**"The judge said what?"**

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"The judge is in a place apart."

-Senator Arthur Meighen, 1932

## Introduction

We recall our horror in the early 1980s when a prominent Alberta judge was and sharply criticized in the press. His house was picketed for suggesting that a victim of sexual assault might have been more careful about going home with strangers she met in the bar. Protesting a judicial statement in such a personal way was not so common then. Judges were thought to be above direct criticism, and beyond the reach of political action. However, this attitude has changed. In the last year alone, the number of complaints against Canadian judges has increased remarkably.

Judges are public figures. Unlike most people, judges occupy a very unique platform from their tiny courtrooms and penned judgments. Their every word and action is scrutinized. Not only must they be superbly qualified with spotlessly clean records to be appointed, they must remain so throughout the rest of their working lives. They are highly ambitious, intelligent, and successful individuals. Many have political or legislative backgrounds.

On appointment to the bench, they are suddenly constrained in what they can say, what they can do, where they can be seen, and even who they can socialize with. In their world of reconciling a constant stream of emotionally-charged conflicting interests, they are expected to be rational, non-political and uninfluenced by their own personal beliefs.

They are also supposed to remain above the fray of debate about their decisions, instead confining their thoughts and influence to objective determinations of facts, exacting logic, and the application of law to a particular set of facts in an adversarial environment. This is the substance of their daily job. However, it is easy to see how their personal opinions and ideology might sneak out once in a while, even accidentally, in what they say, write, or do. They possess human frailties like everyone else and occasionally may be accused of impropriety, not necessarily improper for anyone, but improper for a judge.

Public discontent with judicial conduct, when it surfaces, can usually be traced back to the independence of the judiciary, the adversarial framework of our legal system which rarely furnishes full satisfaction to anyone, the enlarged role of the judiciary in defining the contours of our daily lives, and in the current state of acute sensitivity to anything publicly expressed that might be interpreted as offensive to someone in society. In reality, almost all of a judge's work is the routine, non-controversial application of settled legal rules to new facts. Yet there is a law-making component to judging, especially at the higher levels, where legal principles are extended, developed, and modified. The legislatures refuse to enter into the perennially divisive

social problems, so that these eventually present themselves before judges framed in the form of a legal dispute that must be answered. Since judges are called upon to decide these controversial, and often far-reaching, social issues, their judgments will always be seen as controversial and the judges personally as controversial.

Unlike politicians who hope for re-election, judges do not seek to be popular. Sometimes, they have to render unpopular decisions. They often stand up for the minority, or the underdog, against the tyranny of majorities, public opinion, and powerful special interests. Sometimes they have to tell the democratically-elected legislature that it has gone too far, or even that it has not gone far enough, in a context where the democratic legislature has historically been considered sovereign. Much of this is due to how the broad language of the Charter of Rights and Freedoms has constitutionalized the Canadian legal landscape since 1982. In fact, the legislatures do still have the last word and may pass a statute to change what the judges have done, and ultimately may amend the Constitution. Nevertheless, as in the other branches of government, we demand greater accountability from the judiciary, both on and off the bench, to the society over which they preside.

The challenge is to balance essential judicial independence with the need for continuous over-arching public confidence in the judiciary. To do this, the justice system has created the Canadian Judicial Council, an apparatus for dealing with judicial misconduct, a who watches the watchman dilemma.

While the focus here is on the federally-appointed superior court judges, most provinces have parallel systems for provincial judges.

Independence and Tenure During Good Behaviour

In early English common law history, the King's courts were an extension of the King. Judgeships, gifts of the King, were revoked at the King's pleasure. The struggle with Parliament and the Stuart Kings in the late 17th century led to independence of the judiciary from the Crown. The Act of Settlement of 1701 decreed that judges should hold their commissions "during good behaviour". No longer could a judge be dismissed merely for making a decision that displeased government. This principle was enshrined in the Canadian Constitution Act, 1867, section 99, which reads: " ... the

Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons". Only a Joint Address to our two federal assemblies can lead to impeachment of a federal judge, and this has never been done.

Complaints Against the Merits of Judicial Decisions

If one has a complaint merely on the outcome (the merits) of the case, it is understandable that one might blame the judge for that. But the disappointed party can only effectively find relief in launching an appeal to a higher court, not in formally complaining about the judge. All judges in their judicial capacity are extended broad immunity from complaints and lawsuits, so they may

be free in thought and independent in judgment. Lord Denning summarized this immunity in Sirros v. Moore et al. (1974) as follows: "Each [judge] should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?' So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action."

The Universal Declaration on the Independence of Justice, (adopted by the World Conference on the Independence of Justice, Montreal, 1983) also states "Judges shall enjoy immunity from suit or harassment for acts and omissions in their official capacity." It follows that if one cannot successfully sue a judge for a bad decision in law, one cannot bring any other complaint, pressure, or sanction to bear on the judge for the same decision. The greatest portion, by far, of reports in any year to the

Canadian Judicial Council are complaints against the decision, the decision-maker's judgment, not the behaviour of the judge. These complaints against judges are routinely dismissed.

It is possible that one believes the unfavourable decision was motivated by bias on the part of the judge. This is still a legal ground for reversible error, and is best addressed by a formal appeal to a higher court.

Canadian Judicial Council

The federal Judges Act was amended in 1971 to create the Canadian Judicial Council to provide self-regulation of judges: "The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service ...."

The Council, made up of 38 of the highest-ranking federally-appointed judges exists, therefore, for several reasons. These include the exchange of information of interest to the Canadian judiciary, training of new judges and continuing judicial education, preservation of judicial independence, and setting uniform standards of behaviour and discipline.

Until this time, complaints about judges were handled by the Department of Justice, which appointed one-judge ad hoc commissioners to investigate the most serious allegations in public.

Under the Judges Act, the Council, which "shall meet at least once a year", may inquire into and investigate complaints or allegations made by anyone.

In keeping with the spirit of self-governance of the judiciary, the Council is not required by law to investigate any complaint. On the other hand, inquiries about a judge's alleged misconduct must be held if it is referred by the federal Minister of Justice to the Council. The Minister can also name lawyers to the Inquiry Committee. It is interesting to note that the statutory language, in the context of judicial impeachment, speaks in general terms of whether a judge "has become incapacitated or disabled from the due execution of the office of judge." Enduring judicial fitness is the paramount consideration, and public confidence in each judge and in the judiciary must be maintained.

The Council is to direct its attention to certain general indicators of this disability: age or infirmity, misconduct, failure of "due execution" of the judicial role, and having placed oneself in a position incompatible with the due execution of that office. The Council is given the power to decide whether the inquiry or investigation is held in public or private.

If the publication of any information or documents is considered "not in the public interest", this information will be sealed. The current practice is to keep investigations private and summarize the outcome publicly, usually in the Council's Annual Report. The judges' names are often withheld. The council has expressed a desire for a more visible process, but so far has failed to create one.

The number of complaints filed against judges grows each year. In 1996, there were 200 formal complaints, compared with 44 ten years earlier. Yet, it is important to remember that there are one thousand judges in all, engaged in hundreds of thousands of hearings and decisions each year. Most of these complaints are merely critical of the decision of the judge in the case, filed by persons who have a stake in the outcome, and these protests are quickly dismissed. A Chair or Vice-Chair of the Judicial Conduct

Committee of Council usually examines the complaint. That person can choose to send the matter to a panel of up to five Council members, who may settle the matter there or decide to convene a full inquiry. Only a full inquiry can recommend a judge be removed. Few complaints even get to full Council.

Powers of the Judicial Council

The Constitution and Judges Act refer only to the sanction of removal of a judge. The Constitution suggests that only grounds which relate to inappropriate behaviour can lead to removal. The Judges Act appears to be broader, allowing removal to be recommended if the judge "has become incapacitated or disabled from the due execution of the office of judge" including, presumably, causes unrelated to behaviour. If a permanently disabled judge chose to resign, as most would, full pension would be payable, regardless of the length of service. If the disabled judge wanted to remain on the bench, without being able to perform the job, it is not clear that such a judge could be removed on the grounds of inappropriate "behaviour". In Gratton v. Canada (1994), the court held that not doing the job because of a permanent disability can be a breach of good behaviour, and a reason for removal.

The Council, after investigation, is given power under the Judges Act only to recommend to Parliament removal of a superior court judge. There is some merit in such an axe or nothing approach. A judge who is censured by the governing body may appear wounded while serving as judge in future cases.

Many say the threshold for controlling judges should be a high one, they do not readily fear reprimand or sanction in their work. But, what if the investigation discloses misconduct that is not serious enough to warrant removal, but too problematic to ignore entirely?

The Council has interpreted its mandate to include the power to reprimand judges, in addition to recommend their removal. So in 1995, for example, it publicly "expressed disapproval" of rudeness and inappropriate remarks of four judges, whom it did not identify. That is the most serious practical reprimand it can make. Even then, many judges believe that this creates a judicial chill. They say that they will have to keep their heads down, say nothing that could ever be construed as questionable for fear that they will be sanctioned.

Provincial Judicial Councils have much more room to impose intermediate sanctions, such as warnings, suspensions, orders to apologize, counseling, or fines, in addition to removal, than their federal counterpart. For example, in Manitoba, the Council will be comprised of out-of-province judges who do not feel that they are disciplining their own provincial colleagues. The appearance of outside judges examining the allegations also may be more palatable to the public.

On the other hand, some federal judges believe that too much micro-intervention into their conduct is a dangerous course to follow, and one which is below the dignity of the office. They do not see any crisis of public confidence in the judiciary that warrants changing the processes for disciplining federal judges. They strongly oppose the reforms such as the 40-page Code of Conduct being currently circulated, or more lay scrutiny of applicants and complaints, which would encroach on the decision-making process. More formal controls might impugn even relevant comments made by a judge in a ruling, inhibit some judges from making the sometimes unpopular rulings required, and generally weaken the independence of the judiciary.

Conclusion

Judges are human beings with significant power in society. They are responsible to each of the public, through scrutiny by parties, the press, and academics, to their institution through the self-governing Judicial Councils and appellate review of their work, and to the Constitution which provides a process for their termination by Parliament.

As competent and professional as they are on appointment to the bench, they remain subject to errors in judgment in both the domains of their deliberations in the law and in their extra-judicial behaviour. It is important to distinguish between being troubled by an unfavourable decision, by one which may contain reversible error in law, and by one which calls into question personal judicial conduct. In the first scenario (say you disagreed with a judge's finding you guilty) you may appeal, but if there were no errors of law, a court of appeal may very well refuse to hear your appeal. In the second scenario, where the judgment may contain reversible errors in law, the best recourse will be to appeal the judgments through the appellate structure. This may bring an effective remedy on the merits of the case. In the third scenario, one might complain about the individual judge to a Judicial Council for action in the public interest.

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