

Judges and Public Policy : Issues of Accountability and Judicial Independence

The Honourable Judge Gerald T.G. SENIUK*

INTRODUCTION	169
AFTER WORD	170

* Saskatchewan Provincial Court, Regina, Saskatchewan.

The topic that has just been covered considered the issue of the respective roles of government and the courts as policy makers. Some critics of the judges' role in public policy — sometimes referred to as the "global judicialization of politics" — have made strong public utterances. So heated has this become that in recent months a variety of credible observers have publicly expressed alarm that the judiciary in Canada is under attack. Which brings us to the very important issue of "judicial accountability and independence."

We are fortunate to have three most qualified panelists to lead us through an examination of this question. They have each prepared excellent papers, which I hope you have all had a chance to read because they will limit their oral presentations so as to leave time for your questions and comments. I will be brief in my introduction, and will save my comments for an after-word in the published record of these proceedings.

First we will hear from Professor Ian C. Greene, of York University. In his paper, he has outlined what political scientists have to say about judicial independence, judicial accountability and democracy in Canada. Professor Greene is recognized as one of Canada's leading scholars working in this field. Studies that he has participated in have given him an opportunity to take a close view of the nature of the current tension between judicial independence and judicial accountability in this country. He can tell us, for example, that ten years ago, no judges interviewed felt their own independence threatened, whereas over two thirds of the judges interviewed in this decade listed one or more threats. And he will also share his thoughts on what we should do in the future.

J. Stuart Langford, editor of the *National*, the Canadian Bar Association magazine, is also uniquely positioned to observe these issues unfold over the years. He is a lawyer, journalist, novelist and editor, and until recently a private practitioner and university lecturer. As a researcher and writer he has assisted heads of state, prime ministers, opposition leaders, numerous CBA presidents and even a Supreme Court of Canada judge. His career has given him opportunities few of us have to directly observe and reflect upon the topics we are discussing today. For example, he sat through 269 hours of Senate-Commons Committee hearings, and was closely involved in all that followed. He contends that the tensions can only increase unless corrective steps are taken, and that since the problems are judge-made, they should be judge-solved.

The Honourable Chief Justice Richard J. Scott of the Manitoba Court of Appeal has spent many months, even years, trying to come to grips with the question of accountability and independence. He has chaired a committee of the Canadian Judicial Council that has widely consulted with judges of all courts in Canada in an attempt to draft a document about those twin concerns. When the courts are criticized as they are now, the judiciary has traditionally remained publicly silent, leaving it to persons like Prof. Greene or Mr. Langford to inform the public and hopefully defend the courts. Some judges are wondering whether the judiciary should not begin to publicly defend itself. Today, not only do we have the benefit of a judicial perspective on these issues, but we will have it from a judge who has studied and discussed these issues with judges from across Canada.

AFTER WORD

Communication and education emerged as important themes during the presentation and the question and answer period of this session. The papers speak fully to the issue of the growing criticism of the judiciary, and I will not repeat those points. What I would like to record is some of the points made, or made more emphatically, during the actual session. These points have to do with the question of what can be done to respond to this criticism. The criticism has grown significantly after the Charter placed new responsibilities on the judiciary. As the speakers' papers reveal, an argument is made that the courts have willingly (and against the intentions of the Charter's framers) assumed an activist role, and brought this criticism on to themselves. But whether that is the case, or whether, as many would argue, the Charter required this role of the judges, no one suggested that judges were doing something fundamentally wrong. Whether they chose or were obliged to assume this role, it is a legitimate constitutional role that they are performing. And thus the focus on communication and education. If the judges are being criticized for essentially doing their constitutional duty, then there must be something wrong in the understanding of those doing the criticizing. Either the judges must communicate better what they are doing in the particular cases, or more public education is needed about the role of the judiciary in a constitutional democracy.

Undoubtedly, most people could improve their communication skills, and many judges try to do that through training in judgment writing. Clearly written reasons for a decision is always a goal. But that by itself will not, in my opinion, address the underlying problem of communication. In this age of mass media, most people do not read the judgments, and they likely would not read them even if they were published *verbatim* in large circulation newspapers. Most people will rely on the news reports of the decision. If you wish to communicate with the public, then you must use the mass media and you must learn how to communicate effectively in that medium. There is no direct communication between a judge and "the public." The judgment will always be filtered through a journalist, who will choose what parts to report or to emphasize, and how much legal context and background to provide. It is not a simple matter to ensure that your message gets through, or that it gets through accurately. Nowadays, experts are routinely retained to help in that process, even if the message is relatively simple, not controversial and not opposed.

But judgments are rarely simple to the lay person, and, if they are of interest to the public, rarely are they uncontroversial. Furthermore, decisions (as opposed to the reasoning in a judgment) are increasingly criticized by politicians, editorial writers and others who attempt to mold public opinion. If the judgment is criticized, the judgment cannot be adequately defended or explained except by a human voice. Journalists strive to report accurately what recognized spokespersons have to say. If one side of a debate chooses not to defend itself, it is not the journalists' task to do so. It is not enough to say the judgment is clearly written and speaks for itself. The test of whether you have communicated well is whether your message has been received. If the message of a written judgment has not been correctly received, then any further communication can only take place through a human voice. Therefore, if we wish to communicate or defend a judgment that is under public attack, knowledge of how to communicate through the mass media is as essential as are good judgment writing skills.

This does not mean that judges, least of all the authors of controversial judgments, must themselves begin speaking out publicly. But it does suggest that a court

needs access to support and advice in communication with the public. At one time, the Departments or Ministries of Justice partially filled that role as part of their responsibilities to maintain public confidence in the administration of justice. But their interests are not necessarily the same as the courts, especially when the political branches of government are the ones critical of the judiciary. At present, few courts have independent access to that type of expertise, and by the experience related by one Chief Justice during the question and answer period of this session, governments are quick to refuse funding for it. And yet, in this day and age, without such support, one is handicapped in effective public communication. If we wish the judiciary to communicate effectively with the public, this type of support will have to be provided. That is the first point I would like to make.

The second point has to do with education. Has the quality of our politicians and legislators decreased in recent decades? Are the judges becoming more activist because of the failings of our legislators? These points were raised during the session. But before a public can make informed decisions on such questions, it needs to have a basic knowledge of how a constitutional democracy works. Citizens need to know what the responsibilities are of their parliamentarians and their judiciary. During the session, it was suggested that the educational system has stopped teaching this fundamental knowledge of citizenship, and that even if it now starts teaching this, there is a whole generation that can already be written off. The need for more education about roles and responsibilities in a constitutional democracy appears critical.

There are some such educational initiatives under way. For example, the past-president of the Canadian Bar Association has met with Ministers of Education across the country to urge them to add such courses to their curricula. The Judges' Forum of the C.B.A. is preparing 100 educational kits on judicial independence for use by lawyers across Canada. This will be a resource for lawyers to use in presenting workshops on judicial independence. Hopefully, the schools will make use of this resource as well. Also, the Canadian Association of Provincial Court Judges has initiated dialogue with Deputy Ministers of Justice across Canada with the goal of avoiding unnecessary confrontation that can undermine the public's confidence in the administration of justice. With the help of the Law Commission of Canada, a full day session was held in March 1998, to begin this dialogue. As part of this dialogue, at least one Deputy Minister and Provincial Court Judge have begun developing a joint presentation on the topic. These examples, and other such initiatives, will have to be expanded and continued. Which brings me to the second point. For the present, it appears that this public education will not take place unless the legal profession and the judiciary play a major role in developing and delivering such programs.