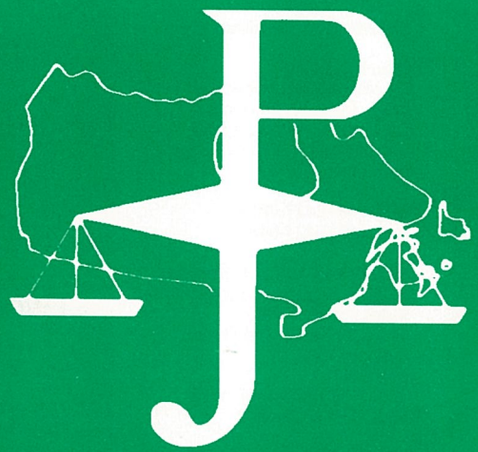

PROVINCIAL JUDGES

Journal

DES JUGES PROVINCIAUX

Volume 19 ~ No. 3 *Fall 1995 Automne*

THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES

The Canadian Association of Provincial Court Judges/ L'Association canadienne des juges des cours provinciales 1994-1995

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NEWS BRIEF / EN BREF

ALBERTA

Retirements/Retraites
Hon. P.R. Broda
Edmonton
effective September 8, 1995
(appointed supernumerary effective October 19, 1995)
Deaths/Mort
Hon. Douglas Foster Fitch
Calgary
Died October 3, 1995

BRITISH COLUMBIA

Appointments/Nominations
Hon. Jane P. Cartwright
Kelowna
effective September 5, 1995
Hon. S. Romilly
appointed to Supreme Court of British Columbia
effective November 3, 1995
Hon. D. Campbell
appointed to Federal Court of Canada (Trial Division)
effective November 29, 1995

NEW BRUNSWICK

Appointments/Nominations
Hon. Steven M. Hutchinson
Campbellton
effective June 9th, 1995
Hon. Jocelyne J. Moreau-Berube
Tracadie
effective June 7th, 1995

NOVA SCOTIA

Retirements/Retraites
Hon. R.E. (Bud) Kimball
Kentville
effective July 1, 1995

PRINCE EDWARD ISLAND

Appointments/Nominations
Hon. R. C. Thompson
Summerside
appointed Chief Judge
effective April 28, 1995

QUEBEC

Appointments/Nominations
Hon. Antonia De Michele
Montréal
effective June 7, 1995
Hon. Armando Aznar
Montréal
effective June 7, 1995
Hon. Louis-Charles Fournier
Chief Judge/juge en chef
effective September 1, 1995
Hon. Rémi Bouchard
Associate Cheif Judge/juge en chef associé
effective September 1, 1995
Hon. Louise Provost
Assitant Chief Judge (Criminal Division)/ juge en chef adjointe
effective September 1, 1995
Hon. Michel Jasmin
Assistant Chief Judge (Youth Division)/ juge en chef adjoint
Hon. Huguette St-Louis
Assistant Chief Judge (Civil Division)/ juge en chef adjointe

SASKATCHEWAN

Appointments/Nominations
Chief Judge Brosi Nutting
effective May 18, 1995
Retirements/Retraites
Chief Judge Patrick Carey *(as chief Judge)*
effective May 18, 1995
Hon. Gerald Fielding
Moose Jaw
effective June 30, 1995

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EDITOR'S NOTEBOOK/REMARQUES DU REDACTEUR

Conference '95 is a wrap! This year it was the New Brunswick judges who threw out the "Welcome" mat to us. Under the capable tutelage of the Honourable Irwin Lampert, they were gracious hosts and lavish and munificent in the hospitality bestowed on the many judges who came to the "Picture Province" from the disparate parts of this country. This was my third National Conference. More than two decades of practice has established a familiar, but effective, format which was much in evidence in Moncton. I refer, of course, to the discreet balance that is maintained between education, business and "fun", all of which, in their own right, foster a healthy and sustaining camaraderie amongst the members of our Bench, from coast to coast.

As to the first of this triumvirate: Thursday and Friday were given over to presentations by speakers and panel discussions. We heard from Michael Enright, host of CBC's "As It Happens", who told us what he thought would be "The Role of the Judge in the 21st Century". We were treated to an active discussion by a panel comprised of Costas Haleveros (host of "Maritime Noon"- CBC, Halifax), Mark Pederson (CBC TV - Fredericton), and Thomas Cromwell (Dalhousie Law School). Their timely topic was "Public Appearances &

La conférence 1995 vient de s'achever. Cette année, ce sont les juges du Nouveau-Brunswick qui nous ont cordialement reçus. En effet, sous l'habile direction de l'honorable juge Irwin Lampert, ils furent les hôtes des nombreux juges venus des quatre coins du pays dans cette magnifique province où nous avons tous pu goûter à leur sens inné de l'hospitalité, le tout arrosé d'une généreuse dose de prévenance. Pour ma part, il s'agissait de la troisième conférence nationale de notre association à laquelle j'assistais. La formule de la conférence, forte de deux décennies de rodage s'est révélée, à Moncton, aussi rassurante par sa familiarité qu'efficace dans sa facture. Je parle bien sûr du dosage subtil que l'on y retrouvait entre les séances de formation professionnelle, la vacation aux affaires de l'Association et les loisirs, trois éléments qui, par leur essence même, suscitent une saine et vivifiante camaraderie entre les membres de la magistrature dont nous sommes, d'un océan à l'autre.

Quant au premier volet de cette trilogie, nous avons consacré le jeudi et le vendredi aux prestations des conférenciers suivies de discussions en table ronde. Nous avons d'abord entendu le propos éclairé de monsieur Michael Enright, présentateur de l'émission «As It Happens», une émission d'information radiophonique du réseau CBC, lequel nous a livré sa vision du rôle du juge au 21e siècle. Il s'ensuivit un débat animé en table ronde, entre Costas Haleveros (animateur de l'émission «Maritime Noon» - CBC, Halifax), Mark Pederson (CBC TV - Frédéricton), et Thomas Cromwell (École de droit de Dalhousie). Le thème de la discussion était brûlant d'actualité : *Public Appearances & Me-*

CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES
BALANCE SHEET - MARCH 31, 1995

	1995
ASSETS	
Current:	
Cash	119,850
Accounts receivable	27,765
Prepaid expenses (Note 2)	24,199
	171,814
LIABILITIES	
Current:	
Accounts payable and accrued liabilities	1,605
CAPITAL	
Capital, beginning of year	156,713
Excess of revenue over expenses	13,496
Prior year adjustment	--
Capital, end of year	170,209
	171,814

In our judgment of human transactions, the law of optics is reversed; we see the most indistinctly the objects which are close around us. *Whately.*

CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES
STATEMENT OF REVENUE AND EXPENSES
YEAR ENDED MARCH 31, 1995

	1995 $
REVENUE:	
Grants - federal	90,860
- provincial	32,795
Membership dues	82,663
Annual conference surplus	-
Judicial Independence Trust Fund	3,200
Interest income	642
	210,160
EXPENSES:	
Accounting	1,805
Bank charges	115
Bilingualism Committee	3,017
Canadian Bar Liaison	6,212
C.M.J.A.	1,699
Civil Courts	3,351
Compensation Committee	1,159
Annual Conference	40,572
Constitution Committee	1,687
New judges training	25,876
Atlantic Regional Seminar	5,807
Western Judicial Education Centre	9,946
Education	4,248
Executive Director	11,009
Executive Meeting	20,585
Family and Youth Court Committee	1,636
Journal	15,044
Judicial Independence Committee	37,878
Committee on law	2,849
Long range planning	1,375
President and Vice-President	11,885
Unification	1,305
GST rebate	(12,396)
	196,664
EXCESS OF REVENUE OVER EXPENSES	13,496

Media Comments - Is There Ever a Time to Speak Out?".

In a similar vein was an enlightening (and entertaining) speech by Mr. Justice John Sopinka, of the Supreme Court of Canada, entitled "The Judge's Role in the Community - Must a Judge be a Monk?". Professor Martin Friedland came by to tell us his views about "Judicial Independence and Accountability".

We were told by Juge Jean-Louis Brugiere of Paris, France, about his role as the chief investigator of the terrorism movements in his country. Keeping up to date on the developments in the law is of much concern to all of us and several senior counsel from New Brunswick, including Fred Ferguson, Gary Miller, James Letcher and Jack Walsh took us through an "Irreverent Review of Recent Developments in the Law of Evidence".

You may be saying: how was there time for "fun", or business even, with such a full educational component? But entertained we were, with barbecues, boat rides, train rides, golf, the internationally known Characters Inc., and a banquet with dancing into the wee hours of Sunday morning.

The highlight of the social events was an authentic Acadian Soiree at the Cocagne Marina. Billed as "a trip back in time, featuring an Acadian banquet with food, dance and song, from the turn of the century", it

dia Comments - Is There Ever a Time to Speak Out? ([*Traduction*] : «Les allocutions en public et les commentaires des médias - Les juges ont-ils vraiment le droit de s'exprimer en public?»).

L'allocution de l'honorable juge John Sopinka, de la Cour suprême du Canada, intitulée *The Judge's Role in the Community - Must a Judge be a Monk* ([*Traduction*] : «Le juge et sa place au sein de la collectivité : Faut-il vivre une existence cloîtrée?») s'inscrivait dans la même veine. Aussi le professeur Martin Friedland nous a livré ses commentaires sur l'indépendance judiciaire lors de son allocution *Judicial Independence and Accountability.*

Le juge Jean-Louis Brugière nous est venu de Paris afin de nous entretenir de son rôle à titre d'enquêteur-chef sur les mouvements terroristes en France. Par ailleurs, l'évolution de la jurisprudence étant d'un vif intérêt pour chacun de nous, nous avons eu droit à un exposé fort à propos, intitulé *Irreverent Review of Recent Developments in the Law of Evidence*, présenté par des procureurs chevronnés du Nouveau-Brunswick, dont M^e^ Fred Ferguson, M^e^ Gary Miller, M^e^ James Letcher et M^e^ Jack Walsh.

Vous devez vous demander comment nous avons pu trouver le temps de nous amuser, ou même de vaquer aux affaires de l'Association, avec un horaire de formation professionnelle aussi chargé? Qu'à cela ne tienne : le tout fut agrémenté de *barbecues*, d'excursions en bateau et en train, de parties de golf, d'une représentation par la troupe de réputation internationale Characters Inc., et enfin d'un banquet où la danse était à l'honneur jusqu'aux petites heures du dimanche matin.

Le clou des activités sociales fut certes l'authentique *Soirée acadienne*, à la marina Cocagne. L'on nous promettait «un voyage dans l'histoire, marqué par un banquet acadien mettant à l'honneur la cuisine, la

did not disappoint! As I sat through the evening, feasting and feting, I **was** transported back in time and immersed in the rich, cultural heritage of "l'Acadie", this proud and suitably defiant people who make their homes along the East and Northeast coasts of the province. I saw and felt many parallels to the music, lives and social practices of my own native province.

The Annual Meeting took place on Saturday morning. Amongst other things we elected a new President, the Honourable James G. McNamee from St. John, New Brunswick, and a new Assistant Executive Director, the Honourable Irwin Lampert, of Moncton. Otherwise, there were meetings of Provincial Representatives every morning for breakfast and countless other committees taking advantage of the opportunity to be together for an hour or two.

As you can see from the above, there were many matters of interest to us addressed at the Conference. For my part I have endeavoured to capture them in a topical context. I propose to develop these topics more fully in succeeding editions of the Journal.

For the present edition my emphasis will be on the subject of the judiciary and the media. I must confess a small measure of anxiety in raising this issue. I have reflected on the source of my anxiety in treating of the media, especially since I, in my role as Editor, address you through a "medium".

danse et la chanson du début du siècle», et nous ne sommes pas restés sur notre appétit! Effectivement, en participant aux agapes tout au long de la soirée, je fus **réellement** transporté dans le passé et immergé dans la riche tradition culturelle de l'Acadie, cette région côtière de l'est et du nord-est de la province dans laquelle s'est enraciné ce peuple fier et digne à juste titre. J'ai constaté et ressenti les nombreuses similitudes entre la musique, l'existence et les pratiques sociales de ces gens et celles ayant également déjà eu cours dans ma province natale.

L'assemblée annuelle a été tenue le samedi matin. L'on y a notamment procédé à l'élection d'un nouveau président, l'honorable James G. McNamee, de St-Jean, Nouveau-Brunswick, ainsi que du nouveau directeur général adjoint, l'honorable Irwin Lampert, de Moncton. Il y eut par ailleurs des rencontres des représentants provinciaux tous les matins au petit déjeuner, ainsi que de nombreuses autres rencontres des membres des divers comités, ceux-ci profitant de l'occasion de pouvoir se rencontrer pendant une heure ou deux.

Comme vous pouvez voir à la lecture de ce qui précède, de nombreux sujets qui nous intéressent tous ont été abordés durant la conférence. J'ai tenté d'en faire ici la synthèse selon une méthode thématique. D'ailleurs, je me propose d'élaborer davantage ces thèmes au cours des prochains numéros du *Journal*.

Dans le présent numéro, je mets l'accent sur le thème de la magistrature et des médias. Je vous avoue que ce sujet n'est pas sans susciter chez moi une certaine anxiété. J'ai tenté de cerner la source de mon anxiété en abordant ce sujet, surtout étant donné ma fonction de rédacteur du *Journal*, m'adressant donc à vous par l'intermédiaire de ce *médium*.

Lorsque j'ai été appelé, par le passé, à

Compensation Committee - Highlights of the Report to the 1995 C.A.P.C.J. Annual Convention September 12-17, 1995, Moncton, NB

The past year started with some hope and excitement, especially in British Columbia where our colleagues were anticipating the creation of their Judicial Compensation Committee. The Committee sat, heard representations from all interested parties, and made significant recommendations, all within the time frame provided for in the enabling legislation. The recommendations were terminated by the B.C. legislature, and all compensation was frozen at existing (1993) levels.

For the most part compensation was frozen in all jurisdictions:

Alberta judges suffered through a year of escalating legal costs caused by two legal actions with the criminal on the way to the Supreme Court of Canada. All compensation in Alberta has been frozen since 1991.

Saskatchewan reported an amendment of the compulsory retirement at age 65 provision to provide for service to age 70 by way of successive 1 year service contracts approved by the Chief Judge.

Manitoba's news was positive: they received a salary increase to $94,017.00. (*actually this restores the salary to before the 3.8% salary rollback of April 1, 1993)*

The judges in Ontario are awaiting the creation of the 2nd edition of *The Triennial Provincial Judges Remuneration Commission* and the beginning of hearings later this year.

Quebec judges, to date, have avoided any salary reductions while they wait for the implementation of the recommendations of the Triennial Committee on Compensation.

New Brunswick Supernumerary Judges took a substantial "hit" when informed that they would now be paid 1/251 of their salary for each day worked instead of the regular salary. Legal action has commenced.

Both Nova Scotia and Prince Edward Island report no significant change in compensation.

In Newfoundland the Whalen Report on "reclassification" of judges has been tabled in the legislature and delivered to the Chief Judge but to date puisne judges in Newfoundland have yet to see the results. The government reports that these recommendations will be considered this fall.

Both the Yukon and Northwest Territories reported significant pension improvements, especially in the manner the pension "CAP" is treated.

17. **Canadian Bar Association:**

- a Canadian Judges Forum has been created within the Association.
- the continued liaison with the CBA has positive implications.

18. **History:**

- an archive is needed.
- there should be a History Committee for each jurisdiction.

19. **Commonwealth Magistrates and Judges Association:**

- legal literature still being sent to Commonwealth colleagues.

20. **Chief Judges Liaison:**

- Thomson, J., President, President-elect, and Chair of the Provincial Representatives caucus met with the Chief Judges.

21. **Assistant Executive Director:**

- Judge Irwin Lampert was elected.

22. **Other Matters:**

- Conference'99 may be held in the Yukon (more after April Meeting).

In a Literary Vein

We are social animals, and so we gather in communities for convenience and for companionship. In doing so we sacrifice independence and assume the little irritants that living as a group necessarily entails. It is a trade off, and it requires give and take. While there is a limit to the extent of that give and take, and society has developed a set of rules governing it, most problems between neighbors must be dealt with outside of the justice system. There simply are not the public resources to enable courts to resolve every dispute between neighbors.

Excerpted from **Beke v. Zanni**, a decision of the Honourable R. Moxley, Provincial Court of Saskatchewan, Nov. 1993.

In the past when I have been confronted with calls for more openness to the media, be it print or electronic journalism, I have swung from one extreme which says there should be no contact to the other which says there should be unrestrained access. I recognize that neither view is particularly healthy when dealing with the issue and that it is at the middle of the spectrum where I most likely will find the best repose.

I have to confess the real reason for my ambivalence in dealing with the topic: It is only with the greatest reluctance, do I cede control of my agenda to anyone, especially the media. Whether this is a endemic to the judiciary or a personal disposition I know not.

My experiences at Moncton have left me with a number of convictions:

1. The issue of access by and to the media is not going away.

2. The judiciary is a public institution and the public is demanding, and will continue to demand, more accessability.

3. Journalists are, by and large, a laudable group who are legitimately interested in the issues before us in our daily work.

4. Providing greater access does not automatically equate to losing "control".

me prononcer sur l'opportunité d'une plus grande ouverture de la part de la magistrature à l'égard des médias, qu'il s'agisse de la presse électronique ou écrite, j'ai adopté soit une position extrême, voulant qu'il n'y ait aucun contact entre les deux, à l'autre extrême voulant qu'on leur accorde un accès sans restriction aucune. Je me dois de reconnaître qu'aucune de ces perspectives ne m'apparaît salutaire lorsque l'on aborde ce sujet, et que c'est vers le centre de cette gamme que je me sentirais probablement le plus à l'aise.

Je dois vous avouer ici la vraie raison de mon ambivalence à ce sujet : ce n'est qu'avec la plus grande réticence que je cède la maîtrise de mon agenda à quiconque, surtout aux médias. Je ne sais pas s'il s'agit là d'un trait caractéristique de la magistrature en général, ou plutôt d'une disposition purement personnelle.

Toutefois, l'expérience vécue à Moncton m'a laissé certaines impressions indélébiles :

1. La question de l'accès des médias et aux médias est là pour rester.

2. La magistrature est une institution du domaine public, et le public exige, et continuera d'exiger, un plus large accès à nos interventions.

3. Règle générale, les journalistes constituent un groupe fort louable, et leur intérêt est légitime à l'égard des questions dont nous avons quotidiennement à décider.

4. Le fait d'accorder un plus grand accès à nos activités professionnelles ne signifie pas automatiquement que nous en cédons la maîtrise.

Vous retrouverez ci-après le texte des

I have reprinted presentations by Costas Haleveros and Thomas Cromwell, each of whom promotes the fostering of "relationships" between Bench and media, offering, by varying measures, the philosophical and practical underpinnings for the same. I have also included the speech given by Mr. Justice Sopinka to the Annual Meeting. You will see by the latter that the learned justice, who is thought of as "the most outspoken of all Canadian judges", has adopted "nuts and bolts" guidelines which share with, but do not cede control of, the "relationship" with the media. Aside from this, Mr. Justice Sopinka explores other "public" aspects of our lives. There is much sound advice for all of us in these carefully chosen words.

conférences données par messieurs Costas Haleveros et Thomas Cromwell, ils favorisent tous les deux la nécessité de cultiver des «relations» entre la magistrature et les médias, chacun nous offrant son point de vue tant sur les considérations philosophiques que pratiques militant en ce sens. Vous pourrez également prendre connaissance de la teneur de l'allocution de l'honorable juge Sopinka devant les membres réunis en assemblée annuelle. Vous serez donc en mesure de constater que ce savant juge, dont il est dit qu'il «est le juge le plus porté à se prononcer publiquement parmi tous les juges canadiens», a adopté une méthode très «pratico pratique» permettant de partager, sans cependant en céder la maîtrise, une «relation» avec les médias. Le juge Sopinka nous livre également ses commentaires sur d'autres aspects «publics» de la profession. Nous pourrons tous tirer profit des conseils judicieux qu'il nous livre en pesant bien ses mots.

Until the next time .....

À la prochaine...

Get your facts first, and then you can distort 'em as you please. *Mark Twain*

It is with our judgments as with our watches; no two go just alike, yet each believes his own. *Pope*

8. **Court Reform:**

   - Chrumka, J. reported that he had corresponded with the Federal Minister of Justice re: disparites between our Bench and the Section 96 judges and the unification of trial courts.

9. **Compensation:**

   - MacDonald, J. filed his 1995 Survey (highlights provided within).

10. **Bilingualism:**

    - Legault and Kirkland, Js. reported efforts at funding for second language training for our judges.
    - stressed having Reports translated before Conference.
    - noted that the Journal is continuing to improve in this respect.

11. **Family and Youth Courts:**
    - Kirkland, J. reported constant contact with Federal authorities re: changes to the YOA and support payments.
    - continue to note initiatives resulting from the YOA Symposium '93.

12. **Civil Courts:**

    - Threlfall, J. reported that the B.C. Small Claims Court will be made court of record in 1996 with an expected $25,000 jurisdiction.

13. **Conference '96:**

    - will be held at Coast Inn, Stanley Park, Vancouver Sept.18-21, 1996, with the Executive Committee meeting Sept. 17 & 18.

14. **Judicial Independence:**

    - McGowan, J. reported extensively on the Friedland Report, despite it only being received recently by her.
    - Committee will reply by January 31, 1996, employing Professor Schmeiser to assist.

15. **Committee on the Law:**

    - Kennedy, J. filed a comprehensive report on Bill C-42.
    - expressed concerns about the "downloading" of jurisdiction.

16. **Professional Responsibility:**

    - work continues on the development of a Code of Judicial Ethics.

HIGHLIGHTS OF THE REPORTS - THE ANNUAL CONFERENCE '95

1. **The President:**

   - attended all Annual Conferences during 1994-95, except in PEI, NB and the Territories.
   - met with the Federal Minister of Justice in October, 1994.
   - was in touch with the issue of Judicial Independence and abreast of all court proceedings currently ongoing.
   - encouraged a working relationship with the CBA and attended the Annual Meeting in Winnipeg in August, 1995.
   - supported the concept of court unification.

2. **The Treasurer:**

   - next year government grants will be less than $50,000, compared to the $100,000 we were receiving in 1990.
   - proposed an increase in membership dues.

3. **The Past President:**

   - we should stick to our own agenda, and be guided by the CAPCJ Constitution and the Long Range Plan, and not be distracted.

4. **Provincial Representatives:**

   - BC, Alta, NS, NB and the NWT filed written reports.
   - most reports, oral or written, discussed the prevailing incursions being made in the provinces on salaries and benefits.

5. **Canadian Judicial College:**

   - needs to focus on curriculum development.
   - training of European judges is progressing.
   - Fowler, J. travelled to Malawi on behalf of the CAPCJ and the CJEI.
   - the Atlantic Regional Conference held May, 1995 featured an "innovative and provocative" program.

6. **New Judges' Training Program:**

   - Babin, J. reported 54 judges attended the program in April, 1995.

7. **National Judicial Institute:**

   - McNamee, J. reported that funding continues to be problematic.
   - Hansen, J. stated that the NJI is re-focusing on its role as a disseminator of resources.
   - unlikely that the Intensive Study Program will be continued.

MUST A JUDGE BE A MONK - REVISITED
FAUT-IL VIVRE UNE EXISTENCE CLOÎTRÉE - VERSION REVUE ET CORRIGÉE

by The Honourable John Sopinka/par l'honorable juge John Sopinka

It is now almost 7 years since I first gave this speech. It has been discussed and debated and referred to in at least one decision of the Judicial Conduct Committee of the Canadian Judicial Council. I have been described by some as "the most outspoken of all Canadian judges". Since giving that speech I have continued to conduct myself in accordance with what I concluded were the restraints on judicial activity. Based on that experience and that of other judges, it is time to revisit the topic.

I gave that speech at the time of my appointment because during my 28 years at the bar I had observed a remarkable variation in views of judges as to their freedom of action. Some had withdrawn completely from society. They would not be seen in a public place such as a bar, would not speak in public and even refrained from socializing with counsel. Often these same judges would complain about the difficulty of adjusting to this monastic lifestyle. On the other hand, other judges behaved more or less like ordinary citizens. In particular, they accepted some public speaking engagements and even appeared to be interviewed on television.

I decided to look into the legal restraints which permitted this disparity. I discovered

Il y a de ça déjà près de sept ans que j'ai prononcé cette allocution. Elle fut d'ailleurs l'objet de débats, discussions, et l'on y a référé dans au moins une décision du comité disciplinaire du Conseil canadien de la magistrature. Certains m'ont décrit comme étant le juge «le plus porté à se prononcer publiquement parmi tous les juges canadiens». Depuis cette époque, j'ai continué à me comporter conformément aux balises des activités judiciaires que ma réflexion m'avait alors amené à poser. Fort de cette expérience et de celle vécue par d'autres juges, l'occasion me semble propice à un réexamen de cette épineuse question.

J'avais prononcé cette allocution au moment de ma nomination car j'avais constaté, durant mes 28 ans de pratique comme avocat, qu'il existait parmi les juges tout un éventail d'opinions quant à leur liberté d'action. Par exemple, certains d'entre eux s'étaient complètement retirés de la société. Ils se tenaient loin des endroits publics comme les bars, n'osaient pas parler en public et allaient même jusqu'à ne pas fréquenter les avocats. Par ailleurs, ce sont ces mêmes juges qui se plaignaient des difficultés qu'ils avaient à s'ajuster à ce type de vie monastique. Il y avait par ailleurs d'autres juges qui se comportaient plus ou moins à la façon d'un citoyen ordinaire. Notamment, il pouvait leur arriver de prononcer une allocution devant un grand public et même d'accorder des entrevues à la télévision.

J'ai donc décidé de me pencher sur les contraintes juridiques pouvant justifier une telle disparité. Or, j'ai découvert qu'en réalité il n'y en avait aucune et qu'en fait,

that there were, in reality, no legal restraints and that various so-called rules were based on the opinion of individual judges which varied with the particular school to which the judge belonged. The old school adhered to the maxim that a judge should speak only in reasons for judgment. The more modern school admitted of no such restriction. The Canadian Judicial Council had not clarified matters. It is, of course, limited by the fact that its only statutory power of a disciplinary nature under ss. 63-65 of the *Judges Act* is a recommendation of removal. No such recommendation has ever been made based on public utterances of a judge. I will mention four complaints with which the Canadian Judicial council has dealt:

(1) Bertha Wilson, while a member of the Supreme Court of Canada, spoke at Osgoode Hall concerning gender bias of the criminal law;

(2) Beverley McLachlin, a Supreme Court of Canada justice,spoke to the Elizabeth Fry Society about crime and women;

(3) Thomas Berger, while a judge of the British Columbia Court, publicly criticized the First Ministers for abandoning the rights of aboriginals during the 1981 constitutional negotiations;

(4) And more recently, Justice Jean-Claude Angers, formerly of the New Brunswick Court of Appeal, wrote an open letter to the Prime Minister criticizing the Government's proposed gun-control legislation.

les soi-disant règles que l'on pouvait invoquer étaient plutôt fondées sur l'opinion personnelle de chacun des juges, laquelle pouvait varier selon qu'ils appartenaient à une école de pensée plutôt qu'à une autre. Selon les adeptes de l'ancienne école, un juge ne devait s'exprimer qu'au moment de rendre jugement. Les tenants de l'école plus moderne ne pouvaient admettre une telle contrainte. Par ailleurs, le Conseil canadien de la magistrature n'a pas vraiment tiré cette situation au clair. Il est vrai que l'action du Conseil est limitée par le seul pouvoir que la loi lui confère au niveau des sanctions disciplinaires, aux termes des articles 63 à 65 de la *Loi sur les juges*, c'est-à-dire celui de recommander la révocation de l'individu en cause. Aucune recommandation de cette nature n'a jamais été faite à la suite de déclarations publiques faites par un juge. Je vous mentionnerai ici quatre plaintes dont le Conseil canadien de la magistrature a été saisi :

(1) Bertha Wilson, alors qu'elle siégeait à la Cour suprême du Canada, a prononcé un discours à Osgoode Hall sur la discrimination faite aux femmes dans le cadre du droit pénal;

(2) Beverley McLachlin, juge à la Cour suprême du Canada, s'est adressée à la Société Elizabeth Fry sur la criminalité et les femmes qui en sont victimes;

(3) Thomas Berger, alors qu'il siégeait à la Cour de la Colombie-Britannique, a publiquement critiqué les premiers ministres pour avoir fait fi des droits des Autochtones à l'occasion des négociations constitutionnelles de 1981;

(4) Plus récemment, le juge Jean-Claude Angers, qui siégeait

be posing a telling question to counsel from a chair that, on the screen, looked to be quite empty. That being said, we at the Court are very pleased with the results of this initiative, which provides members of the public with coverage of the Court's proceedings that is both complete and accurate. It is, in effect, the next best thing to being there.

I come now to the third and last of these initiatives. This one will be of special interest to Members of Council, because it implicates in a very direct way the C.B.A. In fact, the impetus for this initiative has come from your organization. It involves the creation of what is being called "The Supreme Court Decision Response Team" made up of various members of the Bar chosen for their expertise in particular fields of law. The idea is that the newswire announcement that particular decisions are going to be rendered by the Court, brief summaries of the cases, and, on the day that the decisions are released, the full text, will all be made available to members of the Response Team through the Internet. The members of the Response Team, whose names would be provided to the media, would then be available to the media for comment on the decisions that fall within their particular area of expertise.

I understand that the Court's contribution to this initiative is now in place, and that you Association is making good progress in putting together the Response Team. There appears to be considerable enthusiasm for this initiative on the part of several of the journalists covering the Court and they, like I, are looking forward to its implementation.

Before moving on ... I should mention that for three years now, we have made it a practice in all cases to turn on the cameras and sound installed for hearing parties attending the studios throughout the country. The cassettes of all hearings are sent to the National Archives and are becoming part of our heritage for future generations. Also, a matter possibly of interest to those involved in didactical activities, a copy of these is available to anyone at cost upon request.

be rendering on a particular Thursday is now sent out by the Court on the newswire service on the preceding Friday. This not only alerts the media to the fact that particular cases are about to be decided, but also gives them the opportunity to inform themselves about the cases, their factual underpinnings, the legal issues to which they give rise, the history of the cases prior to their arriving at the Supreme Court of Canada, the broader significance of the cases, and anything else that they consider to be germane to their understanding of them. The Executive Legal Officer, currently Professor Robin Elliot, is available to the media to assist them in developing their understanding of the cases, and it is an unusual judgment week in which at least some representatives of the media do not avail themselves of this service.

At 9:15 a.m. on Thursday morning, the Executive Legal Officer goes down to the Press Room in the Courthouse to meet with the media, provide them with a background synopsis of each of the cases being decided, and answer questions about the cases. Then, at 9:45 a.m. precisely, the judgments are wheeled in on a trolley and the Executive Legal Officer proceeds to summarize the holdings in each of the cases, the divisions, if any, on the various issues raised, the main components of the reasons, at least in the majority judgment, and indicates to whom the case is important, and why. The Executive Legal Officer is also available throughout the remainder of that day and thereafter, to field questions from the media relating to these judgments.

It should be noted that all of the background and other information relating to the cases is provided by the Executive Legal Officer to the media for their information only and not for attribution. This not only serves to protect the Court - not to mention the Executive Legal Officer - from potential embarrassment - it also serves to emphasize that it is the information itself that is important, not the person providing it.

It should also be noted that the Supreme Court of Canada is now not the only Court in this country that provides assistance to the media in their reporting of judgments. The success that we have had has led to several other courts doing so, including the superior courts of this province. Generally, such assistance is provided by a staff person equivalent to our Court's Executive Legal Officer. In British Columbia, it is provided by a retired judge.

The second initiative, the one that I described as being at the stage of a pilot project, involves CPAC, the Cable Parliamentary Channel based in Ottawa. Following what for CPAC was considered to be a very successful broadcast of the hearing in the ***Rodriguez*** case held in May, 1993, they approached us to see if we would be willing to permit them to broadcast additional hearings. An agreement has now been worked out pursuant to which they have been given permission to do so. And, in fact, they have already broadcast the hearings in six cases, some more than once. These broadcasts, I should note, are in both official languages.

Those of you who have had occasion to watch any of CPAC's broadcasts of hearings at the Supreme Court of Canada will know that they occasionally leave something to be desired in a technical sense. In one broadcast I saw recently, Mr. Justice Major, part of a seven person coram, appeared to

Complaints (1) and (2) were dismissed, the latter with a commendation for speaking out. Although disapproval was expressed with respect to Berger and Angers, the Canadian Judicial Council expressly refrained from recommending removal, the only disciplinary action available. In respect of Berger, the Council expressed an opinion that judges "should avoid taking part in controversial political discussion except only in respect of matters that directly affect the operation of courts". In Angers, the Chairman of the panel, speaking for the panel, acknowledged that while "the great majority of Canadian judges, and indeed most members of the public, do not believe that it is proper or appropriate for Canadian judges to make partisan, controversial out-of-court statements...", there exists a "possible exception with relation to matters which might affect the proper administration of justice". He quotes Professor Jeremy Webber with apparent approval as follows:

> **The line is crossed, I believe, when the judge identifies himself closely with a particular faction in the legislature or executive, or when he lobbies consistently and forcefully for a specific political goal -- in short, when his activities become partisan in nature. When this occurs, many of the considerations which lead the legislature or the executive to pay insufficient attention to individual interests begin to operate on the judge. If he joins the day-to-day struggle for a particular policy outcome, he may increasingly be**

auparavant à la Cour d'appel du Nouveau-Brunswick, a écrit une lettre ouverte au Premier Ministre critiquant le projet de loi gouvernemental en matière de contrôle des armes à feu.

Les plaintes (1) et (2) ont été rejetées et d'ailleurs cette dernière fut rejetée avec mention honorable pour avoir pris position publiquement sur le sujet en cause. D'autre part, tout en désapprouvant le comportement des juges Berger et Angers, le Conseil canadien de la magistrature a expressément évité de recommander leur révocation, soit la seule sanction disciplinaire qu'il leur était permis d'imposer. Quant à l'affaire Berger, le Conseil a émis l'opinion que les juges [*Traduction*] «devraient éviter de participer à des débats de nature politique sur des sujets controversés, à moins qu'il ne s'agisse d'une question touchant directement le fonctionnement des tribunaux». Dans l'affaire Angers, le président du comité formé pour entendre la plainte a affirmé, au nom de ce comité, que [*Traduction*] «bien que la grande majorité des juges canadiens, comme d'ailleurs la plupart de leurs concitoyens, ne croient pas qu'il soit convenable ni approprié que les juges canadiens fassent des déclarations hors de l'enceinte du tribunal, de nature partisane sur des sujets controversés..., il pourrait y avoir exception lorsqu'il s'agit d'une question pouvant affecter la bonne administration de la justice». Il cite, semble-t-il avec approbation, le professeur Jeremy Webber, comme suit :

> [*Traduction*] **Je crois que l'on dépasse les bornes lorsque le juge s'identifie étroitement à une faction particulière au sein de l'assemblée législative ou du pouvoir exécutif, ou encore lorsqu'un juge mène un *lobby* d'une manière persistante et vigoureuse, à l'appui d'un objectif politique spécifique -- bref, lorsque ses activités deviennent de nature partisane. Dans un tel cas, plusieurs considérations ayant pu porter l'assemblée législative ou le pouvoir**

tempted to decide matters solely on the basis of whether they conduce to that end, taking insufficient account of other interests involved in the decision. And in order to muster popular support for the desired policy or party, the judge may, in his adjudication of controversial disputes, be eager to appease public opinion.

On April 11, 1992, an article appeared in **La Presse** entitled "Des juges plus loquaces" by Yves Boisvert, in which he points out that judges are speaking out publicly more often and are redefining the traditional notions of restraint. HE then quotes Chief Justice Lamer:

> **"Peut-être bien qu'il y a un lien avec la Charte", répond Antonio Lamer, qui, malgré une charge de travail titanesque, est sans doute le juge en chef le plus disponible de l'histoire de la Cour Suprême.**

In the absence of any legal restriction, or indeed well-defined guidelines, judges must determine for themselves what is appropriate. Surely judges who daily make decisions affecting the lives of others can be trusted to determine this matter for themselves.

While there are no actual rules, there are consequences and a price to be paid for speaking out. Here are some of them:

(1) a challenge of impartiality may require the judge to rescue himself or herself;

exécutif à ne pas porter une attention suffisante à certains intérêts spécifiques commencent à leur tour à avoir un effet sur le juge. Ainsi, s'il ou elle se joint à la lutte quotidienne en faveur d'un dénouement particulier au niveau des énoncés de politique, ce même juge pourrait être de plus en plus porté à rendre jugement uniquement en fonction de leur effet sur le dénouement souhaité, ne tenant alors plus suffisamment compte dans son jugement des autres intérêts en cause. En outre, afin de mousser l'appui de la population en faveur de la politique ou du partie qu'il ou elle favorise, le juge pourrait être porté, en tranchant à l'occasion de litiges portant sur des sujets faisant l'objet de controverse, d'apaiser l'opinion publique.

Le 11 avril 1992, un article signé par Yves Boisvert fut publié dans le journal La Presse, intitulé «Des juges plus loquaces», dans lequel l'auteur de l'article en question souligne que les juges se prononcent de plus en plus sur la place publique et sont en train de redéfinir les principes traditionnels du devoir de réserve des juges. L'auteur cite notamment le juge en chef Lamer :

> **«Peut-être bien qu'il y a un lien avec la Charte«, répond Antonio Lamer, qui, malgré une charge de travail titanesque, est sans doute le juge en chef le plus disponible de l'histoire de la Cour suprême.**

En l'absence de toute contrainte juridique, ou encore de directives clairement définies à cet égard, il revient donc à chaque juge de déterminer la ligne de conduite qui leur semble la plus appropriée. Assurément, puisque les juges prennent quotidiennement des décisions affectant l'existence de tous et chacun, l'on devrait pouvoir leur faire confiance lorsqu'il s'agit de leur laisser la possibilité de décider d'une telle question à leur propre égard.

S'il n'existe aucune règle régissant

Remarks by The Rt. Hon. Antonio Lamer, P.C.
Chief Justice of Canada
Canadian Bar Association Annual Meeting
Winnipeg, Manitoba
August 19, 1995

As those of you who are familiar with the Court's work in the area of the ***Charter*** will know, the Court has had occasion in several of its recent judgments to confirm the importance, in a society committed to democracy, the rule of law and individual rights, of ensuring that the work of the judiciary is open to scrutiny by the public and by its surrogate, the media.

Direct scrutiny by the public is, of course, difficult. Few members of the public are in the position to attend court in person. Most public scrutiny of judicial proceedings, like most public scrutiny of the work of the other branches of government, must, therefore, come through the filter of the media. However, there are risks associated with reliance upon the media in the furtherance of the goal of public scrutiny. Such scrutiny, if it is to fulfil a useful and constructive purpose, should be based on both accurate information regarding proceedings in the courts and informed and thoughtful commentary on the manner in which those proceedings are handled by the judiciary. To the extent that the media, in covering the courts, fall short of providing the public with such information and such commentary, public scrutiny of the courts is both less reliable and less valuable.

Regrettably, there is nothing that the courts themselves can do to guarantee fair and accurate coverage of their proceedings by the media. However, there is, I believe, a good deal that they can do to promote such coverage. I want to describe three initiatives on which the Supreme Court of Canada is now embarked that are designed to assist the media in performing their role as filter to the public in matters relating to the judicial branch. One of these initiatives has been under way for some years, another is in the pilot project stage and the third is still in the planning stage.

Several years ago, during the tenure of Chief Justice Dickson, the practice developed of having the Court's Executive Legal Officer function in effect as a media officer for the Court. In that capacity, the Executive Legal Officer performs a number of functions in relation to the media. Most of these functions have tended to be reactive in nature, in the sense that the Executive Legal Officer's involvement comes in response to inquiries or requests from the media. Recently, however, the Executive Legal Officer has taken on a pro-active role in what, for the Court, is considered to be a particularly important sphere.

As you know, except in very unusual circumstances, the Court renders it judgments at 9:45 a.m. on Thursday mornings, a time that, by the way, was chosen as a result of discussions with the different media. Notice of which judgments the Court will

is good for Mr. Justice Sopinka, why is it not good for other judges? Or does Judge MacEachern approve of the Sopinka comments merely because he agrees with them?

Judge MacEachern's second caveat was that "judges would be seen to be making inconsistent or contradictory statements. And that would not be healthy".

It sounds as if Judge MacEachern is afraid that judges might be seen to exhibit human characteristics.

Of course public statements by "a large number of judges" would be inconsistent or contradictory. Public statements by a large number of any class -- historians or butchers or music teachers -- would be inconsistent or contradictory. But simply because large numbers of judges don't make public statements, are we to believe they don't hold opinions that are inconsistent or contradictory? Hardly.

If judges didn't hold opinions that are inconsistent or contradictory, our appeal court judges would feel like the Maytag repairman.

I'm sure that many of you knew the late Percy Brian of the New Brunswick Provincial court. On the occasion of his retirement in 1983 -- one of those rare occasions when judges speak outside of court -- he commented on the importance of judges having the latitude to assess each case individually, but also of the importance of assessing each case with compassion.

So far, the Canadian legal system allows you to proceed by Justice Brian's simple but profound guidelines. It seems to recognize that you're a heterogeneous lot, and it allows room for subjectivity: there are maximum sentences in Canada, which accommodate both lenient and harsh interpreters of the law, as well as both hapless and hardened lawbreakers. This is quite different from certain jurisdictions in the United States, where mandatory minimum sentencing has dehumanised judges.

In his comments 12 years ago, Judge Brian foresaw the threat of what has since come to pass in the States: a system in which it's politically attractive to promote punishment over justice. He saw that uniform sentencing would destroy the humanity of the justice system. In Justice Brian's words: "If you're going to do that, you don't really need a judge".

Given the fact that so far, you operate with more latitude than many of your American counterparts, I think it's obvious that some "educational extension work" with the public would come in handy, since the political winds that brought about "mandatory minimums" in the States blow across the border unimpeded. Without the "educational extension work", you'll continue to hear an uproar every time a sentence is seen to be lighter or heavier than one meted out in what's perceived to be a comparable case. And as we've seen in the States, enough uproar can eventually loop back through opportunistic legislators in the way that Justice Brian feared.

So to conclude, I believe there are plenty of opportunities for judges to make appropriate and even necessary contributions to public discourse on matters of justice and the law ... and don't be surprised if you get a call inviting you to be a guest on the Maritime Noon phone-in some day.

(2) the complaint to the Canadian Judicial Council will cause pain and embarrassment even though no disciplinary action is taken;

(3) some colleagues and the Chief Justice may give you the cold shoulder;

(4) some courageous members of the bar may write to criticize your conduct;

(5) the media will either applaud or criticize, depending on which makes the better story.

The safest course is to refrain from any public statement. Then, you may ask, why do it. For some it will not be a problem. Not everyone is sought after as a public speaker. I suspect that many who adhere to the old school fall into this category. It is, however, a personal decision which should be respected. I happen to believe that accepting speaking engagements is important for the image of the judiciary. Under the *Charter*, we are entrusted with the task of making judgments that were previously the exclusive prerogative of elected representatives. These decisions were made after debate in Parliament or the legislature. No longer can we expect the public to respect decisions in a process that is shrouded in mystery and made by people who have withdrawn from society. They public is demanding to know more about the workings of the courts and about judges.

As observed by Professor Leon Dion, total abstention from political discussion will transform judges into social eunuchs.

comme tel les déclarations publiques des juges, il y a cependant des conséquences et un certain prix à payer pour ceux et celles qui s'y adonnent. En voici une énumération succincte :

(1) l'impartialité du juge peut être mise en cause, et alors il pourrait être appelé à se récuser;

(2) une plainte déposée devant le Conseil canadien de la magistrature constituera une épreuve difficile pour le juge en question et lui causera de l'embarras;

(3) certains collègues, voire même le juge en chef, pourraient se montrer plus froids à son égard;

(4) le juge en question recevra peut-être des lettres de protestation de la part de certains membres du Barreau, certes courageux, critiquant ses prises de position;

(5) les médias applaudiront sinon critiqueront ses prises de position, selon le capital journalistique qu'ils pourront en tirer.

En vérité, la prudence nous incite à éviter de faire des déclarations publiques. Mais alors, direz-vous, pourquoi pourrait-on être tenté d'en faire? Pour certains d'entre nous, le problème ne se pose même pas. Après tout, ce n'est pas la majorité d'entre nous qui se fait solliciter pour prononcer un discours. J'ai tendance à croire que la plupart de nos membres qui se réclament de la vieille école font partie de cette catégorie. Il s'agit toutefois d'une décision personnelle qui mérite notre respect. Je suis de ceux qui croient que le fait d'accepter de prononcer une allocution devant le grand public constitue un atout important pour l'image de la magistrature. Depuis la *Charte*, nous nous sommes retrouvés avec la tâche de poser des jugements qui, antérieurement, étaient du ressort exclusif des représentants élus. Les décisions ainsi rendues surviennent après la tenue de débats à la Chambre des

United States Supreme Court Justice Oliver Wendell Holmes stated:

It is required that a man take part in the actions and passions of his time at the peril of being judges not to have lived at all.

If a matter is troubling a judge and relates to the work of the court, a public discussion will often serve not only to clear the air but result in a happier, more effective judge. Recently, our Chief Justice spoke out about criticism of the court. In particular he responded to the criticism that judges are intruding into the legislative sphere. In commenting on the speech, one political commentator concluded:

No doubt some observers will fault the chief justice as crying in his champagne. But is it in fact fair to blame the judiciary for what Pierre Trudeau wrought, with wide public support, in 1982?

Our Supreme Court justices are uniquely placed as the ultimate in-basket for some of our country's most sensitive problems.

We should encourage them to speak out like this, to help keep us all better informed about what's really happening in Ottawa, on and off the Hill.

A judge who decides to accept public speaking engagements must consider the

Communes ou dans les assemblées législatives. Nous ne pouvons plus nous attendre que la population en générale respecte les décisions que nous rendons si la démarche pour y arriver demeure un mystère et qu'au surplus, ces décisions sont rendues par des personnes qui vivent en retrait de la société. Le public demande, voire exige, d'en savoir davantage au sujet du fonctionnement des tribunaux et des juges qui les constituent.

Comme l'a fait remarquer le professeur Léon Dion, l'abstention totale des juges de toute discussion d'ordre politique les transformera inéluctablement en des eunuques sociaux. Le juge Oliver Wendell Holmes, de la Cour suprême des États-Unis, s'exprima ainsi à ce sujet :

[*Traduction*] **Il est nécessaire qu'une personne participe pleinement aux actions et aux passions de son époque, à défaut de quoi notre rôle de juge nous condamne à la réalité de n'avoir pas vécu.**

Si un juge est préoccupé par une question reliée au fonctionnement du tribunal, un débat public à ce sujet pourrait servir à désamorcer cette situation tout en favorisant la sérénité et l'efficacité du juge. Récemment, le juge en chef du Canada a fait une sortie publique à propos des critiques adressées à notre tribunal. Il répondait notamment aux critiques voulant que les juges intervenaient indûment dans des domaines relevant de l'autorité législative. Un observateur politique fit le commentaire suivant au sujet des propos du juge en chef :

[*Traduction*] **Il s'en trouvera certainement qui reprocheront au juge en chef de se plaindre le ventre plein. Mais est-ce vraiment équitable de blâmer la magistrature pour les gestes posés par Pierre Trudeau en 1982, fort d'un appui populaire considérable?**

Les juges en chef de la Cour suprême

superintendent of child welfare and the police failed to do what they should have to prevent the slide of youths into full-fledged criminality.

But she also alluded to the tone of current political debate on young offenders. She said the public often talks about preventing crime, but instead, it should focus on how to prevent criminals.

Now I was struck by 3 things about this analysis. First, many lay people already suspect what Justice Southin confirms. Second, it's virtually indistinguishable from good journalism. And third, like good journalism, it challenges us all to think harder about our opinions.

Another thing Justice Southin has in common with good journalists is that she stops short of prescribing solutions. This is a tacit acknowledgement that journalists, and yes, even judges, don't ever have the last word in a democratic society.

I think that what the late Randy Shilts had to say about this in the journalistic context applies as well to judges who speak out in the way Justice Southin did. Shilts was the author of a book entitled "And the Band Played On" -- a Pulitzer Prize-winning study of the AIDS epidemic and how people in positions to control that epidemic failed in their responsibilities.

He said "It's dangerous when journalists start worrying about outcome. You don't have any control. Other people decide that". This was a simple call to contribute our best information to the public debate, but not to presume, or in other cases, to fear, that we'll influence its resolution.

To return to Madame Justice Southin -- here was an active judge speaking out on existing legislation. Her editor at the legal journal acknowledged such public statements by a judge were unusual, but he was quoted as saying "There was a time it was frowned upon... Times have changed".

With articles like Justice Southin's on existing legislation and stances like Judge Angers' on proposed legislation, I don't think Canadians clearly understand what governs public comments by judges anymore. Furthermore, I don't think judges understand when those appearances or comments by their colleagues are justified.

By way of illustrating this apparent confusion within the judiciary, I'd like to quote from recent remarks by Chief Justice Alan MacEachern of the British Columbia Court of Appeal on the matter of "judicial outspokenness".

He was talking about public comments by Mr. Justice John Sopinka of the Supreme Court of Canada -- whom he described as "our most outspoken judge". Justice MacEachern said that Mr. Justice Sopinka has "pretty well confined himself to the subject matter of litigation and judicial and court administration". He went on to say that "it is useful that we have an outspoken champion like Mr. Justice Sopinka to say things on the national scene about the operation of the courts and the administration of justice".

But Judge MacEachern added two comments, and I quote" "First, I think it would be unfortunate if every judge or any large number of judges were to adopt the Sopinka model at the national or media level. The din would be cacophonous and unbearable".

I find this a curious comment. He has just said that it was useful for Mr. Justice Sopinka to say things on the national scene; but if self-appointment as a spokesperson

- although as we will see in a few moments, it might not be an unanimous perspective.

And what about a whole other class of legislation that leads to activity in your courts? I realize it must be disturbing to decide whether to hear a case pertaining to a law which offends your personal moral code or religious beliefs.

Once when we announced Maritime Noon was going to deal with such a topic on the phone-in -- a topic that was under consideration in Parliament - it provoked the only call we've received in 8 years demanding that we cancel a programme and not discuss an issue. The call came from a retired judge.

Now don't worry -- I'm hardly going to generalize about judges based on a single call from someone who was now a private citizen. But I don't think the vehemence of his opinion had just developed because he had more time on his hands.

And while I believe that you must hold strong beliefs or convictions which occasionally test your objectivity, I don't recall ever hearing an active judge discuss they way he or she resolves that kind of conflict.

This is probably too esoteric an area for Oprah or Geraldo, so don't worry -- you won't get invited to bare your soul there. But I don't believe the admission of such feelings in the appropriate public forum would detract from your effectiveness on the bench. If anything, it might remind us all that justice is a distinctly human notion, and not something that hovers out there as a platonic ideal.

I think there is an appetite -- and I believe a justifiable one -- among the public for hearing more about how you do your job, and what you've learned in the course of your work.

There are occasions, of course, when active judges do go on the public record -- but it's generally, among friends or colleagues. This is one of those occasions.

You also write articles for journals with circulation figures considerably lower than People Magazine, so your opinions expressed there are only "public" in a technical sense.

That's too bad, because most of you have been appointed to your position -- in part -- because of the clarity of your intellect. And the clarity of intellect you exhibit in some of these quasi-public forums is sorely needed in many public debates.

As an example of one of those clear-thinking, well-expressed, but virtually invisible contributions to public debate, let me cite an article by Madame Justice mary Southin of the British Columbia Court of Appeal which appeared this past year in a publication of the Vancouver Bar Association. In the article, entitled "On the Prevention of Criminals", she examined the cases of 10 juvenile killers.

Among other things, she opined that the right to silence should be abolished for all offenders tried in youth court, and their names should be made public.

She wrote that the ban on publication of younger offenders' names is "one of the law's sillier provisions, at least in cases of serious crime" because it contributes, she says, to "the ruination of the child who is embarking on a life of crime" and "protects those who deal with young offenders and delinquent children from being called to account publicly for their failures".

In fact, the article took on the tone of "J'accuse": in 8 of the 10 cases Justice Southin had studied, she concluded that authorities such as school officials, the

limits of his or her pronouncements in order to avoid the consequences to which I have referred. There is much discussion about a Code of Conduct for judges. In this area, I do not favour adoption of a code. I believe that this should be left to the discretion of judges. In the absence of any clear rule, judges have in fact been exercising a discretion. In over 25 years there have been only two serious complaints. That does not strike me as a situation that calls of a Code of Conduct. Moreover, a code may or may not be sufficiently specific to provide the necessary guidance. The existence of a code is no guarantee that it will be applied in the same way by all judges.

The following are the guidelines that I try to follow:

1. **Controversial Current Political Issues**

These are to be avoided. Invariably, involvement in such issues gives the appearance of taking sides and partisanship. I would make an exception with respect to matters directly affecting the administration of justice and concerning which the judges are particularly knowledgeable. Preferably, this should be left to the Chief Judge or Justice. For example, proposed legislation to affect the jurisdiction of the court would be a subject upon which judges can publicly comment. Our judges, including our Chief Justice, have commented on the proposal to eliminate preliminary hearings. Judge J.B. Weinstein, senior judge on the U.S. District Court for the Eastern District of

se retrouvent ainsi dans une situation unique, devant trouver en dernier ressort les solutions à certains des problèmes les plus délicats que notre pays doit résoudre.

Nous devrions plutôt les encourager à se prononcer ainsi publiquement, afin que nous puissions tous savoir ce qui se passe réellement à Ottawa, tant sur la colline parlementaire que dans ses antichambres.

Un juge qui décide d'accepter de prononcer des allocutions en public doit cependant tenir compte des restrictions qu'il importe d'apporter alors à ses propos, et ceci afin d'éviter les conséquences néfastes dont j'ai parlé tantôt. Dernièrement, l'on a beaucoup entendu parler de l'adoption possible d'un code de déontologie pour la magistrature. Je ne suis pas en faveur de l'application d'un tel code à des questions de cet ordre. J'estime que de telles initiatives devraient être laissées à la seule discrétion des juges. D'ailleurs, en l'absence d'une règle claire à ce sujet, les juges ont effectivement exercé leur discrétion à cet égard. En vingt-cinq ans, il n'y a eu que deux plaintes sérieuses à ce sujet. Cela ne m'apparaît pas comme révélant une situation qui appelle l'adoption d'un code de déontologie. Par ailleurs, un code ne contiendrait pas nécessairement des dispositions suffisamment spécifiques permettant d'établir une ligne de conduite claire et nette. L'existence d'un code ne garantit aucunement que ses dispositions seront appliquées d'une façon uniforme par tous les juges.

Voici donc les paramètres qui me servent de guide en la matière :

1. **Les sujets d'actualité politique soulevant la controverse**

Ces sujets sont à éviter. Le fait de prendre part à de tels débats mène invariablement à une apparence de parti pris et d'appui à une thèse donnée. Je ferais cependant une exception à l'égard des questions touchant directement

New York, refers to public statements by federal judges, including Chief Justice Rehnquist, criticizing legislation imposing mandatory minimum sentences. I place in this category a speech about restrictions on legal aid and the problems which that creates for the conduct of trials.

This is however, a sensitive area which requires careful consideration and considerable restraint. Before embarking on a speech on public statements of a controversial political nature, a judge must fully appreciate that he or she is entering the arena and therefore can expect the blows that are encountered in that forum.

2. **Undecided Cases**

The other area to be avoided is cases before the court or cases that are about to come before the court. Apart from explaining the issues, no comment should be made.

I do not subscribe to the view expressed by some that a judge cannot comment on decided cases written by the judge or members of his or her court. For years, it has been accepted that judges can give prestigious lectures on the law, at law schools and to professional bodies. This would be impossible if comment on cases were prohibited. If, however, a decided case has raised a controversy as to its interpretation, a judge should avoid trying to clarify it by an extra-judicial interpretation.

l'administration de la justice et au sujet desquelles les juges sont particulièrement bien informés. Règle générale, ce sont les juges en chef qui devraient commenter des sujets de cette nature. Par exemple, les juges devraient pouvoir commenter sur la place publique les projets de loi portant sur la compétence d'un tribunal. À cet égard, les juges, notamment le juge en chef du Canada, ont commenté les propositions visant à supprimer l'obligation de tenir des enquêtes préliminaires. Le juge J.B. Weinstein, un juge senior de la Cour de district des États-Unis du district de l'Est de l'état de New York, se fonde sur des déclarations publiques faites par des juges de nomination fédérale, notamment celles du juge en chef Rehnquist, critiquant les lois prévoyant un seuil minimum des peines pour la commission de certaines infractions. Je classerais par exemple dans cette catégorie les allocutions portant sur les restrictions en matière d'aide juridique et les problèmes que cela occasionne dans la tenue ordonnée des procès.

Il s'agit cependant de questions fort délicates qui exigent à la fois mûre réflexion et grande réserve. Avant de livrer une allocution portant sur des questions controversées de nature politique, un juge doit être pleinement conscient qu'il ou elle sera alors sous les feux de la rampe, et il ou elle pourra ainsi s'attendre à encaisser les coups auxquels l'on s'expose alors.

2. **Les causes en instance**

Un autre sujet à éviter est celui des causes dont un tribunal est saisi ou dont il sera bientôt saisi. Aucun commentaire ne devrait être fait à ce sujet, à moins qu'il ne s'agisse simplement d'expliquer la nature des questions à trancher.

Je ne souscris pas à l'opinion voulant qu'un juge ne puisse commenter sur une cause à l'égard de laquelle jugement a été rendu par ce juge ou encore par d'autres juges du même tribunal. Depuis des années déjà, il est reconnu que les juges peuvent

Sadly enough, to pin you name to your opinion is still a risky business in some pockets of this democratic society.

If the topic is, for instance, the power of political patronage, and the livelihood of you and your family members depends on riding out the cycles of that system, you are probably not going to be in a hurry to share your first-hand experience and hard-won insights about who gets jobs in your constituency on a phone-in or at a public meeting. You have something to lose.

If the topic is working conditions or economic practices and your employer controls a wide range of companies in your town or province, you're unlikely to talk about dangerous conditions or unfair practices you've observed. You have something to lose.

In both of these cases, self-interest quietly counsels a person to hush up, even though the unfair distribution of discretionary jobs or the existence of unsafe working conditions or unethical business practices have negative effects on many of one's fellow citizens.

But where do judges fit into all this?

Well, you have unique limitations on speaking publicly. You're proscribed from discussing your decisions outside of court. Of course, if you're boiling over with indignation or frustration about some trend you observe in society, you can artfully work your feelings into a decision. But if you express these thoughts outside the courtroom, you have something to lose.

In an extreme case, it could be your job. But it's more likely that loose lips could sink other, less tangible ships: status in the community, the respect of one's peers, or the nearly unassailable authority you're used to enjoying in your court.

On those rare occasions when a judge dares to speak directly to controversial legislation - such as Judge Angers did on gun control - the reaction of the Judicial Council can be swift and pointed. And while I noted that Judge Angers wasn't exactly contrite after the Council criticized his action, it's too early to tell whether his extraordinary action will move colleagues to emulate him or further inhibit them.

And moving away from gun control to speak generally, I can understand how it would be galling to see legislators creating something so unenforceable that you can almost predict a growth area in the kind of cases you'll be hearing in the coming years.

But at the same time, if you know this season's political bandwagon has a good chance of turning into next season's traffic jam in the courts, is there not some responsibility to point out judicial concerns?

I know there's a risk here - the risk of appearing to straddle the pointy picket fence that separates you from the political process. But I think there's also an untapped spring of public good will that awaits the comments of a judge who feels moved to speak outside the courtroom on a matter of law or justice.

That good will is there because people know you can't be lobbied by private interests. They know you can't be forced to compromise in order to quell a caucus revolt. They know you're not speaking with one eye on polls and the other on the date of the next election. They know that unlike a lawyer, you don't argue a position because a client is paying you to do it.

For these reasons, I believe the public understands that judges are differentiated enough from the forces that drive legislation that you can be expected to present a unique and welcome perspective on certain issues

I work on a daily current affairs and phone-in programme -- Maritime Noon. On the phone-in portion, my role is to cultivate a forum in which anyone listening will feel comfortable expressing an opinion within the electronic earshot of tens of thousands of fellow Maritimers.

This isn't an easy task, especially when you're talking about matters of substance: the quality of education and health care, public security, the forces that shape the job market, the status of women, aboriginal rights -- even the administration of justice.

The task of making the airwaves hospitable for such dialogue isn't easy for a couple of reasons.

First, we're Canadians. Culturally, we don't seem predisposed to go blathering to complete strangers when the sharp point of a complex issue gets under our skin. We Canadians -- and perhaps even more so, we Maritimers -- play our cards pretty close to the chest.

Second, there's the awkwardness or insecurity most of us feel when we move from the private to the public sphere - even for a few minutes. Normally, we only voice opinions to our closest friends or professional colleagues: people who know us well enough to "fill in the blanks", so to speak, as we try to cobble together the words that describe a complex reaction.

If the opinion sounds raw, too quick off the mark or even "injudicious", our friends "fill in the blanks" because they're familiar with what they know of our personal history - they "know where we're coming from".

When we leave that secure, private sphere and consider expressing the same opinion in front of people who are not friends, it's a very different matter: we start numbering the reasons we should be exempt from parading our opinions or convictions in public.

For instance, if you consider calling the Maritime Noon phone-in, your fellow listeners aren't familiar with your intellectual and emotional evolution, your credentials or your position in society. They're only willing to grant your opinion the context you can provide in a few minutes... the few minutes before the next caller gets on the line. And that next caller - unlike your indulgent friends - might challenge your facts, your logic or your motives - which can be very unsettling or even hurtful.

Nevertheless, the people on our programme think it's important to provide citizens with a forum for the democratic exercise of expressing an opinion in public (and to digress - it's curious that this is virtually the only spot in the daily schedule where the tightly-formatted news media relinquish control over who gets on the air). So over the years, we've tried to cultivate an environment of respect and security to encourage listeners to participate.

But even when there is a forum for voicing an opinion on a substantive matter, what else inhibits people from exercising that right?

People feel insecure about expressing an opinion when they feel they have something to lose. And just about everyone has something to lose.

Callers to our programme identify themselves by name and community. But with certain topics, you can watch the lines not light up - you can almost sense a murmur of opinions and stories that never quite becomes audible.

Some support a rule of total silence on the basis that almost any issue may come before the court. My response to this is that it is accepted that judges have views with respect to issues of the day. The fact that they are expressed not in the context of a specific case but in general should not be a basis for recusal. If judges are expected to set aside their personal views which are not expressed, the situation is not different when they are expressed. For example, many judges have commented on the subject of television in the courtroom, both pro and con. This issue has and will come up in the context of a *Charter* challenge either by the media or a party. In my view, a judge's comments about how the presence of T.V. cameras may affect the proceedings would not be the basis for recusal in a case raising the issue.

3. Appearance on Radio and Television

Greater care must be exercised by reason of the uncontrolled nature of the process. Before agreeing to the interview, satisfy yourself that the interviewer is responsible and will not try to embarrass you. The ground rules for the interview should be firmly laid down before agreeing to it. It is preferable if cuts are to be approved by the judge.

Public speaking is just one, albeit the most important, aspect of a judge's extra-judicial conduct. I turn briefly to other aspects.

donner des conférences prestigieuses d'ordre juridique, dans une faculté de droit ou encore devant les membres d'une corporation professionnelle. Ceci serait impossible s'il était interdit de commenter la jurisprudence. Par contre, si une cause à l'égard de laquelle jugement a été rendu suscite certaines controverses quant à son interprétation, un juge ne devrait pas tenter de clarifier la teneur d'un tel jugement en proposant une interprétation extra-judiciaire.

Certains tenants du mutisme absolu fondent leur position sur la prétention voulant que presque n'importe quel sujet peut faire l'objet d'un litige devant le tribunal. Je leur répondrais qu'il est largement reconnu que les juges ont des opinions sur les diverses questions dont ils ont à décider. Le fait qu'ils expriment ces opinions non pas dans le contexte d'une cause spécifique, mais plutôt en termes généraux, ne devrait pas constituer une cause de récusation. Puisque les juges doivent faire abstraction de leurs opinions personnelles qu'ils n'expriment pas, la situation ne s'avère pas différente lorsque ces opinions sont effectivement exprimées. Par exemple, plusieurs juges ont émis des commentaires sur l'opportunité de télédiffuser les audiences devant le tribunal, les uns en faveur, les autres contre. Cette question a déjà été soulevée et sera certainement soulevée à nouveau dans le contexte d'une contestation relativement à la *Charte*, de la part des médias ou encore d'une autre partie. À mon avis, les commentaires d'un juge sur l'incidence de la présence de caméra de télévision sur le déroulement d'une instance ne devrait pas constituer une cause de récusation de ce juge à l'occasion d'un litige où cette question serait soulevée.

3. Prestations radio diffusées ou télévisées

Il s'agit de situations où la prudence est de mise, le déroulement de ce type d'entretiens échappant à notre contrôle.

Outside Activity

(A) **Social**

The restriction in s. 55 of the *Judges Act* does no touch upon social restrictions. The standard guidelines simply caution a judge not to engage in conduct which would bring the judiciary into disrepute. A former Minister of Justice, commenting on the ministry publication, said that a judge should not be seen dancing with the wife of a litigant who will appear before him the next morning. These opportunities will be rare. This is an area where good taste is perhaps the only guideline, subject to the law relating to appearance of conflict of interest.

(B) **Business**

The Act leaves unaffected activities such as writing books, receiving royalties and lecturing, which are permitted unless they conflict with the judge's judicial duties. A reasonable honorarium, it would seem, can be accepted for lectures.

Participation in educational, religious, charitable, cultural or civic organizations, so long as not designed for the economic or political advantage of their members, seems perfectly acceptable, although active participation in fund-raising activities should not be engaged in for fear that potential donors may fee compelled to donate or may expect future favours.

Avant de participer à ce genre d'entrevue, assurez-vous tout d'abord que le journaliste procédant à l'entrevue est une personne responsable et qu'il ne cherchera pas à vous mettre dans l'embarras. Les règles régissant le déroulement de l'entrevue devraient être clairement établies avant d'y consentir. Il est préférable que le juge puisse d'abord autoriser les séquences de l'entrevue avant qu'elles ne soient diffusées. Les allocutions prononcées en public ne constitue qu'une partie, la plus importante sans doute, des divers volets du comportement extrajudiciaire d'un membre de la magistrature. Je toucherai ici un mot à propos de ces autres volets.

Activités externes

A) Activités d'ordre social

Les dispositions de l'article 55 de la *Loi sur les juges* ne comportent pas de restrictions d'ordre social. À ce sujet, il s'agit surtout de retenir qu'un juge ne doit pas se comporter d'une manière nuisible à la réputation de la magistrature. Un ancien ministre de la Justice, dans ses commentaires sur les obligations incombant aux titulaires d'une fonction judiciaire, affirma qu'un juge ne devrait pas être vu en train de danser avec l'épouse d'un individu qui doit comparaître devant lui le lendemain matin. Des occasions de ce genre sont probablement rarissimes. Il s'agit donc d'un domaine où la meilleure consigne est probablement celle du bon goût sous réserve évidemment des prescriptions juridiques en matière d'apparence de conflit d'intérêts.

B) Activités d'ordre commercial

La *Loi sur les juges* demeure muette sur les activités d'ordre littéraire, la perception de royautés et la présentation de conférences, de telles activités étant permises à moins qu'elles n'entrent en conflit avec les obligations reliées à ses fonctions judiciaires. Il semble également qu'un honoraire raisonnable puisse être accepté pour la présentation de conférences.

Il serait également tout à fait

Presentation by Costas Halavrezos, host of CBC Radio's "Maritime Noon" to a panel session at the Annual Convention of the Canadian Association of Provincial Court Judges in Moncton, NB, on September 14, 1995.

When I was invited to take part in this panel, I felt both flattered and anxious.

Flattered, because I'm not sure how I've earned the privilege of addressing men and women who make the ultimate interpretations of "the law".

Anxious, because I tried to imagine what would normally earn me an appearance before even one of you.

I think I prefer this unearned appearance before the man.

But speaking of appearances, let's get to the topic of this panel: "Public Appearances and Media comments: Is There Ever A Time To Speak Out?" Or, to play a few of the many possible variations on that theme: "should a judge take part in a panel at a convention of people other than Judges?", or, "should a judge appear on a phone-in show?".

My answer to these questions is "of course".

This is a personal view, by the way, and not necessarily representative of any thinking within the CBC.

Now given the traditions in this country concerning public appearances and media comments by judges, I hope you don't think my view is callow or simplistic. I've come to it after reflecting on your role and on the role of the news media in a democratic society. I admit that this bout of reflection was inspired by the invitation to join this panel.

And please don't react suspiciously when I use the phrase "democratic society"; I realize that as often as not these days, it's part of the preamble made by anyone arguing for the right to bring, say, lap-dancing or freely accessible child pornography to every town in Canada.

No - I use it instead to describe a society in which community relations are functional, fair and civil. I believe that the more citizens engage in constructive public dialogue over difficult issues, and the more places where they feel secure doing that, the more we protect the notion of a "democratic society" from being debased by rascals.

And while I don't expect judges to start justifying the decisions they made in the morning on the one o'clock regional newscast, I think that it would enhance our democratic society if you entered the forum of public debate directly by speaking outside your courtrooms more often. And I use the word "directly" because you already enter that forum indirectly when you render high-profile decisions on anything from divorce settlements to sentences for polluters.

Why do I think you should speak in public more often? Perhaps I should give a brief description of the job I've held for the past 8 years.

is being explored in Halifax. The point is that these problems need to be identified and solutions developed at the systemic level. And they must be approached in a cooperative and positive way.

I am not suggesting that any of this will lead to lots of good press for judges and courts. But it should lead to better press in the sense that the coverage is accurate, comprehensive and fair. That sort of coverage is in the public interest and I believe courts and judges have a responsibility to do what they reasonably can to promote and assist that sort of coverage.

participation d'avocats, de juges, de journalistes et d'étudiants en journalisme. Ce qui importe cependant, c'est la nécessité d'identifier ces problèmes et d'élaborer des solutions afin d'y remédier il s'agit également de s'y attaquer de manière constructive et dans un esprit de collaboration.

Il est évidemment impossible de garantir qu'il en résultera une quantité considérable de reportages favorables aux juges et aux tribunaux. Il est fort probable toutefois qu'il en résultera des meilleurs reportages, en ce sens que la couverture médiatique sera plus fidèle, globale et équitable. Ce style de couverture médiatique est dans l'intérêt public, et j'estime qu'il incombe aux tribunaux ainsi qu'aux juges de faire le nécessaire, en y consacrant des efforts raisonnables, afin de promouvoir et de faciliter l'avènement de ce type de couverture médiatique.

IN A LIGHTER VEIN

Break and Enter (or was there consent?)

An elderly couple was lying abed in the wee hours of the morning. Madge heard noises coming from the back garden and thinking that an intruder had gotten into their coal shed, she roused her husband: "Morley, I think there is somebody out in the coal shed." He turned over, pulled the covers tightly down around his neck, and went back to sleep. Within a few minutes the noises came again and once again Madge was worried: "Morley, I think there is somebody out in the coal shed." Muttering under his breath, he pulled back the covers, and throwing his feet loudly onto the cold floor, he hobbled over to the window and threw it up roughly: "Whatever you're looking for, you'd better get it tonight, because I'm puttin' a lock on her in the morning."

Extra-judicial public service on commissions, inquiries and the like is widespread in Canada, and, at least in the current climate, there is no need to refuse such appointments. It should be noted, however, that there exists room for concern about judges assuming these roles because of the potential for conflict between policy-making functions and future adjudicative responsibilities.

Conduct after Ceasing to be a Judge

When two retired Supreme Court of Canada justices spoke out on the issue of the effects of the Canada-U.S. Free Trade Accord, it focused attention on the issue of the limits on free speech of retired judges. Some were openly critical suggesting that this was a misuse of office for political purposes. The public might think they were speaking for the court. If a judge may resign in order to engage in political debate, as was suggested by Chief Justice Laskin in the Berger affair, surely a retired judge is in no different position.

Frankly, although I have found that I thoroughly enjoy the job, one of my concerns in considering a judicial appointment was the finality of the decision. Many provinces, including Ontario, have restrictions on judges rejoining the bar after resignation or retirement. For example, Saskatchewan forbids a former judge from appearing before a court in the province for one or two years depending on the length of judicial service. Similarly, New Brunswick imposes a waiting period of five years before a former judge can practice "at

convenable qu'un juge participe à des activités éducatives, religieuses, charitables, culturelles ou encore à d'autres organisations favorisant le civisme, n'a pas pour objet de procurer un avantage d'ordre économique ou politique, tout en évitant autant que possible les activités de levée de fonds, car certaines personnes pourraient se sentir obligées d'y contribuer, ou encore pourraient espérer un traitement de faveur à l'avenir.

La participation à une fonction publique extra-judiciaire, comme les commissions d'enquête ou autres, est devenue pratique courante au Canada et, du moins dans l'état actuel des choses, il n'y a pas lieu de refuser d'y prendre part. Il importe cependant de se rappeler qu'il s'agit d'être circonspect à cet égard, en raison de la possibilité d'un conflit entre le fait d'assumer la responsabilité de l'établissement de politiques en la matière, et celui d'assumer par la suite la responsabilité de rendre jugement sur de telles questions.

La conduite d'un juge après avoir cessé d'exercer ses fonctions

Lorsque deux juges à la retraite de la Cour suprême du Canada se sont prononcés sur la question des effets de l'Accord de libre échange nord-américain, cela a soulevé la question de la limite de la liberté d'expression des juges à la retraite. Certains ont ouvertement critiqué cette situation, insinuant qu'il s'agissait là d'un abus de pouvoir à des fins politiques. Certains citoyens auraient pu croire qu'ils s'exprimaient au nom du tribunal. Si, comme semblait le suggérer à l'époque le juge en chef Laskin dans l'affaire Berger, les juges désirant s'engager dans un débat politique devraient démissionner pour ce faire, alors la situation d'un juge à la retraite ne me semble guère différente.

Honnêtement, bien que je me plaise tout à fait dans mes fonctions, l'une des considérations qui me préoccupaient le plus

the bar of the court of which he was a member or of any lower court". The Law Society of Upper Canada, in contrast, has different rules depending upon the court of service. For judges of the Supreme Court of Canada, the Federal Court of Appeal or the Court of Appeal for Ontario, the express approval of convocation is required before the judge may appear before any court or tribunal. For lower court judges, approval is only required if the judge wishes to appear before the court of service or a lower court or tribunal within two years of retirement or resignation. The apparent concern is that a former judge will be in a preferred position before the courts, or at least litigants might think so. This is less than convincing. I am told by retired justices of the Supreme Court that when a former colleague appeared before them for the first time after resigning, the only difficulty was knowing what to call him. It was a motion for leave and the retired judge was for the applicant. The dilemma was resolved by Chief Justice Cartwright stating "you begin" to his former colleague.

Under the U.S. Code of Judicial Conduct, only retired federal judges who are eligible for recall to judicial service are restricted from the practice of law under Canon 4(g). Federal judges who have resigned and retired judges not eligible for recall are exempted from the Code's application, and are therefore apparently not restricted in the practice of law.

Individual American states impose their own rules. In Maryland, the Court of Appeals held that a statutory provision

en réfléchissant aux conséquences d'une nomination à la magistrature, c'était le caractère définitif de la décision. Dans plusieurs provinces, dont l'Ontario, il existe des restrictions à la réadmission au Barreau d'un juge ayant démissionné ou pris sa retraite. Par exemple, en Saskatchewan, une personne ayant occupé la fonction de juge ne peut plaider devant un tribunal de cette province pendant une période d'une année ou de deux années, selon la durée pendant laquelle il ou elle a occupé un tel poste. Au Nouveau-Brunswick, une personne ayant déjà siégé comme juge doit attendre après l'expiration d'une période de cinq années avant de pouvoir pratiquer devant un tribunal dont il ou elle fut membre ou un tribunal inférieur à ce tribunal. La *Law Society of Upper Canada* applique des règles différentes selon le tribunal pour lequel le juge a exercé ses fonctions. Notamment, les juges de la Cour suprême du Canada, de la Cour d'appel fédérale ou de la Cour d'appel de l'Ontario, doivent obtenir l'autorisation expresse d'une convocation avant de pouvoir plaider devant un tribunal, quel qu'il soit. Dans le cas des juges ayant siégé à un tribunal inférieur, cette autorisation n'est requise que si le juge désire plaider devant le tribunal pour lequel il exerçait ses fonctions, ou devant un tribunal inférieur, dans les deux années à compter de sa retraite ou de sa démission. L'on semble apparemment préoccupé du fait qu'un ancien juge jouisse d'une situation privilégiée devant les tribunaux, ou du moins que les parties en cause croient qu'il en est ainsi. Cet argument me semble dénué de tout fondement. Dans les faits, des juges à la retraite de la Cour suprême m'ont dit que lorsque l'un de leurs anciens collègues se présentaient devant eux pour la première fois après avoir quitté ses fonctions, la seule difficulté était de savoir comment il fallait l'appeler. Il s'agissait d'une requête pour permission d'appel, et le juge qui avait pris sa retraite agissait au dossier au nom du requérant. Le dilemme fut finalement résolu par le juge en chef à l'époque, le juge Cartwright, lequel s'adressa à son ancien collègue en lui disant «you begin»

The first step is to analyze the problems. This may require an analysis of the media's coverage of the court or courts and an assessment of the quality of that coverage. It may involve comparison of the coverage to what really goes on in the court. Why do reform initiatives receive little press? Why is there no regular justice reporter? Why do the cases of violence get all the attention? Why do all the quoted comments come from interest groups that make no effort to be balanced in their assessment? These are all things that may emerge as problems. But they are systemic problems and have to be approached as such.

The next step is to find a vehicle for fruitful discussion of these broader issues. It may be that having meetings with editorial boards is a useful step. There may be useful initiatives that try to bring justice people and media people together to define and address the issues. The Canadian Journalism Foundation is one organization that is active in this area. Perhaps whatever good news there is does not get out because nobody knows about it. There are very simple ways of getting the information out. Maybe they need to be used more frequently and more effectively. There may be a need for educational programmes and opportunities for interchange. The possibility of an educational program involving lawyers, judges, journalists and journalism students

couverture médiatique d'un tribunal particulier ou des tribunaux en général, ainsi qu'une évaluation de la qualité d'une telle couverture médiatique. L'on voudra peut-être alors comparer la fidélité de cette couverture à la réalité de ce qui se déroule devant le tribunal. Pourquoi les propositions de réforme du droit retiennent-elles si peu l'attention des médias? Pourquoi n'affecte-t-on pas un journaliste spécifiquement à la couverture des affaires judiciaires? Pourquoi l'attention des médias se porte-t-elle surtout aux affaires de nature violente? Pourquoi publie-t-on surtout les commentaires de certains groupes de pression, même de ceux qui se soucient peu de fournir une évaluation équilibrée de la situation? Tous les sujets précités ont le potentiel de devenir des problèmes. Il s'agit cependant de problèmes d'ordre systémique et doivent donc être abordés de la manière qui convient à de tels problèmes.

La prochaine étape consiste à trouver un véhicule permettant d'assurer une discussion fructueuse de ces questions plus complexes. La tenue de rencontres avec le comité éditorial des entreprises de presse peut s'avérer utile à cet égard. Aussi, d'autres initiatives peuvent réunir des intervenants du domaine judiciaire ainsi que du domaine médiatique afin de cerner et de tenter de résoudre les divers problèmes qui se posent. La Fondation canadienne de journalisme est un organisme particulièrement actif dans ce domaine.

Peut-être une des raisons pour lesquelles elles ne sont pas souvent publiées que personne n'en est informé. Il existe pourtant des méthodes très simples permettant de communiquer l'information. Il s'agirait peut-être d'en faire un emploi plus généralisé et plus efficace. Il y a peut-être lieu d'implanter des programmes d'éducation et d'échanges interprofessionnels. À Halifax, l'on étudie actuellement la possibilité d'implanter un programme d'éducation avec la

similarly, the press might be failing in its duty if it always praised court decisions. The sorts of day to day efforts I have touched on here are about building a relationship and helping to get the routine work done accurately and as easily as possible -- to eliminate unnecessary friction and, when deserved, to foster mutual respect. The relationship does not exist so that both sides can always be nice to each other. It exists to help things go right and, more importantly, so that there is a mechanism to deal with things that go wrong.

Once the relationship is there, it should be maintained. New rules or policies affecting the media should be the subject of consultation. If there is an inaccurate or unfair report, it should be discussed. Fixing it is usually a pipe dream, but making it less likely to happen again is realistic. The relationship can bring with it some person to person accountability.

The second level is the systemic level. These are the problems of how reporters are assigned to courts, what the media decides to make into news, how justice issues are approached, etc. There is little point in discussing these things, other than as idle conversation, with a busy journalist, any more than it is usually very productive to talk about the big problems in the justice system with a busy lawyer. Practitioners of all sorts are usually too busy to give these tough, general questions the concentrated attention that they deserve.

lot quotidien qui incombe à chacun et ce, en facilitant le travail de chacun, de façon à éliminer les frictions indues et de susciter le respect mutuel, lorsque les gestes posés le méritent. Cette relation n'existe pas uniquement afin que les deux parties se comportent toujours de façon agréable à l'égard de l'autre. Elle doit plutôt exister afin de veiller à ce que tout fonctionne bien et aussi, ce qui m'apparaît encore plus important, afin de pouvoir régler ce qui fonctionne mal.

Une fois établie cette relation, il s'agit de la maintenir. La modification des règles ou des politiques en matière de relations avec les médias devrait faire l'objet de consultations. Si un reportage semble inéquitable ou non conforme à la réalité, il faudrait pouvoir en discuter. Même s'il n'est pas toujours facile de réparer les dégâts à cette occasion, l'on peut toujours tenter de s'assurer qu'une telle situation ne se produise plus. Aussi, cette relation a tendance à favoriser la responsabilisation respective des individus impliqués les uns à l'égard des autres.

Le second niveau d'intervention est le niveau systémique. Il s'agit ici de se pencher sur les modalités régissant notamment l'affectation des journalistes à la couverture des tribunaux, le type de nouvelle que les médias décident de diffuser, l'attitude générale adoptée à l'égard des questions de nature judiciaire, etc. Bref, c'est le genre de sujet que l'on peut difficilement aborder avec un journaliste très affairé sauf d'une façon très superficielle tout comme il est généralement peu utile d'aborder les grands débats de l'heure avec un avocat également très affairé. La plupart des professionnels sont généralement trop occupés afin d'accorder à ces questions coriaces et complexes toute l'attention qu'elles méritent, dans de telles circonstances.

Il s'agit donc tout d'abord d'analyser les problèmes qui se posent. Ceci peut impliquer une analyse serrée de la

restricting retired judges who accepted pensions from engaging in the practice of law for compensation was unconstitutional on the basis that it was in violation of equal protection guarantees.

I think it important that we re-examine the restraints on activities of judges who resign or retire. I believe that many candidates who have had a concern similar to the one I expressed are deterred from accepting a judicial appointment. Conversely, there are a number of examples of judges who, after appointment, decided it was not for them. By reason of the restrictions, they stay on unhappy with the job. Why keep them there? This and other aspects of the subject which I have touched on are matters that are worthy of our anxious consideration and debate. While judges must of necessity give up some freedom, we should not do so except for very good reasons.

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([*Traduction*] : «C'est à vous de commencer»).

En vertu des règles prescrites par le *U.S. Code of Judicial Conduct*, seuls les juges à la retraite de nomination fédérale qui sont admissibles à reprendre un poste de juge ne peuvent pratiquer le droit, suivant les dispositions de l'article 4(g). Les juges de nomination fédérale ayant démissionné ainsi que les juges ayant pris leur retraite qui ne sont pas admissibles à reprendre l'exercice de la fonction de juge, ne sont pas assujettis à l'application du code de déontologie et, partant, ne se trouvent aucunement empêchés de pratiquer le droit.

Chacun des États américains possède ses propres règles à cet égard. Au Maryland notamment, la Cour d'appel a déclaré inconstitutionnelle une disposition interdisant aux juges à la retraite touchant des prestations de retraite de pratiquer le droit contre rémunération, car une telle disposition contrevenait aux garanties constitutionnelles d'égalité de tous devant la loi.

Je crois qu'il est important que l'on révise les contraintes imposées aux activités des juges qui prennent leur retraite ou qui démissionnent. Je crois même que plusieurs candidats et candidates à la magistrature qui partagent les préoccupations dont je viens de vous parler hésitent à accepter une telle nomination. De même il existe un certain nombre de cas de juges qui, après leur nomination, ont décidé que la magistrature ne leur convenait pas. En raison des restrictions précitées, ils se résignent à accepter, à reculons, à continuer d'exercer leur travail de juge. Pourquoi en serait-il ainsi? Ces aspects, comme tant d'autres, méritent que l'on s'y attarde afin d'en débattre entre nous. Alors que la magistrature nous impose certes de renoncer à certaines libertés, il ne faudrait pas accepter de ce faire sans motif valable.

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7. **Attorney General of Maryland et al. v. Waldron,** 426 A. 2d 929 (1981).

A journalist once called at Robert Frost's house for an interview. "Do you have one of those machines -- those tape recorders?" asked the poet suspiciously as he opened the door. "No, sir," replied the journalist. Frost's manner changed instantly. "Well, come on in!" he cried. "Those people who take down every word never get anything right."

which sets out what is available to the media and how to get it. Surely these simple pieces of information are not state secrets! The process of producing such a handbook helps clarify the rules and to make them more uniform across the court system. The handbook itself helps reduce unnecessary tension and makes everyone's life easier.

Some courts have someone on staff who acts as a media resource person. In the section 96 and 101 courts, there are now 8 such persons across the country. I think that both journalists and judges find this useful. There are many simple things that can be done to make access to information easier and reliability and accuracy more likely. Having a non-judge as a go-between is often useful to both sides.

Of course, it must be clear that this relationship which is being built and the vehicles of communication and consultation are not opportunities for the media to lobby judges for changes in the law. These are matters for legal argument in open court. This rule must be made clear at the outset and scrupulously observed because departure from it can put the whole enterprise in jeopardy.

The goals of these sorts of day to day initiatives must be realistic. If they are approached as a way to "get good press", they will be judged unsuccessful. There will be times when the judiciary would be failing in its duty if it did what the press would like; d'établir clairement les règles à suivre et de rendre leur application plus uniforme au sein de l'appareil judiciaire. La publication du livret permet également de résoudre les tensions et facilite la vie à tout le monde. Certains tribunaux ont même délégué à un employé spécifique la responsabilité de traiter avec les médias. Il existe maintenant, dans l'ensemble du pays, huit attachés de ce type auprès des tribunaux constitués en vertu des articles 96 et 101. Je crois que tant les journalistes que les juges conviennent de l'utilité de ce processus. Plusieurs petits gestes simples de ce genre favorisent l'accès à l'information ainsi que la fiabilité de ces renseignements. Le fait qu'un individu qui n'est pas membre de la magistrature établisse la liaison entre les deux permet souvent également de faciliter les choses.

Il doit également être clairement établi que l'établissement d'une telle relation ainsi que la présence de tels mécanismes de communication et de consultation ne doivent pas être utilisés par les médias afin de solliciter l'appui des juges pour réformer les lois. De telles questions devraient plutôt être abordées dans le cadre de plaidoiries présentées dans l'enceinte du tribunal. Cette règle doit être clairement établie dès le début du processus et observée à la lettre, à défaut de quoi les efforts consacrés à une telle entreprise pourraient être anéantis.

Les objectifs poursuivis à l'occasion de ces initiatives quotidiennes doivent également être réalistes. Si on aborde ces questions dans le but d'obtenir bonne presse, l'atteinte de ces objectifs sera loin d'être chose faite. D'un côté, la magistrature ne respecterait pas ses engagements si elle cherchait plutôt à agir dans le sens voulu par les médias; d'un autre côté, les médias ne respecteraient pas non plus leurs engagements s'ils se bornaient à constamment louanger les décisions des tribunaux. Les initiatives quotidiennes dont il est question ici visent à bâtir une relation et à favoriser l'accomplissement fidèle du

THE COURTS AND THE MEDIA:
Putting the Relationship into Media Relations
Presentation to CAPCJ Conference 1995
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LES TRIBUNAUX ET LES MÉDIAS
L'établissement des liens dans les relations avec les médias
Allocution prononcée le 12 septembre 1995 à Moncton, N.-B.
à l'occasion de la Conférence de l'ACJCP

by/par T.A. Cromwell

What society sees of the public face of justice is shaped by many factors. Media coverage of courts and judges is not the only one, but it is one of the most important. I am going to suggest that courts and judges need to pay attention to the potential public influence of the Media's coverage and that they should be active participants in steps to encourage and improve that coverage. In other words, courts should be active in media relations.

I am not going to deal here with questions of the substantive law of freedom of the press, the courts' responsibility to ensure a fair trial or the privacy rights of individuals involved in court proceedings. Instead, I would like to approach the theme of "The Public Face of Justice" by looking at the relations between the media and the courts. My suggestion is that both the media and the courts should think about whether there, in any real sense, is a relationship between them. Each court should ask itself the following questions as regards the

Ce que la société perçoit de l'image publique de la justice est le fruit du mariage de diverses composantes. La couverture médiatique des tribunaux et des juges n'est pas la seule de ces composantes, mais certes l'une des plus importantes. Mon propos vise à vous sensibiliser au fait que les tribunaux et les juges doivent porter une attention particulière à l'influence potentielle de la couverture médiatique sur l'opinion publique, et qu'ils devraient donc devenir des participants actifs dans l'élaboration de mesures visant à favoriser et à améliorer la qualité de cette couverture. En d'autres termes, les tribunaux devraient adopter une attitude plus active dans leurs relations avec les médias.

Je ne traiterai pas ici de questions relevant du droit substantif en matière de liberté d'expression, de la responsabilité des tribunaux de s'assurer l'équité des procès, ou encore du droit à la vie privée des individus ayant des démêlés devant les tribunaux. Je voudrais plutôt aborder le thème de «L'image publique de la justice» en examinant l'état des relations entre les médias et les tribunaux. À mon avis, tant les médias que les tribunaux devraient se demander s'il existe effectivement et véritablement une relation entre eux. Chaque tribunal devrait idéalement se poser les questions suivantes à propos de leurs rapports avec les médias : existe-t-il un dialogue sur des questions d'ordre

suggesting a deliberate approach to media relations on the part of the courts and judges, I am not suggesting that the more familiar models of media relations be adopted.

The question, I think, is simply how can courts and judges help bridge the gap that frequently exists between them and the media. In other words, how can a relationship be built in a way that is respectful of and appropriate to the judicial role?

The first step is to acknowledge at the beginning that the approach must be on two levels. One is the day to day level. The key factor here is what can the two parties do to make their day to day lives easier? The courts and judges want accurate coverage. The responsible media want to make their reporting accurate. There is surely room for common ground and cooperative action here.

The steps to be taken need to be coordinated at the court level so that practices do not vary unnecessarily from judge to judge. There should be consultation: media relations committees with judges and journalists have proved invaluable as a forum for such consultation.

The rules and practices applying to journalists should, as much as possible, be knowable. For example, the Nova Scotia courts have produced a media handbook

relations avec les médias, je ne veux pas signifier par là qu'il faille adopter les modèles plus usuels des relations avec les médias.

Je crois que la question doit se poser en ces termes : comment les tribunaux et les juges peuvent-ils contribuer à combler l'écart qui existe souvent entre ceux-ci et les médias? En d'autres termes, comment peut-on arriver à établir une relation qui soit à la fois respectueuse et appropriée au rôle de la magistrature?

La première étape d'un tel processus serait tout d'abord la reconnaissance de la nécessité d'aborder ce problème à deux niveaux. Le premier niveau c'est celui des relations quotidiennes, au jour le jour. L'élément principal à considérer, c'est de déterminer comment les deux parties peuvent arriver à faciliter le vécu quotidien de chacun. Les tribunaux et les juges tiennent à la fidélité de la couverture médiatique. Les médias qui sont responsables désirent également que leurs reportages soient fidèles. Il semble donc qu'il y ait là un intérêt commun à partir duquel il serait possible de collaborer.

Il s'agit ensuite de coordonner, au niveau du tribunal, la méthodologie à suivre afin d'éviter que les pratiques varient sans raison d'un juge à l'autre. Il faut également un mécanisme de consultation : les comités de relation avec les médias, composés de juges et de journalistes se sont avérés des outils précieux permettant de procéder à de telles consultations.

Les règles et les pratiques à l'égard des journalistes devraient, autant que faire se peut, être connues. Par exemple, les tribunaux de la Nouvelle-Écosse ont rédigé un livret à l'intention des médias qui leur indique les documents auxquels ils peuvent avoir accès et comment se les procurer. Ce genre d'information relève certainement pas des secrets d'État! Le processus de rédaction d'un tel livret permet en soi

media. Is there dialogue about matters of professional concern? Is there a forum to discuss problems? Is there understanding by each of the other's roles, responsibilities and limits? Is there an understanding of areas in which there are common interests and goals as well as areas of different interests and goals? Affirmative answers to some or all of these questions provide evidence of a relationship. Negative answers suggest the opposite.

Should courts and judges care about their relations with the media? My answer is that they should care, for several reasons:

✔Courts depend on public confidence for their authority. To the extent that the media shapes public attitudes, the media is a significant factor influencing the strength of that confidence.

✔Justice is public. The public pays for it and is entitled by law to see it in operation, at least most of the time. When courts deal with the media, they are dealing with people who have rights and legitimate interests.

✔The justice system is almost always the poor cousin of health and education in the political battles for resources. A well informed media that understands the justice system can help to bring public attention to its legitimate needs. This, in turn, may help get what is required at the Cabinet table.

professionnel? Y a-t-il un forum permettant de débattre des problèmes qui surgissent? Chacun comprend-il le rôle, les responsabilités et les limites de l'autre? Existe-t-il un certain consensus sur les questions où il peut y avoir convergence de leurs intérêts et de leurs objectifs, ainsi que des questions où leurs intérêts et leurs objectifs peuvent diverger? Si l'on peut répondre par l'affirmative à l'une ou à plusieurs de ces questions, la preuve de l'existence d'une telle relation sera faite. Des réponses négatives nous porteront plutôt à croire le contraire.

Les tribunaux et les juges devraient-ils être préoccupés par les relations qu'ils peuvent avoir avec les médias? J'estime que oui et ce, notamment pour les raisons que voici :

✔Les tribunaux dépendent du degré de confiance du public à leur égard afin d'asseoir leur autorité. Dans la mesure où les médias influencent les attitudes du public en général, les médias constituent donc un élément important influençant le renforcement de ce degré de confiance.

✔La justice a un caractère public. C'est le public qui en défraie les coûts et la loi lui permet par ailleurs d'en suivre le fonctionnement, du moins la plupart du temps. Lorsque les tribunaux traitent avec les médias, ils traitent avec des personnes jouissant de droits et disposant d'un intérêt légitime.

✔Le système judiciaire fait presque toujours les frais des luttes politiques pour le partage des ressources avec les domaines de la santé et de l'éducation. Lorsque les médias sont bien informés et comprennent bien le fonctionnement de l'appareil judiciaire, ils peuvent attirer l'attention du public sur ses besoins légitimes. Ceci peut, par voie de conséquence, aider à obtenir les ressources nécessaires lorsque ces questions sont abordées au Conseil des ministres.

To look at it from the other side for a moment, why should the media care about their relationship with courts and judges. Consider these factors:

✔A good working relationship will allow the journalist's job to be done better and more easily.

✔Covering courts and the justice system is not just covering specific news - or at least shouldn't be. It is, or should be, institutional coverage. Institutional coverage requires knowledge of the institution, and that requires a relationship with that institution.

For these reasons, both the courts and the media should be concerned with their relations. However, courts and judges need to develop a different model of media relations than the more familiar ones used by politicians and business. I am certainly not advocating that courts and judges should relate to the press as, for example, cabinet ministers and their officials do. Judges are not elected and their job is to render justice according to law, not to try to please the majority. Journalists, who are often more accustomed to covering politicians, do not always understand these differences. In

Et maintenant, si l'on prenait le problème à l'inverse, en se demandant pourquoi les médias devraient se préoccuper de leurs relations avec les tribunaux et les juges; considérons les motifs suivants :

✔L'établissement d'une bonne relation de travail permet au journaliste d'accomplir mieux son travail et ce, plus facilement.

✔La couverture médiatique des tribunaux et du système judiciaire n'est pas et ne doit pas être la simple couverture d'une nouvelle spécifique. Il s'agit ou devrait s'agir plutôt de consacrer une couverture médiatique à l'ensemble de cette institution. Ceci implique donc une certaine connaissance de cette institution, et donc l'établissement d'une relation avec cette institution.

Pour ces motifs, tant les tribunaux que les médias devraient se préoccuper des relations qu'ils entretiennent. Toutefois, les tribunaux et les juges doivent tenter d'élaborer un modèle différent de relations avec les médias que les modèles employés par les politiciens et les gens d'affaires. Je me garderais bien ici de préconiser que les tribunaux et les juges adoptent le même type de relations avec les représentants des médias que ne le font, par exemple, les ministres et les hauts fonctionnaires. En effet, les juges ne sont pas élus, et leur tâche consiste à rendre la justice en fonction des lois, et non afin de plaire à la majorité des citoyens. Les journalistes, dont la plupart sont plus habitués à suivre les faits et gestes des politiciens, ne sont pas toujours conscients de ces distinctions. Ainsi, lorsque je prône une attitude délibérée de la part des tribunaux et des juges à l'égard des