"Judge-Bashing"

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I am mindful of the hour and recall the story of the speaker who apologized for going on too long, saying "If I have talked too long, forgive me, but I don't have my watch with me, and there's no clock in the hall." A voice from the audience was heard to say "Yeah, but what about the calendar behind you."

Judges tend to be sensitive when it comes to media attention. I perceive that judges prefer the sort of attention that the French artist Daumier depicted in his famous sketch of "Maître Chapstard lisant l'éloge de lui-même, par lui-même" or, "Lawyer Chapstard reading a eulogy concerning himself, written by himself." No doubt this represents the ideal media exposure judges strive for—stories they themselves would write. Unfortunately, that's not what happens in the real world.

The thought I wish to leave with you with today is this: over the past few decades, there has been greatly increased scrutiny of the comments made by judges in courts—by the media, by litigants and by special interest groups. While to some extent this has been a welcome trend and has served to call certain rude, insensitive and arrogant judges to account, I believe the pendulum has swung too far so that it is now open season for judge-hunting, as a result of which free speech in the courtroom, which is vital to an enlightened search for truth, threatens to be stifled. My plea to judicial critics is for moderation and tolerance.

All of us can recall the days when certain judges mouthed off in the courtroom with impunity. We grinned. We bore it. Happily, those days, for the most part, are gone.

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As we know, judges are immune from legal liability for remarks made in court.[1] That immunity has in the past been abused—and, may I say, in my experience, it was abused particularly in appellate courts where with some exceptions, no record is kept of the interchanges between judges and counsel.

The modern ethic is that all people in the courtroom should be treated with dignity, be they counsel, jurors, litigants or witnesses. This is a positive development.

However, for the past few decades we have witnessed a "rights revolution", to borrow Michael Ignatieff's phrase.[2] Increased rapid communication, including communication over the Internet, has fueled this revolution. Traditional icons in society—lawyers, doctors, police officers, teachers, politicians and judges—have been subjected to severe body blows from citizens, special interest groups and the media. This icon-bashing is all pervasive. It is not just a question of demanding accountability—that can be understood—but the criticism from some quarters has become so strident that the institutions themselves threaten to be weakened.

As for the groups being attacked, we must remember that there are special obstacles facing judges. Judges are the final link in the chain that ensures the rule of law. While immune from liability for speech in the courtroom, judges are not immune from disturbingly acerbic attacks by ever increasing and emboldened critics. The singular difficulty for judges is that they do not respond to attacks, however unwarranted, and for good reason: to descend into the trenches would transform judges into advocates. The hallmark of effective judging is impartiality. When judges get mired in their own self-defence, the administration of justice suffers. Judge Duncan Shaw must have been sorely tempted to defend himself over the media attacks on him personally, following his ruling in the *Sharpe* case.[3] His silence has been golden. We witnessed a media frenzy

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1 The immunity of superior court judges in Canada, including judges of the Quebec Superior Court, is inherited from English common law. See *Morier et Boily* v. *Rivard*, [1985] 2 S.C.R. 716. In Ontario, this immunity is extended to judges of all Ontario courts, masters, and case management masters. See s. 82 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43.

2 M. Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000).

3 *R*. v. *Sharpe*, [2002] B.C.J. No. 1219 (B.C.S.C.).

and frankly, it bothered me. At the end of the day, a whole bunch of newspapers got sold and the image of justice got debited.

What critics should remember is that judges are defenceless targets. To maintain impartiality, they must turn the other cheek when attacked. Quite apart from media scrutiny, judges must also be concerned about complaints to the Canadian Judicial Council.[4] While judicial accountability for bad conduct may be a welcome thing, and I for one believe it is, judges should not be held accountable for comments made in good faith in a courtroom setting where truth and justice in the case are the goals. In its mandate to maintain confidence in the administration of justice, the Judicial Council must not allow itself to be tempted toward public statements of disapproval of judges that may be the result of the strident demands of uninformed critics or special interest groups.

Let's consider two very recent cases that have come before the Council.

First, consider the case of Justice Jean-Guy Boilard. Judge Boilard is generally acknowledged to be a brilliant man, a judge of vast experience and the author of the continuing *Manuel de Preuve Pénale*, published in English as *Guide to Criminal Evidence*. Reputedly, he does not suffer fools gladly.

During the course of a bail hearing relating to a trial involving the Hell's Angels motorcycle gang in Quebec, Judge Boilard criticized the defence counsel in what a panel of the Canadian Judicial Council termed "unjustified and unacceptable" language.[5] Judge Boilard had stated that "an insolent lawyer is rarely useful to his client" and that the lawyer's arguments amounted to "bombastic rhetoric and hyperbole."

Unfortunately, the letter from the Judicial Council sent to the judge was given to the complaining lawyer, who in turn gave it to the media, who in turn asked Judge Boilard for comments on the letter before he had even seen it.

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4 *Judges Act*, R.S.C. 1985, c. J-1, ss. 58-71.

5 Letter of Chairperson of the Panel, Canadian Judicial Council, to Mr. Justice Jean-Guy Boilard (July 15, 2002).

When Judge Boilard received the letter he read the following: "It is the opinion of the panel that such abuse of judicial power not only tarnished your image as a dispenser of justice, but also harmed, and unfortunately undermined, respect for the judiciary."

Now I regard the comments made by Justice Boilard as being no worse than many of the comments made by judges that I have witnessed during my years as an advocate at every level of court. Assessed in the modern day, however, Judge Boilard's comments are right on the cusp. While his comments probably deserved criticism, I'm sure you will agree with me that the words employed by the Judicial Council panel were very strong indeed. Justice Boilard recused himself from the case, stating that in view of the fact that the panel's letter had been made public, he no longer had the "moral authority" to conduct the hearing.[6]

Some might argue that the public response of the panel was so severe in its language as to be counterproductive to the goal of enhancing respect for the judiciary. Certainly Judge Boilard thought so.

Now let's consider another case that has recently been brought before the Judicial Council and as yet is undecided. This case involves Justice James MacPherson of the Ontario Court of Appeal. Judge MacPherson is an altogether excellent judge, well known for his fairness, scholarship and good humour. Those who know him can attest to his devotion to human rights. He is decidedly not a racist.

Judge MacPherson became involved in a case in which certain Chinese plaintiffs were seeking certification as a class to sue the federal government in order to obtain financial compensation in the billions of dollars for the "head tax" imposed on Chinese Canadian immigrants from 1885 until 1923. During the course of oral argument in the case, Judge MacPherson asked some penetrating questions and made some challenging observations including these: "The Chinese felt the head tax was bad, but they decided to pay it and they got what they wanted, namely to come to Canada—they were happy to be here and had already received redress through their ability to remain in Canada;" and: "Many other groups had a hard time in the context of immigrating to Canada: the Scots landing in Pictou; the expulsion of the Acadians; the barring of the Jews during the 30s and 40s; and groups of German immigrants in the 17th

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6 "Judge in Quebec Hells Angels trial steps down from case", *CBC News Online*, (July 22, 2002), online: CBC News <http://www.cbc.ca/news.

century. Many of these other immigrant groups suffered more than the head-taxpayers." These comments resulted in a complaint being lodged with the Canadian Judicial Council that Justice MacPherson was guilty of making racist remarks.[7]

Well, it seems quite obvious to me that what Justice MacPherson was doing by making these comments was picking the brains of counsel in an attempt to put their claim, and the implications of their claim, in context. This just happens to be what we expect from our judges. We do not expect judges to make decisions in a vacuum without any context. Picking the brains of counsel is the job of judges, particularly in the appellate forum. In my view, judges have an obligation to ask the hard questions and put challenging observations to counsel. That is the very reason they enjoy immunity for what is said in court. There is a value behind that immunity. It is designed to seek the truth. We should beware the unasked question that a judge may harbour for fear there may be a complaint to the Judicial Council. Judges are human beings and like all human beings, harbour certain preconceptions. These preconceptions must be aired in the courtroom—openly, honestly and without fear of criticism—so that justice can be done in the individual case. It is this clash of ideas that promotes sound thinking and good judgment.

We have learned that Justice MacPherson asked equally probing questions of the lawyers representing the government.[8] The MacPherson complaint dramatically highlights the danger of curbing free speech in the courtroom lest someone's sensitivities be pricked. Court prickles—and sometimes hurts. Just watch any cross-examination of worth. One can only hope that the MacPherson complaint will be summarily, and unceremoniously, dismissed.

While judges deserve criticism for gratuitously insulting remarks made in court, this goal must be balanced by the recognition that overzealous scrutiny and criticism of judicial remarks can hinder the administration of justice. The harm that concerns me is not the fracturing of dainty judicial egos, but rather the chilling effect that this criticism engenders. Unbridled, it stifles judicial spontaneity and candour. A judge must be free to say whatever he or she wishes in the quest for truth and justice. If a judges

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7 S. Eng, "Tell it to my Father", *The Globe and Mail*, (September 27, 2002) A15.

8 E. Greenspan, Q.C., "He's no Racist Judge", *The Globe and Mail* (September 23, 2002) A11.

does in fact possess biases, the courtroom is the most appropriate forum where they can be addressed and flushed out.

In 1998, British Columbia Chief Justice Allan MacEachern, speaking on behalf of the Judicial Council, remarked that: "It is in the interests of the administration of justice that the ability of counsel to engage in… unrestricted advocacy, and the ability of judges to engage in frank and wide-ranging discussion with counsel, continue."[9]

Defence lawyer Edward Greenspan, in a recent Globe and Mail piece defending the remarks of Justice MacPherson quoted above, cited the late Supreme Court Justice Sopinka's concern that a "judge who is looking over his or her shoulder may decide a case in a way that will avoid the Judicial Council, rather than accord with the material presented."[10]

As judges we are faced with competing ideals that must be balanced. On the one hand, we must ensure that our comments respect the dignity of all Canadians. On the other hand, we must not shy away from controversial remarks or questions if they are in the furtherance of truth and justice.

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[9] Canadian Judicial Council, *Annual Report 1997-98* (Ottawa: Canadian Judicial Council, 1998) at 23.

[10] Greenspan, *supra* note 8.