

Defending the “Publicness” of the Justice System

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Last October 17, 2002, I was invited to speak at a Hull, Quebec conference sponsored by the Canadian Institute for the Administration of Justice. I got this opportunity really by chance. A few days before the conference, my friend Stephen Bindman (who works as Special Advisor to Justice Canada) called and said the *National Post*'s Christie Blatchford, who had originally been scheduled to speak at a session entitled “Influence of Media on Judicial Decision-Making,” had to cancel because she was covering the Washington sniper story. Could I come and pinch hit for her?

I said okay, not because I really wanted to speak, but because I wanted to do Stephen a favour—and journalism, like law, is lubricated by goodwill between colleagues. The time was so tight I did not have time to prepare a proper presentation—so I got my producer at CBC's “Newsworld Morning” to throw a couple of clips of my TV legal columns onto a cassette and I sketched out some ideas on a napkin at breakfast—then went in and winged it. I even lost the napkin after I spoke, but my colleague David Gambrill, from *Law Times*, was in the audience and he taped the session, so I have been able to reconstruct what I had to say with some accuracy.

I said I wanted to go on a “rant” about the relationship between the bench and the media. I told the CIAJ attendees I had been working full-time for more than 20 years as a legal affairs journalist and I have grown *very* weary and disillusioned about the so-called relationship between the bench and the media. Any alleged “dialogue”, when it happens, is never

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about real or substantive change. It is really about judges telling the media what they should do, rather than assisting the media in helping to publicize what happens in courtrooms and the role judges play in that process.

At the CIAJ meeting I said: “Very often the media are *harrumphed* at by judges. They are patronized, they are belittled, and their opinions are not really taken seriously. It is reached the point where I really do not want to be part of this [process] anymore, I just want to get on with doing my job.”

Moreover, I said any discussion between the media and judges is all at a procedural level—and this is not all bad—like that Nova Scotia media-bench committee which helped figure out a way journalists and judges could cope with publication bans in the wake of *Dagenais v. Canadian Broadcasting Corp.*² (I have attached a story on it at Appendix 1).

But no one on the bench really seems interested in coming to grips with important substantive and fundamental values like freedom of the press and the right to an open, public justice system—in my opinion two of the underpinnings of our democracy.

At that October conference, I confessed that, in the past, I had been part of many bench-media groups where participants discussed tinkering with procedures, but would never get down to address substantive issues like the utility of press freedom (and how to protect it), plus a judge’s fundamental duty to ensure that justice is *seen* to be done.

Note the words, “seen to be done,” are an echo of Lord Hewart’s famous words in *R. v. Sussex Justices, Ex Parte McCarthy*,³ which is a case about bias. But I think the concept of justice being “seen to be done” can be looked at much more broadly—in the sense that justice “seen” is *public* justice, and justice done “in private” or behind barriers—something that is happening more and more these days—is not justice at all.

Indeed, the whole system of *publicizing* the common law generated by our courts is so integral to our system of *stare decisis* that to compromise that is to compromise the functioning of the law itself. What cannot be seen, cannot be reported on or discussed by the public at large—and cannot influence the future course for the law, nor contribute to public discourse vital to the democratic process.

² (1994), 120 D.L.R. (4th) 12.

³ [1924] 1 K.B. 256.

But I told the CIAJ conference I did not want to tear things down without offering some ideas about what I thought would be constructive (and substantive) matters for the bench to turn its mind to as areas of potential reform—and when I think about it, they are not so much reforms as bringing our legal system back to its roots—where it functions *in public*, with judges themselves being the strongest champions of open courts and a fully transparent judicial system.

With that in mind, in this paper (and it is being written for a Joint Meeting of the Courts of Alberta and Saskatchewan, held in Jasper, Alberta, on May 29, 2003), I am attempting to flesh out some of my back-of-the-napkin ideas that I ranted about last October, and perhaps try to explain what measures I think should be taken (and it is hardly an exhaustive list) to encourage judges to become advocates of public justice and open courts.

Plus, I would like to offer some idea of why things have gotten the way they have, with judges actually assisting in hiding the bright light of justice under a bushel. And I would like to say why I think judges should be more mindful of their duty—and it is a duty—to insure a transparent, open and public court system.

Last October 7, 2002, Federal Court of Appeal Justice John M. Evans gave a speech at an administrative law symposium (I have reproduced a news story I wrote on it in Appendix 2). He said administrative tribunals should *always* provide written reasons for their decisions, not only because “justice and decency” require it, but also because it “undergirds the legitimacy” of the tribunal, and the tribunal needs legitimacy to do its job.

There are probably few in this room who would disagree that this very same duty to provide reasons applies to full-blown courts; indeed the Supreme Court in *R. v. Sheppard*,⁴ says exactly that.

Evans told the symposium that from a constitutional perspective reasons are required because “we all exercise powers which have an important impact on the lives of our fellow citizens” and, “our decisions may have important public policy implications, and yet we are not elected to our positions.”

⁴ [2002] 1 S.C.R. 869.

“An important function for reasons is to help make good on this democratic deficit,” he said. “By explaining publicly why we have decided as we have, we acknowledge the intrinsic worth of individuals in a democratic society and their claim to be treated in a way that recognizes their essential dignity.”

And, he added,

“by giving reasons, we expose ourselves to the judgment of others, whether it is the media, the legal profession, politicians, public interest groups, our colleagues or those set in authority over us. Reasons are the primary accountability mechanism for those in the judging business, and provide our justification for the exercise of public power. They are meant to be persuasive and to assure the parties and the public that our decisions are supported by the evidence before us and faithfully carry out the express wishes of the most democratic branch of government—our legislatures.”

But I would go further. I believe that making good on Evans’s “democratic deficit” involves more than merely giving meaningful reasons. Indeed Evans, by his language—that reasons are a “primary” mechanism of accountability—suggests there may indeed be *other* mechanisms.

One of those, I suggest, involves a mindset that judges must have to “sedulously foster” (to borrow from Wigmore) the essential “publicness” of the court system. That “publicness” principle (it is been expressed by others as the “open courts” doctrine) means assuming that *all* court cases are to take place in the sunshine—in the full glare of the public eye.

There are many aspects to ensuring the “publicness” of the courts and there are specific items which underpin the concept of open courts and an open justice system.

First, I believe judges should make sure all participants in the justice system are fully identified, unless there is a significant and overriding policy reason why they should not be. That means that the names of spouses in matrimonial actions should not be reduced to initials, as is becoming common in some jurisdictions. If matrimonial litigants cherish their privacy, they should go to mediation or arbitration to settle their disputes, not the public courts that we all pay for.

At a more basic level, this also means judges should abandon customary designations like “Smith J.,” or “Jones J.A.” and clearly identify themselves with designations like “Justice Joan Q. Smith” or “Appeal Justice John J. Jones.” Customary designations confuse and mislead all but those in the legal community, and it is time they were done away with.

It means there should be very few publications bans, gag orders or sealed files. Already the Supreme Court’s provided useful guidance on publication bans in *Dagenais*, but the court’s helpful direction is being flouted daily, either by judges ignoring their duty to notify the media altogether or by making nice distinctions between publication bans and sealing orders (which are the same thing under a different name).

Tom Claridge, who edits *The Lawyers Weekly*, recently told me about a Toronto case where an unhappy client sued her lawyer for negligence. The lawyer moved to bring in LawPro, the Ontario lawyers’ insurer (owned by the Law Society of Upper Canada) to defend and indemnify him. Both LawPro and the lawyer asked for the file to be sealed, ostensibly because it dealt with solicitor-client privilege matters, but more probably because it contained details of the solicitor’s alleged negligence.

Somehow the sealed decision of Superior Court Justice Mary Anne Sanderson got mailed around to publishers in a routine distribution, prompting a mad rush by court personnel to put the cat back in the bag (see story, Appendix 3). The real question here is not whether the sealed judgment could be recalled once it had been e-mailed to media outlets, but whether the file should have been sealed in the first place. The matter is clearly in the public interest (at least for the public that reads *The Lawyers Weekly*) and it is difficult to see why the decision was ever sealed at all, except that the parties simply *asked* the master for the sealing order and got one. No one here, it seems, bothered to defend the interest of justice itself and its inherent publicness.

The publicness of justice also means that all justice system participants—and all people—get to talk about, write about, comment on, criticize and even rant and rave about, what goes on in a courtroom, what is decided by a judge or what is disclosed by court records.

It means talk radio show hosts can call a judge a “bonehead” when he disagrees with a decision, and it means judges will have to suck it up and get over it.

It means lawyers can “argue their cases in the media” before, during and after a hearing—and even on the courthouse steps or while the matter’s being considered for an appeal. Last August, during a lawyer-and-media Canadian Bar Association seminar, former Ontario chief justice Patrick Lesage lamented he felt “uncomfortable” when lawyers argued their cases before him in the media or outside court, but he could not really say why—he just did.

And that general feeling of judicial “discomfort” seems to be the main reason for the custom of silence existing—lawyers do not want to annoy the judges they are pleading before. But I think judicial discomfort (or anyone’s discomfort for that matter) is not a good enough reason to stifle public debate about the law. Judges should be tolerant of these out-of-court client representations—which are happening more and more. Courts have long recognized zealous representation can include speaking to the media.

Publicness means jurors get to discuss with anyone why they reached the decision they did—just like judges get to disclose their reasons. While there might be good reasons to forbid a jury from talking about a case *while* it is being heard, it make no sense to silence a juror after the case has been disposed of.

The rule does not exist in the US, and not only has there been no significant harm from ex-jurors helping the public better understand a verdict, but their post-game analyses help lawyers refine their advocacy skills and contribute to our scholarly understanding of the law and the jury system.

Publicness means judges get to comment on questions of law and explain their law in the media for those who have difficulty understanding it. Toronto lawyer Clayton Ruby once said at a seminar I attended, “it is not that judges are forbidden to speak out about the law, it is that they choose not to.” The late Supreme Court Justice John Sopinka, in his famous 1990 address, “Must a Judge be a Monk,” said judges must refrain from commenting *only* on cases that are likely to come before the court and issues of current political debate, leaving “a wide range of issues on which a judge can comment” (See Appendix 4).

And an open court means court administrators must allow, without imposing service charges or other barriers, the broadest possible access to court files and records. It means any disclosure by the Crown is automatically a disclosure to the media. It means that all court records be fully accessible on the Internet without being censored.

I attended a conference, “Law via the Internet,” in Montreal last November 2002 where court records administrators stated flatly (and without much evidence other than *their* vague feelings of discomfort) that the availability of online judgments would lead to a “tabloid nightmare” unless parties were, in their words, “anonymized” (I have attached a *Law Times* news story about this meeting at Appendix 5). So system administrators, and their consultants, have cooked up all kinds of schemes to restrict public access to records and censor what people can obtain.

No one bothered to consider that any reasonably diligent tabloid reporter can go to the court house and see the file or even make a few calls and get the information—the online version just saves time.

The problem is no one seems to be confronting these administrators and reminding of them of their public duty to justice system openness—the uncomfortable feelings of court administrators is not a good enough reason to compromise the publicness of our justice system.

In Ontario, the Attorney General’s ministry, which runs the court system, has instituted a schedule of fees for accessing and copying court records. Members of the public who do not have great financial resources must still pay administrators to fetch and copy court files, and yet few justice system players (except credit-rating agencies, which have managed to negotiate their own set of preferred fees), even question whether these fees should be levied at all, much less their reasonableness. When news-gathering agencies protest these fees at those bench-media groups—the judges uniformly adopt an attitude of “we do not want to rile the bureaucrats,” forgetting that such access fees seriously compromise justice system publicness.

And publicness includes court judgments themselves. It is astonishing to me that certain elements of government are trying to assert some sort of intellectual proprietary interest—sometimes called Crown copyright—in what you produce as judges. Unlike the US, where all judicial output is clearly in the public domain, government officials worry that online dissemination without proprietary right being asserted will make it too easy for “commercial interests” to use the courts’ rulings.

So what? Surely they are perfectly entitled to do that—and it is difficult to see why the state would want to assert any property interest in a judgment unless it has the goal of either control over dissemination or some eventual financial return (governments call this “cost recovery”). But surely any control over your judgment undermines the principles of the public access to the justice system.

And publicness is not just wide access to the courts’ judgments, but the courts themselves. That means full access by radio and television and new emerging online technologies. This is a vexed area in Canada, but television coverage is already a fact of life in most US trial courts.

I have grown very weary of listening to poorly conceived and knee-jerk attacks on the concept of courtroom cameras (with the “discomfort” again being the key driver of most of the objections). One of the latest comes from Ontario Chief Justice Roy McMurtry who was quoted in the *National Post* on February 22, 2003 saying trial cameras threatened to “pollute” (a good sensational tabloid word) the justice system in the name of cheap entertainment for the evening news.

It is the same tiresome argument made by the Australian court records administrators—the “tabloidization” of the justice system. McMurtry equates all television coverage with “20-second soundbites on the evening news,” and he is partly right, but it is like saying putting a 200-word headnote on a 20-page court judgment “pollutes” the judgment. News coverage is a tool to help people acquire information quickly—and a summary does not necessarily distort or “pollute” what being summarized.

Back in the 1740s, the press (print media all) were not allowed into Parliament and writers for the “gentlemen’s magazines” of the day would approach members and essentially reconstruct their speeches from documents and interviews, often considerably improving what the members actually said in the house. (For a while, the great English writer Samuel Johnson made his living doing this.)

Eventually, Parliament allowed reporters into the chamber, and eventually there was full television coverage for most house business (not without a court battle in some jurisdictions). Now everyone acknowledges this aspect of publicness in government is a good thing—and yet we have suspicions about the same technology being introduced into another branch of our government.

In any event, I believe electronic coverage of trial courts is inevitable. The cost and other advantages of keeping a video record will mandate *somebody's* camera (if not those of the media, then those of the court system itself) will eventually be rolling on what happens in court and will, in the end, constitute the principal record of what goes on. The (mostly cultural) objections of the present judiciary will be swept aside and looked on in the same way we look upon England's closed parliamentary rules of the 1740s.

Finally, and perhaps most importantly, publicness means that judges *themselves* should set the example for transparency in the justice system. They should open up their own governing institutions, the Canadian Judicial Council and its provincial counterparts. Why is it that judges, unlike lawyers, doctors and others, are disciplined in private? Why is it that the CJC (and its provincial counterparts) enjoy an exemption from freedom of information laws? Why is it that the CJC has no lay members assisting with its disciplinary processes?

The transparency of the CJC has recently been in the news because of a recent complaint by former federal justice minister John C. Crosbie, who had written to the council complaining about Newfoundland and Labrador Chief Justice Clyde K. Wells. The council's handling of the complaint (that Wells had compromised the independence of the judiciary by writing to *The Globe and Mail* about a decision) ended up deeply insulting Crosbie, who thought his complaint had been given short shrift and "cavalier treatment" (I have attached news stories on this at Appendix 6).

Last month (on April 30, 2003) Crosbie wrote a long letter to the CJC, which he has made public (and which he has expressly authorized to be reproduced here). His letter complains the CJC complaints process lacks transparency and "does not meet twenty-first century standards of justice and fairness."

I am in a difficult position here because I actually *agree* with the council's result (I think Wells was perfectly entitled to write his letter), but I also agree with Crosbie that the closed process at the council undermines public confidence in the judiciary because it *appears* high-handed and arrogant, and that, it seems to me is what really insulted Crosbie (I have attached Crosbie's letter in full at Appendix 7).

I do not see much downside for the public to see the CJC's members going through some process of consideration and reasoning, then reaching a conclusion everyone can understand, if not agree with.

And this lack of transparency with the CJC is hardly a new thing—in his book *One Man's Justice: A Life in the Law*,⁵ former B.C. Supreme Court justice Thomas R. Berger tells the story about the disciplinary process he went through at the hands of the CJC back in the early 1980s (and I have attached a copy of the book's Chapter 6 to this paper—I have reproduced it for this meeting with Berger's kind permission).

The tale shows that the CJC had little sense of media relations back in 1982 (in my opinion things have not gotten much better since). One of Berger's chief complaints is the council let stand an uncorrected news story about his discipline. We get Berger's views on judges speaking out on public issues, and whether we agree with them or not, one big question is why we are learning about the details of this dispute more than 20 years after it happened, and even then solely through the eyes of Thomas Berger. Doubtless Bora Laskin would have a view on these events, but sadly, we do not get to hear from him. It baffles me why all this could not have been aired years ago—it is a significant public issue and an interesting event in our legal history yet we get it decades later from biased witnesses—mostly because of the secrecy under which the CJC operates.

Not only should judges themselves open up their disciplinary process, but they should take active steps to remove the exemption that organizations like the CJC enjoy from information access legislation. The argument, as I understand it, is that access to the internal documents of the CJC would somehow compromise the independence of the judiciary. But I do not see it. Other branches of government operate with independence and integrity, both virtues uncompromised by the public's ability to see what they do. And yes, there is an increased administrative cost, but all government organizations make that argument.

Also key to fostering publicness, I think, is the opening of the judicial appointments process. While it is possible to discover, with a lot of digging and legwork, how judges get appointed (indeed I have overseen the preparation and publication on two major stories on precisely this

⁵ T.R. Berger, *One Man's Justice: A Life in the Law*, (Toronto: Douglas & McIntyre, 2001).

topic), to the public it has seen as a mysterious and complicated process—and it is.

Judges *themselves* should take active steps to ensure their appointment process is transparent, merit-based and free of political patronage—including any *appearance* of patronage. And judges should seriously reconsider having the Canadian Bar Association as a key player in the judicial appointments process. The CBA is an interest group with its own agenda—an agenda which, while public-spirited, is still that of a private group, the legal profession. As I will come back to in a moment, lawyers have a culture which is driven by core concepts confidentiality and professional privilege—both of which are at odds with a culture of open justice which the judicial system should be practicing, or at least aspiring to.

And the appointment of the Supreme Court’s justices is especially important and must be opened up to public or parliamentary scrutiny, something I understand is being discussed as an area of reform in the new Paul Martin regime, coming next year (see story Appendix 8).

Finally, judges’ meetings and conferences should be open to the media—not only so the public can see what happens at these, but so you will also create an available historical record for future judges (and others) to consult. At Appendix 9, I have attached a marvellous story (by Stephen Bindman) from the July 1991 Canadian Institute for Advanced Legal Studies in Cambridge, U.K. It reports a debate between John Sopinka and Ontario Court of Appeal Justice Sydney Robins who argue over whether judges should speak out on public issues.

It is not dry and academic conference papers that are going to inform future generations about what we were like as judges and lawyers, but stories like Bindman’s, reported “hot” from the scene by an “embedded” journalist.

It is impossible to write such a story today (and look how it adds to the debate we are having at this very meeting) since the organizers of the Cambridge meeting have closed it to the media—or at least that is what I was told when I asked to attend and cover the lectures this summer. The speakers in the story state their views courageously and the piece provides a perfect and colourful example of an historical record created by an on-the-spot reporter doing his job, and doing it well.

Amazingly, that Montreal “Law via the Internet” conference mentioned above actually had a “closed” session where *only* judges were permitted. Surely the views and debates of judges are critical to any consideration of the electronic dissemination of court judgments, and yet we are denied the opportunity to consider and report on your views.

Time and again, I have been at legal conferences which are widely open to the media, except the judges’ section, which gets arbitrarily closed on someone’s whim or (as happened last August at the Canadian Judges’ Conference in London, Ont.) because one judge felt “uncomfortable” about the media being present. (In any event, what happened at the closed session was duly reported in *The Globe and Mail* the next day, with the reporter writing his story based on post-game interviews.)

In trying to promote the publicness of the justice systems, judges should start with the bodies and institutions that govern them, plus be open and welcoming in helping the public learn what it is they do and how they are trained.

To me the notion that justice should be public and open is something so basic it seems difficult to understand why there are so many instances of judges failing to stand up for those concepts and even sometimes actively undermining them.

One reason this occurs, perhaps, is because judges are recruited from the senior ranks of lawyers—and when they are elevated to the bench, they bring with them all the cultural baggage of the legal profession, including an emphasis on keeping a client’s business confidential.

The problem is, there is no longer a “client” once a lawyer assumes judicial office, except perhaps justice itself. Judges are not charged with protecting the interests of the parties (that is the job of their lawyers), but must come to a decision based on applying law to the facts, and exercising discretion based on equitable principles.

And that is a job that must be performed *in public*, not behind closed doors. Judges should take the *public* aspect of their job much more seriously, plus cherish and defend the *publicness* of our system and try to stop those who would compromise that value, even indirectly.

Appendix 1*Canadian Lawyer*

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In Practice:

Notifying media of publication ban notices

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Seven years ago, the Supreme Court ruled the media must be notified when a publication ban is sought, but it did not say much about how that notice was to be given. Many counsel and judges are still not certain about those details and it is usually up to the reporter to stand and assert the public’s right of access to court information. Now courts are slowly figuring out how to make that notice more meaningful, including an Internet notification procedure already working in Nova Scotia.

By Dean Jobb

The scenario is all too familiar to media law practitioners across the country. The phone rings and a frantic editor or reporter is on the line with some breaking news—counsel involved in a major criminal case has applied for a publication ban and the judge has adjourned to afford the media a chance to be heard. Can the lawyer appear on the media organization’s behalf to fight for access?

The lawyer accepts the retainer and is not especially fazed by the request to head for the courthouse immediately. Many motions for publication bans—restrictions that strike at the heart of the principle of open courts and the constitutional right to freedom of expression—are argued with as little as 15 minutes’ notice.

“In no other circumstances would a lawyer be forced to make constitutional arguments to the highest law of our land with 15 minutes’ lead time,” says Halifax lawyer Jim Rossiter, who acts for news organizations in Nova Scotia and Prince Edward Island. “Show me one other instance where you can apply to a court for an order that has the effect of abridging a third party’s Charter rights without having to give notice to that third party. You cannot find another example.”

Yet there are plenty of examples of last-minute bids to have a judge impose a news blackout on the name of a person appearing before the court, on the contents a sensitive document about to be entered into evidence or on testimony that may threaten a commercial or privacy interest.

Given the fundamental rights at stake, this state of affairs is puzzling. It is been almost seven years since the Supreme Court of Canada, in *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) 12, affirmed that the media have standing to oppose publication bans, but given the practical realities of notifying media outlets about a publication ban (and the fact it often is not done in a timely fashion), the frustration of media counsel and their clients is understandable.

This fall, this frustration is being channeled into a nationwide campaign to convince the bench and bar that the media's right to oppose publication bans can be exercised without unduly disrupting trials or burdening litigants with the costs of serving notice on dozens of media outlets. And it appears the long-overdue solution is only a few mouse clicks away, on the Internet.

The media's right to intervene was established through a legal tug-of-war between fact and fiction. In late 1992 the CBC planned to televise "The Boys of St. Vincent," a gritty drama based on the abuse of children at the Mount Cashel orphanage in St. John's. Lucien Dagenais, a member of the same Christian Brothers order that ran the Newfoundland institution, was standing trial before an Ontario jury on similar charges. Lawyers for Dagenais and three other members of the order obtained a sweeping injunction that blocked the broadcast and even prevented the media from reporting the fact a ban had been imposed.

In 1994 the Supreme Court of Canada overturned the injunction as "far too broad" and seized the opportunity to revamp the traditional common-law approach to publication bans, which gave greater weight to the fair trial rights of accused persons when concerns were raised about publication and media access to the courts.

Writing for the majority, then-chief justice Antonio Lamer held there is no hierarchy of rights enshrined in the Charter of Rights and Freedoms—the media's guarantee of freedom of expression under s. 2(b) carries the same weight as s. 11(d)'s right to a fair trial for those accused of crimes.

Dagenais sets out a procedure for assessing whether bans should be imposed in circumstances where the judge has a discretion, under the common law or the Criminal Code (or other statutes), to prevent or allow publication. (It does not apply to mandatory bans, such as the restriction on identifying young offenders, which have already withstood Charter scrutiny.) The party seeking the ban bears the burden of establishing that the infringement on free expression is justified. Judges must be satisfied a ban is necessary to prevent “a real and substantial risk” to the fairness of the trial, and that “reasonably available” alternative measures—such as sequestering jurors and changing venue—will not alleviate the risk. Any ban imposed must be as limited in scope as possible and, furthermore, the benefits of banning publication must outweigh the detrimental effects of curtailing free expression.

Getting the media into the courtroom to exercise this new-found right was a trickier business. Chief Justice Lamer directed that judges “should give the media standing (if sought)” and may direct that third parties affected by the proposed ban—invariably, the media—be given notice.

Okay, but how much notice? In what form? And who *is* the media? It was up to individual courts and provinces to resolve those questions, the chief justice said. “Exactly who is to be given notice and how notice is to be given should remain in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant caselaw.”

Journalists hailed *Dagenais* as a landmark. Armed with the ruling, media lawyers have defeated or watered down numerous restrictions that were once routinely imposed. When the federal government amended s. 486 of the Criminal Code two years ago to enable all complainants and witnesses to seek bans on their identities, at the court’s discretion, it included provisions that require judges to notify the media and balance Charter rights in keeping with *Dagenais*.

Counsel and judges alike, however, have been slow to recognize and appreciate the media’s right to intervene. “It is a question of breaking the psychology that publication bans are routine and can be dealt with in the absence of the media,” notes Daniel Henry, the CBC’s senior counsel and president of Advocates in Defence of Expression in the Media (Ad IDEM), a national association of media lawyers.

Media outlets continue to learn of bids to restrict publication only when the motion is put to the court. It is then up to a brave journalist in the gallery to stand up and interrupt the proceedings, cite *Dagenais*, and request an adjournment so a lawyer can be summoned. While judges have generally been accommodating, the timing could not be worse, leaving jurors and witnesses to cool their heels while a hearing is hastily arranged and conducted.

And when no reporter is in court to intervene, bans have been imposed without media input and with no formal advisory of their terms. “The result was everyone was unhappy,” observes Jonathan Kroft of Winnipeg’s Aikins MacAulay & Thorvaldson, who acts for the *Winnipeg Free Press* and *Brandon Sun*. “The courts were unhappy when they felt they made orders that were not being followed, the journalists were unhappy that they were being chilled because there was some suspicion there was an order but they were not really sure what it was.”

Even though *Dagenais* does not make it mandatory to give notice of ban motions, it is obvious the media’s right to intervene is meaningless without such a mechanism. Alberta was the only province to take up Chief Justice Lamer’s challenge and devise informal rules to inform the media that a ban is being sought.

A Court of Queen’s Bench practice note requires applications for publication bans to be filed at least 21 days before trial, unless a judge waives the requirement. Applicants must notify the media by posting written notice of the application at the courthouse no later than 14 days before the motion is heard.

The initiative looks good on paper. In practice, says Edmonton media lawyer Barry Zalmanowitz, notice still tends to be an *ad hoc* affair. Judges advise counsel who fail to comply with the deadlines “to try and give some kind of notice.”

“Nobody has been refused a publication ban or has been rebuked by the court for not complying with the practice note,” notes Zalmanowitz, a member of the firm Fraser Milner Casgrain who represents Alberta’s *Sun* newspapers. “A practice note is a start, but practice notes do not have the force or law—they are informal statements of the procedures that should be followed.”

Despite the posting requirement, notice is usually a phone call from a lawyer advising that a motion is pending. Often only counsel for the Edmonton *Sun* and its competitor, the *Edmonton Journal*, are contacted. It

is “the usual suspects” approach—since print reporters cover the courts in more depth than their colleagues in radio and television, the names of the newspapers’ counsel are known.

“So in practice,” Zalmanowitz points out, “most of the time it is just the print media that is getting some kind of formal notice.” Another limitation is that the practice note does not apply to the provincial court level, where most publication bans are going to originate. Zalmanowitz hopes Alberta’s Law Reform Commission will address the system’s shortcomings as part of its current review of the rules of court.

Last spring, Ad IDEM came forward with proposals to sort out the notice mess. The organization’s court access and publication committee, headed by Kroft, has called on court officials across the country to establish a central registry—in effect, a publication ban clearinghouse.

Media outlets interested in being notified of ban requests would register with the court, and counsel seeking a ban would be directed to contact those on the list. Ad IDEM envisions notice being provided via e-mail or fax, within the time frames set out in each jurisdiction’s civil procedure rules for motions. The registry would also record the exact terms of any ban ultimately imposed.

“*Dagenais* said the media had an interest and was entitled to notice. It did not say how, in fact it specifically left it to the local rules of procedure,” Kroft told *Canadian Lawyer*. “Then the question is, how do we do that? Do you just go to the phone book and look under M? Does not work.” The proposed registry would free counsel and judges from being forced to cherry-pick who gets notice, an exercise that risks leaving out an interested media outlet or individual journalist. “It is a self-identification process.”

Ad IDEM’s initiative has been upstaged by the Nova Scotia courts, which instituted an Internet-based system last March to notify the media of publication bans. The province’s media-liaison committee, a forum for judges and media representatives to discuss access issues, oversaw the creation of a web page that enables counsel to notify media subscribers, via e-mail, at the touch of a button. The website is maintained by the School of Journalism at the University of King’s College in Halifax, at no cost to the courts, applicants, or the media. It is being promoted for cases heard in the busy Halifax-area courts, with plans to extend coverage to the entire province.

“This regime is a one-stop shopping, no-cost or low-cost, five-minute system,” says Jim Rossiter. “It can be picked up by any jurisdiction for almost no cost.” Rossiter, who helped devise the system, has been promoting it to lawyers across the province. The alternative is serving conventional notice, on paper, at a cost of at least \$70 per media outlet—a prospect with little appeal in times of rising legal costs and shrinking legal aid budgets. “This is the most inexpensive method of notice that I can think of in any criminal or civil process.” Media outlets in Prince Edward Island, he says, are considering asking their courts to adopt the procedure.

The Nova Scotia system has already netted a favourable ruling for the media. In mid-April, Associate Chief Judge Brian Gibson (of the provincial court) ruled against banning publication of the names of two young complainants and their mother’s boyfriend, who had pleaded guilty to assaulting them with a hot steam iron.

A witness-protection provision added to the Code in 1999, s. 486 (4.1), cannot be invoked simply to spare witnesses possible embarrassment, the judge ruled. “Those who make complaints of possible criminal conduct ought to know and expect that the investigation of such complaints which lead to criminal charges, will be subject to public scrutiny. Public scrutiny provides a balance.” [See: *R. v. Rhyno*, April 11, 2001]. Lawyers for Halifax’s two daily newspapers responded to the e-mailed notice and argued against the ban. “In my estimation,” says Rossiter, “there could not have been a more favourable interpretation for media clients.”

One by-product of the Ad IDEM and Nova Scotia initiatives is education. Media lawyers say an alarming number of counsel and judges remain oblivious to the rights established years ago in *Dagenais*. “And everyone involved.”

Nova Scotia’s system has had I would say that those criminal defence lawyers and Crowns who were aware of the obligation to give notice were usually in no hurry to remind anybody else,” adds Rossiter. Still, he says, feedback has been positive.

Nova Scotia’s Public Prosecution Service, for instance, has incorporated information about the e-mail system into its training materials. “It seems to streamline the process,” says Jennifer MacLellan, a Crown attorney in the service’s Dartmouth office. “Any time you have something like this in place, it makes it easier for another, unexpected payoff for the media—it has forced counsel to take a hard look at the *Dagenais* principles. Informally, lawyers are telling Rossiter that they are dissuading clients from seeking bans, citing the cost and the limited

chances of success in most cases. "Where before counsel would have said, 'What the hell, I'll put up my hand and ask for a ban,' now they are being forced in advance to think through their reasons," Rossiter says. MacLellan confirms that the notice requirement may play a role in deciding to forgo a motion for a ban. Witnesses concerned about seeing their names in the paper, for instance, realize that notice is tantamount to an open invitation to reporters to attend. "If you take your chances, there may not be any media in court that day. But if we use (the notice system), they are going to be in court that day,"

Rossiter knows of at least two occasions since March when counsel sought a ban but dropped the request after the judge directed them to use the e-mail system. Still, Rossiter is troubled that the system was used just once in its first five months of operation, and he suspects bans are still being imposed without notice. "I think you still have the lingering old system."

Even if ban requests continue to fall through the cracks, the Nova Scotia experiment shows Ad IDEM's proposals are workable. The organization may have a tougher time convincing prosecutors to take a proactive role when bans are sought. Kroft's committee believes Crown attorneys, as the public's representatives, have a duty to ensure a court considering a ban is aware of the applicable law.

Even in situations where the prosecution is itself seeking the ban, Kroft contends, a Crown attorney "has an obligation not only to prosecute, but to ensure the court is aware of the broader public interest in open court and what the Supreme Court has had to say about that." While MacLellan agrees that counsel have an obligation to inform the court, she is hopeful the notification system will enable media lawyers to fight their own battles and prosecutors will not be expected to become "advocates for the media."

Ad IDEM has designated members across the country to promote the registry and the e-mail notification system. "The object is to bring this onto the court agenda in each of the provinces, hopefully get the judges talking amongst themselves," Kroft says. The group has endeavoured to balance the interests of the courts, the media, and litigants. "This is not proposing to change the law. This is proposal to create procedures that will allow the law that the Supreme Court has laid down to be administered in a way that appropriately protects all of the interests that are entitled to protection."

Dean Jobb is a legal affairs journalist in Halifax.

APPENDIX 2*Law Times***SLUG: administrative law focus Evans****DATE: February 3, 2003****ISSUE: 14:4****WRITER: FJ****PAGE:****POSITION:****PHOTO:****CUTLINES:****SUGGESTED HEAD:*****Kicker:******Reasons “undergird the legitimacy we need in order to do our job”*****Main:****Federal C.A. judge gives reasons for reasons**

By Michael Fitz-James

For *Law Times*

(1300 words)

TORONTO—Administrative tribunals should *always* provide written reasons for their decisions, says a prominent Federal Court of Appeal justice—not only because “justice and decency” require that, but also because it “undergirds the legitimacy” the tribunal needs to do its job.

Speaking to an audience of administrative law professionals at a recent (October 7, 2002) symposium, Justice John M. Evans said during his almost five years on the federal bench, he is “consumed reasons on an almost daily basis, reasons by every federal administrative tribunal you have heard of, and a number you will not have heard of.”

And, he added, “in my previous life as a law professor, I spent a long time reading and critiquing judges’ reasons.

“What I now know is how hard it is to write reasons that do not make you cringe when snippets of them are thrown back at you by counsel—always, of course, out of context.

“It is a sobering experience, and make me look with a more charitable eye on other’s efforts than perhaps I once did.”

While preparing written reasons for publication “is a time-consuming and difficult business,” said Evans, it is also “integral to our understanding of fair adjudication.”

Already, he pointed out, in 1999 the Supreme Court of Canada has recognized in *Baker v. Canada (Minister of Citizenship and Immigration)* that the duty of fairness requires administrative tribunals to give reasons for their decisions.

And last year, in *R. v. Sheppard*, the court also decided judges are subject to a similar obligation to give reasons.

Even if a tribunal’s enabling statute contains no specific duty to provide “the common law may supply the omission of the legislature,” said Evans.

From a constitutional perspective reasons are required because “we all exercise power which have an important impact on the lives of our fellow citizens.

“Our decisions may have important public policy implications, and yet we are not elected to our positions.”

“An important function for reasons is to help make good on this democratic deficit. By explaining publicly why we have decided as we have, we acknowledge the intrinsic worth of individuals in a democratic society and their claim to be treated in a way that recognizes their essential dignity.”

And, he added, “by given reasons, we expose ourselves to the judgment of others, whether it’s the media, the legal profession, politicians, public interest groups, our colleagues or those set in authority over us.

“Reasons are the primary accountability mechanism for those in the judging business, and provide our justification for the exercise of public power.”

“They are meant to be persuasive and to assure the parties and the public that our decisions are supported by the evidence before us and faithfully carry out the express wishes of the most democratic branch of government—our legislatures.”

Published reasons, said Evans, also “foster tribunal consistency and coherence. They enable us to share with colleagues the benefit of the thought we have given to a problem—and that might be useful to them.”

Plus, a tribunal’s reasons “are essential to a reviewing court’s ability to discharge its function.”

Evans wondered: How can a reviewing court ensue a tribunal’s decision is based on findings of fact rationally supported by the evidence when it does not know what finding of fact the tribunal made?

Equally important, he said, reasons allow a reviewing court to “educate itself about the nature and implications of a specialized tribunal’s decision,” so “the court can give proper deference” to the tribunal’s expertise and “restrict its role to reviewing the reasonableness of the tribunal’s interpretation or application of its enabling legislation.”

Finally, said Evans, “we write reason for ourselves—not for our own aggrandizement or self-satisfaction, but to help us identify and think through the issue—to organize the material presented to us and to reach our decision.”

For Evans, “preparing reasons is integral to the thinking process. When I sit down to prepare reasons, I do not always know how I am going to come out; or, if I think about how I am going to come out, precisely on what I am going to base the decision.”

“Sometimes when I think I know what the answer is in the beginning, I surprise myself by discovering the process of preparing reasons, that initial view can’t be sustained when the record and the law are examined more closely.”

Decision-makers should realize however, that "not every case requires a full treatment of formal reasons.

"Unless you are able to distinguish between cases that do and do not require a full treatment, you will find you will be hopelessly backlogged, and your working life will become a misery. You will not have enough time to devote to the cases that do need your full attention."

In simple or routine cases, said Evans, it will often be sufficient to say just enough to let the parties know (and particularly the losing party) that "you understand the issue, the evidence and their submissions, and in light of the material before you, to explain briefly the basis of your decision."

In such cases, reasons can be short, but even if they "think you have got it wrong (and they often will), losing parties should be able to go away knowing exactly why the tribunal has rejected their version of the facts or the law."

For cases requiring "more elaborate treatment" the decision maker "must set out clearly the findings of fact and the evidence supporting it."

Sometimes, said Evans, there will be a "mound of oral and documentary evidence, and while "the case may not be of great policy or precedent value, it is very important to the parties who have invested heavily in the hearing."

Similarly, he said, when a case concerns the application of a statute, or involves an exercise of discretion, "it will be important to explain why the facts fall on one side of the statutory line rather than the other, and which facts were relevant to the exercise of discretion, and why certain facts weighed particularly heavily with the decision maker."

Courts, said Evans, have long recognized that a tribunal bears the prime responsibility for findings of fact, and will only intervene when a finding of fact "contains some powerful or overriding error, or when the tribunal has overlooked or misunderstood important parts of the evidence."

Even so, the tribunal's reasons do not have to deal with "every hare-brained argument dreamed up by desperate counsel," said Evans.

“Lawyers should not be encouraged to deluge tribunals with hopeless argument and expect to be dealt with solemnly in reasons for decision.”

But “some arguments have seemed sure losers,” until the Supreme Court of Canada adopted them.

“So before you consign an argument to oblivion by ignoring it in your reasons, you should be pretty sure it really is an irrelevant case, is inconsistent with a decision binding on you, or is otherwise totally without merit.”

Evans also urged caution in using “boilerplate” phrases—like “having considered all the evidence” or “in all the circumstances of this case.”

“As stand-alone reasons, catch-all phrases do not cut it,” he said, but they can be used toward the end of reasons to reassure the parties (or a reviewing court) that just evidence was not specifically mentioned, it has not been overlooked.

Boilerplate phrases, Evans said, are “reasons helpers” and “not some substitute for reasons.”

Evans concluded: “In this age of skepticism and decline of deference to authority, the public seems to have more confidence in those performing judicial functions than in most other actors in the public or private sector.

“An important reason for this may be precisely because we do expose our exercises of power to public scrutiny, criticism and correction.

“That we provide published reasons for our decisions may in the last analysis be what undergirds the legitimacy that we need in order to do our job.”

Readers can order the judgments cited in this article by calling our CaseLaw Service at (905)841-6472.

Baker v. Canada (Minister of Citizenship and Immigration), no. 099/195/077, p. 61.

R. v. Sheppard, no. 002/081/002, p. 45.

APPENDIX 3

The Lawyers Weekly

Vol. 23, No. 2

May 9, 2003

Superior Court releases judgment, then declares it sealed

By Cristin Schmitz

Ottawa

In a bizarre move that flummoxed some legal observers, Ontario’s Superior Court tried last week to retroactively seal a major judgment—one day after electronically disseminating the entire decision on lawyers’ professional liability insurance coverage to law publishers and some daily newspapers.

“There was a confidentiality sealing order placed on this decision and should not have been sent out. This decision should be destroyed immediately,” instructed April 30 e-mail from a Superior Court clerk. “Please treat this message with utmost urgency.”

That terse message to editors and publishers was followed up 41 minutes later by another urgent dispatch demanding: “Could you please immediately reply me whether appropriate action mention [*sic*] below was taken.”

The court’s cryptic missives left reporters at newspapers, including *The Lawyers Weekly* and the Toronto Star, scratching their heads over whether a court has jurisdiction to retroactively seal a judgment after sending it into the public domain, and whether the court is empowered to do so by, in essence, imposing at its own behest what appears to be a sweeping *ex parte* gag order.

Because the matter at stake in the judgment was the scope of the duty to defend of Ontario’s Lawyers’ Professional Indemnity Company (LawPRO), Justice Mary Anne Sanderson’s decision and reasons, released April 29 at 3:20 p.m., are of significant and legitimate interest to the entire legal profession, as well as to the broader public which relies on lawyers’ professional liability insurance.

Her judgment dealt with a dispute between Toronto lawyer Dev Misir and LawPRO over whether LawPRO is required to defend Misir, under Misir's 2002 LPIC policy, against a professional negligence suit launched against him last year by former clients.

LawPRO had declined to defend Misir, arguing that the plaintiffs' alleged damages arose from what LawPRO characterized as alleged activities as an investment counselor and advisor, and not from Misir's legal services.

Misir took the matter to court where it was heard over a three-day period last March and April. After examining the applicable law and coverage issues in her 12-page judgment, Justice Sanderson rejected LawPRO's position and granted Misir a declaration that he is an "insured" under the LPIC policy, that LawPRO does have a duty to defend, and that he is entitled to retain and instruct counsel of his choice.

Misir's counsel, Jerome Morse of Toronto's Adair Morse, told *The Lawyers Weekly* the decision is an important victory for practising lawyers. Had LawPRO's position been upheld, Morse suggested, "there would have been an appeal and I believe there would have been an uproar. I just think it would be terribly wrong to put our profession in this position. One of the reasons why we pay the rates we do is there is loss-spreading amongst the profession for the whole host of claims that come down the pipe when lawyers have undertaken a range of activities both lawyer-like and otherwise."

With respect to the Superior Court's confusing attempt to retroactively seal its reasons, Morse said he obtained a sealing order on behalf of his client from a master, with LawPRO's consent, about a month before the motion was argued before Justice Sanderson. The master's order sealed Misir's and LawPRO's affidavits because of a concern that solicitor-client communications between LawPro and Misir should not be publicly disclosed, and particularly to the plaintiffs in the main action.

Asked whether he gave notice at the time to the media, Morse responded, "of course not, why would I alert the media?"

Morse said when the coverage motion was argued before the judge, Justice Sanderson told counsel that because material in the case was under seal, "her reasons would [initially] not be disseminated to anybody but counsel, and she would take further submissions on whether [the reasons] had to remain under seal or be put in the public domain. [...] Madam

Justice Sanderson was supposed to maintain the confidentiality of those reasons, deliver them to counsel.

"If she wrote her reasons in a way that revealed solicitor-client privileged information then she would hear further submissions with respect to keeping it under seal," said Morse. "[The Court] should not have sent them out to you. That would have been an error."

Because of contempt of court concerns that could not be fully resolved at press time, *The Lawyers Weekly* is informing readers only of the existence of, and a brief summary of, the judgment, without revealing details at this time.

The judge's reasons do not disclose that a sealing order had ever been sought, let alone that it was granted or the nature of the sealing order.

The case may be part of a pernicious and growing trend amongst courts to issue sealing and anonymity orders either on consent of the parties, or at the judges' own behest, without providing the requisite notice to the media.

In *Dagenais v. C.B.C.*, (1994), 94 C.C.C. (3d) 289 and *R. v. Mentuck*, (2001), 158 C.C.C. (3d) 449, the Supreme Court of Canada made it clear that notice should be given to the media, where possible, because of the latter's importance to the open court principle and to the administration of justice as a whole.

Toronto media lawyer Brian MacLeod Rogers told *The Lawyers Weekly* the aftermath of the case illustrates a systemic problem in the justice system.

Rogers noted that the Canadian Bar Association recently passed a resolution calling for a system that ensures proper notice is given to the media and that the text of any publication bans or sealing orders is made available immediately "so that this situation cannot arise [...] where you have got a judgment, and the media were not given notice of any application for a sealing order or a publication ban, and no opportunity therefore to respond to one, and therefore we have an order that we do not know about, that we are being told about in an email from a court clerk, but we do not even have the text of the order, much less the reasons for it."

Rogers added that there “is clearly an urgent need to take action. I am disturbed that these situations keep on arising and nobody seems to be addressing this underlying problem.”

APPENDIX 4

The Lawyers Weekly, 12:01

May 1, 1992

Judges should not be cowed by “political correctness”: Sopinka

By Michael Fitz-James

TORONTO—A Supreme Court of Canada justice characterizes the “political correctness” movement as an “attack” on free speech, and says judges should not have to be constantly “looking over their shoulders” to ensure their decisions do not offend special interest groups.

Instead of worrying about rendering “politically correct” decisions, judges should ensure their decisions are “legally and factually correct,” said Mr. Justice John Sopinka, in an address to the Empire Club here on April 16.

In his speech entitled “Freedom of Speech Under Attack,” Mr. Justice Sopinka told an audience that he saw attacks on the Charter’s free expression right coming from four areas:

- penal law sanctions;
- civil law sanctions;
- the demand “for political correctness;” and
- by self-imposed restraints.

While the free speech right enshrined in Charter s. 2(b) is a wide one, Mr. Justice Sopinka said the Supreme Court has allowed it to be overridden in “certain narrow and well-defined areas.”

In prostitution communication cases, he said, “public nuisance and other societal harms” has meant a restriction of the right to free expression in soliciting sexual services.

And in the *Keegstra* case, the need to reduce “racial, ethnic and religious tensions” has meant a restriction on the right to disseminate various anti-Semitic messages.

And, the court has found that some forms of pornography may be suppressed because they threaten women and children.

Nevertheless, “the court [...] has attempted to draw exceptions to this freedom narrowly and demands that any restriction impairs the freedom as little as possible.”

Another attack on free speech comes from the threat of civil proceedings in actions for libel or slander, said Mr. Justice Sopinka.

“According to the popular press the threat of libel actions has had a ‘chilling effect’ in some areas of public interest.”

“[...] Those who complain of libel chill have argued that Canada’s libel laws do more than just protect reputation—they also seriously inhibit debate on important issues.”

“While it is true that debate on public issues should be robust it must also be inhibited if the foundation of the debate is falsehood or malicious comment which cause harm to members of society.”

“In the absence of this restraint, the media would simply be allowed to publish as they please,” he said.

“To the extent that the law of libel has an undue chilling effect on free speech, it is largely due to the costs of the action and the size of the awards,” he said.

“Consideration should perhaps be given to these aspects of the libel laws before addressing the difficult and more serious question of increasing the burden on the plaintiff.”

But threats to free speech are not confined to the legal system, he said.

“In the past decade there has developed a phenomenon known as the demand for political correctness.

“Certain segments of society, who are justifiably seeking equality for their particular interests have extended their demands so far that they sometimes threaten the freedom of others.”

“They not only criticize the expression of views that do not accord with their own, but demand that the contrary views be suppressed.”

Mr. Justice Sopinka quoted Harvard Law School professor Alan Dershowitz who regretted the “palpable reluctance” of many students to speak out on controversial subjects because of “speech codes” which forbid comments which are perceived as anti-gay or anti-woman.

He also quoted University of Toronto professor Michael Bliss who deplors the “inoffensiveness in undergraduate papers.” According to Mr. Justice Sopinka, Prof Bliss adds: “But universities are places where people will be offended, and should be offended. It is very, very wrong when we will not publish anything that may be construed as offensive.”

“Free speech is offensive,” said Mr. Justice Sopinka. “Many of us who may support in general the objectives of the groups that comprise this movement cannot but be concerned by the intolerance for free speech which some of its members advocate.”

As examples of intolerance, he pointed to “the banning of a painting of a black woman with a basket of bananas on her head” and the outcry for the recall of an academic journal because it contained an article with negative comments about working women.

“This movement has had its effect on the judiciary—it has not been all negative,” said Mr. Justice Sopinka.

“Judges in the past have been insensitive to the legitimate feeling or concerns of minority or disadvantaged groups [...]”

“However there is cause for legitimate concern that the overzealous dissection of every word that drops from the Bench, with a view to finding some indicia of political incorrectness—which may be the basis of a complaint to the Judicial Council—may result in decisions which are politically correct, but not legally and factually correct.”

“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,” he said.

“[...] Society should not seek to censor the speech of someone because it appears to be wrong or absurd in light of the conventional wisdom of today. It may become the conventional wisdom of tomorrow,” he said.

A final attack comes from “the self-imposed restrictions which judges have imposed on themselves with respect to their public utterances.”

While there’s no formal requirement that judges refrain from public speaking, “many judges feel severely constrained from doing so. Indeed many, if not most, judges would disagree with me giving this speech,” said Mr. Justice Sopinka.

Former Supreme Court Chief Justice Bora Laskin advocated judges’ “absolute abstention” from public comment and former Justice William McIntyre argued a judge should “speak once, only in his or her reasons for judgment,” said Mr. Justice Sopinka.

He said that at a debate during the bi-annual meeting of the Canadian Institute for Advanced Legal Studies in Cambridge, England last July, Lord Desmond Ackner, of the House of Lords, defended the “Kilmuir Rules,” which forbid a judge to be interviewed by the media or to give a public speech without the permission of the Lord Chancellor.

But the present Lord Chancellor, Lord MacKay, revoked the Kilmuir Rules and explained why in a debate in Toronto last year.

According to Mr. Justice Sopinka, Lord MacKay said: “Judges make rules which affect the lives of hundreds of people and I’m to tell them whether they can make a speech or not. Make the decision yourself.”

In defending the Kilmuir rules Lord Ackner said the rationale was “to prevent judges from making fools of themselves” (see: Sopinka, “Robins lock horns over right of judges to speak,” *The Lawyers Weekly*, July 26, 1991, p. 2).

But Mr. Justice Sopinka said: “If [judges] cannot speak in public without making fools of themselves, then why allow them to do it in their reasons for judgment?”

Quoting from his previous address, “Must a Judge be a Monk,” Mr. Justice Sopinka said judges must refrain from commenting only on:

- cases that are likely to come before the court; and
- issues of current political debate.

This leaves a wide range of issues on which a judge can comment, he said.

And, he said, there are even areas where a judge should comment, notably in "demystifying" the judicial system for the public.

He also drew a distinction between cases pending before the court and those that have already been decided.

When cases are already decided, "I see no reason why a judge should not be able to discuss the current state of the law and how the law can be improved."

He added he was "unconvinced" that all political topics should be "taboo."

"Surely a judge should be able to comment on matters relating to the administration of justice, and reforms to that system," he said.

"As key players in the judicial system their views should not be absent on such issues as court reform."

But, he said, "Judges do have views and [the public] must have confidence that the judiciary is capable of setting aside personal political views when such views threaten to interfere with the impartiality of their decisions."

APPENDIX 5*Law Times***SLUG: LT-38 online decisions****DATE: November 4, 2002****ISSUE: 38****WRITER: Eleanor Brown****PAGE: 5****POSITION:****SUGGESTED HEAD: Putting decisions online full of pitfalls****PHOTO: no****CUTLINES:**

By Eleanor Brown

For *Law Times*

MONTREAL—The co-director of the Australian Legal Information Institute worries his Internet Web site could be used to power a tabloid nightmare: Click here for complete raunchy details of this month's vicious divorce cases!

Gatekeeper Graham Greenleaf will do everything he can to avoid that, including blocking access to the most popular search engines laypeople use, cutting off any links to the decisions of the more than 60 courts and tribunals AustLII carries.

Joe Blow, the Internet browser, has no business connecting to AustLII, he says. "If they are searching for an old school friend, they should not find that person's divorce case."

And he threw out the "hot divorce cases" as a scenario that he'll do anything to avoid. "If we discovered that, we would block anyone browsing from those links."

Greenleaf made the comments as a panelist at the recent International Conference on Law via the Internet in Montreal. Speakers looked at privacy and the online publication of court records, in Canada and around the world. It would seem the legal community itself is thwarting the

promise of absolute accessibility first introduced by electronic, integrated justice projects, where every document in every court file could be easily read on the Internet.

There are world-wide rules for “spiders,” the electronic bugs that search out keywords and sources for generalist search engines like Google and Yahoo. Non-law web spiders have been banned from AustLII. “Rogue” spiders, if discovered, are blocked individually.

Greenleaf, the gatekeeper, sees no contradiction in ensuring that legal decisions are restricted only to those who know where to look. AustLII receives, he says, 500,000 hits a day. (It is run out of the University of New South Wales.)

Along the same vein, AustLII takes special care in its privacy provisions. There is no passwords (they could allow staff or others to track who is researching what legal issue, tipping off opponents to possible legal strategies, for example; logs are used for statistical purposes, only).

Then there is the privacy of those caught up in court cases, from the defendants to the children of divorcing parents.

“The major role must be taken by the courts in determining that very difficult balance,” says Greenleaf.

Greenleaf says the courts should decide what gets posted—and some send over everything. But then, he’s not willing to post everything that is forwarded. AustLII has made certain decisions about what is an acceptable privacy level.

One option would be complete anonymization—removing names and any details that could identify parties. That, however, would cost a fortune in manpower.

AustLII has no significant editorial resources, with much of the work being automated. It has adopted other strategies instead.

Very few family court rulings make it into the system, and a number of those posted at the beginning of the project have since been withdrawn, Greenleaf explains.

The service avoids posting almost all lower court decisions, which generally have little precedent value.

“They usually contain the highest proportion of factual and privacy-invasive content,” says Greenleaf. “Standards of care have risen in response to complaints we have forwarded to the courts. They have more responsibility in this regard because of the greater access.”

(AustLII receives “a handful” of complaints each year, immediately forwarded to a court clerk. There is no editing of posted decisions unless the court which produced it agrees with the complaint.)

Some jurisdictions ban the identification of minors and sexual assault victims: “Some mistakes have occurred when judges have incorrectly revealed [identities],” says Greenleaf.

Greenleaf says the legal community has never come to a consensus about what should be easily available and what shouldn’t.

US lawyer and consultant Susan Larson noted the confusion in her country over access to court documents. There are no federal rules. US courts have constitutional authority over their own records, resulting in a mish-mash of regulations for various jurisdictions. At least one state has completely reversed itself in the last couple of years, restricting access to some dossiers that had previously been completely open.

“Think about it ahead of time,” warns Larson. “Save yourself the embarrassment.”

Some states restrict access to past criminal cases; others allow for “financial privacy”; still others hope to deter stalking or identity theft (credit card details and social security numbers are included in some court files).

“People do not really have any legal privacy right,” Larson says. “Personally, I think this [confusion] is going to continue for another six to 10 years, at least.”

Alberta is working out some of the issues, too. Kate Welsh, legal officer of Alberta Court Services, noted that law libraries and paper files have been open to the public for many years, but “it is been practically obscure. Now we’re publishing to the world, you have no control [...] nor for what reasons they are accessing it.”

Full text searches of electronic rulings allow someone to extract a single witness's name from an otherwise incomprehensibly huge amount of documentation.

"It is portable, malleable, easy to extract—and it's impossible to retract it. You have no idea who may have copied it to some source you may have no control over. We have issues, but access to law is a core value of democracy. Publication is basic to judge-made law."

The Alberta courts also hide their rulings from general Internet search engines.

But Welsh's job is to control at the source.

She reads through each and every decision rendered. If she sees something that she considers problematic in terms of privacy, she sends a note to the judge and asks about an edit. If she gets an okay, she adds a note to the document about editing. She also double-checks whether any publication ban is in effect.

There was a time when a child's name was included in a written decision, even if there was a publication ban on their name. But what now?

The vulnerable must be protected, Welsh says "I have been trying to identify a unifying principle, protecting innocent people from harm that may come from access."

All these questions lead to the role of the judges who write the decisions. Should a judge censor herself? Bertrand Salvat, editor of CanLII (the Canadian Legal Information Institute), says there is no need to put the name and address of a witness in a judgement. And he pointed to another ruling he saw, which "cited almost 10 pages of witness testimony about a sexual assault, down to every little detail. Is this really necessary?"

No can say whether independence will be compromised. "But judges must be more aware of the larger visibility. They must be more careful of what they write."

APPENDIX 6

Crosbie Slams Ruling

3/18/03

By Terry Roberts
St. John's
The Telegram

A ruling by the Canadian Judicial Council clearing Newfoundland Chief Justice Clyde Wells of any misconduct in a December letter he wrote to *The Globe and Mail* is proof that reform is needed in the way complaints against judges are examined, said former federal justice minister John Crosbie.

The council ruled Friday that Wells was within his rights when he wrote to the newspaper, seeking to correct what he perceived to be an error in a report on a Newfoundland Court of Appeal ruling.

Wells' letter prompted a rebuttal from Crosbie, who accused the former Newfoundland premier of undermining judges on the court he now leads. Crosbie also lodged a complaint with the judicial council and called for Wells to be disciplined.

In the judgment, Manitoba Chief Justice Richard Scott, chairman of the Judicial Conduct Committee, said Wells was simply doing his job by bringing the matter to public attention.

Scott also stated the furor could have been avoided if the appeal court judges had been clearer in their positions on the ruling in the first place.

Reached Monday while on holiday in St. Petersburg, Fla., Crosbie described the process as a "whitewash" and suggested the conduct committee did not even examine the real issue behind his complaint: judicial independence.

"This whole procedure has proven to be frivolous, vexatious and ineffective," said Crosbie.

Crosbie plans to write the judicial council and make the case for reform. He believes such complaints should be handled by an independent body, perhaps comprised of retired judges and leading attorneys. He said the panel members should be nominated by law societies across Canada.

"The group deciding whether a complaint is justified against a judge is actually composed of judges and chief justices, which means they are in an awkward position as far as conflict of interest is concerned. They have to decide upon the conduct of one of their colleagues, who they meet frequently through the council."

"The current formula is unsatisfactory," he explained.

The controversy stemmed from a \$24 million pay-equity settlement Newfoundland agreed to give a group of female employees in 1988. Three years later, with Wells as premier, the province deferred payment because the provincial treasury was buried under recession and a \$200 million deficit.

In December, Justice William Marshall agreed the province could do so, and two other judges, Justice Geoffrey Steele and Justice Denis Roberts, each issued concurrences of a single paragraph.

In his letter to the *Globe*, Wells said Marshall's reasons reflected his views and not those of the other judges.

Scott said Wells wrote to the *Globe* with the consent of the other two judges of the appeal court panel. He described Wells' actions as being "taken in good faith and with the intention of fulfilling his role as chief justice."

Crosbie expressed frustration at the way his complaint was handled.

"It is like making a complaint which disappears into a black hole you do not know how it is being processed or dealt with. There is been no opportunity to present any argument about the issue to a council or to a judge. There is been no opportunity of establishing whether certain facts are correct or not. The letter was simply sent to the chief justice of this committee, who dealt with it himself. I think this is a most unsatisfactory procedure and badly needs reform," he said.

Wells and Crosbie have been fighting on and off in the Newfoundland political scene for years. However, Crosbie said his complaints are not personal. His no. 1 concern is the independence of judges.

“The principle of judicial independence is supposed to protect them from autocratic and interfering chief justices,” he said. “In my opinion, the actions of Chief Justice Wells did not observe the proper principles that should apply.”

Crosbie added that Wells, behaviour raised eyebrows throughout the Newfoundland legal community.

“This is not some matter that is popped out of my mind. It is generally felt in the legal profession that this kind of conduct is something that has to be ruled on. This is a failure of the Canadian Judicial Council, in my opinion,” he said.

“Judges are not above the law and their actions are open to criticism and discussion and debate. But the present rules and machinery are obviously totally ineffective.”

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Judicial body clears former premier for letter

The Canadian Press

Saturday, March 15, 2003

OTTAWA (CP)—Newfoundland’s chief justice, former premier Clyde Wells, did nothing wrong when he wrote a letter to a newspaper criticizing an article that dealt with a court decision, the governing body of Canadian judges ruled Friday.

The Canadian Judicial Council was responding to a complaint aimed at Wells by one of his old political foes, former federal justice minister John Crosbie.

The council concluded Wells's letter to *The Globe and Mail* last December "did not constitute judicial misconduct."

The dispute started when Crosbie alleged that Wells had interfered with the independence of the Newfoundland Court of Appeal.

The letter in question took issue with the Globe's interpretation of a unanimous decision by a panel of three judges. Wells stressed that the written decision, which included a scathing critique of judicial activism, was the work of only one judge and did not reflect the views of the other two judges.

Crosbie had argued it was improper for Wells to clarify the judgments of his colleagues.

But the council said Wells did not overstep his bounds.

"A council policy endorses a role for chief justices in correcting errors in public reports of judicial decisions," the council said.

As well, the chairman of the council's judicial conduct committee, Manitoba Chief Justice Richard Scott, noted Wells's letter was written with the consent of the two judges.

Both Crosbie and Wells were cabinet ministers in the Liberal government of legendary Newfoundland premier Joey Smallwood.

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Wells wins a round in legal war of words
By SHAWNA RICHER

The Globe and Mail
Saturday, March 15, 2003 - Page A5

Newfoundland Chief Justice Clyde Wells was within his rights in seeking to correct what he perceived to be an error in a report in *The Globe and Mail* on a Newfoundland Court of Appeal ruling, the Canadian Judicial Council says.

But the furor would never have arisen, the council said, if the appeal-court judges had been clearer in their positions on the ruling in the first place.

In the judgment released yesterday, Manitoba Chief Justice Richard Scott, chairman of the Judicial Conduct Committee, dismissed a complaint by former federal justice minister John Crosbie that the former premier had undermined judges on the court he now leads.

“I am not pleased at all, in fact I’m very disappointed,” Mr. Crosbie said yesterday, reached on holiday in St. Petersburg, Fla. “My expectations were not great, and this just confirms them.”

Chief Justice Wells wrote a letter dated December 12, to *The Globe* trying to qualify a recent ruling by the Newfoundland Court of Appeal. Mr. Crosbie shot back with an article in the newspaper’s Comment section, saying that Chief Justice Wells showed insufferable arrogance and insulted the integrity of his own judges. He later requested that the governing body of Canadian judges consider disciplining him.

The two men have been fighting on and off in the Newfoundland political scene for years.

This controversy stemmed from a \$24 million pay-equity settlement Newfoundland agreed to give a group of female employees in 1988. Three years later, with Clyde Wells as premier, the province deferred payment because the provincial treasury was buried under recession and a \$200 million deficit. In December 2002, Mr. Justice William Marshall agreed the province could do so, and two other judges, Mr. Justice Geoffrey Steele and Mr. Justice Denis Roberts, each issued concurrences of a single paragraph.

In his letter to *The Globe*, Chief Justice Wells said Judge Marshall’s reasons reflected his views and not those of the other judges.

Chief Justice Scott said that Chief Justice Wells wrote to *The Globe* with the consent of the other two judges of the appeal court panel, and that all of the Chief Justice’s actions were “taken in good faith and with the intention of fulfilling his role as chief justice.” He said Chief Justice Wells was simply doing his job by bringing the matter to public attention, and that there can be no misconduct if he believed there was an error to correct. “Although the complaint may be described as significantly overstated, a lesson for all of us in this matter is the abundant caution that must prevail when taking the initiative to correct perceived errors in relations to

judgments," Chief Justice Scott said. "Another lesson is the importance of judges speaking clearly in their judgments, including concurring judgments, to avoid potential misunderstanding." Mr. Crosbie said that part of the decision misses the point.

"Judges should always be clear [...]. It's a completely unconvincing whitewash of a serious issue," he said of the council's handling of his complaint. "There's been no attempt to deal with the issue. Having judges make decisions involving themselves is a conflict of interest. This is just an opinion of a chief justice. It's not a decision or opinion of a group or a number of judges who have considered the issues. I don't find that to be very satisfactory."

Mr. Crosbie said he wants to see reform that would establish an independent agency to offer a more thorough and unbiased means, as well as an appeal process, for examining complaints.

"I have no recourse but to express my opinions," Mr. Crosbie said. "And I intend to do that. The process is very wrong. It's difficult for anyone who has a complaint to follow up. This experience has shown me that our legal system has a serious gap."

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UPDATED AT 8:43 PM EST Friday, March 14, 2003

Wells cleared over controversial letter

Canadian Press

Ottawa—Newfoundland's Chief Justice, former premier Clyde Wells, did nothing wrong when he wrote a letter to a newspaper criticizing an article that dealt with a court decision, the governing body of Canadian judges ruled Friday.

The Canadian Judicial Council was responding to a complaint aimed at Chief Justice Wells by one of his old political foes, former federal justice minister John Crosbie.

The council concluded Chief Justice Wells's letter to *The Globe and Mail* last December "did not constitute judicial misconduct."

The dispute started when Mr. Crosbie alleged that Chief Justice Wells had interfered with the independence of the Newfoundland Court of Appeal.

The letter in question took issue with the Globe's interpretation of a unanimous decision by a panel of three judges. Chief Justice Wells stressed that the written decision, which included a scathing critique of judicial activism, was the work of only one judge and did not reflect the views of the other two judges.

Mr. Crosbie had argued it was improper for Chief Justice Wells to clarify the judgments of his colleagues.

But the council said Chief Justice Wells did not overstep his bounds.

"A council policy endorses a role for chief justices in correcting errors in public reports of judicial decisions," the council said.

As well, the chairman of the council's judicial conduct committee, Manitoba Chief Justice Richard Scott, noted Chief Justice Wells's letter was written with the consent of the two judges.

In a letter to Chief Justice Wells, Chief Justice Scott wrote: "There can be no doubt that all of your actions in this matter were taken in good faith, in conscientiously seeking to fulfil your role as chief justice."

As for Mr. Crosbie's complaint, Chief Justice Scott suggested it was "significantly over-stated."

Still, Chief Justice Scott concluded there were lessons to be learned from the legal jousting. As a result, he has recommended another committee should take a closer look at the issue.

"Another lesson is the importance of judges speaking clearly in their judgments, including concurring judgments, to avoid potential misunderstanding," Chief Justice Scott wrote.

Both Mr. Crosbie and Chief Justice Wells were cabinet ministers in the Liberal government of legendary Newfoundland premier Joey Smallwood, and each resigned over an issue of principle.

Mr. Crosbie later rose to senior positions in the federal Tory government while Chief Justice Wells became Liberal premier of Newfoundland.

APPENDIX 7

The Honourable John C. Crosbie, P.C., O.C., Q.C.
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April 30, 2003

VIA FACSIMILE 613-998-8889

The Chair and
The Honourable Richard J. Scott,
Chief Justice of Manitoba,
Chairperson of the Judicial Conduct Committee,
and Members of the Canadian Judicial Council,
c/o Ms. Jeannie Thomas,
Executive Director,
Canadian Judicial Council,
Suite 450, 112 Kent Street
Ottawa, ON K1A 0W8

Your Lordships:

1. On January 6, 2003 I made a complaint to the Canadian Judicial Council (the “Council”) with reference to certain conduct of The Honourable Clyde K. Wells (“Wells CJ”), Chief Justice of the Court of Appeal of Newfoundland and Labrador (the “Court of Appeal”). I did so because I thought it necessary to the public’s interest in the due administration of justice in Canada that the Council consider whether certain conduct of Wells CJ was appropriate. The complaint sought to have the Council address whether the conduct violated the principle of the independence of members of the Judiciary when carrying out their judicial functions, and to obtain guidance from the Council for Judges, members of the legal profession and Canadians generally, on this important and fundamental principle of our system of justice.

2. My complaint voiced the expectation that "the actions and conduct of the Chief Justice should therefore go before a committee of his peers" appointed by the Council. This to me seemed a perfectly logical expectancy inasmuch as that complaint went far beyond the individual actions that gave rise to it and involved extremely critical questions of principle affecting the operation of the entire judicial system. I did not register the complaint lightly. Neither did I take any pleasure in doing so, despite the imputation of other motivation, to which anyone who ever shouldered public office is well accustomed. I did it because a very serious public issue affecting the public interest had been engaged which merited serious treatment by Chief Justice Wells' peers on the Council.

3. Regrettably, it did not receive such treatment. Instead of consideration by the Chief Justice's peers, it was referred to a single Chief Justice, Scott CJ of Manitoba for investigation and disposition. The latter referred the disposition, not to his peers for discussion, but to a lawyer from whom he received comfort that she was in complete agreement with the disposition of the complaint as the file disclosed no evidence of judicial misconduct. The complainant was not given access to the file and opportunity to reply to responses to his complaint. Neither was I furnished with a copy of the legal opinion and given a chance to respond. Instead I only learnt of the solicitor's involvement when the disposition was announced, when the complaint was described as "significantly over-stated".

4. By any yardstick, this is cavalier treatment of an important matter. Frankly, the attempt to deprecate the complaint as "significantly over-stated" is insultingly offensive. I have been a member of the Bar probably longer than most members of the Council, and can claim a reasonably full measure of life experiences. Included in these is service to Canada as Minister of Justice and Attorney General. These have left me with a very high opinion of and respect for both federal and provincially appointed Judges. I believe the judicial role is one of the most onerous and difficult that a person can assume. My lifetime connection with the law has also left me acutely aware of how vital is that role, and the high importance of judicial independence in its discharge. The issues raised in my letter and this complaint are of importance to me because they get to the very core of the judiciary's operation, and to the repute of the administration of justice without which confidence in the basic institutions of society will crumble.

5. I am aware that there is no appeal from the decision of Scott CJ declining to refer my complaint to a panel of judges for consideration. However, I did not ask that the impugned actions of Wells CJ be referred to a judge, but directly to his peers. I now reiterate that request. The matter is important enough for that. The way in which my complaint was handled exposes the total inadequacy and inappropriateness of the Council's present system for dealing with complaints about the conduct of Judges. Unless a fairer system replaces it, the judiciary will be subjected to ridicule and contempt for the way in which our Judges deal with complaints over their own conduct, and the repute of the entire justice system will be significantly undermined as a result. This is the primary reason why I am pursuing this matter. In doing so, I wish to also register protest against the unsatisfactory, unfair and unjust way with which my complaint was dealt. Before dismissing it as "significantly over-stated", please bear in mind it comes from a former Minister of Justice and Attorney General who has considerable respect for the judiciary and continues to care very much about public concerns of the nature which this matter engages. It is, then, in that spirit that I now broach constructive suggestions for reform of your complaints system, whilst expressing my objections to the way my complaint was handled to illustrate the system's inadequacies.

6. R.G. Ingersoll in 1883 wrote "We have to remember that we have to make judges out of men, and by being made judges their prejudices are not diminished and their intelligence is not increased." In other words, Judges too must remember they are only human and Lord Acton's warnings about the effects of power on people apply to Judges as well as to politicians!

7. Your process to deal with complaints about the conduct of members of the judiciary does not meet 21st century standards of justice and fairness and is most unsatisfactory for many reasons including the complete lack of transparency. The process should be as open as are Court proceedings generally. The complainant should be given full information on what is happening with the complaint, how it is being handled, by whom, and just where the matter stands at any time. In my own experience from January 6th to March 13th no questions or queries were directed to me, nor information given me, nor was I asked to make any further submissions or comments in response to submissions or replies that may have been received from Wells CJ nor was I given any right to see any information obtained by Scott CJ while he was deciding whether the matter should be referred to a panel or how the complaint should be

treated. Your present process is a Star Chamber process with a complaint disappearing into a black hole once received at the Council.

8. The process you use to deal with complaints concerning judicial conduct does not appear to be an independent or impartial process and should not be permitted to continue by the Council and the Judges of Canada.

9. The system should be completely open to the public and to the complainant as is the business of the Courts of Canada and not treated as a secret to be hidden and dealt with in secrecy.

10. Your process is fatally flawed as it begins since complaints about the conduct of Chief Justices or Judges have to be made to a body composed of Chief Justices or Judges who meet professionally and socially each year at meetings of the Council and Committees of the Council so that those who hear complaints about judicial conduct preside over matters that affect the personal interests and reputations of fellow Judges or Chief Justices with whom they have professional and personal and social relationships during the year. Any reasonably well informed and fair-minded observer must conclude there is *ab initio* the appearance of conflict of interest and a reasonable apprehension of bias which discredits the judiciary. This should not continue.

11. I doubt that any Judge would consider it proper to preside over a matter in Court involving the interests of someone with whom they enjoyed close professional or personal or social relationships such as the members of the Council have one with the other.

12. It is urgent that the Canadian Judiciary and the Government of Canada take steps to reform this system immediately to eliminate the appearance of conflict of interest or any cause for anyone to reasonably apprehend bias in the disposition of complaints.

13. There are alternatives such as a judicial conduct committee completely separate and apart from the Council with members comprising retired Judges together with eminent legal practitioners nominated by the Law Societies to sit on such a Committee.

14. My original seven page complaint made on January 6, 2003 concerned certain actions taken by Wells CJ arising out of an Appeal from the Trial Division of the Supreme Court in the matter of the Newfoundland Association of Public Employees, Appellant/Respondent on Cross-Appeal and Her Majesty the Queen in Right of Newfoundland,

as represented by Treasury Board and the Minister of Justice, Respondent/Appellant on Cross-Appeal heard on January 10-11, 2001 by a panel of Judges of the Court of Appeal consisting of Mr. Justice William Marshall, Mr. Justice Geoffrey Steele and Mr. Justice Denis Roberts.

15. On December 6, 2002 the Appeal Panel rendered Judgment and in his reasons for Judgment, Mr. Justice Marshall dismissed both the Appeal and the Cross-Appeal with his decision concurred in by Steele and Roberts J.J.A. Neither Justice Steele nor Justice Roberts in their short concurring reasons for Judgment wrote of any disagreement with any point made by Justice Marshall in his lengthy and thorough Judgment. In analyzing the issues involved and the precedents with respect to the standards to be used in making decisions under Section 1 of the Charter, Justice Marshall, clearly a believer in the exercise of judicial restraint, made it clear he opposed judicial activism where Judges do not hesitate to decide what public policy should be rather than as, before the Charter, accept what was decided as policy by elected legislated bodies, with the Judges to interpret and apply the law and not make it. Marshall J.A. recognized that while he thought some of the legal precedents should be revisited it did not lie with the Court of Appeal to conduct such re-visitation. He proceeded to follow previous decisions of the Supreme Court of Canada.

16. In his reasons for Judgment, Marshall JA made certain obiter observations in relation to the respective roles of the Courts and the legislators and when the reasons for Judgment came to the notice of Kirk Makim, Justice Reporter of the Toronto *Globe and Mail* newspaper, a dramatic story appeared on December 12, 2002 reporting “One of the country’s highest Courts has issued an extraordinary ruling, saying judicial activism has gone too far and calling for the curtailment of Judge’s powers to second guess politicians and overturn laws.” This came to the attention of Wells CJ causing him to adopt a line of conduct which I believe to be inappropriate, contrary to the public interest and to the due administration of justice since this conduct appeared to threaten the independence of other Judges of his Court. The conduct of Wells CJ complained of is evidenced by a letter dated December 12, 2002 sent to *The Globe and Mail* and published giving his opinion that while it was a 3-0 Ruling, most of the significant comments in the story reflected only the opinions and comments of one of the three Judges. Wells CJ then gave his own interpretation of what the short concurring decisions of Justice Steele and Justice Roberts meant. The Chief Justice wrote that while Judges Steele and Roberts agreed with Justice Marshall on the disposition of the Appeal, other significant comments in the story reflected only the

opinions and comments of one of the three Judges. Neither of those Judges stated this in their concurring Judgments.

17. Clearly, whatever Wells CJ thought of the reasons for Judgment of all or any of the three Judges, he should not have taken a public position on what any of their reasons for Judgment meant. The public statements of Wells CJ were unprecedented and clearly interfered with the independence of his fellow Judges. In *R. v. Lippe*, (1991) 64 C.C.C. (3rd) 515 at 530, Chief Justice Lamer of the Supreme Court of Canada made clear that judicial independence involved not only independence from the executive and legislative branches of government but the concept applied to include "any person or body within the judiciary which has been granted some authority over other Judges, for example, members of the Court must enjoy judicial independence and be able to exercise their Judgment free from pressure or influence from the Chief Justice."

18. My complaint involved fundamental principles of the independence of the judiciary but Scott CJ completely failed to deal with that issue or to allow the Judicial Conduct Committee to deal with it.

19. Justices Steele and Roberts were not permitted by Wells CJ to speak for themselves through their written reasons for Judgment as is the traditional practice but said in his letter to *The Globe and Mail* that it was written with the express approval of Justices Steele and Roberts. If this is correct these Judges were amending their own reasons for Judgment in an unprecedented and improper way.

20. Scott CJ expressed no views on whether the rules of judicial independence were violated or not and chose to treat the matter as though Wells CJ was simply acting in a public information role in disagreeing with and correcting what he believed to be an erroneous report in the Toronto *Globe and Mail*. Scott CJ in his letter to Wells CJ of March 12th also made the gratuitous remark "The complaint may be described as significantly over-stated".

21. In paragraph 20 of my original complaint, I requested that the conduct of Wells CJ should be reviewed by a committee of his peers who could decide whether his actions were appropriate conduct.

22. In paragraph 21 I submitted that the Council should affirm that the administrative responsibilities of a Chief Justice, no matter how broadly defined, do not permit him or her to interfere with the exercise of judicial functions by a Judge whether directly or indirectly. I submitted

also there should be no perception of any interference by a Chief Justice in the judicial function of other Judges.

23. Scott CJ failed to deal with this fundamental issue and concluded by writing Wells CJ that “There can be no doubt that all of your actions in this matter were taken in good faith, in conscientiously seeking to fulfill your role as Chief Justice, in accordance with your view of the position of the Canadian Judicial Council.”

24. No one suggested that the actions of Wells CJ were not taken in good faith or in conscientiously seeking to fulfill his role as Chief Justice but this was not the issue. Despite acting in good faith and trying to fulfill conscientiously his role as Chief Justice, any Chief Justice might still have violated the principles of the independence of Judges when exercising his judicial functions. If the hearer of complaints of the Council is simply going to advise a complainant that the Judge was acting in good faith and conscientiously seeking to fulfill his role, what is the point of making a complaint about judicial conduct to the Council? Scott CJ further stated that he had concluded that the actions of Wells CJ involved the exercise of discretion in carrying out his role of Chief Justice without any improper motive and with the best of intentions. Thus he concluded the actions of Wells CJ fell outside of the realm of judicial misconduct and closed the complaint file. In other words, Scott CJ simply failed to deal with the issues at all. This was an obvious judicial whitewash which avoided dealing with the fundamental issues raised.

25. Chief Justice Lamer has made clear he considers “Independence is the cornerstone, the necessary pre-requisite, for judicial impartiality.” Did Chief Justice Lamer significantly over-state the necessity of Judges enjoying judicial independence and exercising judgment free from pressure or influence from a Chief Justice? I think not!

26. With respect to the comment of Scott CJ that my complaint was significantly over-stated the Benchers of the Law Society of Newfoundland in a letter dated January 27, 2003, to the Council wrote of their concerns about the public statements of Wells CJ. That a letter was sent is reported in the March 12th issue of The Telegram. They wrote that the statements of Wells CJ gave rise to nine questions and concerns which they forwarded. Among their questions was whether or not the December 12th letter of Wells CJ encroached upon the independence of the judiciary since the tenor of the letter was a disassociation with parts of the written reasons of the Court of Appeal panel decision? They asked was it appropriate for a Judge to make a public statement on a decision that may be the subject of ongoing litigation, including a further possible Appeal?

(An Appeal is now underway). They asked whether it was appropriate for a Chief Justice to approach Panel Judges regarding interpretation of their reasons with a view of issuing a public statement. They pointed out the public statements raised concerns about the extent of the administrative role of the Chief Justice. As well, they had a corollary concern as to whether such public statements impacted upon the independence of the judiciary.

27. Were these questions and concerns of the Benchers significantly over-stated as well? Why did Scott CJ not deal with any of these questions or concerns of the leaders of the Law Society of Newfoundland?

28. The ethical principles for Judges adopted by the Council state "Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair-minded and informed persons." Would a reasonable, fair-minded and informed person find the conduct of Wells CJ in the matters complained of, above reproach? Does the procedure used in deciding complaints made to the Council with respect to their fellow judges observe their own principle? The ethical principles also state "Judges should, therefore, strive to conduct themselves in the way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment." Was this principle observed when Scott CJ reviewed the conduct of Wells CJ? Was this principle observed by Wells CJ after he read *The Globe and Mail* story?

29. If the test of impartiality is, as the Council's ethical principles approve, whether "An informed person viewing the matter realistically and practically—and having thought the matter through—would apprehend a lack of impartiality in the decision maker" then using this test, is it not clear that the procedure of the Council for dealing with complaints leads to a reasonable apprehension of bias in favour of the Judges complained against? Would not any informed person examining the present process apprehend a lack of impartiality in the decision maker?

30. Was it fair that I, as the complainant, should learn only from the letter of Scott CJ when he announced his decision that my complaint was referred by him together with his proposed disposition of the complaint to Ms. Nancy Brooks of Blake, Cassels and Graydon LLP. The Executive Director of the Council wrote that Ms. Brooks advised she was in complete agreement with the disposition of the complaint as the file disclosed no evidence of judicial misconduct on the part of Wells CJ. Did Ms. Brooks examine the rules applying to the independence of Judges in their judicial functions and give an opinion whether they were observed by

Wells CJ or not? The correspondence between Scott CJ and Ms. Brooks was never copied to me.

31. As the complainant, I have to conclude that I feel a reasonable apprehension of bias in the proceeding and apprehend a lack of impartiality in the decision maker.

32. I submit that there is an urgent need for a proper process to be put in place that will not give support to any apprehension of bias or possible conflict of interest when complaints about judicial conduct have to be decided. There should be no delay in creating a judicial conduct committee that will not suffer from the weaknesses now evident and recognized for years to exist. I submit as well that my complaint be sent back for reconsideration for the reasons expressed herein.

33. I am making this submission public through the news media and will send copies to the Minister of Justice of Canada, who should lead in ensuring the necessary changes with respect to dealing with complaints about judicial conduct, the Canadian Bar Association and various other organizations involved in and concerned about the proper administration of the system of justice in Canada. The concept of judicial impartiality and independence is endangered if the concept that Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair-minded and informed persons is not faithfully observed. The present system for dealing with complaints about judicial conduct must be, in the interest of our Judges, the justice system and the public immediately improved.

Respectfully submitted,

The Honourable John C. Crosbie, P.C., O.C., Q.C.

APPENDIX 8

00897E/courts SCC appts March 03

Head:

The Courts:

Martinizing the Supreme Court

Deck:

It is business as usual under the upcoming Paul Martin Liberal Government except for one area: Appointing judges to the Supreme Court of Canada. Martin wants to give a parliamentary justice committee the power to interview prospective justices and make recommendations on their appointment to the Prime Minister. Some think this it is a great idea—introducing some measure of transparency in the top judicial appointments process. Others are not so sure.

By Mark Bourrie

The House of Commons Justice Committee meets in a small room tucked away at the back of Parliament’s 140-year-old West Block. If Paul Martin becomes prime minister and keeps his promise to give the committee the power to interview judicial candidates before they are appointed to the Supreme Court of Canada, the committee will likely need a much bigger room.

Martin does not depart from current liberal policies in any major way except for one thing: He wants Supreme Court nominees to appear before a House of Commons committee and answer questions from MPs. The prime minister would still retain the power to appoint the candidate, even if the committee’s consensus was against the appointment. Martin is not clear whether MPs would even vote to approve the recommendation.

It is part of Martin’s pledge to put Parliament back into the center of the nation’s political system. But as Martin told Toronto’s Osgoode Hall Law School last October 21, he doesn’t want that parliamentary vetting committee to be a “a kangaroo court” and it seems like the committee will have to play to the media to block an appointment. Embarrassment of a candidate will be its only weapon.

Martin says a “responsibly executed” a Commons committee review of court nominees would “shed light on the appointments process” for the public. “We do not want a system that creates a partisan circus with the effect of discouraging good people from public life.”

His idea is being panned by just about everyone. MPs want the power to *stop* an appointment, not just chat with appointees. And legal scholars and the former chief justice of the Supreme Court say the plan won’t do anything to improve the quality of the court.

There does seem to be movement among some judges and politicians towards a vetting process. Supreme Court Chief Justice Beverley McLachlin has signaled that she’s open to some kind of review, and retired Justice Gerard La Forest has also called for some sort of public scrutiny of prospective judges.

Antonio Lamer, the Court’s former Chief Justice (who’s now a lawyer with Stikeman Elliott in Ottawa) fears the proposed Canadian system will, at worst, adopt some of the circus atmosphere of US Senate confirmation hearings. Details of personal lives will be dragged out. Judges will be grilled about their political beliefs. Opposition MPs will try to humiliate judicial candidates as a way of scoring points on the government, he says.

He would likely have turned down his appointment to the top court if he had to defend his record as a lawyer and judge (and his personal life) to a committee of politicians.

He concedes in its early days, the court was packed with cronies of the government, “but if we bring back committees, we bring back politics. We have a perfect example to the south. Even if a judge gets appointed, you have a weak or lame judge.”

“When I watched (US) confirmation hearings, every question that was meant to embarrass (the candidates) was put by someone not in the president’s party. Helpful or neutral questions were asked by people in the president’s party. They were not interested in getting the best judge. It’s all about protecting or embarrassing the president.”

“In Canada’s system, all you need to know, you know. If there is a black ball—the judge is lazy, slow, or ducks issues—the appointment will not happen. And we elect governments to govern. If there’s a bad appointment, if we believe the government has played politics with the Supreme Court, then out you go.”

Lamer says he takes the issue personally, not just because he was appointed under the present system: "I care for my court. I gave it 20 years. Maybe if Mr. Martin has a talk with me, I would be able to explain it to him."

"If anybody came up with a better system, I would be in favour of it, but I have yet to hear about a better system because everybody who is knowledgeable about [the candidates] is consulted," said Lamer, who was consulted by the government about the Supreme Court during the decade that he held the top judicial job in the country.

"People who are considered for the Supreme Court are well-known entities," Lamer says. "The justice system is an open system. Day in, day out, if you are a trial lawyer, you are before the courts, you are in front of your peers, arguing cases."

"You do this for at least 10 years; but, in reality, lawyers who go straight to the court have been in practice 20 or 30 years. Most appointments are already judges, but those lawyers who are not have written factums and made arguments. Who did not know John Sopinka?"

Lamer says the informal process that is been used for the past 30 years to select federally-appointed judges still works. The federal Justice department drafts a short list from the applications of candidates. Then it lets loose a "beagle", a discreet departmental agent, to check the candidate out.

The beagle looks at all the judges' judgments, interviews the chief justice of the candidate's court, speaks to law societies, the bar association and provincial section heads. Then the beagle speaks to prominent lawyers and the Chief Justice of Canada before writing a report for the justice minister and his senior staff. "If there are skeletons still in the closet, they will be from way back," Lamer says.

University of Ottawa law professor Ed Ratushny designed the system and was its first "beagle". He says the government knows more about potential judges than most people give it credit for: "I would get to know all the justices in, say, British Columbia between 35 and 65 and look for possible candidates. Now, people apply to the Minister of Justice. They are scrutinized by people in the ministry and by the minister's advisor on judicial affairs."

Ratushny says the Parliament here is nastier than the US Senate—opposition parties aren't part of the compromising and give-and-take that's common in the US. Instead, as outsiders trying to win office, Canadian opposition parties use every opportunity to embarrass the government.

“Proponents of a parliamentary committee vetting Supreme Court justices have not examined the US system carefully enough. We have a very adversarial system here, one where the Opposition would believe it has a duty to try to embarrass candidates.”

“And, even in the US the system has worked against the appointment of the best judges.” Ratushny says after the nomination hearing “fiascos” of US Federal Court Judge Robert H. Bork and US Supreme Court Justice Clarence Thomas, “the president looks at candidates who are more bland. In Canada, the executive makes these decisions and is held accountable for them.”

Lamer goes farther, saying the trivial scandals that have kept judges off the bench in the US—pot smoking or sexual indiscretions, for example, aren't anyone's business. In the Canadian system, “anything that they [politicians] are entitled to know will be known. If a judge had a mistress when he was 30, it is not relevant. We are trying to get the best judges available.”

Lamer knows that his own hearings into his own appointment could have been rough. He defended some of the highest-profile criminal accused in Montreal, was an active Liberal, and attended the 1957 leadership convention as a Paul Martin (Senior) delegate.

But, says Lamer, political connections are not a serious factor in Supreme Court appointments: “I was appointed to the court by [Pierre] Trudeau and promoted by [Brian] Mulroney, and there was no love lost between those two men. When I was promoted, all of the judges were Mulroney appointees except me.”

And, he challenges: “Name one bad appointment in the past 25 years.”

Lamer says he understands the arguments for public hearings: “Since the Charter, people have wanted to know judges' thinking. But I do not make up my mind before I hear a case.”

"There are things that you do make up your mind about, such as the presumption of innocence, but if you had asked me how I'd judge *Rodriguez v. British Columbia (Attorney General)*, the assisted suicide case, I'd have said: 'I do not know, I'd need to hear the case.'"

"I have seen people have an opinion on the Court of Appeal and have a 180-degree change on the Supreme Court. The quality of arguments is first-rate, especially by counsel for intervenors."

However, Martin's advisor on the vetting issue, Osgoode Hall law professor Patrick Monahan, says it's "highly, highly unlikely" Canadian politicians would imitate US senators would play politics with Supreme Court appointments.

"I think that people recognize that what went on there was excessive so I do not think that that is likely to occur here, but of course there is no absolute guarantee," he admits. Canada needs a Supreme Court appointment system that is open to public scrutiny, he says.

"The difficulty, quite frankly, is whether in the 21st century, we can continue to have a system of appointments, where the prime minister plays a critical part, that has absolutely no transparency to it, no sense of an opportunity for review of any kind."

"I was involved in these discussions that took place over the summer. He had a working group of sorts of academics, people who had been working with him and some MPs. It is not envisioned that this process would not involve cross-examining of candidates regarding every issue that would come up. It would not be fair to the judge."

Monahan says the hearings would be "a relatively modest change" since the ultimate decision would be made by the prime minister. "It would not require a constitutional change or even amendments to the Supreme Court Act," he said.

Even so, Lamer suggests, Paul Martin's future plans might be struck down by a constitutional challenge if enacted. Lamer isn't the only legal authority tossing around the idea of a constitutional fight: Jacob Ziegel, professor emeritus at the University of Toronto Law School, says the *present* system likely would not survive a Supreme Court challenge.

“Is it appropriate that the principal litigant should be appointing the judges?” Ziegel asked.

For years, Ziegel has criticized the appointment process. In an important essay entitled “Merit Selection and Democratization of Appointments to the Supreme Court of Canada,” published in the June 1999, issue of *Choices*, published by the Institute for Research on Public Policy (a Montreal-based think tank), Ziegel argued that the present system is secretive, arbitrary and undemocratic.

He wants parliamentarians to be freely able to choose from a short list of candidates presented by a non-political nominating committee of legal experts.

Moreover, Ziegel says the Canadian legal and political establishment’s claims—that US politicians are irresponsible and cruel in their treatment of Supreme Court candidates—are not true.

“I am not enthusiastic about things in the US, but they realize the court has a tremendous amount of power and they take the scrutiny process very seriously. Of course ideology is involved. It should be.”

“Our system is primitive in the extreme, probably the most closed system in the developed world. In Australia, the attorney general has at least made an agreement with the states to discuss appointments. We do not even have that.

And our Supreme Court is so dogmatic in its view of then world. It tells Parliament that it is unconstitutional to deny voting rights to prisoners, it talks about democratic rights with such authority; yet Canadians have no rights in the appointment of the most powerful institution in the country. It is even more powerful than the Prime Minister’s Office,” Ziegel said.

University of Western Ontario constitutional law professor Robert Martin says the current judicial appointments process is rather confusing “because we have no system.”

Even so, Robert Martin, a long-time critic of the court, doesn’t support Paul Martin’s plan. It would, he says, leave the worst aspects of the present system—the secret selection of candidates and the prime minister’s absolute power of appointment—in place.

Even if MPs do get the power to vote on appointments, Martin and the rest of the critics of an activist judiciary fear that parliamentary scrutiny might actually *strengthen* the hand of judges.

“Having Parliament appoint judges to the Supreme Court would give the court a certain amount of legitimacy. Judges would have the belief that they are acting on the will of Parliament.”

So, he says, “it is advisable that it be a purely advisory committee, rather than an executive committee.” And, even then, candidates would probably avoid tough questions on legal issues.

“The obvious answer to any question about ideology or issues would be ‘I keep my mind open’ or ‘I would have to hear the arguments.’ Would a committee have prevented a Claire L’Heureux-Dubé? How could it predict the kind of judgments she made? It would have to be psychic, it would have to be able to look into the future.”

Mark Bourrie is an Ottawa-based freelance legal affairs writer.

APPENDIX 9

The Lawyers Weekly, 11:13

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Sopinka, Robins lock horns over right of judges to speak

By Stephen Bindman

CAMBRIDGE, U.K.—Two of Canada’s most senior judges have clashed publicly here in a bitter debate over freedom of speech—their own.

The unusual harshness of the confrontation between Supreme Court of Canada Justice John Sopinka and Ontario Court of Appeal Justice Sydney Robins stunned many of the judges, lawyers and academics gathered for the bi-annual meeting of the Canadian Institute for Advanced Legal Studies. At Queens’ College at the University of Cambridge, Mr. Justice Sopinka was participating in and Mr. Justice Robins was moderating a panel entitled: “Judges Criticizing—Criticizing Judges.”

Mr. Justice Sopinka, who was appointed to the Supreme Court in 1988, repeated his now-familiar but still controversial view that judges should be allowed to speak out publicly on controversial subjects.

Mr. Justice Sopinka said no subject should be off limits for judges unless it is a political controversy or an issue that is likely to make it into the courts.

Judges should also be allowed to publicly explain their judgments in speeches and in conversations with reporters, Mr. Justice Sopinka said.

“If you trust judges to make these decisions, some of them virtually life and death, do we have to be lectured to by the chief justice as to whether we can make a speech or appear on television?” Mr. Justice Sopinka questioned the gathering, which included dozens of judges from across Canada.

"It is in the interest of justice that light be spread on what we do. The overriding interest is that the media and the public we serve get it right."

Since his appointment to the Supreme Court, the former Toronto lawyer has given speeches criticizing

- the use of royal commissions as a substitute for criminal investigations;
- pressure groups which demonstrate on the steps of courthouses; and
- the "sea of commercialism" which has engulfed modern law firms.

Two of the female justices on the top court, Bertha Wilson and Beverley McLachlin, have also delivered controversial speeches analyzing the law from a feminist perspective and attacking discrimination against women in the justice system.

Said Mr. Justice Sopinka: "I think judges have found it very comfortable to avoid the requirement to do things that ordinary people have to do by reference to the fact that they cannot do this because it would interfere with their independence. I think that's a vastly overblown issue."

"I do not think that it is a matter compromising your independence to make a speech on a matter of law in which you explain to the public what the impact of the decided cases is. It is in the interest of justice and it will increase the public's confidence in the courts if they can understand what all that jargon means. Every judge has to decide this for himself or herself."

"But the guiding principle is do not say something that will prevent you from doing your job by indicating bias or in any way compromising your ability to do the job."

But Mr. Justice Robins, a senior Justice of the Ontario Court of Appeal, appeared to repeatedly cross-examine Mr. Justice Sopinka on his views.

“I will be happy to debate this matter with you at length, but I thought you were asking questions,” Mr. Justice Sopinka interjected at one point.

Retorted Mr. Justice Robins: “This is important. You are setting an example and setting standards because there are no rules of judicial ethics for judges across the country.”

“If you are free to explain your judgments, then so am I and so is the judge of the trial court.”

And at the end of the discussion, Mr. Justice Robins launched into a blistering five-minute denunciation of Mr. Justice Sopinka’s position, saying it threatens the impartiality of the judiciary and public confidence in the legal system.

Mr. Justice Robins was one of the judges who recently helped draft a Canadian Judicial Council handbook on ethics for all federally-appointed judges.

Although the book does not take a firm stand on off-the-Bench speeches by judges, it states that “by counselling a restrained approach, we express the view of most Canadian judges.”

Mr. Justice Robins said all judges have a responsibility both on and off the Bench to “preserve, promote and enhance” public confidence in the legal system.

“Is there not the risk that the perception of impartiality of the judge will be tarnished by the judge speaking out on controversial issues, that to put the matter bluntly, are none of his judicial business?” Mr. Justice Robins wondered.

“There is a very narrow tightrope to be walked here and I venture to say that few judges can walk it successfully.”

“I think it would not be consistent with the administration of justice if the advice that judges are free to discuss these matters on the basis of their own judgment is one which is followed throughout the judicial system in Canada.”

Mr. Justice Robins said judges should only speak out to help educate the public on the role of courts and judges, the workings of the legal system and the importance of the Rule of Law and independence of the judiciary.

Certainly all judges have personal opinions on controversial subjects but most are able to put them aside and deal impartially with issues that come before them, said Mr. Justice Robins, who was appointed to the appeal court in 1981.

But if a judge has spoken out on an issue, the parties in a case may not believe they have received “a fair shake.”

“Appearances count, perceptions are important,” he said.

“By speaking out about [controversial] issues of this nature, the danger is that the judge may call into question in the public mind whether he or she can put aside the personal beliefs and rule evenhandedly if and when the issue comes before the court.”

“This is particularly so at this juncture in our constitutional history of Canada, when more and more social issues can, and do, become legal issues.”

Mr. Justice Sopinka, who was not expecting the lecture from Mr. Justice Robins, seemed stunned by the attack. “Thank you for that very balanced account of the panel discussion,” he told the audience when Mr. Justice Robins asked if he wanted to respond.

“I thought it sounded more like a lecture from the Judicial Council. I guess my case rests on the fact that if I hadn’t given the speech ‘Must a Judge be a Monk,’ that book from which you were quoting [the Canadian Judicial Council handbook] would have been much shorter.”

One of the other panelists, Lord Desmond Ackner of the British House of Lords, agreed with Mr. Justice Robins. Lord Ackner, who bitterly attacked the British media for its hostile attitude to the judiciary, said judges should not speak out on controversial subjects other than those touching on the administration of justice.

“It reminds me of what the mother whale said to the baby whale—they can only shoot at you when you’re spouting.”

“The rule is designed to stop judges from making fools of themselves which they can do very easily.”

