montréal, Wilson & Lafleur, 2000, p. 214.

hand, it is often preferable that he delegate it to the Senior Associate Chief Judge (Justice), an Associate Chief Judge (Justice) or a Coordinating Judge (Justice). This approach allows the Chief Judge (Justice), and thus the court, to keep some leeway. If need be, he can intervene if initial communications between the court and the media have not produced satisfactory results.

During an actual or anticipated media controversy about a court decision, the duty of reserve generally calls for judges not to intervene with the media. The principles of judicial independence and impartiality are better respected when judges abstain from any comments on judgements they have rendered.

However, at times it might be necessary to rectify serious factual errors made by the media. Yet only a flagrant error will justify the intervention of a judge with the media. The Canadian Judicial Council, in its paper entitled "Judicial Role in Public Information", published in 1999[6], justifies its stand in this way: "Unfair criticism and inaccurate reporting can damage the reputation of judges and erode public respect for the courts in the administration of justice."

But it is not advisable for such a rectification, or follow-up of any kind, to be made directly by the judge who is the victim of a serious error by the media. In my opinion, this is the responsibility of the court to which that judge belongs.

In any event, such a forum can't be used to clarify or explain the juridical basis of a decision. It is in his judgement and nowhere else that the judge must give adequate reasons to state his legal position without ambiguity.

Aside from extremely rare exceptions, the sitting judge who faces biased or general criticism of his decisions, can never directly intervene with the media, partly because he is bound by the duty of reserve and partly because no person is best suited to be judge in his own case. It is up to the Chief Judge (Justice) (or his delegate) to issue a correction and defend the court. This role of the Chief Judge (Justice) was recognized and confirmed by the Honourable Richard J. Scott, Chairman of the Canadian Judicial Council's Judicial Conduct Committee, in handling a complaint lodged with this Council against Chief Justice Clyde Wells[7].

The Chief Justice's decision as to whether or not to contact the media should be made after consultation with colleagues and members of an advisory council in the court. In certain circumstances it might even be desirable to consult a communications specialist.

When a controversy concerns administration of the judicial system, intervention will be justified only to rectify facts or to recall basic principles. This will preferably be done by the Chief Judge (Justice), or by a judge in an administrative position, after making sure that the position he expresses is shared by all judges of the court, because in the eyes of the public the opinion of one member of the court's administration commits the judiciary as a whole.

Contact by a sitting judge with the media is highly inadvisable. It must be borne in mind that the judge in such circumstances has no safety net and cannot invoke the principle of judicial independence to shelter himself from the consequences of remarks that he might make to justify or clarify a situation.

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[6] CANADIAN JUDICIAL COUNCIL, *The Judicial Role in Public Information*, September 1999

[7] "Letter from Chief Justice Not Misconduct, Judicial Council Concludes", News release issued by the Canadian Judicial Council, March 14, 2003.

Therefore, in cases of media controversy it is preferable for a spokesman appointed by the Chief Judge (Justice) to state how the judicial system operates as well as its values and foundations. This should affirm the protection that the system provides to society as a whole, without addressing the particular judge unless he is the victim of an unjustified personal attack. Ideally, groups such as the Bar Association, or the association of defence counsel, have the necessary detachment to intervene in this regard. But I would add that one of the tasks of the Minister of Justice and Attorney General is to defend publicly the integrity of the judicial system.

So, the judge whose conduct is criticized in the media should not personally intervene with the media. As for the Chief Judge, there is also cause for prudence. In the Court of Québec at least, the Chief Judge is the Chairman of the judicial council (the *Conseil de la magistrature du Québec*). By definition he presides over questions of compliance with judicial ethics and should not publicly intervene where this might undermine the impartiality required by this duty. Consequently, public intervention on his part is delicate in any matter concerning a possible breach of the code of judicial ethics for which a Judge is being publicly criticized. That is why it is wiser to delegate this task to a judge in an administrative position — the Senior Associate Chief Judge, for instance.

As for issues relating to the working conditions of judges, any interventions in this regard must be made prudently, and are more a concern for the administrators of the Judges' Association, which is the organization that usually represents judges in dealing with the government.

In any public intervention by the judiciary, "prudence" and "reserve" remain the watchwords with regard to the appropriateness of intervening and to the message to be conveyed. The court's administration, through its Chief Judge (or Senior Associate Chief Judge), will generally be in a better position to send a balanced and nuanced message that takes into account all of the factors involved in the controversy.

C – OBJECTIVES THAT MUST BE PURSUED BY A COURT OF JUSTICE IN ITS RELATIONS WITH THE MEDIA

In many ways, the media represent the public. The media observe the public's interests and concerns, and it reports on them. But today the media make little room for informing and educating the public on the advantages of our justice system and on the role of the judges. The business needs of the media often prompt a focus on certain topics at the expense of others.

Yet the media does provide the public with an invaluable service, and its responsibility to the public is a heavy one. Although justice is "public", it is rarely intuitive and it is not always understandable to observers.

While judges stand front and centre in a system that has many players, they are the last link in a chain that ensures enforcement of the rule of law. For the media, judges are virtually defenceless targets because they cannot respond due to their duties of reserve and impartiality. Yet judges are not immune to vicious criticism that can disturb a judge's peace of mind. When a judge becomes the target of criticism, often the entire judicial system is affected and its image suffers.

Having said that, I am not suggesting that reporters should stop criticizing the courts or stop scrutinising things in great detail.

However, society in general, including judges, expects to have reliable news presented in a fair and balanced manner. We all want the issues of genuine concern brought to public attention and not as the result of a misunderstanding concerning the system and its underlying principles. Shortcuts must be avoided and journalists must act with skill and professionalism.

The "playing field" for reporters has long been free and practically clear but perspectives and practices change over time. Whereas traditionally judges were rather silent, perhaps we did ourselves a disservice in the past by rendering justice in a manner that some considered too hermetic. It is true that the hunger for news was not as intense in the past as it is today but there was also never a constitutional obligation for courts to inform the public. Their obligation was to administer justice *in public*. Today, in addition to the obligation that justice must be public, justice must now be accessible through the media *to the public as a whole* if we want to guarantee better the legitimacy of the process.

Previously such legitimacy stemmed from procedural fairness, judicial independence and the rule of law. Everything was carried out before a public that might or might not want to observe judicial activity and this was enough for public acceptance of court decisions. Nowadays, media coverage is perhaps more of a necessity to put the exercise of judicial authority into a more concrete context and thus enhance its legitimacy. In so doing, however, media coverage exposes the courts to sensationalism, to attacks of a political nature and to attacks on the very foundations of the system. This creates a risk of undermining the public's confidence in judicial institutions.

In order to redress these effects, judges and their courts have the responsibility to ensure better communications with the media, and to ensure better understanding by the media and the public of the workings of the courts and the role that the judges play.
What is best, then? I advocate a proactive approach by the judiciary toward public education so that a judge's comments are not perceived as a response to criticism. The judiciary's main objective in this regard should be to ensure that the public has a good understanding of the judicial system and the judge's role in it, thereby allowing the sitting judge to stand back from the circumstances to form his own opinion of the matters at hand.

On this topic, Judge Michael Kirby of the Australian High Court made these inspiring remarks:

> "Let it be a goal for the coming millennium that we re-teach the lessons of our Constitution and engender an informed appreciation of the judges and of their vital importance for the peaceful government of us all.
>
> "Not blind or uncritical faith. Not appreciation won by clever public relations and media hype. But a deserved evaluation of faithful and honest service in a difficult profession, the alternative to which is anarchy and guns."[8]

Judges are often the best messengers for conveying accurate and appropriate information. Our justice system helps itself, and helps the public, by informing it about who judges are, what they do and how they do it. In this regard, the Court of Québec produces an annual report and

[8] "Attacks on Judges – A Universal Phenomenon", Speech delivered to the American Bar Association, Winter Leadership Meeting, Hawaii, January 5, 1998.

makes explanatory pamphlets available concerning the court and its judges. In my opinion, all courts of justice should produce a public report on their activities, progress and objectives. Public reports of judicial institutions are a wonderful asset to courts that make more accessible information that was previously considered irrelevant, even by judges themselves. I would add that, given the high costs of operating the various courts in Canada, it is increasingly imperative for judicial institutions to be more accountable to the community as a whole. And so the institutions, on their own, must explain their day-to-day activities and the objectives they want to attain.

But this more open relationship, toward a more communicative judiciary, does not imply a change to the rule that judges abstain from public comment on their decisions. As I mentioned earlier, only flagrant errors in media reports on judicial decisions and unjustified personal attacks on judges can justify a public response to criticism, and only because such attacks risk damaging and weakening judicial institutions.

D – TOPICS THAT JUDGES MAY DISCUSS WITH THE MEDIA

A vast range of topics that may be discussed by judges was suggested by the Canadian Judicial Council[9]. Judges may publicly intervene, even in times of turmoil, to protect and promote the integrity of the judiciary. They may speak out on the operations of the court, on the efficiency or effectiveness of judicial institutions, on the reform of the judicial system, on judicial independence or on the ethical obligations of judges.

The topics suggested are all associated with the individual and collective duty of judges to defend the prestige of the judiciary, judicial institutions and the administration of justice. On these topics judges have obvious expertise that can prove useful in a public debate. Obviously, judges who agree to speak in public are duty-bound to do so while respecting their role and their obligations as judges. As I previously mentioned, the more a judge goes out of his field of expertise, the more vulnerable he becomes.

Recently, Québec's Court of Appeal, in the *Ruffo* judgement, provided certain guidelines in order to restrict the communication activities in which judges can take part:

> "[TRANSLATION:] […] certain concrete proposals should be set forth that make it possible, in the opinion of the Court, for harmonious reconciliation of the integrity of the judiciary and the judges' freedom of expression when they speak publicly outside the Court. Accordingly, as a rule, and insofar as the judges' active role doesn't compromise their image of impartiality, or doesn't result in an excessive number of objections, they are allowed to:
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> - take part in continuing education programs for lawyers and judges as well as in activities devoted to increasing the general public's understanding of the law and the judicial procedure
> - defend the independence of the judiciary

[9] CANADIAN JUDICIAL COUNCIL, *Judicial Role in Public Information,* 1999.

- within an appropriate framework, make comments on certain points of law that are poorly defined, or on shortcomings of the law, but while avoiding giving opinions on the legality or constitutional validity of a bill or law, and being careful not to give the impression of taking part in the efforts of pressure groups

- denounce, in an appropriate forum, the deficiencies in the administration of justice, when these are directly related to the efficient operations of the court and to the enforcement of the judges' orders

- take part in civic, charitable or religious activities that have been organized for purposes other than the financial or political gain of its members and that don't risk adversely affecting the performance or dignity of judicial duties

"On the other hand, the following public speeches and behaviour seem to be irreconcilable with the institutional protection that must be granted to the judiciary as a whole:

- a judge's comments on his own decisions, except insofar as he tries to share his views, with the public, in relation to his role, but without discussing the merits of the decision itself

- the refusal to accept an ethics-related sanction, except with regard to the right to contest it judicially

- membership in associations whose activities risk adversely affecting the performance and dignity of judicial duties

- public fund-raising

- membership in a political organization

- participation in a public discussion on controversial topics, except on matters directly relating to the operations of the courts, the independence of the judiciary or basic aspects relating to the administration of justice

- signing petitions aimed at influencing a political decision

- vexatious remarks on the behaviour of people who take action before the courts

"Generally speaking, any public statement made outside of court proceedings must be examined with regard to a certain number of factors, such as the approach, the intensity of the interventions, their appropriateness at a given time, the forum chosen and the degree of visibility. As for freedom of expression, it all depends on the extent, and under all circumstances, the judge must demonstrate great restraint."[10]

[10] [2006] R.J.Q. 26, par. 60-62.

Despite profound changes in the principle of judicial reserve, the rule still remains—and bears repeating—that judges must abstain from all comments relating to their decisions. Here is what Australian Chief Justice John Doyle had to say in this regard:

> "A case is to be heard and decided upon the facts and submissions presented to the court. To engage in public discussion is to begin to involve others in the process. […] a judge is likely to be drawn into matters or aspects of the case which are not part of the judicial decision-making process."[11]

Others, including the late Justice John Sopinka, who always believed in greater freedom of expression for judges,[12] are of the opinion that a more nuanced approach might be appropriate under certain circumstances. Thus it might be possible to clarify a judgement that is a source of confusion or scorn, but not to justify or defend it.

Some people even go so far as to add to this list the possibility that of judges might publicly discuss and even criticize judgements that have been handed down pursuant to the *Charter*. The complaint against the Honourable Michel Bastarache, a judge of the Supreme Court of Canada[13], for having publicly commented on and criticized judges as well as certain decisions rendered by the court to which he belongs prompts one to think that, even though the complaint was dismissed, this is a particularly dangerous ground that is preferable to avoid.

For myself, while fully respecting the opposite view, I think it is very risky for a judge on the bench to associate the judiciary's freedom of expression with the ability to clarify a judgement that has been given, or to criticize or comment on court decisions. Such an approach is risky, in part because not all judges have the same expertise in communications. Further, if every judge could comment on or criticize a judgement, even in the most elegant way, there is a possibility of conveying a confusing message to the general public. Self-criticism of our work could further risk discrediting the judicial system through the confusion that poorly coordinated comments might cause. Moreover, there would be the obvious risk that judges who have become impromptu commentators would be described as prejudiced for an opinion that they have expressed with regard to a judgement.

In my opinion, any stand taken by a judge with regard to a law or a controversy of a political or social nature—or even a judgement—is likely to cause this judge to lose his impartiality (or his appearance of impartiality) toward the matter in question, which might be a matter eventually submitted to the court to which he belongs. Besides, so far as perception and understanding are concerned, the opinions that judges express in public, as mentioned earlier, risk being interpreted as those of the entire judiciary. In this regard, the Chief Judge (Justice) is in the same situation as his colleagues, and therefore could diminish the apparent impartiality of the court.

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[11] "The Well-Tuned Cymbal", in *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, Sydney, Judicial Commission of New South Wales, 1998.

[12] "Must a Judge Be a Monk", Speech delivered to the Junior Bar Association of Montreal, March 3, 1989; "Must a Judge Be a Monk – Revisited", (1995) 19 *Prov. Judges J.*, no. 3, p. 7-20.

[13] Criminal Lawyer's Association, *The Complaint against Justice Michel Bastarache*, For the Defence, (2001) vol. 22, No. 1, p. 20.

E – THE COURTS' MEANS OF COMMUNICATION WITH THE PUBLIC AND THE MEDIA

When we think of communications with the media, we think mainly of the written press and broadcasts on radio and television. The Internet has now been added to these media and makes it possible easily to convey information to the public.

A few years ago the Court of Québec set up a website[14] that presents the Court and its jurisdiction, a portrait of its judges and its management. Information on the Court of Québec and judges' responsibilities is also found there. There is information of an administrative nature, news releases addressed to lawyers or to the general public, and even information on vacancies for judges and the time limit for filling these vacancies. This website is managed by a "webmaster", reporting to the Chief Judge, and appointed from within the Court.

Another of our communication tools, as previously mentioned, is a public report, presenting the Court's activities, the work accomplished by the judges as well as the details of the judicial regions in the province. This report is now produced annually by the Court of Québec. It is also available on the Court's website. It helps better acquaint people with the Court, its judges, its activities, and even the scope of its administrative autonomy and the way that it is being exercised. And, as I mentioned earlier, it makes the institution more accountable to the public in general.

In addition, each court of justice should have a person in charge of liaising with the media, in order to ensure contact between the court and the media, so as to direct the media representatives, if need be, to the right person likely to convey pertinent information.

As an additional tool, each court should adopt a policy to specify the court's procedures for communicating with the media and to provide for the appointment of a person in charge of media relations. This policy should also provide for an advisory committee of judges interested in media-related matters and responsible for keeping up to date, informing and advising the court's administration and the judges on whether and how to communicate with the media. This advisory committee should have sufficient autonomy so that the court's administration can quickly have access to knowledgeable advice when there is an apparent media blunder. When there is criticism from the media, it would also be possible to seek the assistance of a legal advisor or an information officer if necessary.

Among other possibilities, some courts have a public information officer. This officer may serve as an intermediary between the Court and the media and as a means of channelling judicial information to the public in general.

F – PROTOCOL FOR COMMUNICATING WITH THE MEDIA REGARDING CASES OR JUDGEMENTS GIVEN MEDIA COVERAGE

For the past few years the Canadian Judicial Council has supported an open approach toward the public by the judiciary. In this regard it published an information paper in 1999, directed at federally-appointed judges, that suggested various strategies to deal appropriately with media relations[15]. This document provides advice and tools to courts and judges who want to play a

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[14] www.tribunaux.qc.ca

[15] *Op. cit.,* note 5.

more active role in educating and informing the public. The main recommendation of this publication is that courts develop and implement a public information policy.

In 2005 a report submitted by the Court of Québec's committee on communications with the media expressed a desire by a majority of the Court's judges to support, in part, the vision of Chief Justice Lamer and Justice Sopinka. They had suggested that judges should be able to speak in public about issues regarding their work, their contribution toward establishing suitable social relations, and the promotion of basic values of justice and freedom.

This report also concluded that each judge should have a guide to identify appropriate channels of communication when contact with the media is necessary. I firmly believe that each court should develop such a media guide so that all judges and all judicial institutions are made aware of media-related matters. This media guide should address such topics as:

a) communication in the court room;
b) actual or anticipated media controversies;
c) impromptu media intervention;
d) a solicited interview;
e) referral to an advisory committee on communications; and
f) the role of the Chief Judge and the judges in charge of communicating with the media.

The purpose of this guide, at the present time in the Court of Québec, is to make it possible for a judge to initiate consideration of a response to media coverage, to reassure him about support he can obtain from the court's administration, to set guidelines and to frame choices available to him with regard to media relations.

As for cases subject to media coverage, each court should agree on a protocol with regard to the hearing of cases and the release of judgements, whether interlocutory or final ones, providing for the following, at the very least:

1. order and organization in the court room for the media;
2. publicity and explanation of the interlocutory judgements likely to be of interest to the media; and
3. efficient release of decisions with the media

G – CAMERAS IN THE COURT ROOMS

The public's right of access to court proceedings, through access to court rooms, transcriptions, judgements, etc., is one of the best ways of guaranteeing the public nature of proceedings. The right to a public hearing is also a guarantee for litigants, who perceive the presence of the public as having a witness to the process in which they, themselves, are involved.

While coverage of judicial activities by the press makes it possible to express social realities and inform the public about current events, and while exercising freedom of the press encourages the public's participation in issues, in proceedings, decisions and choices in a democratic society, it's my opinion that it hasn't ever been shown, however, that non-narrowcasted audiovisual broadcasts of court hearings might help carry out a public information and education role to a greater extent.

Although judges do not always agree with the media's coverage of judicial affairs, which one might think would prompt them to welcome more direct media coverage, but in the findings of a

consultation conducted in 2003 among Court of Québec judges (270 judges), and other stakeholders in the field, it was found that a majority of judges were not in favour of having cameras in the court rooms.

Despite some benefits that judges willingly admit, such as greater public confidence and transparency, they are of the opinion that these advantages do not justify the potentially negative effect on the administration of justice that extensive television broadcasting of hearings might have.

Some fears expressed by the Court of Québec judges in this regard are shared by the Canadian Judicial Council, which modified its position on television broadcasts in 2002[16] due to the impact that television might have on witnesses, jurors and trials in general. To date the CJC continues to be of the opinion that television in court rooms is not in the best interests of the administration of justice.

As for cameras in court rooms, one must wonder about the main purpose of having a television broadcast of the hearing in a case currently before a court. To be sure it is not the public nature of justice that is involved here, as the fact that the court rooms are open to the public in general is a sufficient guarantee that court proceedings are public. The only thing we might consider as an exception is that hearings be televised for training, information and education purposes. And yet such purposes would not necessarily be addressed by extensive television broadcasting of hearings. Plainly, "show trials" must be avoided. Also to be avoided, above all, is having witnesses who were compelled to attend court feel intimidated by the media's presence, and therefore question their participation in the judicial process. In my opinion, television broadcasts of hearings do not add anything to the quality of the judicial process or its legitimacy. When we compare the risk of discredit to the advantages of having cameras in court rooms, the pros clearly do not outweigh the cons. As mentioned earlier, certain exceptions might be allowed if they are solely aimed at promoting by educational means the credibility and public understanding of the judicial system.

In this regard the Regulation governing the Court of Québec prohibits any broadcast of a court hearing[17]. This rule has since been liberalized to allow audio recording by the media of both the proceedings and the decision unless banned by the judge. Broadcasting such a recording remains prohibited.

Elsewhere in Canada the Supreme Court of British Columbia broke new ground by adopting in 2001 a policy on televised broadcasting of court hearings, which provides for banning television broadcasts of court proceedings except with the consent of the parties and the permission of the presiding judge.

The Supreme Court of Canada has been broadcasting hearings since 1993. Some courts of appeal—including the Court of Appeal of Québec, Nova Scotia and Ontario—have also experimented with this as well but it was inconclusive because it did not give rise to the expected media interest. So, all in all, our experience with regard to TV broadcasts of hearings is relatively limited.

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[16] "Council modifies position on cameras in the courts", News release of the Canadian Judicial Council, March 28, 2002.
[17] *Regulation of the Court of Québec*, R.Q. c. C-25, r. 1.01.1.

The media has tried to contest the constitutionality of certain rules restricting the access of cameras at hearings, but their efforts have so far not proven very successful[18]. When subject to court challenges, provisions that prohibit cameras in court rooms have been considered appropriate, given the objectives of procedural fairness, protection of the witnesses and decorum in the court room.

CONCLUSION

Relations between the media and judges have long been strained and full of suspicion on both sides. Cultural differences between judges and journalists might account for some of these fears. And, as previously mentioned, the objectives of these two institutions are very different. But no one can deny the indirect influence that the press has on judicial matters.

And yet, each in their own way, judges and the media look after the integrity of the judicial system, which depends first and foremost on the perception that litigants have of this system. Judges are the main "creators" of this perception. Given the judges' vital role in society and the legitimate expectations that the public has of them, they must conduct themselves in a manner that is beyond reproach in all respects. Their decisions and any errors they might make are analyzed and criticized by the media who, for their part, ensure that the judicial system is more accountable to the public.

Prudence must therefore continue to be the watchword in relations between judges and the media. There must be prudence among journalists, who hold vast power in their hands and who must use that power with good judgement. Criticism of judicial decisions and their authors must be made with care and tact, and only after attentively reading all the grounds for a given judgement. The media is aware of the influence it has on public opinion, and because it is aware of this fact, it has the obligation to use this power in the best interests of society. Vitriolic, unjustified, incomplete and slapdash comments—not to mention chronic misunderstanding of the judicial world—may lead to regrettable consequences and may even go so far as undermining public confidence in the justice system. Yet such confidence is absolutely necessary to enhance the vigour of democracies based on the independence of its three branches of authority that form such a democracy: the executive power, the legislative power and the judicial power. On the other hand, skilful, objective analysts who are trained in judicial affairs and concerned about basic rights the integrity of the judicial process are excellent safeguards that promote an essential reconciliation between the *two powers.* They add value to the process for both the public and the judiciary.

Prudence must also continue to be the watchword for judges when they think of making a public statement off the bench. Judges must be alert to ensure that frank comments do not diminish the independence of court and the impartiality of its members. Exercising freedom of any kind inevitably goes hand in hand with a corresponding responsibility.

To meet the imperatives of good relations with the media, each court should equip itself with the following six tools:

1. a court policy on dealing with the media
2. a guide for each judge in the court, on the topics of communication and the media

[18] *R. v. Squires*, (1992) C.C.C. (3d) 97 (Ont. C.A.); *R. v. Vander Zalm*, [1992] B.C.J. No. 3065 (QL) (B.C. S.C.); *R. v. Fleet*, [1994] N.S.J. No. 505 (QL) (N.S. S.C.).

3. a committee of experienced judges in charge of advising and informing the court's judges about media-related matters.
4. a public report, preferably annual, presenting activities of the court, its concerns and its vision.
5. a website that is thorough and updated on a daily basis.
6. a training program dealing with social realities and communications with the media.

If there is something judges must keep in mind concerning our relations with the media, it is that the media contributes—as I previously mentioned—toward greater accountability of the courts. No one will deny that the costs inherent in the judicial system are constantly increasing, and gone are the days when judges could claim legitimacy solely on the inherent nature of the judicial function. Our fellow citizens want to understand the system, evaluate it, and indeed judge it. But while judicial power is one thing, its legitimacy is yet another, and in the latter case the best way to guarantee it is to make sure there is a network of closer communications with the general public. In this regard, the media is part of the solution; I would say that like all public organizations the courts are bound by this unofficial—but so very real—obligation of being more accountable to the public and to the government that subsidizes the justice system.

In closing, I would like to remind you of those wise words of the Honourable Charles Gonthier, formerly a judge of the Supreme Court of Canada, at a conference organized by the Canadian Institute for the Administration of Justice: "An independent judiciary, a responsible legislature and a vigorous media are vital organs of the democratic state."[19]

Guy Gagnon
Chief Judge

[19] "Les tribunaux, le parlement et les médias au service du public et de la justice", in *Dialogues about Justice: The Public, Legislators, Courts and the Media*, Canadian Institute for the Administration of Justice, Montréal, Éditions Thémis. 2002, p. 415, on p. 417.