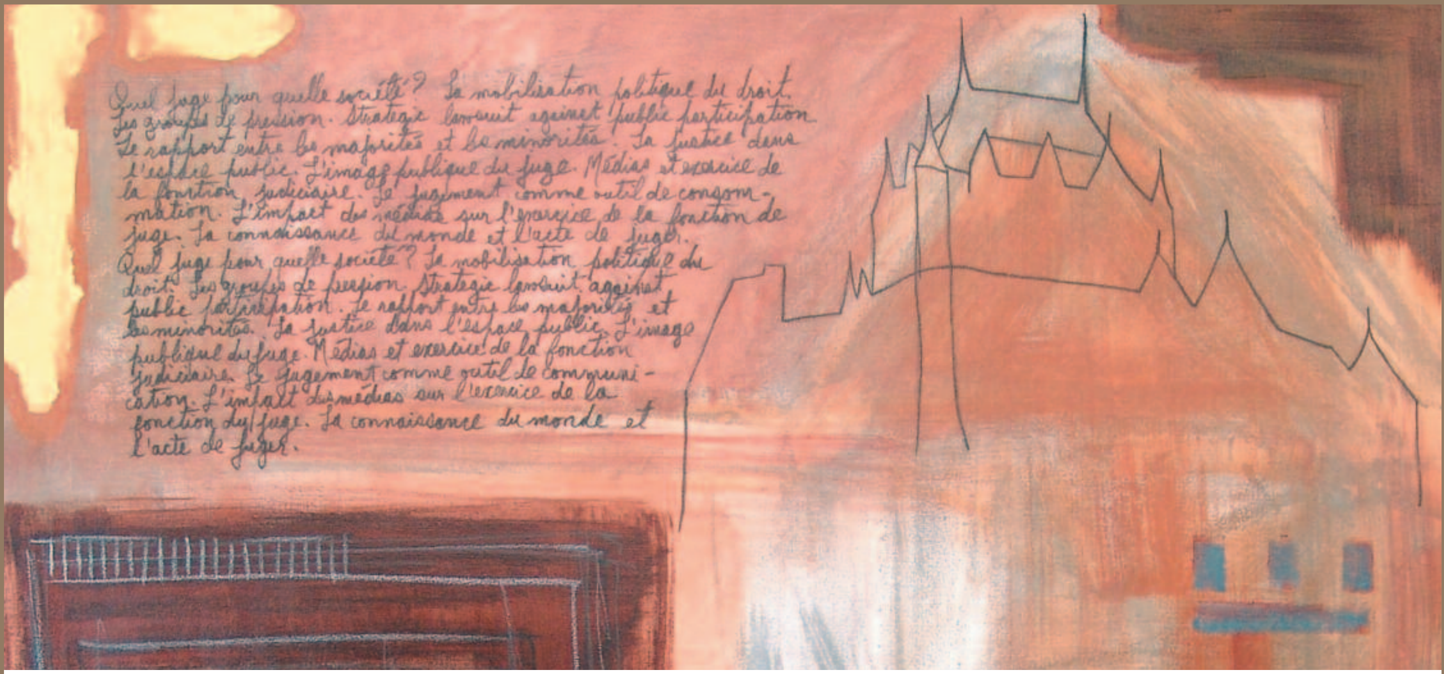

Which Judge for Which Society?

PROCEEDINGS OF THE 2008
JUDGES' CONFERENCE

In memory of David Ostiguy

David Ostiguy, Program Manager at the National Judicial Institute, passed away on April 4, 2009.

Through his work and his involvement in organizing the 2008 Judges' Conference and while it was being held, he contributed toward the success of this event.

We wish to pay tribute to him.

Welcome to my château

Table of contents

Table of contents

FROM LEFT TO RIGHT

Honourable
J. J. Michel Robert
Chief Justice of Québec

The Right Honourable
Beverley McLauchlin, P.C.
Chief Justice of Canada

Honourable
François Rolland
Chief Justice of Superior Court of Québec

Honourable
Guy Gagnon
Chief Judge of Court of Québec

MESSAGE FROM THE

Chief Judges of Québec

The 2008 Judges' Conference, which was held November 5-7, 2008, gave judges from all over Canada, and from all jurisdictions, their very first opportunity to get together and discuss various matters around a common theme.

Which Judge for Which Society? That was the theme that provided food for thought to those who attended the conference in Québec City, which was still all decked out in the colours of its 400th anniversary, under the warm rays of Indian summer sun.

The Organizing Committee – a small team skilfully chaired by the Honourable France Thibault, Court of Appeal judge; the Honourable Paule Gaumond, Court of Québec associate chief judge; and lawyer André Ouimet, Secretary of the Conseil de la magistrature du Québec – worked relentlessly in order to attract over 500 judges.

No efforts were spared to ensure the success of this conference. And the organizers were well rewarded for their efforts: the participation was exemplary and the talks were followed very attentively. It must be said that the remarks made by the speakers were well worth the trip… They have been put in print so they will remain engraved in our memory. Combined with the photos included in this publication, they will rekindle excellent memories among the conference participants who moreover exchanged ideas and shared their views on topics of common interest, thanks to the social activities that formed part of this event.

For those who were unfortunately unable to attend, we hope these words will prompt that same food for thought – reflections striking sensitive chords – that touched those in attendance in those early days of November 2008.

Enjoy!

J. J. Michel Robert
Chief Justice of Québec

François Rolland
Chief Justice of the Superior Court of Québec

Guy Gagnon
Chief Judge of the Court of Québec

MESSAGE FROM THE

Co-chairs of the Conference

In 2008, all eyes were turned toward the Old Capital. A vast number of events were held during the year to celebrate the 400 years of Québec City, and their unforgettable memories still live on.

The legal community took the opportunity to organize large-scale meetings in Québec City. The judiciary was no exception and, in fine style, marked the anniversary of a city with two systems of law – civil and common.

This deserves to be said and repeated: The *2008 Judges' Conference* brought together, for the first time, many judges from all over Canada and from all jurisdictions. And that's not all… For the occasion, colleagues from France, the U.K. and the U.S. joined the 500 Canadian judges who attended this event as well as the former judges and the many academics who contributed toward sparking reflection on topics related to exercising judicial functions and the future of doing so.

As the Conference came to a close, one remark resounded like a leitmotif: This first event of its kind mustn't be the last. This publication of the *Proceedings of the 2008 Judges' Conference* aims at responding to that desire expressed over and over again.

The project that was launched at the beginning of the new millennium couldn't have materialized without the sustained contribution and active participation of many people and organizations: The Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Conseil de la magistrature du Québec, the Court of Appeal of Québec, the Superior Court of Québec, the Court of Québec and the National Judicial Institute all pooled their efforts to do so. Special mention must also be made of the financial contribution of the Justice Departments in both Québec and Canada.

We wish to thank all the people who contributed toward the success of the Conference. Due to limited space, we are unable to mention them all individually, as the list would be far too long. However, these people know who they are and we want them to know that we are truly grateful to them.

In publishing the *Proceedings of the 2008 Judges' Conference,* we are bringing an end to the mission with which we were entrusted and that we took great pleasure in fulfilling.

France Thibault

France Thibault
Court of Appeal of Québec
Co-chair of the conference

Paule Gaumond

Paule Gaumond
Court of Québec
Co-chair of the conference

Opening Address at the 2008 Judges' Conference

The Right Honourable BEVERLEY MCLACHLIN, P.C.
Chief Justice of Canada

THE FUTURE OF COURTS IN A CHANGING WORLD

Judging Change

Fellow Judges, Magistrates, judicial officers, Ladies and Gentlemen. It is my honour and privilege to welcome you this evening to the 2008 Congrès de la magistrature. The theme of this conference – *What judge for what society?* – reminds us that we live in a world of constant change. This was understood as far back as the fifth century B.C., when Heraclitus proclaimed that "[n]othing endures but change."[1]

Yet, for many people, progress is a word not often associated with our justice system. It has been said that "judges and legal scholars can make archeologists seem forward-looking."[2] Perhaps the judiciary's reputation for being mired in the past arises from the fact that the law seeks constancy and predictability. Perhaps it has something to do with the fact that judges spend most of their time examining the past; trial judges pore over past events in the lawsuit before them, and appellate judges in turn scrutinize what the trial judges did – all events in the past. Perhaps it has to do with the law's focus on precedents, what courts have decided in the past. Or perhaps it is the role of the law in ensuring consistency and predictability. The truth is that judges and the judicial system in which they operate are in many ways backward looking. Even the courtrooms we sit in are rooted in tradition. If Samuel de Champlain walked into one of today's courtrooms, he would instantly recognize what was said and done: the physical structure of a courtroom is much the same, as are the rules of evidence and the adjudicative process.

Yet even as we look back, we cannot avoid acting in the present and shaping the future. As Heraclitus understood, the present and the future are inherent in past. Like his metaphorical stream, the past moves into the present and goes on to become the future. And so it is with the law. The rules of the past, shaped by judges of the present, inevitably become the future. No matter how fixed the judicial gaze in the past, it transforms itself and becomes the future.

If what we do today inevitably becomes the future, it follows that we as judges should ensure not only that our decisions are firmly anchored in the past, but that they reflect present realities and bode well for the future. Justice as a continuous stream. When we make a decision, we dip our feet in the stream. We may change the current and send the water in a new direction – the direction of the future. At the same time, our decisions are not immutable. They enter a stream where other currents and other interventions will buffet them and alter them. And so the law develops. Nevertheless, when judges put their foot in the stream and alter its current, they should be aware of where the stream has come from, where they are presently standing, and where the change they are making is likely to take the current in the future.

1. Diogenes Laertius, *Lives of Eminent Philosophers* (Cambridge, Mass.: Harvard University Press, 1979).
2. John Foreman, "The Future of the Courts in Champaign County: Summary of a Conference at the Champaign County Courthouse" (February 8, 2003), online: <http://www.co.champaign.il.us/circt/courtfut.pdf> at 3.

The topic of this conference reflects this dynamic picture of judging. The question *What judge for what society?* presupposes that there is no such thing as a single, or universal, model of justice. Justice must adapt the principles of the past to the contemporary context, all with an eye to the future. We serve not some past ideal, but the society in which we actually live.

This dynamic and responsive focus affects judicial systems in two ways: first, how judges make decisions on the cases before them, and second, how judges and those who assist them manage the processes of the justice system.

In making decisions on the cases before them, judges must reflect the current realities of the societies they serve, not the prejudices of the past. This became very clear in a case Canadians call "The Persons Case", where Viscount Sankey expressed the need to adapt to changing realties expressed by likening the law to a "living tree".[3] The year was 1930. The issue was whether women could hold public positions, such as seats in the Canadian Senate or on its courts. The Canadian constitution said that only "persons" could so serve. For centuries, courts had held that "persons" meant men, and excluded women. But that view no longer fit in a society where women were involved in work outside the home, had been granted the franchise, and were playing an increasingly important role in political events. Instead of looking backward at what had been laid down, the Judicial Committee of the Privy Council, then Canada's final court of appeal, looked at current reality and with an eye to the future declared that women were indeed persons changing the law for Canada and the Commonwealth.

It is now settled doctrine that "courts can and should make incremental changes to the common law to bring legal rules into step with a changing society."[4] Introducing yet another metaphor to express the dynamic and responsive nature of the law, the Supreme Court of Canada has repeatedly admonished that legal concepts are not "frozen"[5], and must adapt to changing realities. This approach dominates the interpretation, for example, of treaties entered into many years ago between Canada's First Nations peoples and the Crown. Promises of the 18th and 19th centuries cast in terms of fur-trade, hunting rights and payment in the currency of blankets may mean little in today's world. If they are to have meaning, ancient obligations must be transposed into the currency of modern times.[6]

Changes in society inevitably impact on judging. As Alexis de Tocqueville observed in 1835, every social issue ever raised eventually becomes a judicial issue.[7] More recently, Frances Zemans, executive vice-president and director of the American Judicature Society noted, "[t]he courts are still expected to solve, to at least to deal with, every problem that arises in our society in every realm and dimension. When no one else wants to decide, it becomes the role of the courts to do so."[8] It is the job of judges to resolve these issues – often issues of great difficulty – prudently, in a way that serves the present and sets a wise course for the future.

The dynamic and responsive focus of the law should imbue, not only judicial decision-making, but the administration of justice. We cannot content ourselves with the processes of the past, when better ways of bringing justice to the people we serve are at hand. We must seize the tools the present provides and scan the horizon for the innovations of the future.

In a word, dynamic and responsive justice does not destroy the value of the past, or the importance of grounding ourselves in precedent. However, it requires judges grounded in the principles of the past to understand the reality of the present – the society they live in – and keep an eye out for the implications that the decisions they make hold for the future. This applies not only to judicial decisions on particular cases, but to the administration of the larger justice system.

Against this background, let me turn to three social changes occurring in the world we currently occupy, and ask how these changes impact on judicial decisions and court administration. The world we live in faces many new realities. I am no seer, and new, unforeseen developments have a way of turning the expected course of history on its head. But with that caveat, let me offer what I see as the three most fundamental developments in our societies which we as judges are facing – technological and scientific development; the challenge of the environment; and the challenge of managing diversity.

The Challenge of Technological Change

The first seismic shift we are undergoing in our respective countries and throughout the world, is the transformation wrought in recent decades by technological and scientific developments. In the last hundred years we have gone from horses through cars to spacecraft; from script through typewriters to digital communication; from primitive physics through quarks to nano-science. Cellular phones, computers and the internet facilitate and define our daily interactions. Convenience, communication, yes, but at a price - a price paid in the currency of new avenues for fraud, theft, invasion of privacy, hate speech, cyber-crime and much more. And to

3. *Edwards v. Canada (Attorney General),* [1930] A.C. 124.
4. *R. v. Salituro,* [1991] 3 S.C.R. 654.
5. *Reference re Same-Sex Marriage,* 2004 SCC 79, [2004] 3 S.C.R. 698 at para. 22.
6. *R. v. Marshall; R. v. Bernard,* 2005 SCC 43, [2005] 2 S.C.R. 220 at para 25; *Mitchell v. M.N.R.,* 2001 SCC 33, [2001] 1 S.C.R. 911 at para. 13; *R. v. Van der Peet,* [1996] 2 S.C.R. 507 at para. 172; *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at 1093.
7. Alexis de Tocqueville, *Democracy in America* (New York: New American Library, 2001).
8. Ira Pilchen, "The Future and the Courts: A Perspective from Illinois" (1992-1993) 76 Judicature 137 at 137

complicate matters, we are told that the pace of technological change and scientific discovery is increasing exponentially.

So much change in the technology and science that drive our world means that courts will more and more be confronted with the problem the Judicial Committee of the Privy Council faced in the *Persons' Case* almost seven decades ago – how to bring the legal rules we have inherited into step with a changing society. Often, the rules that we have been given simply don't give us the answer to the questions raised by new scientific insights and accomplishments. Our Court has experienced this many times in recent decades, but let me give you just one example, the *Harvard Mouse* case.[9] The question before us was whether the Canadian *Patent Act,* which spoke in general terms of patenting inventions, permitted the patenting of a life form, more particularly a type of mouse that had been genetically produced to have qualities that made it an enhanced tool for testing in cancer research. The majority of our Court held that the Harvard Mouse was not patentable in Canada, reasoning that had Parliament intended to patent life forms, it would have said so. The dissenting justices, on the other hand, argued that the broad general language Parliament had used should be read, in the context of current Canadian society, as extending to any invention, including life-form inventions.

Science and technology are placing a multitude of such issues on the judicial roster. What is required for the formation of a contract over the internet?[10] What of the issues raised by new forms of electronic commerce, emerging genetic research, electronic transmission of ideas in an age of ipods and hackers, the effects of genetically modified foods, and cellular radio waves? And what about stem cell research, new methods of file sharing, internet spyware and artificially created body parts? All these technological advances bristle with potential legal issues.

Our first response as a society to these technological developments should be national and international regulation. But often, as change confounds change, legislatures and regulators are simply unable to keep pace. The result is that the courts are called upon to apply the old laws to new disputes. To discharge this function responsibly, judges must understand not only the principles of the past, but the reality of the present and the possibilities of the future. Judges need to be informed about emerging science and technological innovations, and understand their impact on society. Only thus can the credibility of the justice system be sustained and the rule of law maintained.

I have been speaking about the impact of technological change on the legal issues judges must decide. But technological change is also transforming the way justice is administered and accessed.

I opined a moment ago that if Samuel de Champlain were to walk into one of our modern courtrooms, he might find himself, if not at home, familiar with the proceedings. He would see a judge sitting on the bench, lawyers arguing points of law, books of authority, and a great deal of important paper being waved about. Champlain would doubtless note the absence of quills and spittoons and register astonishment at the presence of women in the room. But the essentials might seem much the same as those of his time. All this, however, is changing. In the courtroom in which I sit, every judge and lawyer has a computer, and video cameras transmit images from afar. And Champlain would never have understood electronic filing or a podium that moves up or down to accommodate the pleading lawyer's dimensions and needs!

Make no mistake, the global technological revolution of the age we live in will change the administration of justice, and for the better, in a way that gives people more convenient, less costly, access to justice. Court web sites provide access to court records and forms. Video-conference systems allow litigants to present oral arguments from remote locations, thereby reducing or eliminating travel time and reducing court fees. Trial through the internet and telephone allow ordinary women and men to resolve residential, employment and consumer disputes fairly and efficiently, without the expensive trappings of traditional court proceedings. And we are just at the threshold. More and more, we can expect to see technological developments pervading every aspect of the judicial process from the presenting of evidence to the final verdict.[11]

Yet the good news is not unalloyed. While embracing what technology can do to enhance access to justice, we must exercise care to deal with the risks it raises. Electronic filing, for example, while improving access and document management, raises issues of maintaining the proper balance between privacy and public access. New technology will inevitably alter the current battle between institutional efforts to protect the confidential information and the ingenuity of those who seek the sensitive data for unscrupulous reasons. Despite a mandate to keep their records public, protecting sensitive information will become a growing concern for courts.

The Challenge of the Environment

The second major societal shift that is impacting on present and future justice is concern for the environment and how the way we live is affecting the earth. We live in a world driven by resources – petroleum and a thousand other products. There is huge competition to obtain these resources, huge consumption of these resources, and, as a consequence of this consumption, frightening pollution of our land, waters and atmosphere. The ozone layer is depleted. Vast swaths of the Pacific Ocean are strewn with casual human debris.

9. *Harvard College v. Canada (Commissioner of Patents),* [2002] 4 S.C.R.45.
10. *Dell Computer Corp. v. Union des consommateurs,* 2007 SCC 34
11. Hugh A. Cannell, "The Convergence of Technology and the Law" (1999) 48 U.N.B.L.J. 301.

The ozone layer is depleting. Polar ice-fields are melting at an unprecedented rate. In many parts of the world, water is becoming scarce. This is our reality, and while politicians may be starting to talk about changing it, it is likely to be our reality for some time.

Each of the related environmental phenomena I have mentioned – increased competition for resources, excess consumption of resources in new and multitudinous forms, and finally the pollution that resource extraction and consumption produce – gives rise to new social problems and conflicts. As de Toqueville predicted so long ago, the result will be that judges will be called upon to resolve a host of new issues. Competition for increasingly scarce resources will produce commercial issues within national boundaries and destabilizing stresses between nations; where legislation and statescraft leave gaps, justice systems – national and international – will be called upon to mediate differences. And even where mechanisms for resolution of these tensions are in place, courts will be called upon to interpret and define constitutional boundaries. The Supreme Court of Canada has dealt with whether the regulatory process followed in approving the Oldman River Dam in Alberta complied with constitutional requirements, for example. [12]

Courts can perform their role on the environmental front only if judges understand ecological and social reality of the world in which they live. The past, viewed in isolation, will not give us all the answers. It will provide the principles and values which stand as general guides. But to apply these principles intelligently, judges will be required to understand their current reality and consider the impact of the choices they make on the future.

On the front of administration of justice, the drive for a "greener" planet also calls for forward thinking. We need to ask ourselves what we can do to lessen the drain on the world's resources in providing justice to the people. Can we cut down on paper use by using e-filing, as many courts, including the Supreme Court of Canada, are doing? Can we recycle disposable products and paper? Can we cut or reduce the need to travel by using electronic communications, video equipment, dispute resolution by e-mail or telephone, and flexible employment policies? Can we lower the use of fuel while keeping people comfortable by building "green" courthouses? By asking these questions and arriving at sensible and sensitive answers, court administrators can respond to the environmental changes that, whether we like it or not, are our contemporary reality and our future.

The Challenge of Diversity

The third and final social shift that is changing the issues judges face and the way the courts administer justice, is the increasing diversity of our societies and the challenge of managing that diversity. In 1962, a farsighted Canadian scholar named Marshall McLuhan popularized the term "global village" to describe the world of the future. [13] He was right, and that future is now. The populations of the nations of the world are increasingly diverse and increasingly complex. Wherever we work, whatever we do, we come up against people who seem different, people whom Jean-Paul Sartre called "the other".

"The other", or the presence of minorities in our midst, is not new. The wars of religion that ravaged Europe in the 17^{th} century were wars aimed at eliminating minorities. Many of the civil wars and exterminations that have followed in succeeding centuries have been caused by a hatred of "the other"; the Holocaust of World War II, the Balkan wars in the former Yugoslavia, and the genocide in Rwanda are only three among a host of examples.

The problem of diversity in pre-democratic societies was typically resolved by exclusion or eradication. However, two developments have made these solutions impossible, and radically shifted our approach to diversity in our midst.

First, the character of population diversity has changed. The rise of the "global village" means that borders between peoples of different races and ethnic backgrounds have broken down. People move around and intermingle much more than before. Often the intermingling becomes permanent. Once, not so long ago, the vast majority of people finished their lives where they were born. No longer. Everywhere in our globalized world, people are on the move. And as the pace of demographic change accelerates, so people find themselves living in countries and communities quite different from those to which they were born.

As a result, the traditional ethnic nation state is becoming the *multiethnic* nation state. This is increasingly true in Europe, and it is most certainly true in Canada, which unlike many European nations, was built on the concept of diversity. Canada's first "citizens" were the populations we now call our First Nations. To these were added settlers from France, the United Kingdom, the present United States and most recently, people from all races and all parts of the world. The 2006 Census reported that one in every five Canadians was born in another country, [14] and that nearly half of the population of urban centres such as Toronto and Vancouver came to Canada as immigrants. [15] This "deep diversity" renders exclusion impossible and leaves us with no option but to find ways to live together in harmony.

The second change in how we deal with diversity is the fact that most of us live in countries that espouse adherence to the values in the *United Nations Declaration of Human Rights.* This means that

12. *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3
13. Marshall McLuhan, The Gutenberg Galaxy; The Making of Typographic Man (Toronto: The University of Toronto Press, 1962)
14. Susan Crompton, "Census Snapshot - Immigration in Canada: A Portrait of the Foreign-born Population, 2006 Census" (Summer 2008) Canadian Social Trends 85, online: <http://www.statcan.ca/english/freepub/11-008-XIE/2008001/article/10556-en.htm>.
15. *Ibid.*

the solutions that traditionally were used to eliminate or drive out diversity are no longer available. Tragically, genocide and exclusion still occur. But, more and more, they are condemned as unacceptable. Increasingly, the easy responses to population diversity are disappearing.

The shift to "deep" diversity, combined with the increasing disrepute of the alternatives of ethnic cleansing, war and displacement as solutions to diversity, leaves us with no option but to live together. There are two ways a diverse population can live together – in mutual isolation, or in constructive interaction. A nation's component groups can live together in "name only", like an estranged married couple who occupy different parts of the same house. That is the way of tension, perceived injustice and ultimately social breakdown and violence. Alternatively, the nation's component groups can construct a society that permits them to work and grow together in constructive interaction. This is the model Canada has chosen.

Managing diversity through constructive interaction raises issues that inevitably find their way to the courts. It requires members of majority and minority groups to make reasonable compromises or "accommodations" with each other on issues like language, religious practices and cultural traditions. Lines must be drawn on a case to case basis, and determining what is reasonable in a particular case is often difficult. From Malaysia to South Africa, from Turkey to Canada, courts have been grappling with these issues.

There can be no more delicate or important judicial work than this. The peaceful coexistence of the nation's people depends on it. As in dealing with technological and environmental change, judges whose duty it is to make these decisions, cannot confine themselves to looking back to how things once were, nor allow themselves to be blinded by sentimental visions of a society that seemed simpler and better than the one they now confront. They must accept and understand the present reality of the actual diversity of their communities and countries and render decisions that are just in the context of that reality. They must seek fairness for all, even those who have come recently or carry a different race, ethnicity or religion. They must judge in the present with a view to the future peace of the nation.

To encourage this, judicial education in Canada stresses that good judging requires an appreciation of the social context from which the matter before the court arises and the varying perspectives of the people before the court. We must strive for impartial justice, free from prejudice and false assumptions about cultural difference. In a world marked by pluralism and cultural diversity, the judge stands as the interpreter of difference, the one who listens to every voice, and understands it. We are not judges of this community or that community; we are judges of everyone in every sector of society, high and low, rich and poor. We are in no one's corner and in no one's pocket. We are independent, and hence impartial.

The project of diversity which is the judge's modern reality also has an administrative face. Justice must not only be done, but be seen to be done. Minority voices must not only be recognized, but be seen to be recognized. This means that our judicial institutions – our courts, registries and legal professions – must reflect the diversity of the society they serve. They should include women and members of minority and ethnic groups. Achieving that inclusion may require time, but we must strive for it, on pain of forfeiting public confidence in our justice systems.

As a junior trial judge, I found myself one afternoon hearing a dispute about the division of a couple's matrimonial property. The wife, the wife's lawyer, the court clerk, and the court reporter were all, like me, women. On his side of the room, the husband sat alone. After hearing the wife's case, I turned to the husband and invited him to present his side of the case. He seemed to be having trouble getting to his feet. I told him, in my kindliest tones, that he should not be concerned that he didn't have a lawyer, and that I simply needed to hear his side of the story in his own words. Finally, he got to his feet and said with a tone of umbrage, "Frankly, your Honour, I feel a little outnumbered." I assured him that the fact I was a woman judge and he the only man in the courtroom would not be held against him. In the end, I ordered the property evenly divided, the usual outcome. On retiring to my room and reflecting on the moment, I was struck with the significance of that man's feeling. How many times over all the centuries, I wondered, have women stood alone before all-male courts – if they had the misfortune or the daring to get there – and felt a little outnumbered? And does the same hold, I wondered, for people of minority races and ethnicities who find themselves before a solidly Caucasian, Christian court? Since then I have adhered to the ideal that the face of our justice system should reflect the diversity of the population it serves.

Conclusion

Let me return, in conclusion, to the theme of this conference: *What judge for what society?* And let me answer simply this: "A contemporary judge for contemporary society." A judge firmly grounded in the legal and ethical principles that have developed over the centuries and in whose rich soil justice is rooted. But a judge who also understands that judicial decisions and judicial administration must reflect contemporary realities and contribute to a peaceful, prosperous future where rights are affirmed and the rule of law is respected. A judge and a judicial system that does not look backward, resisting change, but that understands society as it exists and perceives the direction of a prosperous and peaceful future. For as John Galsworthy wrote: "If you do not think about the future, you may not have one." [16]

16. John Galsworthy, *Swan Song* (London: Ballantine Books, 1978)

Address

The Honourable J. J. MICHEL ROBERT
Chief Justice of Québec

This morning, I would like to take the liberty of talking to you mainly about the contribution of French law in North America and our dual legal heritage.

This year, we are celebrating the 400th anniversary of the founding of Québec City by Samuel de Champlain, on July 3, 1608, to be precise, when he set up, at a location that was called Québec—an Indian word meaning "where the river narrows" – a permanent settlement that was named Habitation. I believe this is a good time to recall the important influence that French civilization had on North America – and on Québec and Canada as a whole, in particular.

And you can see that if today, we have a Federal, bilingual Canada that is bijural and multicultural and has an important aboriginal heritage, it is obviously due to our dual colonial history and our history as an independent country since 1867.

My remarks will focus on legal and judicial aspects. Of course, I will also say a word about the English influence, which has contributed toward giving us a hybrid justice system that is both bilingual and bijural. Québec, and Canada as a whole, in this respect, are unique among developed countries, because while 1608 is the year when Québec City was founded, it was also the start of French civilization in North America. For over 150 years, this civilization, which stemmed from the largest European country at the time – in terms of population and economy – would later extend within an immense arc of a circle covering almost half of North American territory – first Acadia and then the St. Lawrence Valley, the Country of the Illinois, the Mississippi Valley and, lastly, GrandeLouisiane, right up to the entrance to the Gulf of Mexico and New Orleans.

Contrary to England, which adopted a colonial population redistribution policy based on farming, France adopted a colonial policy based on creating trading routes, scattered with fortresses and garrisons dependent upon constantly renewed alliances with the aboriginal nations. On this map, you can see a very large number of aboriginal nations with which the French formed alliances. There were over 30 of them, including the Micmacs, which were in the far east, right up to the Atacapas, which were very near present-day New Orleans.

Principaux groupes indiens en contact avec les Français au cours des XVIIe-XVIIIe siècles en Amérique du Nord

This French empire was later dismantled in three periods.

First, in the period from 1603 to 1713, which ended with the Treaty of Utrecht.

And then the period from 1713 to 1763, which came to an end with the Treaty of Paris.

And the final stage, Napoleon's sale of Grande-Louisiane to the United States, in 1803.

A number of historians have shown that these two colonial policies were bound to conflict with one another at some point in time. And that's what happened in 1759, with the defeat on the Plains of Abraham, suffered by the Marquis of Montcalm. Young English General James Wolfe never found out that he had won, as he died in combat.

Obviously, what happened on this side of the Atlantic was more or less the result of the wars being waged in Europe, whether the Seven Years' War or the War of the Grand Alliance or the War of the Spanish Succession.

My Acadian friends would take me to task if I didn't mention the founding of Port-Royal in 1604, in present-day Nova Scotia. I will add that a first attempt at a permanent settlement was made in Tadoussac in 1603 by La Rochelle Protestants, Pierre Du Gua de Monts and Roberval; however, this attempt failed. Five years later, following his conversion to Catholicism, Protestant-born Henri IV, known for his famous statement *"Paris vaut bien une messe"* ("Paris is well worth a Mass"), put a good Catholic from Brouage, by the name of Samuel de Champlain, in charge of founding the Habitation settlement in 1608, which survived under the name of Québec, as I previously explained.

Despite the mystery surrounding Samuel de Champlain – some say he was the natural son of Henri IV – he was probably also a Protestant who converted to Catholicism, more or less at the same time as his presumed natural father. Henri IV had apparently acknowledged eleven illegitimate royal children (or "Royal Bastards", as they were called at the time). Perhaps he had forgotten a twelfth or perhaps he wasn't absolutely sure that he was the father.

The French colonial period brought us the Custom of Paris and the Custom of Orleans as well as the institutions of justice at the time. The defeat on the Plains of Abraham, in 1759, and the Surrender of Montreal, in 1760, marked the start of the English colonial period that mainly brought us English public law and criminal law.

When the *Act of Capitulation of Montréal* was signed in 1760, the Canadians at the time – the *"François"*, as they were called – and the Acadians asked for a certain number of things.

"The French, Canadians and Acadians of what state and condition soever (sic), who shall remain in the colony, shall not be forced to take arms against his most Christian Majesty *(that's what the King of France was called at the time)*, or his Allies, directly or indirectly, on any occasion whatsoever; the British Government shall only require of them an exact neutrality."

The reply from the Generals of the time is ambiguous, and read as follows: "They become Subjects of the King." However, this reply was clarified several years later, with *The Quebec Act, 1774,* as we shall see.

And Article 42 of the *Articles of Capitulation, Montréal, 1760,* is to the same effect: "The François and Canadians will continue to be governed according to the Custom of Paris and the laws and practices established for this country, and they may not be subject to other taxes except for those established under French rule."

And once again, the same ambiguous reply was given: "They become Subjects of the King."

A little later on, in 1803, came the third step in breaking up French America: Napoleon's sale of Grande-Louisiane to the United States of America. GrandeLouisiane mustn't be confused with Louisiana of today, because it is much larger. This sale was called the Louisiana Purchase and involved France's transfer of over 2,244,476 square kilometres, or 529,911,680 acres of territories, to the United States, at a price of three cents per acre, or more than $15,000,000 or 80,000,000 million francs in all. But console yourself: That was equivalent to nearly $390,000,000,000 in 2003, by extrapolating the terms of percentage of gross domestic products—practically the cost of one year of war in Iraq. And you will note that the territory cuts through over 14 present-day states in the U.S.

In red, the territory of French Louisiana in 1803
(The territory sold was over 2 million km²)

Following some fifteen years of wavering, *The Act of Québec, 1774* approved the compromise between the "François", the Canadians and the Acadians. *The Act of Quebec* maintained French civil law for property and civil law – an expression, in fact, that would be found much later on in *The Constitutional Act, 1867. The Act of Quebec* also maintained common law for public law and for criminal law as well. And that's how we wound up with our hybrid system that some will call: "The best of both worlds."

What has been forgotten to mention is that the influence of common law doesn't stop with public and criminal law. The courts that were created after the conquest adopted the British model, where oral communication plays a greater role than written procedure, contrary to the situation found in Europe, even today.

In criminal matters, the procedure, the indictment, replaces the inquisitorial procedure; the rules of proof and procedure are substantially based on the British model. In fact, in *The Act of Quebec,* it is mentioned that the Canadians, the "François" and the Acadians appreciated the clemency of English criminal law, especially when compared to torture on the wheel, which was not uncommon under the French regime.

During the 19th century, the enforcement of the Custom of Paris and the Custom of Orleans became more and more of a problem, because – as you know – it was no longer in use, given the codification of the *Code civil des Français,* which was later called the Napoleonic Code, in 1804.

On the eve of the creation of Canada in 1866, the Legislative Assembly adopted the Civil Code of Lower Canada, thereby re-encountering the French vein, but this time, through the codified civil law of 1804. At times, the student surpasses the teacher – that being said without any criticism of our French friends, given the fact that in 1994, the Québec government brought a Civil Code of Québec into force that was entirely revised in-depth. In fact, our civil law has taken a lot from common law – for example, of course, testamentary freedom, which had been adopted well before that, but also adds therein an institution such as the trust.

Add to that what was taken from American law in relation to injunctions, pragmatic and functional bilingualism at the discretion of each party, carrying more weight of *stare decisis* than in French law, but less than in classic common law, vast freedom for judges to create new solutions because of their inherent powers and the lighter burden of the doctrine, and you will then have a flexible, effective, efficient system of justice, fashioned after Québec's model. When I asked my researcher, lawyer Sébastien Lafrance, to find me an image to express this reality, he suggested *"pâté chinois"!*

So the pâté chinois *(TRANSLATOR'S NOTE: literally Chinese pie… but called "shepherd's pie" in English)* has three ingredients: first the mashed potatoes – you know or you remember Mr. Parmentier; I think he was a Frenchman who popularized the use of potatoes for human consumption. At the bottom of this pie is the minced beef of Lord Sandwich, who invented what we eat every day and which is named after him. And between the two, there is a very American ingredient – the corn – which is the aboriginal contribution to our legal system and which binds both the French part and the English part. So that our French friends from France aren't totally lost with this *pâté chinois,* because the name isn't common in France, I have reproduced something that is found more commonly in France and which is called *hachis parmentier,* which is very similar to *pâté chinois;* however, you will notice that there is no corn in *hachis parmentier.*

So the Acadian contribution must also be mentioned and, in particular, that of the Université de Moncton, which has made it possible to develop a common law in French, so that Canada's legal system comes in four versions, rather than two: French civil law, English civil law, English common law and French common law. I believe this is unique in all the world at the present time.

At a time of development of international institutions and globalization of markets, this unique, hybrid legal system gives us considerable competitive advantages that all too often we don't fully use. Once again, it prompts us to promote the benefits of such a system, and even beyond our borders. Other courts faced with similar problems may want to draw inspiration from this. And of course, the Belgian example immediately comes to mind.

We must also mention, as a reminder, the French contribution to our civil law, which has made it possible for us to develop a complete code, expressed in general, accessible terms, and which contains rules of law formulated as principles. These may then be enforced by the courts in various factual situations, while ensuring judicial security and stability of social relations.

In fact, our charters, including the *Canadian Charter of Rights and Freedoms,* borrowed – if I may say so – this legal style based on the expression of general principles. Obviously, we are indebted to our friend Napoleon, who once again donned his everyday suit and which was his coronation suit, in fact.

Whereas our common law colleagues are still in the process of defining the various "torts", as for ourselves, for the past one hundred years and more, we can already base ourselves on the general principle of extra-contractual liability contained in article 1457 of the new *Code.*

Our common law colleagues had to wait until the unfortunate presence of a snail in a bottle of Ginger Beer to start defining a general principle of proximity underlying civil liability in common law. Moreover, the culture of civil law and the codification have had an influence on the common law world, and particularly through the codification of our criminal law in 1955. However, common law has made a considerable contribution – mainly in the flexibility, interpretation, creativity in seeking solutions because of the praetorian nature of common law and inherent powers of the superior courts from which we have inherited English courts.

Our dual legal heritage is therefore defined in three parts: To our French ancestors, we owe the fact that the French language and culture have been maintained in North America. We also owe them the development of the French legal culture, which includes, in particular, a legislative drafting style based on general principles and criteria, a method of deductive reasoning, by first laying down a principle and then applying it to the particular facts of the case on which a decision has to be reached, and lastly a civil code forming a coherent, complete, organized and logical whole.

To our British ancestors, we owe the influence of the tradition of common law, which, in particular, consists of a detailed style of legislative drafting, often including precise definitions, a method of inductive reasoning that makes it possible, when examining all the case law, to identify the rules to apply to the legal action on which a ruling must be made, and courts having inherent powers that allow them to create new solutions to meet the changing needs of society.

On this note, I wish you a very good conference.

Thank you.

Address

The Honourable GUY GAGNON
Chief Judge of Court of Québec
Chair of the Conseil de la magistrature du Québec

The Honourable Michel Robert, Chief Justice of Québec, a real history buff, has just presented us a history of this very extraordinary place that Québec City truly is – a city that is 400 years old.

As for myself, I would like to encourage you to take a look at the events that are a bit closer to modern times, illustrating to what extent Québec City has been the focal point of many events that have marked the destiny of both the province of Québec and that of Canada, from a cultural, social and political point of view. I might mention, in passing, that, in fact, it was at a time when residents of Québec City started to reflect on how to mark the 400th anniversary of this fortified city, the idea was born to organize a meeting of judges from all jurisdictions and all parts of Canada, in order to set up a forum where we could reflect on the role of the judiciary. And so, your presence here is the materialization of this project.

Over the past few months, in its hallways, conference rooms and hotel suites, this establishment where we are meeting here today, a privileged witness of the history of Québec City, has seen various celebrities, such as Céline Dion, Paul McCartney and even Nicolas Sarkozy, the President of the French Republic. And you and I today are here on the very same premises, filled with so much history. It is also here, during World War II, that the Québec Conference was held, when delegations directed by Winston Churchill, Franklin D. Roosevelt and William Lyon Mackenzie King stayed here to develop the offensive strategy that was going to be launched in Europe and that concerned – particularly for Canadians – the landing plan for the Allies in Normandy.

And so the fact that we have chosen the Château Frontenac to hold this conference is not foreign to the history of Québec City, and bringing together people from all the courts of justice as well as all those who – directly or indirectly – are interested in this wonderful judicial world, was – to my mind – an ambitious objective, but one that is in keeping with the vision and values of our ancestors – that is, to set up a context on which we will all be able to build for the future.

So on the heels of the remarks made by the Chief Justice of Québec, I would first like to remind you of the origins of our meeting today, and explain to you how the event took shape, and tell you about our objectives in holding this historical meeting.

How this gathering came to be

Let's first take a look at how this gathering came to be: I briefly alluded to it in my introductory remarks and, as a resident of Québec City, I can bear witness to the fact that all throughout this historical year, which will soon be coming to a close, the 400 years of French presence in North America were celebrated in various ways and at various levels. Just before, I made an allusion to the artistic context, and even to a political context; however, to these events, I will add to all that I have mentioned earlier, that residents and visitors to Québec City were all delighted with the highly artistic activities of the Cirque du Soleil or of stage director Lepage, and even religious events were held, as Québec played host to a Eucharistic conference – a gathering of several thousand people – that was held under the responsibility of Cardinal Marc Ouellet, Archbishop of Québec City and Primate of Canada – all this to say that the various facets of social, cultural, religious and political realities that make up our society were largely covered by the activities of the 400th anniversary of Québec City.

As for the legal world, there was the Barreau du Québec's conference, bringing together all the lawyers in the province of Québec – a conference that was held here last June. And I mustn't fail to mention the imposing conference of the Canadian Bar Association, which took place this past August, under the auspices of outgoing president and Quebecer Bernard Amyot.

Needless to say, these events remain engraved in the world of the legal community in Québec and Canada; however, we also needed to add an initiative that would have an even greater impact on the judicial world.

We thought that recalling the four hundred years of Québec City would therefore not be complete without holding judicial celebrations here as well. And that's how the idea was born to organize a meeting of judges from all over Canada, all jurisdictions combined.

Since auspicious events come in pairs, it must be mentioned that this year, we are also celebrating the 30th anniversary of Quebec's judicial council, the Conseil de la magistrature du Québec, an organization devoted to deontology and training for provincially-appointed judges. Added to that is another anniversary, and I'm very proud to announce it to you, in my capacity as Chief Judge of the Court of Québec: the 20th anniversary of this Court, which is now known all across Canada. These two organizations – the Conseil de la magistrature du Québec and the Court of Québec – moreover have their headquarters in Québec City.

In addition to these two anniversaries is yet another very important one, and it's my friend, the Honourable Brian Lennox, who reminded me of it just recently: It's the 20th anniversary of the National Judicial Institute, an organization of world-renown and well known to us all. And so that's the line-up of anniversaries being celebrated this year…

As you now know, this meeting is therefore the first of its kind. The first, because in Canada, we have no other precedent where judges of all jurisdictions and of the entire Canadian confederation have met to discuss and exchange their points of view. Henceforward, Québec City will be the place where we will now be able to say that such a first took place. Our discussions will be conducted by judges of the Supreme Court of Canada, the Court of Appeal of Québec, the Superior Court of Québec and the Court of Québec, renowned lawyers and prominent jurists, both from inside and outside Canada. I would like to thank, in advance, the high-calibre moderators, guest speakers, academics and jurists as well as our colleagues who – over the coming hours – will be relating their research, their work, their commitment and their experience.

I am therefore expressing the wish that this type of conference, as demanding as it is to prepare and organize, won't be the last one of this kind that we will have. We have so much to learn from the various courts of justice that make up Canada's judicial system that it would truly be a loss for all those in the judicial world, as well as for litigants, if we didn't take the opportunities that such meetings can give us, and consequently, it is so all important to repeat this experience in the near future.

Organizing the conference

Let me briefly tell you about the organization of this conference. Never in the past have we witnessed such cooperation between institutions – what I would describe as inter-institutional cooperation. For instance, the Canadian Association of Provincial Court Judges decided to pool its efforts with the National Judicial Institute, the Conseil de la magistrature du Québec, the Court of Appeal of Québec, the Superior Court of Québec, the Court of Québec and the Conférence des juges du Québec, to organize a meeting bringing together judges representing the various jurisdictions from all Canada's horizons.

Using as a pretext, these very special features of this conference, I decided to invite my colleagues – and specifically, the chief judges and chief justices of all the provincial courts in Canada – and to make our annual fall meeting coincide with this conference.

I was particularly pleased to welcome to Québec City, at the beginning of this week, all my colleagues – Canadian chief judges and chief justices – and to give them the chance to discover the charms of our old fortified city. I would also like to take this opportunity to thank the Québec government, which, last Monday, hosted the Canadian Council of Chief Judges at an official dinner, where the Right Honourable Beverley M. McLachlin, Chief Justice of Canada, was the guest speaker. In this same vein, the Canadian Judicial Council also agreed to hold a meeting of its members here. Within that meeting, which took place at the beginning of the week, under the patronage of the Chief Justice of Canada, all the Canadian chief judges and chief justices were, in fact, invited to a dinner at the National Assembly, chaired by Madam Chief Justice McLachlin. I would therefore like to pay tribute to Madam Chief Justice and express my heartfelt thanks to her for her support and her great receptiveness.

However, bringing together all the judges from all the jurisdictions, when all these people have very heavy agendas, represented a considerable challenge, as you can well imagine.

At the very start of our meeting, it is important to pay tribute to the women and men who shouldered special tasks, in addition to their daily work, to make this event one that, I hope, will remain engraved in your memories forever.

I would also like to pay particular tribute to the work of the two co-chairs of this conference, who are making sure that this week of ours will be one of the most memorable and, having been a witness to it, I can tell you that these two people have worked tirelessly to see that this event is a real success. It is by combining their efforts and devoting outstanding energy to it all that Madam Judge France Thibault of the Québec Court of Appeal and Madam Associate Chief Judge Paule Gaumond of the Court of Québec have managed this feat, being at the head of a very small team, to give life to what we are experiencing at the present time. I would like to thank you both for your extraordinary work!

In addition, I must tell you that for the past few years, a custom has been established during the judges' conferences in Québec. One of our colleagues, Judge Jean La Rue, a great jurist and also a great artist, has created – every year – an original work of art inspired by the theme of the conference. At the request of the organizers of this year's conference, Judge La Rue has made a new and original work of art that you may have noticed on the website. It has also been produced on the program of activities as well as on the banners. Thank you, Judge La Rue, for this fantastic work of art.

In the coming weeks, we will be sending you a copy signed by the artist himself. I am sure that this work of art will be a pleasant souvenir of your stay in Québec City.

And so that's the story behind how it originated, this program that we are proposing to you and which the Honourable François Rolland, Chief Justice of the Superior Court of Québec, will be describing to you in detail.

However, the main focus of this conference isn't social gatherings, although various moments have been set aside for you to discuss among yourselves, without any formal framework. In this regard, we have, in fact, agreed to hold events and social activities, which are precisely supposed to allow for such communication.

The objectives of the 2008 Judges' Conference

Our main objectives, however, are highly scientific. In fact, the conference organizers quickly agreed that our society presents challenges that are as numerous as they are varied. The judge's role, formerly perceived as being static and at the top of the pyramid, has greatly changed over the past decade, and this role is bound to significantly change some more, over the coming years, so as to adapt to litigants' needs. Beyond a doubt, we are in an era of change, where communications are now almost instantaneous and where expectations with regard to the judiciary are constantly on the rise. Commentators, observers and forces on the judicial scene regularly report on the benefits of an independent, impartial judiciary; yet in the same breath, they emphasize the main challenges of modern Justice. Of all these challenges, one constant emerges: our courts must aim, more than ever, at improving access to justice to all our fellow citizens.

As judges who, for a number of us, moreover, work in both legal systems – both civil law and common law – it is therefore important to ask ourselves, with full independence of mind, how we can assume our role in this changing society and what our attitude should be in the face of these challenges, and hence the question: *Which judge for which society?*

In fact, judges are now faced with increasingly significant realities, such as:

- *a heavier workload*
- *more open disputes over their decisions*
- *more aggressive publicity about judges' work*
- *a more attentive media eye on courts' day-to-day activities*
- *fast changes in jurisprudence, which is now affected by influences all over the world, not to mention the ever-growing role of technologies in the day-to-day activities of courts of justice*

All the fields of law are now subject to a speciality, not counting the fact that the judge must, more than ever, adapt to the social and cultural realities of an ever-changing world.

This simple list, far from being exhaustive, is very incomplete proof of some of the challenges that the Canadian judiciary must face. And yet, it's entirely up to us to consider these challenges as being an opportunity – a chance to be fulfilled within an exciting profession. In fact, we have the opportunity to become better judges and the basic opportunity to better serve our fellow citizens, by making it possible for unfortunately unavoidable disputes to be resolved in the most civilized and best possible way – that is, in the best interests of people under the court's jurisdiction.

The objective that the organizing committee has imposed on itself is therefore to propose some down-time: a time-out to listen, a time-out to reflect and communicate with one another. The talks that we will be hearing and that Mr. Justice François Rolland will be telling you about in detail, and the discussions that we will subsequently have, I hope, will help us partially answer the question: *Which Judge for Which Society?*

Address

The Honourable FRANÇOIS ROLLAND
Chief Justice of Superior Court of Québec

Judicial Independence and Access to Justice

Just as the other speakers before me, I would like to take this opportunity to make special mention of the outstanding work that has been done by the two co-chairs of this conference and by the members of their committee.

They spared no effort to make this conference an immense success – a conference which, incidentally, coincides not only with the election of a new U.S. president – an outstanding historical event – but also with the call for an election in Québec. We can say that our co-chairs are blessed with intuition! We will long remember this conference, which will form part of the history of the judiciary.

I therefore wish to express very special thanks to the Honourable France Thibault and the Honourable Paule Gaumond.

I'm very pleased to be with you here today.

The Honourable Michel Robert, Chief Justice of Québec, has just told you about the wealth of our legal heritage, which stems from both French and British traditions.

Judicial independence, which come to us from England, is one of the invaluable legacies that History has handed down to us in this regard. To some extent, it is the cornerstone of our judicial system, whose legitimacy – need we recall? – is based solely on the public's confidence in that system.

Today, I would like to briefly review this rule with you and place it in the present context of access to justice in Québec.

To begin with, I would like to make a few remarks about judicial independence, what it represents for Québec and for Canada as a whole, its guarantees, its history and its most recent developments.

In the *Beauregard* ruling [1], Chief Justice Dickson defined judicial independence as follows:

> *"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider be it government, pressure group, individual or even another judge should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision."*

A few years later, in 1997, in *Reference re Remuneration of Judges* [2], Judge Lamer added that "judicial independence also operates to insulate the courts from interference by parties to litigation and the public generally".

Judicial independence therefore aims at ensuring and guaranteeing the judge's impartiality, which is at the very heart of exercising his functions. Because while impartiality refers to the decision-maker's state of mind, independence goes well beyond that and concerns, instead, his status, which must guarantee him total independence from any influence or outside interference.

Such independence pursues one single aim: to ensure the public's confidence in the judicial system, by creating objective conditions aimed at guaranteeing that justice is rendered, and appears to be rendered, according to the principle of the Rule of law, pursuant to the applicable laws and to the facts put in evidence before the court.

In Canadian society, there are three ways and means of guaranteeing the judge's independence: to begin with, his security of tenure, as the judge is appointed during good behaviour; secondly, his financial security, as the judge is guaranteed sufficient income to shelter him from any financial influence; and lastly, what we call "institutional independence", as the judge is a member of an institution that must function completely apart from the executive and the legislative branches of government. Within the judicial institution, in his capacity as decision-maker, the judge can't be subject to any form of pressure.

All these conditions place the judge in an environment demonstrating not only that he has a guarantee of total liberty, but also that he is perceived as being totally free. And all this in order to ensure the public's confidence in the institution – confidence that forms the basis for his respect and his acceptance.

In Canada, sections 96, 99 and 100 of the *British North America Act* officially guarantee such independence for Federally-appointed judges. Moreover, the preamble of *The Constitution Act, 1982,* of ours is sometimes cited to reinforce the independence of the judiciary, with Chief Justice Dickson having noted, in the *Beauregard* ruling,[3] that: "Since judicial independence has been for centuries

1. The Queen v. Beauregard, [1986] 2 S.C.R. 56, par. 21.
2. Ref re Remuneration of Judges of the Prov. Court of P.E.I., [1997] 3 S.C.R. 3, par. 130.
3. Supra, note 1, par. 29.

an important principle of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble."

Although provincially-appointed judges aren't covered by the provisions of the *British North America Act,* the Supreme Court decision in the *Valente* ruling[4] clearly establishes that independence, and more particularly security of tenure of provincially-appointed judges, is practically the same as that of Superior Court judges.

Judge Dickson's reasons in *Beauregard* refer to history as a source of law. Judicial independence is a powerful illustration of Man's progression toward freedom and democracy.

Where does this principle come from?

It originated in England and dates back to the 17th century. At that time, the courts were royal courts where the judges could be removed from office by the king, for no reason. It was in this context that a clash arose between Sir Francis Bacon, Minister of Justice of England, and Chief Justice Coke of the Court of King's Bench. For Sir Bacon, judges were lions subject to the Throne and therefore mustn't ever oppose the King. Chief Justice Coke, outraged by this position, declared that it was rather the King who was subject to God and to the Law! As a result of this confrontation, the chief justice resigned, in 1616, at the request of King James, for having gone against his will.

Although the man was ousted, his ideas gained ground. Through the support of many other notables of those times, England's *Bill of Rights* of 1689 and the *Act of Settlement* of 1701 would later affirm the independence of the courts by establishing two important aspects of judicial independence:

- *judges' security of tenure during good behaviour, and*
- *the protection of their salaries, which would be determined by Parliament from then on, and not arbitrarily by the King.*

It's worth mentioning that the *Act of Settlement* of 1701 is based on the ideas of John Locke, father of the doctrine of separation of legislative, executive and judicial powers.

It was only in 1834, or 133 years after the *Act of Settlement,* that the first law on the judges' security of tenure in British North America became applicable to the Court of King's Bench of Upper Canada. The same law was adopted for Lower Canada and for the other courts in Upper Canada only in 1843, after the union.

When the Confederation was created in 1867, the provisions of the *British North America Act* entrenched the protections of the *Act of Settlement* of 1701 with regard to security of tenure and protection of the judge's salary.

This constitutional protection guaranteeing judicial independence is extended to provincially-appointed judges in the *Valente* ruling.

Subsequently, at the time of legal challenges by provincially-appointed judges, certain significant rulings were handed down with regard to judicial independence and the judges' financial security.

And so at the beginning of the 1990's, a series of litigation was undertaken following disputes between the judiciary and the executive branch of the government, and particularly in the provinces of Prince Edward Island, Alberta and Manitoba, in reaction to the executive's cutback in the judges' salary and without prior consultation. This prompted the late Judge Lamer[5], on behalf of the majority, to establish the following three basic principles:

- *first, the salaries of judges may be reduced, increased or frozen; however, in order to do so, this requires prior recourse to an independent, effective and objective commission*
- *second, negotiations regarding judges' salaries are prohibited between the judiciary, on the one hand, and the executive and the legislature, on the other*
- *and finally, the judges' salary may not be reduced below a certain minimum level.*

The Court held that a hearing by an independent commission was a constitutional prerequisite for an alteration in a judge's salary, whether or not the commission's recommendations were adopted.

Since then, the procedure to scrutinize and adjust judges' salaries in Canada has been through independent salary commissions.

In fact, the Superior Court of Québec has ruled a number of times on matters stemming from the recommendations of various triennial commissions.[6]

Nonetheless, judicial independence is a fragile concept and we must remain on guard to ensure that it is respected.

If we have an independent judiciary, it's so that it can fully exercise the mission with which the public has entrusted it. However, the court still has to be able to be referred such litigation, and the public must be able to refer its disputes to it and call upon its services.

And what about access to justice, and particularly in Québec?

If I can rely on what I have read and on my own personal experience, such access is still a major problem in a great many provinces that

4. Valente v. The Queen, [1985] 2 S.C.R. 673.
5. Supra, note 2, par. 132-135.
6. In particular, see: Conférence des juges du Québec c. Québec (Procureur général), [2007] R.J.Q. 1556 (C.S.); Québec (Procureur général) c. Conférence des juges du Québec, [2006] R.J.Q. 2733 (C.S.), appeal partially upheld, [2007] R.J.Q. 2295 (C.A.); Québec (Procureur général) c. Conférence des juges du Québec, [2003] R.J.Q. 1488 (C.S.), appeal dismissed, [2004] R.J.Q. 1450 (C.A.), appeal dismissed in the Supreme Court; Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec c. Québec (Procureur général); Minc c. Québec (Procureur général), [2005] 2 R.C.S. 286.

are no different in this regard from a number of Western societies. If we haven't yet succeeded in resolving the problem satisfactorily, it's not because this matter hasn't been discussed at great length nor because a certain number of strategies to achieve this haven't been developed.

In Québec, in fact, the courts of civil justice continue to be deserted. The public, which largely finances the operations of our civil justice system, through its income tax, still can't afford to take advantage of it. And the popular belief is still steeped – and wrongfully so, I feel – with the cliché that all recourse to justice is an endless affair.

Indeed, in 1998, the Québec authorities decided to react to the increasing loss of credibility of the civil justice system in terms of cost, delays and other perceived issues by creating a committee composed of practicing and government lawyers, law professors and judges, appointed to study the problem and propose solutions. It started its work with a vast consultation within the legal profession. Three years later, in July 2001, a report[7] was tabled whose title aptly portrays the ambitiousness of the project: *"Une nouvelle culture judiciaire"* ("A new judicial culture").

The majority of the report's recommendations became law on January 1st, 2003. For the most part, they revolve around the following goals:

- *Simplification of proceedings*
- *Reduction of delays; and*
- *Control of costs.*

The objective of this reform is truly ambitious: to establish a faster, more efficient and less costly justice system that will improve access to justice and increase public confidence.

This new judicial culture, which must lay the foundations of the use of the civil justice system, is based on four principles:

- *good faith*
- *the proportionality of the procedures in relation to the objectives*
- *the power and duty of the Court to intervene in order to ensure sound case management, proper conduct of proceedings and respect for the rule of proportionality, and lastly*
- *judicial conciliation*

In my opinion, the systematic enforcement of the rule of proportionality remains the key to the success of our reform. And it's probably our reservations about this obligation that explain, to a great extent, the little progress accomplished since it was implemented, nearly six years ago. Access to justice is still very costly for litigants, to the point of being inaccessible to the majority, except for the needy and the more affluent.

Our reform of 2003 also put into place a system of conciliation presided over by a judge, upon the parties' request, in the form of out-of-court settlement conferences.

Judicial mediation has proven enormously successful among those who call upon the Court. Introduced in 2003, it continues to be popular and those who take advantage of this opportunity gain a lot of satisfaction from it.

Unfortunately, it seems to have little effect on the costs of justice, as these conferences take place, in most cases, only a few months – or even a few weeks – before the hearing, which means after all the costs inherent in preparing the case have been incurred.

What does the future hold in store for us? I believe that the problem of access to justice is not insurmountable and that we can do much better than in the past.

How? By being more efficient, by doing more with less, by producing more results with fewer proceedings, less preparation time and less hearing time. By being more frugal so that justice once again becomes more affordable. Because that's the flaw, first and foremost, and so far, we have intervened the least in this problem of the utmost importance. Every step of the way, we must be aware of the rule of proportionality and apply it strictly and consistently. We must inform the litigant, and inform him directly, if necessary. And we have the means of doing so. All that is left to do is to do it.

The title of the report by the review committee behind the reform was evocative, not to say "premonitory": *Une nouvelle culture judiciaire* – A new judicial culture.

A change of culture, vision, and methods generates resistance and requires persistence. The new judicial culture requires a change of perspective before it can translate into results. This change of culture is difficult. It is not being embraced rapidly by the legal profession or by the judiciary. Judges have an important role to play in case management – a new role for them – so change must also happen at that level.

Nevertheless, I remain resolutely optimistic. Progress is being made – more slowly than we would wish, but there is progress. Changing a culture is a long and laborious undertaking.

As for ourselves, we are determined to stay the course, in good years and bad. The toughest times to get through are precisely those transition periods, those periods of adaptation. And that's what we're experiencing at the present time. But it is our firm conviction that we will succeed.

Let me conclude by saying that much has been done since 2003, and that we are seeing a change in attitude by those involved in the system, lawyers and judges included. I believe that we now realize

7. *La révision de la procédure civile : Une nouvelle culture judiciaire,* Report of the Civil Procedure Review Committee, Québec government, July 2001.

that this change of culture was and is necessary and inevitable. The judicial system belongs to all citizens; they must have access to it.

This wonderful instrument of freedom, which judicial independence truly is, has been made available to the judge by the public, to fulfil his duties. The public is now asking the judges to again make available to it, both in terms of time and costs, the indispensable instrument of justice that the court certainly is, in order to give precedence to the rule of law, which forms the very basis of our mode of democratic operation. It is our duty to respond to the public's appeal.

I thank you and wish you an excellent conference.

Address

Mr. ANDRÉ OUIMET, *lawyer*
Secretary of the Conseil de la magistrature du Québec

ANNOUNCEMENT OF PUBLICATION LAUNCH: *APPLIED JUDICIAL ETHICS*

Kenesaw Mountain Landis was a U.S. Federal judge at the beginning of the last century. At the same time, he held the position of Commissioner of Major League Baseball. Realizing that his position as a judge didn't give him enough time for his other occupations, Mr. Landis stepped down from the bench. I must point out that a number of people voiced their opinion, to make him reflect on his decision.

So much water has gone under the bridge since that time. For example, court decisions and authors have mentioned, as a reminder that judicial ethics and judicial independence are interdependent, and have the same objective: to maintain the public's confidence in judicial institutions.

And while some situations may prompt the public to file a complaint against judges, it is then the judicial council's role to examine such complaints and respond to them.

Within the entire Canadian Confederation, the public has independent organizations that examine and evaluate the fairness of the criticisms made against members of the judiciary. In carrying out its role, a judicial council is an organization that contributes toward maintaining public confidence.

The province of Québec's judicial council, the *Conseil de la magistrature,* is responsible for providing legal documentation as well as ongoing training and development of Québec's judges, and ensuring compliance with judicial ethics.

Since 1978, the year it was created, Québec's judicial council, which is now celebrating its 30th anniversary, has been called upon to rule on slightly more than 1,500 complaints, to date, against various judges. The very great majority of these complaints have been rejected, because they were unfounded. Nevertheless, the examination of such complaints, and the findings of this judicial council – as well as those of its committees of inquiry or of the courts – have made it possible to develop jurisprudence that may prove to be very useful, in that it favours the emergence of various tendencies, if not actual rules.

For the past few years, Québec's judicial council has been posting – on its website – both its decisions and the reports of the committees of inquiry, in an effort to make these known. These documents are also placed in the databanks of the *Société québécoise d'information juridique* and the Canadian Legal Information Institute.

In addition, in its activity report, Québec's judicial council annually publishes a summary of its decisions and those reached by the committees of inquiry.

Another step was taken in 2005, with the publication of a compendium entitled Applied Judicial Ethics.

An update of this compendium was then launched at the 2008 Judges' Conference. As lawyer Noreau will point out, it is much more than a mere update. This new version of the publication, which will soon be available, will make it possible for the public, the legal community and the judiciary to understand how Québec's judicial council, the committees of inquiry and the courts have enforced the legislation and the codes. This publication is a reference source – an educational tool – and comes within our judicial council's concern for ensuring widespread dissemination of its decisions. The decisions that are included in this compendium are bound to be of equal interest to English and French readers alike. This compendium has therefore been published in both languages.

Creation of a New Judicial Ethics Tool

Moreover, noting the difficulty in accessing legislation, codes of ethics, regulations and jurisprudence on judges' conduct in our vast world, a tool has been developed. It will help share information between organizations responsible for judicial ethics, make it possible for judges and the public to benefit from a modern source of information, and for researchers, to have access to an up-to-date, user-friendly databank that will facilitate access to what has been written on this topic, on the international scene, as well as what has been written on legal doctrine.

Promoted and encouraged by Québec's judicial council, and possibly by other partners as well, in the future, the Université de Montréal's *Centre de recherche en droit public* (a research Centre on public law), under lawyer Noreau, has developed a website in this regard.

Mr. Noreau will give you the details of the various features and will tell you how to access this website.

We must hail this initiative that will increase awareness of the world-renowned principles of judicial ethics, bring to light the proceedings of the various judicial councils on our planet as well as the enabling legislation, the role of these organizations and their approach in enforcing codes of ethics.

I understand that the website unveiled this morning will be open-ended. It's a start, a first step. It will constantly be changing and built upon, as the legislation, regulations and jurisprudence are modified. Articles on doctrine are added on a regular basis as well. Quite obviously, the Internet fosters this type of development.

It must also be mentioned that we expect other organizations to join the original core group – the Université de Montréal's Research Centre on Public Law, the Conseil de la magistrature du Québec and the Institut des Hautes Études sur la Justice de France – so as to more easily add to this databank. It is truly a wonderful initiative.

And so it is with great pride that Québec's judicial council is joining forces with Professor Noreau to launch the compendium entitled *Applied Judicial Ethics,* and the website on judicial ethics as well.

Address

Mr. PIERRE NOREAU*, lawyer*
Full professor at the Université de Montréal's
Centre de recherche en droit public (Research Center on Public Law)

EVER-CHANGING JUDICIAL ETHICS

It is with great pleasure and a certain satisfaction that we are able to launch, today, the new edition of the book entitled *Applied Judicial Ethics* – the culmination of many years of work and exhaustive reading of the decisions reached since 1978 by Québec's judicial council: the Conseil de la magistrature du Québec. Updating this publication made it possible, in particular, to improve its form, so as to make it easier to consult. After all, it is a reference tool, first and foremost.

The initial objective that we pursued was to systematically explore the rules applicable to the examination and inquiry procedure. In this way, we strived to establish a measure of equity in evaluating the complaints received by the Conseil. Through the recent decisions of the various review and appeal jurisdictions, we were able to clarify the applicable procedural parameters. In so doing, we were also able to elaborate on the course of the complaint, from the time it was filed to the time a decision was reached, as well as the terms of the *Courts of Justice Act,* which is the underlying legal framework for the ethics-related activities of the Conseil de la magistrature. The results of these developments form the focus of the first part of this book that we are presenting today, which has therefore been considerably enhanced.

The second part of this publication is devoted to defining the various ethics-related duties stipulated in the *Code of Ethics for Judges* adopted in 1980. The main purpose of this book, in fact, is to determine, as precisely as possible, the definition and scope of these duties. In this way, we intend to specify the obligations imposed upon the judge, both "on the bench" and in society. Even more particularly, judicial ethics establishes the duties applicable to the judge, both with regard to his conduct and to his statements, and not only inside the court, but outside as well.

Obviously, the objective of analysing and publishing the Conseil's decisions isn't only to inform the legal community of the demands of the judicial function. Such analysis and publication also help disseminate these decisions (and the principles that these decisions establish) among the general public. In so doing, the Conseil is affirming that the confidence that the public places in the judiciary is what makes it legitimate as a social institution. Now in democratic societies such as ours, the legitimacy of those to whom we entrust the responsibility of exercising one form of authority or another mainly lies in the confidence of those who are subject to that authority. Such confidence implies, today, that there is a certain transparency. These are values that are very broadly relayed by the other public institutions. Within modern societies, the various expressions of public authority are no longer sufficient in themselves. The institutions live on as long as their activity is understood and appreciated by civil society. This reality explains the impact of the public's expectations of public institutions. It implies an extraordinary ability, on the part of those invested with public authority, to control the exercise of their own activity. And this reflective and self-regulating ability is the very requirement for judicial independence. In this regard, ethics-related demands combine both the requirements of democratic exercise and those of the judicial decision itself.

Nevertheless, judicial ethics is still a new field of law. It aims at ensuring that the judges are familiar with the demands of their own practice; it gives rise to and maintains public confidence, without which the judiciary's contribution toward defining public interest would be constantly questioned by the very people that this public interest intends to serve.

This publication meets certain criteria. To begin with, we sought to make it very easy to consult. Ethics law is a unique law. It is a very "empirical" form of law, built case by case, from very concrete situations that have been denounced or merely submitted to the Conseil de la magistrature.

This approach is also the one adopted by most ethics authorities operating within the majority of western societies. All of them have the responsibility of administering rules of ethics – or professional conduct – similar to those found in *Québec's Code of Ethics for Judges,* in the *Ethical Principles for Judges* established by the Canadian Judicial Council or in the international principles – the *Bangalore Principles of Judicial Conduct.* In all cases, the interpretation of these duties is clarified as decisions are reached in consideration of concrete cases, which sooner or later inevitably poses the problem of their normative consistency. This problem becomes even more obvious when we compare decisions reached over a very long period of time. The publication of this book, *Applied Judicial Ethics,* also aims at responding to the imperatives of such normative and interpretative consistency.

By skimming through the decisions in chronological order, we can, in fact, note certain changes in reference values and norms over time. These changes tend to show that ethics law serves as a "clearing house" (a "sounding board") between changes in moral standards, over time, and the judiciary's definition of the requirements of the judicial practice. As a result, we understand the importance of constantly updating the publication we are presenting to the legal community today.

As far as the judicial institution is concerned, ethics-related questioning can easily serve as a mechanism of internal control over judicial activity. Ethics-related monitoring of judicial activity promotes ensuring internal consistency of judges' conduct. In this regard, it is a very structuring activity for the judiciary.

Researching the topic of judicial ethics also has a complementary advantage. This research work promotes the development of an analytical summary of ethics-related duties. And so although the *Code of Ethics for Judges* lists more than fifteen different duties, three duties emerge more systematically, based on the findings of an exhaustive study of the decisions reached by the Conseil de la magistrature. These duties are the judge's independence, impartiality and integrity. It is the rule of the three I's. Regardless of the ethics jurisdiction, the authority or the country of reference, these three powers constitute the underlying core of ethics-related reference in relation to the judicial practice.

Moreover, the systematic reading of the codes and statements of ethics produced by the various ethics jurisdictions brings to light the fact that ethics-related activity takes on very different perspectives depending on the circumstances. The U.S., for example, has a mainly "disciplinary" conception of judicial ethics. However, other judicial ethics approaches contrast with this disciplinary conception. In another more personalized approach, the judges' activity may be evaluated within a dialogue of an ethical or moral nature, whereas within other jurisdictions, a more "socio-political" or "institutional" perspective of the ethics-related activity is fostered. And it is more specifically this orientation on which Québec's judicial ethics are based. Ethics-related questioning is therefore more of an opportunity for the judiciary to evaluate its practice as a distinctive social structure and to reflect on the corrective action likely to promote the public's increasing confidence in the figure of the judge. Judicial activity is therefore viewed as an ongoing institutional activity, rather than as a sanction on specific conduct. It doesn't strictly aim at controlling a given judge in particular, even though reprimand and removal of judges do form part of the conditions that make it possible to implement ethics-related normativity. Above all, it promotes a permanent alignment of judicial activity with the demands of the function and the social context in which this function is fulfilled.

Exploring everything related to judicial ethics, we easily note that for the past twenty years, in most western countries, there has been an increasing number of reference texts and declarations – the "tools" and statements of principles in relation to judicial ethics. An inventory of these national and international documents was well worth being taken. We have put them together on a new, bilingual website[1] – in French and English – that provides the contact information of the other national authorities in charge of evaluating judges' activity from the standpoint of the ethical standards applicable to their jurisdiction, in the U.S., Asia, Latin America and South America.

This research helped us demonstrate the importance, today, of the question of judicial ethics in the world. As a result, we also note the great variety of institutions in charge of enforcing ethics-related principles. In some countries, it is the Head of State, or the President of the Republic, who assumes the responsibility of enforcing the rules of judicial ethics imposed on judges. Within the British tradition, it is generally authorities that the judiciary establishes itself, often on the basis of legislation. In Québec, for example, it is the *Courts of Justice Act*. As far as content, we note a certain point of agreement in the definition of ethics-related duties. Differences also emerge, bringing to light various tones, depending on the governments or the justice systems.

For example, the *Code of Ethics* of Chinese judges is quite different from the *Code of Ethics* of Israeli judges. We also note that from one U.S. state to another, even though we find a large number of common references, more value is sometimes attached to certain particular duties than others. And even more so within the scope of an international comparison of the various judicial ethics reference tools. And so, while certain jurisdictions attach great importance to the duty of courtesy or tact, the problem of promptness is considered to be a priority within other jurisdictions.

I find this website to be very helpful today. It is a useful documentary source for the legal community, for the public, for the scientific community and for researchers who are interested in the question of judicial ethics. On the international scene, more and more of us are working on this aspect of judicial activity. This website has been established in conjunction with the Institut français des hautes études de la magistrature, with the Centre de recherche en droit public and with the Conseil de la magistrature, which are partners in this adventure. It gives an account of the wide range of procedures within the judicial function, at the same time as it makes it possible to render the specific nature of the judiciary within Québec and elsewhere in Canada. And that's the advantage of comparative

1. http://www.deontologie-judiciaire.umontreal.ca/

research. A website of this kind is, by definition, constantly being reconstructed; however, in its own way, it constitutes the particular contribution of the judiciary in Québec, and in Canada as a whole, toward the development of ethics on the international front.

I believe that this website is an interesting example of what can be produced through active, collaborative efforts between the judicial world and the university research community. It also shows the importance of an interdisciplinary perspective of law and its changes over time. Hopefully, such collaboration will pave the way for other initiatives that will simultaneously benefit the legal community and all residents in our various communities.

Address

The Honourable PAUL-ARTHUR GENDREAU
Justice of the Québec Court of Appeal

SEVERAL KEY CASES IN QUEBEC CITY AND THEIR IMPACTS

Sylvio Normand*

A nation's judicial system is deeply rooted in its culture, so much so that it is not readily exportable. Court judgments reflect the values of the society in which they are rendered. In reality, judges are not only guardians of the norm, but may also at times serve as promoters or rather prudent facilitators of the evolution of societal values. Therefore, to answer the question posed by the conference: *Which Judge for Which Society?* it is useful to take a look back in time.

We will go back and revisit five cases spanning the seventeenth to nineteenth centuries. They all marked their time and involved incidents or events that inflamed passions and divided the population. They also inspired other judgments, even recent ones, attesting to the scope of their impact. These trials mainly concern issues of public law, and some of them fundamental freedoms.

The oldest case dates back to the French revolutionary era, and involved an American accused of high treason. The second case illustrates the undue influence the Catholic Church had in Quebec political life and the third, also having to do with religion, testifies to the rise of anti-Semitism. The fourth case deals with freedom of expression and parliamentary immunity, and the last concerns the protection of religious freedom.

All the cases we have chosen for discussion were heard in Quebec City – our way of marking the 400th anniversary of Quebec's capital, the cradle of French North America.

* * * * *

The David McLane Case: Death Sentence for High Treason

On July 7, 1797, despite the suffocating heat of summer, a large crowd crammed into Quebec City's courthouse to watch the biggest trial of the day – that of David McLane, an American citizen charged with high treason. The Rhode Island merchant was accused of being in the pay of French revolutionaries and of attempting to foment a popular uprising against the British government in preparation for the arrival of the French fleet anchored at Santo Domingo in the Caribbean. At the end of the day, the 12 jury members found McLane guilty as charged after deliberating for half an hour. On behalf of the court, the Chief Justice addressed McLane, declaring the following sentence:

> *That you, David McLane, be taken to the place from whence you came, and from thence you are to be drawn to the place of execution, where you must be hanged by the neck, but not till you are dead; for, you must be cut down alive and your bowels taken out and burnt before your face; then your head must be severed from your body, which must be divided into four parts, and your head and quarters be at the king's disposal; and the Lord have mercy on your soul.*

McLane was executed in public on a knoll near the St-Jean gate on July 21, 1797, after the sheriff, not without some difficulty, succeeded in convincing a mercenary to serve as executioner. Indeed, the latter demanded $600 cash in advance, hardly a paltry sum for the time. McLane was hanged and died while being disemboweled, the latter operation costing the sheriff an additional $300.

- *What kind of case was this to justify such a sentence?*
- *What were the legal issues brought up at the time?*

The French Revolution caused a great stir in Lower Canada, as it did elsewhere in the world. It was applauded by French Canadians and British alike, until Britain and revolutionary France went to war. The political situation in Europe worried the civil authorities in Lower Canada, who feared that France might be thinking of expanding the conflict to North America and retaking its lost colony. They were also troubled by incidents in the wake of the adoption of the *Highways Act,* which obliged the *habitants* to contribute labor, horses, and tools to road construction at a time of bad harvests. From there, it was but a short step to fearing that foreign agents, particularly French, were at work stirring up the population, a step that authorities were quick to take, although investigations uncovered no evidence

* Professor at the Université Laval Faculty of Law. Certain excerpts of this article have been published in the following: Sylvio Normand, "L'affaire Plamondon: un cas d'antisémitisme à Québec au début du XXe siècle," (2007) 48 *Les Cahiers de Droit* 477–504 and Sylvio Normand, *Le droit comme discipline universitaire: une histoire de la Faculté de droit de l'Université Laval.* Quebec City: Les Presses de l'Université Laval, 2005.

of such attempts. Authorities were so anxious that on May 3, 1797, the Legislative Assembly suspended *habeas corpus* and ordered all foreigners to leave the colony.

It appears that their apprehensions were not entirely unfounded. According to Professor F. Murray Greenwood,[1] revolutionary France did in fact have designs on the British colony. Greenwood claims that the account books of Citizen Adet, French ambassador to the United States, reveal that David McLane had been recruited as a French agent and tasked with infiltrating and gathering intelligence in Canada. Greenwood explains that McLane's first trip to Lower Canada was to Montreal in November 1796. The government was informed of his presence, but McLane left the colony before they could capture him.[2]

Professor Greenwood recounts that in March 1797, McLane received new instructions from Ambassador Adet at a meeting in Philadelphia.[3] He then returned to Lower Canada, where he recruited Charles Frichette, who agreed to guide him through the colony. He traveled to Quebec City and concealed his plans by pretending to be a wood merchant. He also hid his identity by using the name of his American associate.

On May 10, 1797, he met with John Black in a wood outside the city. Believing Black to be trustworthy and favorable to his cause, he unveiled the true objective of his trip to Canada. Black, however, saw this confession as an opportunity to curry favor with the authorities; so he set a trap for McLane.

After convincing the American to stay the night in Quebec City in a place he assured McLane was safe, Black denounced McLane to the authorities and the American was arrested a few hours later. Frichette was also arrested, as well as McLane's brother David, and another man called Butterfield.

McLane was then charged with high treason.

According to Professor Greenwood, activities considered as high treason included plotting the death of the sovereign ("compassing the death 'of our Lord the king, our Lady the queen, or their eldest son and heir'") or joining the enemies of the Crown by supporting them or providing them with assistance or information ("adhering 'to the kings enemies in [or out of] his realm, giving them aid and comfort in the realm or elsewhere'.")[4]

The authorities wanted to make an example of this arrest so they did everything in their power to prevent McLane from escaping punishment. The indictment was ordered by a grand jury presided over by the Chief Justice and composed of colonial notables of unquestioned loyalty to the British authorities. Although the letter of the law was observed, all discretionary decisions were made in favor of the prosecution, leading Professor Greenwood to the following observation:

> *The crown observed the outward forms of law. The special rights guaranteed to the accused under the statutes of William III and Anne, for example, were fully complied with and Osgoode enunciated the reasonable doubt principle. But at almost every point where discretion was available to the prosecution or the Bench, it was exercised, often crudely, for the purpose of foreclosing any chance McLane might have had.*[5]

The trial was conducted before a small jury whose members were all anglophones favorable to the government. There were 36 English-speaking and 35 French-speaking candidates on the panel of prospective jurors. Contrary to the custom dictating that alternating English and French-speaking jurors be called, the first 14 prospective jurors were all anglophones, and of the next 18, only 4 were francophones. Thus the jury was made up entirely of English speakers and half of them had already served on the grand jury that had ordered McLane's indictment in the first place: "Clearly this divergence [in the jury selection process]," wrote Greenwood, "might have afforded grounds for a challenge to the panel as a whole."[6]

However, the jury was sworn in and the charge read. To substantiate the charge of high treason with regard to both plotting to depose the king and supporting the enemy, McLane was accused of 14 acts and events. The Crown prosecutor's case was based on the testimony of six people who had met the accused and had been taken into his confidence. However, it should be pointed out that before the trial, two of them had been promised land concessions in the Eastern Townships. Frichette and Butterfield, McLane's coaccused, also testified. They admitted to plotting an insurrection and were later tried but never served any significant sentence.

McLane called no witnesses. He presented his version, which was apparently conflicting at times and often evasive. He was represented by two young, court-appointed lawyers who, according to Greenwood, were more concerned with their future careers than their client's defense. One of them was a 22-year-old protégé of Chief Justice Monk in Montreal. The other was an intern of Crown Prosecutor Sewell in whose home he was still living. Moreover, a month before the beginning of the trial, he had written a letter in which he demanded that his client Cushing, a witness at the trial, be immediately granted the land he had been promised in exchange for his testimony.[7]

1. F. Murray Greenwood, *Legacies of Fear, Law and Politics in Quebec in the Era of the French Revolution,* p. 140.
2. *Ibid.,* p. 141–142.
3. *Ibid.,* p. 144.
4. *Ibid.,* p.149.
5. *Ibid.,* p. 148.
6. *Ibid.,* p. 157.
7. *Ibid.,* p. 155.

In such a situation, it was almost inevitable that McLane would be found guilty and condemned to death, the punishment for high treason.

That said, did McLane have a legitimate defense?

According to historian Claude Galarneau, McLane "was more an unlucky fool rather than a conspirator" and "the scheme attributed to McLane involved many improbabilities."[8] (Translation) Greenwood, on the other hand, based his opinion on Adet's documents and believed that McLane was in fact one of the revolutionary ambassador's agents and a willing conspirator.

Either way, Greenwood considers that McLane could have mounted a serious defense in light of the accusations brought against him. First, he could have invoked his status as a foreigner since treason was a crime that only applied to citizens, and not foreign combatants. Moreover, McLane was American and could have claimed that he was acting under the orders of Adet, whose country was at war with England. Had he done so, he could not have been accused of supporting the enemy against the British Crown, one of the necessary requirements of high treason. He could have been accused of spying or held as prisoner of war, but certainly not charged for high treason, let alone be found guilty of the crime.[9]

As for the second aspect of high treason, namely plotting to depose the King of England or threaten his life, McLane could certainly have claimed that even if he had succeeded in his plans, he could not have deposed the monarch or assassinated him at a distance of 5,000 kilometers.[10]

Finally, Greenwood demonstrated that "*The Treason Act of 1795* did not form part of the Criminal Law of Lower Canada."[11]

In terms of procedural guarantees, McLane could have contested the jury selection process and the decision to appoint his lawyers. He could also have demanded that the president of the court recuse himself for lack of impartiality as the latter had served as a member of the executive before presiding over the trial. It is true that under English law, in cases of crimes threatening state security, the Chief Justice presided over Privy Council hearings of witnesses in view of deciding whether there was issue for trial and determining the nature of the crime. However, in McLane's case, Chief Justice Osgoode had gone far beyond these limits. He had not only served as premier but also "as the political head of security in Lower Canada," writes Greenwood.[12] In this role, he had access to much of, if not all, the extrajudicial information and was aware of the Governor's views on it as well as those of the Crown prosecutor and the other members of the Executive Council. In addition, he had heard the preliminary depositions of the two key witnesses, Cushing and Brassard, with whom he had personally concluded an agreement to the two gentlemen's advantage.[13]

So McLane had, even by the standards of the time, substantial legal grounds on which to appeal his trial. He did not do so because during the 18th and 19th centuries there was no mechanism for appealing, even for legal reasons, a verdict pronounced by a jury. It was only in 1906 that the House of Commons in London adopted legislation to allow such appeals. The adoption of that law was largely due to efforts of the famous author Sir Arthur Conan Doyle. Doyle waged a vigorous campaign in the press to clear the name of the Anglo-Indian lawyer George Edalji, wrongly condemned to a prison sentence for threatening persons and mutilating animals.

Although, in contrast to the other trials we will discuss, McLane's trial had no effect on more recent legal decisions, it was widely commented on in the 19th century. In political terms, McLane's conviction and execution captured the public imagination and helped keep the population quiet, particularly as the government printed and distributed 2,000 copies of the trial minutes. "This unusually cruel punishment made a marked impression; no emissaries were subsequently heard exhorting the population to insurrection," (Translation) wrote Joseph-François Perrault, man of culture, journalist, politician, and above all, prothonotary at the Quebec City courthouse at the time of McLane's trial. Historian Claude Galarneau stresses that "[French Canadians] were... courageous and kind to the prisoner, caring for him before the trial and burying him on the evening of his execution."[14] (Translation) Four citizens of Quebec City buried McLane on the site of the hanging, where his daughter was able to pay her respects 30 years later.

The Langevin Trial: The Undue Influence of the Catholic Church in Quebec Political Life

In the middle of the 19th century, the Church in Québec strongly opposed the program of the liberals, also called *les rouges* (the reds), and denounced liberalism as a dangerous threat. Although the liberal program had been greatly watered down, a faction of the clergy continued, even after Confederation, to combat liberalism and portray it as anticlerical and anti-Catholic. In fact, members of the clergy likened Quebec's liberals to the Catholic liberal movement in France, condemned by Rome. The bishops promoted the creation of a Catholic party, whose ultimate objective was to subject civil authority to the power of the Church. Although part of the clergy – the ultramontanists – supported this movement, not all of them did. Some segments of the Quebec Church disagreed and refused to consider French Canadian liberalism as anticlerical.

8. Claude Galarneau, "McLane (McLean, M'Lane) David", *Dictionary of Canadian Biography,* [Online] *http://www.biographi.ca/index-e.html*.
9. *Ibid.,* p. 149–151.
10. *Ibid.,* p. 149–153.
11. *Ibid.,* p. 152.
12. F. Murray Greenwood, *op. cit.,* footnote 1, p. 167.
13. *Ibid.,* p. 166–168.
14. Claude Galarneau, *La France devant l'opinion canadienne* (1760–1815), Les Presses de l'Université Laval, Quebec City, 1970, p. 259.

In Quebec City, Archbishop Elzéar-Alexandre Taschereau, a member of a liberal family, took a moderate stance on liberalism.

During this period the clergy intervened frequently in elections. In the 1870's, priests readily condemned liberal and conservative politicians who opposed their ideas. Fed up with this behavior, the House of Commons adopted an act in 1874 to prevent undue influence, namely attempts to intimidate voters and prevent them from supporting candidates considered undesirable by the clergy.[15]

This is the background for the next trial we will discuss.

Sir Hector-Louis Langevin, the Conservative Party candidate in the Charlevoix riding, won his seat in the federal election of 1876. Voters in the riding demanded that the election be annulled because priests in several of the riding's parishes had exercised undue influence discrediting the Liberal Party candidate and had encouraged their parishioners to vote for the Conservative candidate.[16] Certain priests went so far as to say that voting for the liberal candidate was "a serious sin, a question of conscience" and even "a mortal sin."[17] One clergyman advised his flock from the pulpit "that those who voted for Mr. Tremblay (Langevin's opponent) would be guilty of a serious sin and that if they died after doing so, they would not have the right to the services of a priest."[18] (Translation)

François Langelier agreed to defend the petitioners. Langelier was at that time a lawyer in Quebec City and professor at Université Laval's law faculty. He began his political career in 1871 by being elected member of the provincial legislature. As a Liberal, he became a target for the ultramontanists, and he instituted proceedings a number of times to have elections annulled due to undue influence. Therefore it is hardly surprising that he agreed to take this case. Mr. Justice Adolphe-Basile Routhier, who was to hear the case, was a fervent supporter of ultramontanism. Langelier did not mince his words in his arguments during the trial,[19] painting a striking and damning portrait of the behavior of a clergy hostile to the Liberal candidate.

Mr. Justice Routhier was aware of the importance of the case that he was called on to hear. He immediately recognized that "The case that I am called upon to judge may be the most important case that has ever come before a Canadian court."[20] (Translation) This explained why the inquiry lasted 35 days, with 135 witnesses heard.[21] The request to have the election annulled was based on a number of grounds, although the clergy's undue influence was at the heart of the dispute.

In a previous judgment – *Derouin vs. Archambault*[22] – Mr. Justice Routhier had argued that a priest who made defamatory statements from the pulpit was not liable to a civil suit and that his actions were a matter for the Church authorities alone.

He took the same approach to this trial. According to the judge, a priest who attacks liberalism and condemns its supporters is simply addressing a doctrinal issue. The judge therefore refused the request to annul on the basis that civil courts were not competent to judge matters of a spiritual nature: "This priest might have been wrong, but he stayed within the limits of his jurisdiction; I cannot intervene. Complain to his superior, the bishop."[23] (Translation)

The case was then taken to the Supreme Court, which overturned the judgment.[24] Mr. Justice Jean-Thomas Taschereau, brother of the Archbishop of Quebec City, was one of the judges to hear the appeal. Mr. Justice Taschereau was particularly incisive in his arguments. He even refers to Mr. Justice Routhier's previous ruling in *Derouin* v. *Archambault,* using it to draw the line beyond which a priest becomes liable to trial before a civil court:

The principle that must dominate in cases of this nature is the following: that the priest who forgets himself in the pulpit to the point of abusing or defaming someone, is not discussing religion, or defining doctrine or discipline, but steps outside his sacred role, and is deemed, like any other person, to be satisfy his personal vengeance or acting out of personal interest, and consequently is not exercising his spiritual functions.[25] (Translation)

After considering the case, Mr. Justice Taschereau, like his colleagues, concluded that there had in fact been undue influence on the part of the priest in five of the Charlevoix riding's parishes. The Court annulled the election, but did not rule the defendant ineligible. A few weeks later, a new election was held in the Charlevoix and Hector-Louis Langevin was reelected!

The affair did not end with the Supreme Court judgment. The ultramontanists, furious at the outcome, launched a scathing attack on François Langelier. Israël Tarte, a conservative and a fervent ultramontanist, denounced the presence of a "rouge" at University Laval. He considered his presence in that Catholic institution as a danger to the students:

15. Sec. 95, *The Dominion Controverted Elections Act, 1874.*
16. *Brassard v. Langevin,* (1876) 2 Q.L.R. 323 (S.C.); (1876–1877) 1 S.C.R. 145.
17. *Brassard v. Langevin,* (1876–1877) 1 S.C.R. 145, 204–205 (Mr. Justice Taschereau).
18. *Ibid.,* p. 206.
19. *In the Supreme Court of Canada: "The Dominion Controverted Elections Act, 1874": appeal from the Superior Court for the Province of Quebec, sitting at Murray Bay, between O. Brassard et al., petitioners in court below (appellants), and Hon. H.L. Langevin, respondent in court below (respondent): appellants' factum: Langelier & Langelier for appellants,* Quebec City, s.ed., 1877. (ICMH microfiche series; No. 01092.
20. *Brassard v. Langevin,* (1876) 2 Q.L.R. 323 (S.C.).
21. *Ibid.,* p. 324.
22. 5 Revue légale 308.
23. *Brassard v. Langevin,* (1876) 2 Q.L.R. 323, 358 (S.C.).
24. *Brassard v. Langevin,* (1876-1877) 1 S.C.R. 145.
25. *Ibid.,* p. 212.

...how could fathers not hesitate to entrust their children to a man like Mr. Langelier, who openly attacks the freedoms of the Church and denies its rights? Although there is nothing reprehensible in what he teaches, are not his example, his speeches, and his writings outside the university the most vivid of lessons?

And does not this teaching by example become terribly dangerous when the liberal press, with the University's full awareness, affirms that the University approves Mr. Langelier's behavior? (Translation)[26]

At the time of these events, Langelier's social stature would probably have protected him from the consequences of such an attack. Nonetheless, he explained his behavior to the religious authorities and finally obtained the support of the bishop. Mr. Justice Routhier, who had brought down the ruling in the lower court, became a member of the University Laval law faculty in 1883, possibly counterbalancing Langelier's ideological influence. The two protagonists never crossed swords, however, notably because the principle of judicial restraint forced the judge to keep a low profile.

Apart from the protagonists, the case affected relations between Church and State. In 1877, divisions in the Quebec episcopate led Rome to send an investigator to Canada – the Irish bishop, Mgr. George Conroy. His mission was to meet with bishops and resolve their differences, particularly those of a political nature. During his stay, the bishop made an effort to explain that Rome's condemnation of Catholic liberalism had its limits and that it did not attack all liberals indiscriminately. He also got the bishops to agree to warn the clergy against overly obvious interference in political life. It is no coincidence that Wilfrid Laurier – future prime minister of Canada – took advantage of Mgr. Conroy's trip to Quebec to define the form of liberalism practiced in the province. He likened it to British liberalism and distinguished it from the continental liberalism condemned by Rome.

Despite the Supreme Court ruling and Rome's efforts to improve relations between the Church and State, the clergy were reluctant to withdraw from political life. Church interference was less direct than its attempt to create a political party but it remained significant in subsequent decades.

The Plamondon Affair: The Right of Individuals to Claim Damages When Their Entire Community is a Target of Slander or Libel

At the turn of the century, there was a resurgence of anti-Semitism in a number of Western countries. The growth of pamphlet literature and the occurrence of show trials such as the Dreyfus affair in France, the Beilis case in Russia, and the Frank trial in the United States,[27] bore witness to a rising hatred of the Jews. It is against this background that our next case unfolds.[28] It all started with a speech given in Quebec City by the notary Jacques-Édouard Plamondon on the evening of March 30, 1910. He presented the speech at the school run by the Brothers of the Christian Schools in Quebec City's Saint-Roch, where a large part of the city's small Jewish community lived.

The majority of Plamondon's remarks were lifted from the works of various French authors. In fact, his personal contribution was limited to the transitions between excerpts taken from several anti-Semitic works. A good part of his speech was devoted to denouncing passages of the Talmud,[29] and he criticized Jews for not observing the Christian Sabbath. In closing, he exhorted his audience to boycott Jewish businesses and to refuse to rent to them or sell them houses, arguing that they were in danger of becoming slaves to the Jews if they didn't.

Jews in the city were attacked in the wake of this speech and its publication. In early June, young people insulted members of the Jewish community, repeating accusations in Plamondon's speech. Several Jews were attacked in the streets, a child was molested, and stones thrown at the Ortenberg family home and the Quebec City synagogue.

It was not an easy decision for the Jewish community to take legal action. As much as success could have a significant positive impact, defeat could lead to a wave of anti-Semitism and make life difficult for Jews living outside big cities. After discussing the pros and cons, the community finally opted for a legal battle. Damage suits for defamatory libel were brought against Jacques-Édouard Plamondon, as the person who made the speech, and René Leduc, who printed the pamphlet, by two Quebec City Jews: the merchant Benjamin Ortenberg[30] and Louis Lazarovitz,[31] President of the Quebec Jewish Society.

Ortenberg alleged in his declaration that Plamondon had acted maliciously with intent to cause personal damage to Ortenberg and

26. *Autour d'une carrière politique: Joseph Israël Tarte, 1880–1897, dix-sept ans de contradiction,* s.l., s.ed., 1897, p. 56–57.
27. On these three cases, which which gave rise to an extensive bibliography, see: Albert S. Lindemann, *The Jew Accused. Three Anti-Semitic Affairs (Dreyfus, Beilis, Frank) 1894-1915,* Cambridge, Cambridge University Press, 1991, 301 p. Antisemitism in Canada and in Quebec also engendered numerous publications. Among them, the following take the legal aspects into consideration: James W. St. G. Walter, *Race, Rights and the Law in the Supreme Court of Canada, Historical Case Studies,* Toronto/Waterloo, Osgoode Society for Canadian Legal History/Wilfrid Laurier University Press, 1997, p. 182-245, Philip Girard, *Bora Laskin, Bringing Law to Life,* Toronto, Osgoode Society, 2005, 646 p., and Mario Nigro and Clare Mauro, "The Jewish Immigrant Experience and the Practice of Law in Montreal, 1830-1990," (1999) 44 *R.D. McGill* 999-1046.
28. David Rome built up a large file on this case: *The Plamondon Case and S.W. Jacobs,* Montreal, Canadian Jewish Congress, 1982, 2 volumes (Coll. Canadian Jewish Archives, No. 26 and 27).
29. On the Talmud, see: Charles Touati, "Talmud," in *Encyclopædia Universalis,* Volume 22, Paris, Encyclopædia Universalis, 1995, p. 21–24.
30. Writ of summons, May 16, 1910. The judicial file (1910-778), which contains a number of documents, is kept at Archives nationales du Québec in Quebec City, Judicial Archives of the Superior Court, judicial district of Quebec City, TP11,S1,SS2,SSS1, Section 563.
31. Writ of summons, May 9, 1910. File No. 1910-650 is kept at Archives nationales du Québec in Québec City, Judicial Archives of the Superior Court, judicial district of Quebec City: TP11, S1, SS2, SSS1, article 491.

his fellow Jews. He claimed $500 for damages to his reputation and the loss of some of his customers.

The plaintiffs' objective was not simply to obtain compensation for the damages they suffered. Clearly, the Jewish community sought to prevent other similar speeches in a city where Jews represented but a tiny minority – approximately 75 families. It appears that once legal proceedings began, the invective and intimidation of Jews quickly ceased.

For reasons that remain unclear, the investigation and trial were delayed till spring 1913. Although the events underlying this affair were already several months old, the trial, which ran from May 19 to 23, aroused tremendous interest. The large crowd even hampered the work of journalists sent to cover the proceedings.[32]

Superior Court Judge Albert Malouin dismissed the plaintiffs' case, refusing to consider whether Plamondon's supposed extracts from the Talmud were true or false, as they had hoped he would. Instead, he ruled solely on the grounds that since the defendant's statements were aimed at the Jewish community in general, they had not infringed on the rights of any particular individual:

> *Whereas the notary, Mr. Plamondon only calls into question the Jewish race, its doctrines, and its religious and social practices in his speech, without attacking the plaintiff in particular nor attributing to him any specific act;*
>
> *Whereas it is legal doctrine that there can be no libel if the writing in question contains no defamatory allegations or accusations with regard to individuals, but only contains a somewhat virulent or passionate discussion of philosophical, social, or religious opinions attributed to a organization, religious sect, or association;*
>
> *Whereas the plaintiff is neither named nor particularly targeted in the defendant's speech, he has no civil remedy against him.*[33] *(Translation)*

This decision was consistent with the case law of the time. Freedom of speech was a fundamental value that could not be easily restricted. Individuals were free in principle to express their views and even to make statements or publish texts that were vindictive, intolerant, outrageous, or racist against ethnic or religious groups, and neither these groups nor their members could sue for damages for libel. Only an individual, who as a member of this group could prove that he or she had personally been the target of slander or libel and suffered a loss, could sue for damages in his or her own name. The court did not deem itself as the proper place to resolve social tensions of this nature, this clearly being the role of public opinion.

Ortenberg immediately appealed the judgment.[34] The case was heard by a court consisting of Chief Justice Horace Archambeault, Justices Norman W. Trenholme, Alexander George Cross, Henry George Carroll, and Louis-Rodolphe Roy as *ad hoc* judge. The Court of King's Bench, represented by Mr. Justice Carroll, started off by affirming its adherence to the case law applicable to the matter – any person was free to publicly express his or her opinions on philosophical, social, or religious issues and to openly attack a group, even using violent statements without being liable to legal action by this group, except if a member of the group was specifically targeted. Despite this position in principle, the court opened the door to the right to remedy in cases where the group in question was small. In such a case, the statements were deemed to personally affect the members of the group, even if none of them had been designated by name:

> *...the defendant is not guilty because he attacked the Jewish race or religion, nor because he repeated the accusations of historians or pamphleteers against Jews in general, nor because he quite rightly denounced working on Sunday, but he is guilty of having attacked the heads of Quebec City's 75 Jewish families and of attributing to each and every one of them the desire to commit the abominable crimes of which their race is accused once they become strong enough here to do so.*
>
> *That is libel. (Translation)*[35]

The small size of the Quebec City Jewish community explains the Court's decision. A speech given in a city with a larger Jewish community would not have been ruled defamatory. The court's reasoning remained consistent with the traditional interpretation of libel, except for the issue of the community's size.

The Plamondon affair dwelled in people's minds for a long time. For Quebec City's Jewish community, the trial is still a key event in its history. The trial proceedings were published in the Jewish press, and Jacobs, Ortenburg's senior counsel, had his arguments published in the form of a pamphlet by The Jewish Times Publishing Company. The appeal court judgment was also seen as a victory of law over intimidation, but at the same time demonstrated its limitations.

Apart from the use the community made of this trial, it became an oft-cited historical event. The publication of some of the archives related to the case kept its memory alive, and historical studies of the community often mentioned it. The case is remembered as an example of anti-Semitism and the benefits of judicial intervention, and remains an important benchmark in the struggle against anti-Semitism.

32. "Les arguments puisés dans le Talmud", *Le Soleil,* May 22, 1913, p. 12.
33. *Ortenberg* v. *Plamondon,* Court Records, 1913, Volume 3, p. 759 (Judicial Archives of the Superior Court, Court Records (TP11, S1, SS2, SSS4, Section 4087); the judgment was published in its English translation in (1913) 14 D.L.R. 549, 551 (S.C.).
34. Files in appeal are kept at Archives nationales du Québec in Quebec City: *Ortenberg* v. *Plamondon,* B.R. 1914-940 and *Ortenberg* v. *Leduc,* B.R. 1914-941 (Judicial Archives of the Court of Appeal, judicial district of Quebec City): TP9, S1, SS5, SSS1, Section 157).
35. *Ortenberg* v. *Plamondon,* (1915) 24 B.R. 69, 77.

The trial was also a legal benchmark. The Court of Appeal's hearing has been described as "the most controversial and well-publicized libel trial in the province"[36] and as "internationally renowned."[37] It influenced jurisprudence by making it possible for a community to bring a libel suit when its numbers are small and the libel directly affects every individual in the group. Some regard it as the basis for recognizing group libel in Quebec.

The ruling has thus been cited and commented on. The doctrine on civil liability, without going into it in any depth, uses it as an example of group harm.[38] The ruling has also been the basis for case law.[39] In the famous Regent Taxi decision, a Superior Court judge refers to the ruling to stress the broad scope of Quebec's civil liability legislation: "the wide scope of Section 1053 C.C."[40] This ruling, like others, has allowed legal scholars to argue that the Civil Code served as a tool for protecting basic freedoms before the development of modern instruments like the charter. In short, it reflects "the potential of traditional civil liability legislation to protect fundamental rights."[41]

Apart from its influence on Quebec liability law, the decision has also been cited in foreign case law[42] and has spurred comments by authors of common law, who still consider it a good example of the right of small communities' to legal recourse.[43] This decision of the Court of Appeal remains one of the most internationally renowned judgments in Quebec jurisprudence.

Even today, the necessary but difficult task of balancing the right to free speech against the need to sanction defamatory statements against a group of individuals or an association is a subject for debate. The recent appeal court decision *Diffusion Métromédia CMR inc. and André Arthur v. Fares Abou Malhab,*[44] is a perfect example. In that case, the Court was unanimous on the principles, but divided on their application. It recognized the right to file a class action for defamation, and the judges also agreed on the rule that in defamation cases, harm must be assessed against an objective standard. They accept the importance of the right to free speech, thought, and belief in our society and the absolute necessity to protect it unless the speech is defamatory and causes individual and personal harm. The judges therefore all recognized that if libelous statements target an association, the case cannot be heard unless there is proof of individual prejudice, either because the group is small enough for the statements to affect each member or that they designate certain individuals under the guise of generalities.

However, the practical application of these rules divided the court in the *Diffusion Métromédia* case. The majority judges, while recognizing the odious and provocative nature of the racist statements broadcast by a well-known radio commentator about Arab and black taxi drivers in Montreal, concluded that the statements were aimed at a large group (about 1,100 people) and "was not of a nature to harm the taxi drivers' reputation and cause the public to have a less favorable opinion of them as individuals." The minority judge expressed the opinion that, on the contrary, the defamation targeted a small group of easily identifiable people and not an association. He added that the commentator's remarks were aimed at people not because of their actions or their membership in an association but because of what they are. In short, for this judge, the defamation was not "collective" but aimed at individuals. Thus, almost a century after Plamondon's speech, the scope of and limitations on freedom of speech are still causing controversy.

Lavergne vs. Le Club de la Garnison de Québec: Parliamentary Immunity

The resolution by members of the Quebec Garrison Club to expel lawyer and militia member Armand Lavergne, the provincial member from Montmagny, sparked a bitter legal battle that marked the period and stirred up public passion. The case's impact was due both to the personalities involved, members of the Quebec social elite, and the issues of the trial, namely the scope of parliamentary immunity, freedom of speech, and less spectacularly, the legal relationship between an association and one of its members.

The affair took place in 1916, in the middle of the Great War. The British had just withdrawn from the Dardanelles after the defeat at Gallipoli. Canada had got involved in the war at England's request. In fact, although largely independent and governed by a parliamentary government, Canada was still part of the British Empire and London directed its foreign policy. It was only at the end of the war that Canada, through the efforts of Prime Minister Robert Borden, received initial recognition as a fully independent entity when it signed the Treaty of Versailles and was granted a seat at the League of Nations.

36. Joseph Kary, "The Constitutionalization of Quebec Libel Law, 1848–2004," (2004) 42 *Osgoode Hall L.J.* 229, 258.
37. Denis Buron, "Liberté d'expression et diffamation de collectivités: quand le droit à l'égalité s'exprime," (1988) 29 *C. de D.* 491, 497.
38. George V.V. Nicholls, *The Responsability for Offences and Quasi-offences Under the Law of Quebec,* Toronto, Carswell, 1938, p. 102; M.H. Myerson, "Group Libel Law Recommended," (1953) 13 *Revue. du Barreau* 218; Mortimer Gerard Freiheit, "Free Speech and Defamation of Groups by Reason of Color or Religion," (1966) 1 R.J.T. 129, 132; André Nadeau and Richard Nadeau, *Traité pratique de la responsabilité civile délictuelle,* Montreal, Wilson et Lafleur Ltée., 1971, p. 266, Maurice Tancelin, *Théorie du droit des obligations,* Québec, P.U.L., 1975, p. 279 and Joseph Kary, *loc. cit.,* footnote 90, p. 258–259 and Denis Buron, *ibid.,* p. 496–499.
39. *Raymond* v. *Abel*, [1946] S.C. 251; *Commission scolaire régionale Blainville-Deux-Montagnes* v. *DesGroseilliers* (C.Q.) EYB 1986-79598; *Trahan v. Imprimerie Gagné ltée,* [1987] A.Q. 1710, par, 58–60; *Alfert* v. *Dugas* (S.C.) EYB 1991-83949 and *Djoufo v. Mailloux,* 2005 CanLII 49442 (QC S.C.).
40. *Regent Taxi and Transport Co. v. Congrégation des Petits Frères de Marie,* [1929] S.C.R. 650, 670 (Mr. Justice Anglin).
41. Louis LeBel, "La protection des droits fondamentaux et la responsabilité civile," (2004) 49 *McGill Law Journal* 231, 237 and Madeleine Caron, "Le Code civil québécois, instrument de protection des droits et libertés de la personne?," (1978) 56 *Canadian Bar Review* 197, 205.
42. *Fawcett Publications, Inc. vs. Morris,* 1962 OK 183; 377 P.2d 42 (Supreme Court of Oklahoma); *Dhami* c. *Southam Inc.,* 2002 BCSC 464 (CanLII).
43. Clement Gatley, *Law and Practice of Libel and Slander in a Civil Action with Precedents of Pleadings, etc. and Canadian, Australasian, and American Cases on the Subject,* London, Sweet & Maxwell; Toronto, Carswell Company, 1924, p. 112; David Riesman, "Democracy and Defamation: Control of Group Libel", (1942) 42 Colum. L. Rev. 727, 766–767; Raymond E. Brown, *The Law of Defamation in Canada,* Toronto, Carswell, 1987, p. 239; Arthur B. Hanson, *Libel and Related Torts, New York, American Newspaper Publishers Association Foundation,* 1969. p. 37, and Laurence H. Eldredge, *The Law of Defamation,* New York, Indianapolis, 1978, p. 58.
44. [2008] J.Q. 10048 (C.A.).

Armand Lavergne was born in Arthabaska. Like all the other members of his family, he was a close friend of Wilfrid Laurier, the former prime minister of Canada. After postgraduate studies in Paris, he became a lawyer, journalist, and politician. A well-known orator and lieutenant-colonel in the Canadian militia, he served alternately as a Member of Parliament in Ottawa and Member of the Quebec Legislative Assembly. He also contributed to his friend Henri-Bourassa's newspaper *Le Devoir* and practiced in a private law firm in Quebec City. He fought for the equality of the French language in the federal government and for Canada's full independence from Great Britain. To do this, he cofounded the Nationalist Party.

Lavergne was thus a member of the French Canadian elite. He was outspoken and had an audience. Due to his professional and family status, membership in the Quebec Garrison Club was a given.

The Quebec Garrison Club, known today as Cercle de la Garnison, was founded in 1879 by a group of English officers. At first reserved for soldiers, it began admitting civilians in 1891. As a Superior Court justice wrote, it was "a social club. It should be considered as different from other societies, composed of gentlemen whose objective is to meet for conversation, gaming, and other social pleasures.[45]" (Translation) In this spirit, Club rules excluded all political and religious issues of whatever nature, "from the object of the club."[46]

However, on January 15, 1916, Lavergne made a virulent speech in the Quebec Legislative Assembly. Citing his political program, he asserted that "Canada, as a colony of the British Empire, has no obligation to participate in any of England's wars either by sending troops, building a wartime navy, or by any other means." (Translation) This attack on Great Britain, right in the middle of the war, had an explosive effect in the cocoon like atmosphere of the Garrison Club. Hardly three weeks later, on February 4, the Club's board, which was responsible for admissions, suspensions, and expulsions, ordered Lavergne to answer to complaints about his speech in the Assembly and to calls for sanctions. The committee, although strongly condemning Lavergne's speech, considered that "that the best interests of Canada and the Empire will be more effectively served by not taking any further action."

The committee's decision did not stop Lavergne's opponents. A petition was launched and a special general meeting of the Club convened. At the meeting, close to two-thirds of the members voted for a resolution demanding that the executive committee revise its previous decision and expel Armand Lavergne from the Garrison Club.

Lavergne fought back with an action to annul the general assembly's resolution coupled with a motion for an interlocutory injunction to suspend the expulsion process during the trial, as well as a claim for damages.

At the trial, Lavergne represented himself with the help of his associate Alleyn Taschereau, while the Club entrusted the case to the well known Montreal firm of Brown, Montgomery and McMichael, assisted by Louis St-Laurent, who would later become prime minister of Canada, as senior council.

The decision of the Court of Appeal,[47] called the Court of King's Bench at the time, confirmed the judgment of the Superior Court and upheld Lieutenant-Colonel Lavergne's claims.[48] It annulled the expulsion resolution and ordered the Club to pay Lavergne $100 in damages plus costs. The Court's reasons were those of Chief Justice Sir Horace Archambeault, former Quebec attorney general, professor at the Faculty of Law at Université de Montreal, and later its dean. The Chief Justice, on behalf of his five colleagues, stated two rules: the first being that even in the absence of a statutory provision, members of the legislature enjoy full immunity from any civil sanctions concerning statements made in the House, except those imposed by the assembly itself. He expressed himself as follows:

> *The privilege of freedom of speech granted a Member of Parliament is not limited to the cases described in this section. In fact, no law is necessary to establish it. Its existence is essential to any independent legislature. Not only is a Member of Parliament exempt from being sued, arrested, or imprisoned, he cannot be bothered in any way, by whomever, outside the parliament. Only Parliament has the right to sanction one of its members for derogatory or censurable behavior or speech of whatever nature. The sovereign himself could not intervene on the pretext that a Member of Parliament had pronounced seditious words or had proposed treasonable measures.*[49] *(Translation)*

The second rule expressed in this decision concerns the contractual nature of the legal relationship between an association and one of its members.

It is interesting to note that the lower court judge, Louis-Rodolphe Roy of the Superior Court of the district of Rimouski, a former provincial cabinet minister, went somewhat farther that the Court of Appeal. In an *obiter dictum,* he stressed the importance of upholding freedom of speech by recalling the words of Lord Asquith. In his condemnation of demonstrators' actions against Lloyd George, who had denounced England's war in South Africa, Asquith declared:

> *It would be a sad day if opinions could no longer be expressed openly in this country. There is no good in an Englishman considering himself to be higher than the inestimable and inalienable right to freedom of speech; in wartime or peacetime, nothing can deprive a British subject of the right to freely*

45. *Lavergne v. Le Club de la Garnison de Québec,* [1917] 51 S.C., 349.
46. *Ibid.,* 350.
47. *Le Club de la Garnison v. Lavergne,* [1918] 27 B.R. 37.
48. Mr. Justice Cross était disagreed with the grounds but agreed with the conclusion.
49. *Le Club de la Garnison v. Lavergne,* [1918] 27 B.R. 37, 38.

express his opinion, regardless of the demands of the government, the army, or the nation.[50] *(Translation)*

Mr. Justice Roy's progressive remarks on freedom of speech were prefaced, however, by a profession of faith concerning Great Britain and the Empire as well as Canada's obligations when the mother country was at war:

... I believe, however, that it is my duty to reiterate, as the Chief Justice of our Superior Court recently stated in a case of habeas corpus as well as a number of our politicians, that when England is at war, her colonies are also, and that the current war concerns us not only as citizens of the British Empire, but also as Christians because our mother countries, England and France, and their allies are struggling today to defend civilization from barbarism and promote the Christian values over those of paganism.[51] *(Translation)*

Surprisingly, this decision, forgotten by all except the historians, had some unexpected echoes recently. In 1980, the Supreme Court of Canada cited it in connection with the contractual nature of the relationship between an association and its members in the famous judgment Senez v. Montreal Real Estate Board.[52]

Even more spectacular, however, is the reference to this ruling by the Wellington Court of Appeal in New Zealand, which was called upon to decide whether certain defamatory statements made by Member of Parliament Owen Jennings about Roger Buchanan, a director of the New Zealand Wool Board,[53] were protected by parliamentary immunity.

As for Lavergne, he continued his struggle. After several electoral defeats, he was elected under the Conservative Party banner in 1930 and appointed vice president of the House of Commons at the suggestion of Prime Minister Richard Bennett.

He died five years later.

The Saumur Case: Protection of Religious Freedom Before the Adoption of the Charter

The Saumur case was part of Prime Minister Maurice Duplessis's war on groups he considered harmful to Quebec society, notably communists and Jehovah Witnesses. The Jehovah Witness movement was founded in the United States in 1878 and subsequently spread to Canada. It was present in Montreal during the First World War and various legal proceedings were brought against its leaders and members because of their opposition to the war. In fact, the movement was banned in Canada at the beginning of the Second World War, but the interdiction was soon lifted.

Jehovah Witnesses were well known early on for their proselytizing activities. The movement spread its message in the form of pamphlets, which members distributed in the street or from house to house. These pamphlets were often viewed with suspicion by other religious movements, who approved neither their content nor their tone. Enter the Saumur case.

In October 1933, Jehovah Witnesses were distributing pamphlets in the streets of Quebec City. City Council reacted swiftly by adopting a by-law requiring prior written permission from the chief of police for the distribution of pamphlets on city streets.[54] Offenders were liable to a fine or imprisonment if the fine went unpaid. Other cities passed similar by-laws, but in Quebec City hundreds of proceedings instituted under this by-law led to many Jehovah Witnesses being arrested and their literature being seized.

Jehovah Witness Laurier Saumur was arrested more than a hundred times for violating the by-law. Fed up with these arrests, he filed a suit in 1949, demanding that the by-law be annulled. He maintained that as a Canadian citizen, he had the right to freely express his opinions by disseminating his ideas orally or by distributing printed material. This right, he insisted, was based on British, Canadian, and Quebec case law.

The Superior Court rejected his suit and upheld the validity of the by-law. The Court of Appeal did the same,[55] with one judge expressing a dissenting opinion. However, in 1953, the Supreme Court overturned the first two decisions in a ruling that split the Court five to four.

This case presented two particular difficulties: the first concerned the mode of inquiry and interpretation of the by-law and the second related to its constitutional validity. On the latter point, it should be noted that at the time, given the absence of a charter of rights, constitutional debate was limited to deciding whether a statute or by-law came under the jurisdiction of the level of government that had adopted it.

Mr. Justices Cartwright and Rinfret, both authors of a minority opinion to which Mr. Justices Fauteux and Taschereau also adhered, believed that the only possible interpretation of the by-law was that it was a neutral text that applied to all, regardless of their nationality, doctrine, or religion.[56] In short, the City of Quebec was only regulating the use of its streets. Mr. Justices Rinfret and Cartwright refused to read between the lines of the by-law and examine the city council's real objective. Mr. Justice Rinfret wrote:

The only question that the courts should examine is that of whether the City of Quebec had the authority to adopt this

50. *Lavergne v. Le Club de la Garnison de Québec,* [1917] 51 S.C., 349, 354.
51. *Ibid.,* p. 353.
52. [1980] 2 R.C.S. 555.
53. *Buchanan v. Jennings* [2002] 3NZLR 145, confirmed by the privy council 2004, *Times,* July 19.
54. *By-law 24,* City of Quebec, October 27, 1933.
55. *Saumur v. City of Quebec* (C.A. Que) No. 4427, [1952] B. R. 475.
56. *Saumur v. City of Quebec,* [1953] 2 S.C.R. 299, 309 (Mr. Justice Taschereau).

by-law. We should not try and look beyond the text of the by-law to see what the Council's purpose in adopting it might have been.[57] *(Translation)*

He went so far as to add: "A by-law can be valid even if the city council's objective is wrong."[58] (Translation). Having refused to expand the scope of their examination, the minority judges concluded that in light of the province's jurisdiction over roads as well as "property and civil rights" the city had every authority to adopt such a by-law.

Mr. Justice Rinfret referred to a number of arguments put forward by the appellant, particularly the claim that the by-law infringed on his right to practice his religion. However, the judge rejected this claim on the grounds that rather than prohibiting the distribution of pamphlets, the by-law allowed it, though subject to certain conditions.[59] He discussed his rejection of the appellant's arguments at length, citing principles of constitutional law that protected Saumur's right to practice a religion. He even concluded that the matter came under provincial jurisdiction.

Each majority judge wrote his own reasons. Despite considerable overlap, each added nuances of his own. They all agreed that the Quebec City by-law should be analyzed not solely in light of its content, but also according to its scope, effects, and true purpose. In their opinion, City Council not only sought to regulate the distribution of documents from one citizen to another, but also concerned itself with the content of the documents. Mr. Justice Kellock, for one, interpreted the objective of the by-law as follows:

Being perfectly general in its terms and setting no standard by which the official it names is to be governed in granting or refusing licenses, the by-law can be used, as it has been, to deny distribution of its literature to one religious denomination, while granting that liberty to another or others. The by-law is equally capable of being applied so as to permit distribution of the literature of one political party while denying that right to all others, or so as to refuse to allow the selling in the streets of some newspapers while permitting others. In any or all of these cases, the same physical acts would be involved occasioning the same degree of obstruction, if obstruction there would be. Nothing more is needed to demonstrate, in my opinion, that such a by-law was not enacted "in relation to" streets but in relation to the minds of the users of the streets.[60]

Having made this observation, the majority judges concluded that the by-law was invalid because, under its exclusive jurisdiction in matters of "property and civil liberties," the provincial legislature could not restrict the freedom of religion or expression. The Court backed up this principle by referring to pre-Confederation statutes concerning Canada's political regime passed by the House of Commons in London and laws adopted by the Parliament of Canada prior to 1867, all still in effect. It also referred to the preamble of the *British North America Act,* now called the *Constitution Act, 1867.*[61]

Mr. Justice Rand's opinion is perhaps the most enlightening. He wrote the following on the freedom of religion:

From 1760... to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammeled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.[62]

He based his assertion on the *Capitulation Act, the Treaty of Paris of 1763,* and Section 15 of the *Quebec Act,*[63] which provided the initial benchmarks, as well as on Section 42 of the *Constitutional Act, 1791*[64] and the preamble of the *Act of 1852.*[65] These constitutional laws, according to Mr. Justice Rand, underpin the guarantee of freedom of religion in Canada. The judge stressed that this principle was taken up by the Quebec Legislative Assembly in the *Freedom of Worship Act.*[66] He then went on to conclude that legislatures can not use their jurisdiction over property and civil liberties to attack freedom of religion and expression. All the majority judges generally followed the same logic as Mr. Justice Rand and drew the same conclusions.

Mr. Justice Rand considered not only the freedom of religion to be essential in Canada, but also the freedom of expression. In his opinion, this right is based on the *Confederation Act,* which gave Canada a constitution similar in principle to that of Great Britain:

So is it with freedom of speech. The Confederation Act recites the desire of the three provinces to be federally united into one Dominion "with a constitution similar in principle to that of the United Kingdom". Under that constitution, government is by parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion: government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed: the government, as licensor, becomes disjoined from the citizenry.

57. *Ibid.,* p. 311 (Mr. Justice Rinfret)
58. *Ibid.,* p. 310 (Mr. Justice Rinfret).
59. *Ibid.,* p. 313 (Mr. Justice Rinfret).
60. *Ibid.,* p. 338 (Mr. Justice Kellock).
61. *30 & 31 Victoria c. 3.*
62. *Saumur v. City of Quebec,* [1953] 2 S.C.R. 299, 327 (Mr. Justice Rand).
63. *14 Geo. III c. 83.*
64. *31 Geo. III c. 31.*
65. *14–15 Vict. C. 175.*
66. R.S.Q. (1941), c. 307, Sec. 2.

The only security is steadily advancing enlightenment, for which the widest range of controversy is the sine qua non.[67]

The Saumur case did not end with the 1953 Supreme Court decision. In reaction to the judgment, Premier Duplessis submitted a bill to the Legislative Assembly – Bill 38 – aimed at amending the *Freedom of Worship Act* in order to limit its scope. The amended Act prohibited the distribution of documents or the making and dissemination of speeches that contained "outrageous or insulting attacks" on a religion.[68]

The new version of the Act did not go unnoticed. Laurier Saumur and the Jehovah Witnesses reacted immediately to what they considered to be an attack on themselves and launched an action to declare the act unconstitutional. The Supreme Court rejected their suit on the grounds that at that time Quebec law did not recognize declaratory actions.[69]

The Saumur case was part of the Jehovah Witnesses' ongoing struggle to exercise their freedom of conscience. The 1940's were particularly difficult for the movement, which was the target of many attacks. Towards the end of the decade, the organization decided to fight back against intimidation and use the courts to gain recognition for their rights. Around the time of the Saumur affair, a number of other cases were brought before various courts. The Chaput and Roncarelli cases are the most famous and deserve attention. In the first decision,[70] the Supreme Court granted Chaput damages for infringement of his extrapatrimonial rights when the police illegally stormed a private residence where a meeting of Jehovah Witnesses was taking place. The police evicted those attending, as well as the minister. In the second case,[71] a restaurant owner, Mr. Roncarelli, who had had his alcohol license revoked for supporting his fellow Jehovah Witnesses, won his case with damages. The Court deemed that the public servant who revoked his license exceeded his legal discretionary power, particularly as he was following the orders of the premier.

The activism of the Jehovah Witnesses was not limited to the legal arena. They were among the first to call for a legislative instrument to defend basic freedoms in Canada. Glen How, one of Saumur's lawyers, ardently defended this idea in an article published in the *Canadian Bar Review* in 1948.

The numerous cases involving Jehovah's Witnesses made a significant contribution to Canadian law. They enabled the courts to move beyond the letter of the law to consider the values underpinning Canadian constitutional law. In the absence of a constitutional instrument protecting fundamental freedoms, they helped secure the recognition of freedom of religion.

Conclusion

What conclusions can we draw from this brief overview of a handful of landmark legal cases? Of course, they all have in common the fact that they were judged in Quebec City, whose 400th anniversary we are now celebrating, and therefore they have a certain anecdotal and historical value. But there is more to them than that.

Landmark cases owe their impact to the issues they involve. They reflect the social concerns of their time. Citizens generally take sides on the matters at issue. The main players sometimes become heroes whom we identify with the causes they support. Dr. Henry Morgentaler, whose abortion trial we didn't discuss because it took place in Montreal, is the best example of this.

In time, however, issues fade and preoccupations change. Yesterday's heated debates may seem outmoded and irrelevant today to the point where they are nothing more than an illustration of social problems that we have put behind us. This is true in certain cases, but much less so in others. Quebec society no longer accepts cruel punishments, which makes our interest in the McLane affair purely historical. Similarly, no Quebec parish priest would stand in his pulpit today and threaten his flock with the fires of hell for refusing to vote according to the priest's personal convictions, as in the Langevin affair. We no longer adopt laws or by-laws forbidding the dissemination of a religious doctrine. Society has made real progress in advancing human values and the relationship between citizens and the State. Yet, legal decisions such as those we have discussed here have contributed to this progress. Maintaining equality between individuals and social groups, ensuring the fairness and legality of government action, and promoting procedural guarantees for defendants were, and still are, issues central to the law and, consequently, to the courts.

We can all agree that there is still much to do, notably regarding the issue of the secular nature of the State, which remains an issue in our society. Yet, are the courts still capable of acting as agents for change? They are often described, and perceived, as fossilized institutions, incapable of renewal, particularly with regard to accessibility.

The French journalist and essayist, Jean-François Khan, has reflected and written a great deal on social questions, and has a few thoughts on the matter. He stated in an interview that "a stable institution never disappears. It renews itself, becomes more complex, improves, and moves to another level, but the original structure never disappears."[72] (Translation) In his opinion, all structured systems go through a period of crisis at one time or another, and then renew themselves. This "adaptive renewal of institutions..." he added, "drives progress." (Translation)

67. *Saumur v. City of Quebec,* [1953] 2 S.C.R. 299, 330 (Mr. Justice Rand).
68. S.Q. 1953–1954, c. 15.
69. *Saumur et al. v. Procureur général du Québec,* [1964] S.C.R. 252.
70. *Chaput v. Romain,* [1955] S.C.R. 834, 841 (Mr. Justice Taschereau).
71. [1959] S.C.R. 121.
72. "Rien ne change! Tout évolue…," *Le Nouvel Observateur,* No. 2268 April 24 to 30, 2008, p. 16 and 17 by Jean François Kahn, interview by Gilles Anquetil.

The courts are clearly stable social institutions. According to Kahn's line of thought, their optimization is associated with social progress. We believe that the universality of the courts' action, the diversity of the cases they hear, and the importance of the issues that stem from them , result in them playing a key role, through jurisprudence, in renewing other social institutions and contributing to general social progress. Thus, the handful of cases we have discussed here, apart from being spectacular in their own time, have contributed in their own way to the evolution of certain values that today benefit all.

This brings us back to the theme of the conference, *"Which Judge, for Which Society."* Some say that society is in the throes of a values crisis. Are the courts also going through a critical phase, where a loss of credibility has led to a weakening of their ties to the majority of the population, a loss of credibility stemming among other things from the fact that for all intents and purposes, they are practically inaccessible to all but the biggest and strongest in our society? Have they ceased, at the same time, to be true agents for social progress?

Jean-François Kahn wrote that every institution goes through crisis and renews itself: "Nothing changes. Everything evolves!" His message is both reassuring and challenging. If I understand it correctly, it implies that lucidity is the key quality that all magistrates need to make a proper and balanced diagnosis and optimize the actions of the institution of which they are a part. This is clearly one contribution that the legal community owes to society.

Address

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LA FACULTÉ DE DISCERNEMENT / EXERCISING JUDGEMENT

(At the author's request, this talk has not been translated)

Introduction : Parametres of Plurality

Première Partie :
Dimensions de diversité – *la règle et le rôle*

A. Diversité des cadres institutionnels des tribunaux
B. Diversité des statuts des magistrats
C. Diversité des fonctions et des mandats
D. Diversité des clientèles et des justiciables
E. Diversité des modes d'adjudication
F. Diversité des sociétés canadiennes et québécoises

Part Two :
Symbols of Singularity – *Self and Other*

A. Singularity of personal pedigree - humility
B. Singularity of character - wisdom
C. Singularity of ontology – life-long learning
D. Singularity of phroenesis – narratives of moral agency
E. Singularity of eudaimonia – the quest for virtue
F. Singularity of uncertainty – liberating the human imagination

Conclusion : Le courage d'être

Introduction:
Parametres of plurality

The burden of philosophy, and of political philosophy (including the philosophy of law) in particular, is to propound universal truths – about democracy, about freedom, about equality, about law, and about justice. To do so requires philosophers to abstract from the complex, diverse, messy world in which real people lead real lives, and in which tyranny, slavery, inequality and injustice are quotidian experiences.

By contrast, the burden of sociology, and of the sociology of law in particular, is to explore exactly how human societies function, and to draw appropriate distinctions between what may (from a bird's-eye perspective) look like identical situations. For better or for worse, most law teaching, and for that matter most theorizing about law, legal practice and courts by professors, lawyers and judges, approximate the philosophical rather than the sociological viewpoint.[1]

Indeed, the theme of this Conference, and presumably the topic I am meant to address in this opening address – "*which judge for which society?*" – implicitly reveals our tendency as jurists to seek simplicity and unity through abstraction: it is cast in the singular. In counterpoint, however, I should like to offer some lessons derived from my personal experience as a legal academic: in my research on access to justice over the past 35 years, I have found nothing but plurality and diversity.[2] Not surprisingly, then, I tend to be sceptical of questions posed in the universalizing singular. For this reason, in this essay I will try to answer a slightly different question than that which I have been asked to address, namely: "*which judges for which societies?*"

I'd like to emphasize this central idea of legal and social plurality by calling forth what has been described by many critics as the "best first sentence in western literature". That sentence is:

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1. I am grateful to Harry Arthurs for helping me to see that, in differentiating between these two types of intellectual inquiry, I am making more of a methodological than an ontological point. Of course, legal sociology constructs universals by identifying affinities between apparently dissimilar objects; and of course, legal philosophy deconstructs universals by positing definitions to exclude apparently non-conforming phenomena. But the manner of argument and the relationship of empirical data to theoretical framework in the two cases are opposed. Thus, the legal sociologist confronts diversity and the impossibility of correcting all wrongs: this approach can be characterized as "tragic realism". Conversely, the legal philosopher lives in a world that embraces the skillful use of literary devices like *Charters of Rights* to achieve in elegant fantasy what cannot be achieved in grubby reality: this approach can be characterized as "magic realism".

2. Voir notamment, R.A. Macdonald, "Accessibilité pour qui: Selon quelles conceptions de la justice" (1992) 33 *Cahiers de droit* 457-484 ; "Access to Justice in Canada Today -- Scope, Scale, Ambitions" in J. Bass, et al., dirs. *Access to Justice for a New Century: the Way Forward* (Toronto: Law Society of Upper Canada, 2004) 19-112.

All happy families are happy alike; all unhappy families are unhappy in their own way.

So begins Leo Tolstoy's Anna Karenina. This sentence has stuck in my mind ever since I first heard it at a planning session for the Community Law Programme at the Law Faculty of the University of Windsor some 30 years ago. To me the opening of Anna Karenina reveals a meta-fact about human beings, about human society and about human institutions (including courts) – except that I believe that Tolstoy got the formula exactly backwards. In my experience all *unhappy* families are unhappy alike, and all *happy* families are happy in their own way.

Now I don't want to be understood as making a large claim here about the "essential nature" of happiness or unhappiness. After all, I suppose that there are as many different ways of being unhappy as there are ways of being happy. Rather, my point in rewriting Tolstoy is to have us think about how human beings understand and interpret their circumstances.

Happy families that reflect on their happiness, it seems to me, realize that there is no catechism for happiness. Happiness results from attending to the specific features of a relationship, the specific character and personality of each member of the family, and the specific circumstances within which the family finds itself. Happiness flows from sustained attention to the contingency of, and irony embedded in, everyday high-affect human interaction.

By contrast, unhappy families that reflect on their unhappiness (and I suspect that most actually do not) often seek some canonical protocol, some magic recipe, some distilled wisdom of the ages that can be expressed in a universal maxim to ensure their happiness. For members of such families, happiness is not something that demands an investment of emotional energy, a humility about one's own circumstances, and an ongoing quest for grace that fails as often as it succeeds. Quite the contrary. Happiness is the necessary outcome of rigourous adherence to an apparently proven and, if possible, memorizable formula that can be repeated like a mantra. But invariably the mantra unhappy families adopt (and attempt to put into practice) is too abstract to provide workable direction for their lives. Moreover, such formulae are typically for saints, not human beings : they require aspirational conduct that most of us are simply incapable of achieving, which only makes us unhappier.

As meditation on the human condition, Tolstoy's epigram (in its inversed form) may be deployed to guide reflection upon all things human – and, in particular, upon human justice. The transposition would then come out something like this:

All happy experiences of human justice are happy in their own way, and all unhappy experiences of human justice are unhappy alike.

Teasing out the implications of this epigram for Canadian judges, for their selection, and for continuing judicial education in Canada, is the ambition of the present essay.[3] As I develop my argument, I will of course, draw connections to the various other topics on the conference programme. That said, I wish to keep my focus on what I consider to be the irreducible judicial task: the exercise of judgement.

* * * * *

Je divise mes réflexions en deux grandes parties. Dans une première partie, je signale les plusieurs dimensions de diversité de l'institution judiciaire au Canada. Je le fais pour rappeler que la question *quels juges pour quelles sociétés* devrait se poser au pluriel tant en ce qui concerne *le rôle du juge,* qu'en ce qui concerne la *notion de société.* N'oublions que tout état, tout sous-état et tout quartier (Canada, Québec, Montréal, Hochelaga-Maisonneuve) comprend une multiplicité de sociétés – hétérogènes, distinctes, et entrecroisées.

Ensuite, j'aborde une seule singularité de la fonction judiciaire, singularité inévitable qui impose sur ces diversités systémiques et sociétales une unité profonde. Cette singularité se résume dans la faculté de discernement. Tout juge, agissant à ce titre pour toutes les sociétés canadiennes, québécoises, montréalaises et autres est appelé à exercer un bon jugement. Ce que cela veut dire – exercer vertueusement cette faculté de discernement – sera l'objet de la deuxième partie de cet essai.

Première Partie : Dimensions de diversité – *règle* et *rôle*

L'essentiel de la doctrine contemporaine sur la fonction judiciaire au Canada est de nature théorique et évoque une conception unitaire et monochromatique – Diceyienne oserais-je dire, – du système de judicature : la Cour y est définie comme une institution peuplée d'experts nommés à vie – ce qui assure leur impartialité et leur indépendance – et qui sont appelés à trancher les litiges qui sont soumis à la cour à la faveur d'un contradictoire. Cette doctrine, fondée sur une acception institutionnelle des tribunaux *(la règle)* et

3. I have addressed a number of themes in this essay in previous studies. See notably, R.A. Macdonald, « Nommer, élire, tirer au sort, vendre au plus offrant ?… à propos le choix des juges » in P. Noreau, ed. *Mélanges Andrée Lajoie* (Montreal : Thémis 2008) 731-806 ; « L'identité en deux temps : le républicanisme et le pluralisme, deux points de vue juridiques sur la diversité » in S. Vibert, ed., *Pluralisme et démocratie : entre culture, droit et politique* (Montréal : Éditions Québec-Amérique, 2007) 273-308 ; « Le catéchisme de l'islamophobie » in M. Jezequel, ed, *La justice à l'épreuve de la diversité culturelle* (Montreal : Éditions Yvon Blais, 2007) 19-61 (with Alexandra Popovici) ; « Une phénoménologie des modes alternatifs de résolution des conflits – résultat, processus et symbolisme » in C. Eberhard et G. Vernicos, ed. *La quête anthropologique du droit* (Paris : Éditions Karthala, 2006) 275-296 (with Pierre-Olivier Savoie) ; « Le juge et le citoyen : une conversation continue » in A. Riendeau, ed., *Dire le droit : pour qui et à quel prix* (Montreal : Wilson and Lafleur, 2005) 3-22 (with Alexandra Law) ; « L'intégrité des institutions : rôles et relations dans le modèle constitutionnel » in R. Macdonald, ed., *Établir la rémunération des juges : perspectives multidisciplinaires* (Ottawa : Commission du droit du Canada, 1999) aux pages 7-23. ; « Auctioneers, Fence-viewers, Popes -- and Judges» (1998) 9 Constitutional Forum 95-104 (with Andrée Lajoie) ; « Should Judges Be Legal Pluralists » in Aspects of Equality : Rendering Justice (Ottawa : Canadian Judicial Council, 1996) 229-234 ; « Authors, Arbiters, Oracles, Performers » in *Appointing Judges : Philosophy, Politics and Practice* (Toronto : Ontario Law Reform Commission, 1991) 233-240. To avoid burdening the text with footnotes, I shall not "string-cite" any of these sources in the remainder of this essay.

sur la fonction processuelle de la magistrature *(le rôle)* traduit dans un même mouvement le mandat des juges et la méthode judiciaire.[4]

Avant d'examiner le bien-fondé de cette approche formelle et unitaire des assises théoriques du système judiciaire canadien, j'aimerais poser une question préliminaire : pourquoi pensons-nous que l'activité judiciaire remplit une fonction incontournable de la gouvernance contemporaine ?[5] Sans doute nous faut-il identifier quelqu'un (un décideur quelconque) ou quelque chose (un ordinateur peut-être ?) ou un protocole purement formel (par exemple, un processus décisionnel fondé sur le hasard ?) pour trancher les conflits qui émergent continuellement de l'interaction sociale.[6] Mais il n'est pas certain que cette prémisse, qui pose la nécessité d'un mécanisme spécifique pour trancher les conflits, soit suffisante pour conclure qu'il nous faut, pour y arriver, nommer des magistrats professionnels, encadrés par des tribunaux institutionnalisés, protégés par la constitution et dotés des compétences en droit public et en droit privé, tout autant qu'en droit civil et en droit pénal, pour décider des problèmes qui lui sont soumis.

Il existe en effet, aujourd'hui, au-delà de l'adjudication judiciaire telle que nous la connaissons, une pléthore de modes et de mécanismes de règlement des conflits – parfois étatique, parfois coutumier. Il arrive parfois que le législateur établit lui-même un organisme administratif chargé de compétences décisionnelles ; il arrive également que nous ayons recours à des instances d'adjudication privé – on pense notamment à l'arbitrage conventionnel. Combien de fois sommes-nous appelés à substituer au processus d'adjudication judiciaire une pratique de conciliation ou de médiation. Ne nous arrive-t-il pas régulièrement de soumettre nos griefs à un conseil d'ainés ou de sages ; ou de déléguer cette responsabilité au prêtre, au rabbin, ou à l'imam.[7] Au sein des démocraties libérales modernes, toutes ces institutions décisionnelles (qu'elles soient étatiques ou non) coexistent et œuvrent au côté des décideurs judiciaires. Les tribunaux, tels que nous les concevons généralement, n'exercent aucun monopole étatique non plus qu'aucun monopole fonctionnel sur le règlement des conflits individuels et sociaux.

Abordés de cette manière, il est évident que les choix de société concernant (1) la *structure* d'un système étatique de règlement des conflits, (2) l'établissement d'un *processus* de prise de décision, et (3) le *choix* des décideurs, bien que fondamentaux, sont des décisions de « second ordre ». Nous devons d'abord décider que c'est notre volonté d'établir un système de décideurs étatiques. Cela étant, il faut bien commencer quelque part et je présume, pour les fins de la discussion, nous avons adopté une constitution qui nous oblige à maintenir un système de judicature impliquant des décideurs institutionnels. Je présume, de plus, que ces décideurs « ultimes » sont les juges plutôt que d'autres interprètes officiels.[8]

Se posent alors deux types de questions touchant *la conception* du système : d'abord, qui sont ces décideurs et comment les choisir ; puis que font-ils et comment le font-ils ? Même en nous limitant au cas des décideurs que sont les juges, il n'y a pas une réponse unique ni à l'une ni à l'autre de ces questions. La magistrature contemporaine est caractérisée par son extrême hétérogénéité. J'aborde les diverses dimensions de cette hétérogénéité – de ce que j'ai nommé la règle et le rôle – dans les cinq premières sections de cette partie. Elles abordent tour à tout la diversité des cadres institutionnelles dans lesquelles œuvrent les tribunaux ; la diversité des statuts des magistrats ; la diversité de leur mandat et de leurs fonctions ; la diversité de leurs clientèles ; et la diversité de leur modes d'adjudication. Dans une sixième section, j'explorerai l'impact de la diversité des sociétés canadiennes et québécoises sur le rôle du magistrat.

A. Diversité des cadres institutionnels des tribunaux

Premier point. On ne peut pas répondre à la question « quelles juges pour quelle sociétés ? » sans en poser une autre : dans quel cadre institutionnel nos juges sont-ils et sont-elles appelé(e)s à travailler ? C'est un réflexe bien humain (et une technique pédagogique connue) de commencer toute réflexion un peu abstraite, par un exemple concret, familier. Ainsi, les discussions sur le cadre institutionnel et normatif des tribunaux au Canada – que ces discussions soient menées dans le contexte de la vie courante, dans celui des médias ou dans celui de la vie professionnelle -- renvoient presque toutes au procès criminel devant jury ; et toute discussion sur le rôle du juge, et sur les qualités qu'on attend trouver chez les magistrats, visent presque systématiquement le juge de première instance siégeant en matière pénale. Nous savons tous que c'est une perception simpliste de la fonction judiciaire. Mais avant de conclure que cette perception n'est que le produit d'un biais relayé pas la culture populaire, je vous invite à écouter quelques « discours d'après-dîner » prononcés aux colloques du Barreau où cette même

4. Cette façon de concevoir la forme institutionnelle et la fonction processuelle de l'acte judiciaire est tirée de W. Bishin and C.D. Stone, *Law, language and ethics* (Mineola : Foundation Press, 1973) Partie IV, aux pages 721-899.
5. La question est Weberienne. Pour une discussion contemporaine voir see M. Coutu and G. Rocher, *La légitimité de l'état et du droit: autour de Max Weber* (Ste Foy : Presses de l'Université Laval, 2005).
6. Karl Llewellyn, juriste, et E.A. Hoebel, anthropologue, ont offert l'un des meilleurs analyses des cette nécessité d'un tiers décideur quelconque dans leur étude du système de justice autochtone : *The Cheyenne Way* (Norman : University of Oklahoma Press, 1941).
7. Toute la gamme de possibilités de processus et institutions de décision sont évoquées dans un document de la Commission de réforme du droit de l'Ontario. À consulter : *Study Paper on Prospects for Civil Justice* (Toronto : Commission de réforme du droit de l'Ontario, 1995).
8. En réalité, les processus officiels d'interprétation et d'application des textes de loi sont très complexes, et comprennent une pléthore de décideurs officiels – des fonctionnaires (police, commis, inspecteurs), des tribunaux administratifs, des arbitres de griefs, juges, *etc.* Le focus des paragraphes qui suivent, toutefois, sera les institutions décision dont la fonction primaire est l'interprétation des lois – des cours, des tribunaux qui exercent un pouvoir de décision statutaire – et non pas celles qui sont appelées à interpréter une règle de droit à l'occasion d'exercer une autre fonction officielle – police, commis, inspecteurs. Sur cette notion de décideurs dont la fonction primaire est l'acte de dire le droit, voir Joseph Raz, *The Concept of a Legal System* (2d) (Oxford : Clarendon Press, 1980) et François Ost, *Dire le droit, faire justice* (Bruxelles : Bruylant, 2007).

perception simpliste domine également. Pour le meilleur ou pour le pire, notre vision du rôle du juge, qu'elle soit d'origine populaire ou professionnelle, est traversée par cet exemple et par l'idéologie jacobine qui la sous-tend.

Abordons la réalité structurelle du pouvoir judiciaire telle qu'elle est circonscrite par la constitution canadienne.[9] Bien que le Canada n'ait pas adopté le système de judicature dualiste qu'on rencontre dans d'autres fédérations comme les États-Unis, il existe tout de même dans notre système de forts éléments de pluralité institutionnelle. Implicitement, la *Loi constitutionnelle de 1867* prévoit trois types de cours : les tribunaux de constitution provinciale où siègent les juges de nomination provinciale (cours de 92 (14)) ; les cours fédérales (y compris la Cour suprême du Canada) où siègent des juges de nomination fédérale (cours de 101) ; et les cours de constitution provinciale où siègent des juges de nomination fédérale (cours de 96). Théoriquement, on pourrait également imaginer des cours de constitution fédérale où siègent des juges de nomination provinciale.

Cette structure constitutionnelle en cache cependant une autre qui favorise, elle aussi, l'entretien d'une véritable diversité institutionnelle au sein du système de judicature canadien : la distinction entre « les cours supérieures » et les autres cours, dites « inférieures ». Parmi les cours où siègent des juges de nomination fédérale se trouvent les cours supérieurs (les tribunaux de droit commun bénéficiant d'une compétence constitutionnellement illimitée) et les cours de comté (qui sont des cours inférieures). De même, en exerçant le pouvoir qui lui ait reconnu en vertu de l'article 101, le Parlement du Canada peut également créer des tribunaux avec les pouvoirs d'une cour supérieure (par exemple, la Cour suprême du Canada et la Cour fédérale) ou une cour inférieure. Constitutionnellement, il n'est pas nécessaire que les juges des cours constituées en vertu de l'article 101, y compris les cours supérieures ainsi constituées, soient nommés par le Gouverneur-en-conseil. Le processus de nomination pourrait être fédéral ou même provincial. Inversement, rien n'empêche qu'une province établisse une cour inférieure et envisage que les juges qui y siègent soient de nomination fédérale.

À ce jour, cette diversité institutionnelle n'a pas provoqué de grands conflits, hors du domaine des tribunaux administratifs de constitution provinciale. Mais il est à noter que, très souvent, les décideurs administratifs sont nommément des juges, et que plusieurs tribunaux administratifs sont fonctionnellement des cours. De même, il arrive parfois qu'en matière fédérale, ces tribunaux administratifs soient définis comme des cours supérieures. En effet, cette structure constitutionnelle nous rappelle (1) que certains juges ont un mandat proactif qui leur oblige de rendre des décisions de politique, (2) que certains juges ont un mandat qui dépasse les strictes limites fonctionnelles de l'adjudication, et en conséquence (3) que l'image du juge pénale ne recouvre qu'une partie de la fonction judicaire contemporaine.

Toutes ces permutations de la structure constitutionnelle nous amènent à examiner plus en profondeur d'autres sources de diversité présentes dans le système de judicature contemporaine – et notamment, la diversité associée au statut du juge lui-même.

B. Diversité des statuts des magistrats

Aujourd'hui, notamment depuis les jugements prononcés par la Cour suprême sur l'indépendance des juges[10], il est important de cerner exactement ce qu'implique le « statut du juge ». Selon la constitution canadienne, la question « qu'est-ce qu'un juge » appelle à la fois une réponse formelle et une réponse substantielle. Formellement, le critère relève de la personne elle-même. Un juge est une personne qui est nommé en vertu d'une *Loi sur les juges* ou d'une *Loi sur les tribunaux judiciaires* (qu'elle soit fédérale ou provinciale), et qui exerce des fonctions selon un *Code de procédure civile,* une *Loi sur la Judicature* ou selon les *Règles de pratique.* Donc, selon ce critère purement formel, tout ce que fait officiellement un juge constitue un acte judiciaire, et seules les personnes ainsi nommés peuvent agir judiciairement.

Mais cette définition est incomplète et inexacte, et ce, pour deux raisons. D'abord, plusieurs actes posés par les juges ne sont pas accomplis dans l'exercice de la fonction judiciaire. Et plusieurs personnes qui ne sont pas juges exercent des fonctions judiciaires ou quasi-judiciaires. Prenons le premier de ces deux cas. Selon les articles 10 et 14 de la *Loi constitutionnelle de 1867,* il est le poste d'administrateur ou de député Gouverneur-général. Aujourd'hui, c'est la juge en chef du Canada qui agit comme député Gouverneur-général. Elle est également Présidente du comité de sélection pour l'Ordre du Canada. Dans le même ordre d'idée, les juges sont parfois appelés à siéger sur les panels du Conseil de la magistrature du Canada ou même à présider certaines Commissions royales d'enquête. Souvent les juges sont nommés par les lois provinciales ou fédérales à agir à titre de *persona designata* et exercent à ce titre un mandat purement statutaire. Dans toutes ces situations, un rôle officiel est en question, mais il n'y a rien d'inhérent dans ce rôle qui exige que ce soit nécessairement un juge qui l'exerce. Pourquoi donc y designer un juge ? Dans certains cas, c'est la constitution elle-même qui impose ce devoir ; dans d'autres, c'est l'idée que les juges doivent être *Maîtres chez eux*[11] ; dans d'autres, encore, le gouvernement nomme des juges parce qu'il cherche à bénéficier de l'impartialité qu'on associe à la figure du juge dans notre système. Toutefois, ce ne sont pas des fonctions qui relèvent du statut du juge en tant que tel.

9. Pour une discussion en profondeur de ces diversités consulter H. Brun, et al, *Droit constitutionnel* (5[ième] éd.) (Cowansville : Éditions Yvon Blais, 2008).
10. Renvoi sur la rémunération des juges [1997] 3 R.C.S. 3 ; Association des juges de la Cour provinciale de Nouveau-Brunswick c. P.G.N.-B. [2005] CSC
11. J. Deschênes, *Maîtres chez eux* (Montréal : Conseil canadien de la magistrature, 1991) ; M. Friedland, *A Place Apart* (Ottawa : Canadian Judicial Council, 1995) ; *Models of Judicial Administration* (Ottawa : Conseil canadien de la magistrature, 2006).

Sur un second versant, nous connaissons des situations où les tribunaux administratifs ou des fonctionnaires désignées exercent des pouvoirs équivalents à ceux des juges. De même, les législatures décidant de l'expulsion de l'un de leurs membres en font autant. Parfois même, on invite des individus qui ne sont pas juges à plein temps à siéger comme juges des petites créances ou comme arbitres des griefs. Finalement, dans certain cas une Commission d'enquête exerce un pouvoir judiciaire, notamment quand des conclusions de fait ou de droit à l'égard d'un individu identifié font partie de son rapport.

Aussi, si notre intention est vraiment de cerner ce qui distingue le statut du juge de celle d'autres figures d'autorité, il nous faut ajouter au critère purement formel qui fonde son statut, un critère plus substantiel. Depuis plus d'un siècle, la jurisprudence de la Cour suprême du Canada établie sur l'interprétation de l'article 96 de la *Loi constitutionnelle de 1867* aborde cette question. Au surplus, depuis 1982, la même Cour a été appelée à donner un contenu normatif à l'article 11 de la *Charte canadienne des droits et libertés.* Dans un cas comme dans l'autre, la Cour propose des tests fonctionnels en vue de circonscrire les contours de la fonction judiciaire. Initialement cette jurisprudence avait pour objet de cerner l'autorité et la compétence des juges nommés à un Cour supérieure et les limites des pouvoirs provinciaux d'attribuer aux Cours qu'elles constituent la compétence d'une Cour supérieure et de nommer les juges appelés à y exercer de tels fonctions. La définition substantielle de la fonction judicaire n'est pas ici mise en jeu. Plus récemment, cependant, c'est l'article 11(d) de la *Charte* qui préoccupait la Cour suprême. En exigeant que le tribunal soit indépendant, la Cour suprême posera les balises de ce qui fonde l'indépendance des juges et l'essentiel de l'acte judiciaire.

Notez, toutefois, que ces deux articles visent des objectifs différents et ont également une portée différente.[12] L'article 11 s'applique à toute personne qui exerce une telle fonction, indépendamment du cadre institutionnel en fonction duquel cette fonction est établie et indépendamment de son titre. Par contre, l'article 96 s'applique à toute institution exerçant un mandat englobant une compétence attribuée à une cour supérieure. Il s'ensuit que, selon la constitution, qu'on peut, selon le cas, nommer des juges « 11 et 96 », des juges « 11 mais pas 96 », parfois des juges « ni 11 ni 96 » et même des juges « 96 mais pas 11 ».[13]

S'appuyant sur ces textes constitutionnels et cette jurisprudence interprétante de l'article 11(d) en particulier, nous sommes en mesure aujourd'hui de reconnaître les critères que les juges adoptent pour définir leur propre statut et le distinguer de celui d'autres décideurs officiels. Mais de cette singularité du statut prétendue, on peut également tirer une grande diversité de fonctions. Pour cerner la portée de cette diversité, il faut maintenant poser la question fonctionnelle : « que font, au juste, nos juges… à titre de juge ? ».

C. Diversité des fonctions et des mandats

En posant la question « que font nos juges, à titre de juge ? », j'envisage laisser de côté toutes les activités extrajudiciaires de nos juges, même si, du point de vue déontologique, tout ce que fait un juge fait partie de son activité « officielle ».[14] En d'autres termes, je ne m'intéresse pas à toutes les actions à caractère juridique que posent les juges. Je ne m'intéresse ni aux activités de lobbying entreprises personnellement (pour faire adopter un règlement municipal, par exemple) ni aux poursuites initiées contre les gouvernements (y compris les poursuites touchant leur statut comme magistrat, comme celles concernant leur rémunération et leur bénéfices marginaux, etc.). J'exclus également les fonctions officielles assumées par les juges hors de l'exercice de leur compétence judiciaire, c'est-à-dire en tant que *persona designata,* à la suite d'un mandat législatif. Tout comme ces autres situations où ils agissent en raison de leur capacité purement privée, c'est-à-dire en tant que simples citoyens, situation au cours desquelles ces juges doivent faire preuve de réserve, de manière à ne pas compromettre l'intégrité de leur office.

L'exclusion de ces diverses activités n'est qu'un début de réponse à la question : « quels devoirs sont proprement judiciaires et tombent dans le mandat du juge… en tant que juge ? » Si, par le passé, on pouvait tenter de fournir une réponse assez simple à cette question, les choses sont différentes depuis que le Parlement et les législatures ont pris l'habitude de transférer aux cours et aux juges des tâches nouvelles et multiples (parfois des tâches essentiellement politiques). Commençons avec la tâche qui, traditionnellement, est conçue comme relevant de l'essence de la fonction judiciaire : le rôle du juge y est d'écouter avec un esprit ouvert et impartial les causes présentées devant lui et de rendre un jugement motivé selon une règle de droit applicable dans les circonstances.[15] Mais qu'est-ce que cela veut dire ?

De nouveau, il faut admettre que la perception populaire est largement forgée par les medias : *Judge Judy, People's Court, L.A. Law, La Cour en direct, la Facture* et ainsi de suite. Les médias ont véhiculé une image « made in the USA » de la fonction judiciaire. Est-ce que cette image d'un juge qui ne ferait que présider les procès et décider de l'issu des causes qui lui sont soumises s'accorde avec la réalité ? Est-ce que nos juges consacrent réellement le plus clair de leur temps à présider des auditions ? D'après un sondage officieux que j'ai mené auprès des juges de la Cour du Québec et la Cour

12. Sur ces questions, consulter P.W. Hogg, *Constitutional Law of Canada* (Toronto : Carswell, 2005) c. 7.3 et c. 48.5.
13. Cette catégorie est difficilement concevable. Voici, cependant, un exemple : il se peut (1) que le Parlement du Canada établit une cour de 101 avec les pouvoirs d'une cour de 96, ou (2) que l'Assemblée nationale établit une cour de 96, mais que dans les deux cas, le législateur invoque l'article 33 de la *Charte canadienne des droits et libertés* pour mettre de côté l'application de l'article 11(d) de la *Charte.*
14. Toutes les dimensions de la déontologie judiciaire sont abordées dans l'excéllent livre de P. Noreau et C. Roberge, *Applied Judicial Ethics* (Montréal : Wilson et Lafleur, 2006) ; *Ethical Principles for Judges* (Ottawa : Conseil canadien de la magistrature, 1998).
15. Voir notamment, A. Kojève, *Esquisse d'une phénoménologie du droit : exposé provisoire* (Paris : Gallimard, 1981).

supérieure, il paraît que nos magistrats consacrent chaque année beaucoup plus de temps à lire les dossiers en vue des auditions, à réfléchir à la preuve et aux arguments soumis par les parties, à justifier leur décision et à rédiger leurs jugements qu'à siéger à la cour. La tâche de juge est multifonctionnelle et, en fonction de la Cour et la nature de chaque cause, ces diverses responsabilités prennent une amplitude variable.

Je ne sous-estime pas l'importance de l'audition. Mais, il faut de nouveau, admettre que la nature des causes et, partant, celle de l'audition sont très diversifiées. Pourtant, le modèle britannique du juge passif, attentif à l'argument des parties, des témoins, etc. s'abstenant d'intervenir dans la course du procès est toujours évoqué comme le prototype à respecter, peu importe la Cour, la causes, ou les parties. Toutefois, même dans les causes les plus simples, cette manière de concevoir le rôle du juge ne reflète plus la réalité : confronté à un justiciable qui se représente lui-même, ou à des avocats mal préparés ou plus ou moins compétents, le juge est appelé à assumer un rôle beaucoup plus actif dans le déroulement de l'audition. De plus, en fonction de la nature de la question (famille, jeunesse, faillite, petites créances, etc.), du profil des parties (des sociétés, des personnes physiques, des adolescents, des personnes âgées), et compte tenu du mandat de la cour (première instance, appel, civil, pénal), et des règles de procédure applicables, chaque dossier renvoie à un processus différent. Finalement, même dans le cadre d'un procès civil « ordinaire », s'impose toute une gamme de procédés distinctes : requêtes, ordonnances de gestion de causes, expertises, voir dire, médiation judiciaire, etc. Chacun de ces expédients s'inscrit dans un cadre normatif particulier que doit respecter le juge.

En d'autres termes, les fonctions des juges sont diverses (parfois purement judiciaires, parfois plutôt administratives sinon carrément législatives), leur mandat est complexe et variable, et leur rôle est souvent proactif plutôt que simplement réactif. L'image répandue du juge qui, dans sa sagesse, écoute et tranche, ne rend compte que d'une très petite partie de l'activité des juges. Le juge agit souvent aujourd'hui comme gestionnaire – qu'on réfère à la gestion des causes à plaider, ou à l'attribution des compétences des décideurs administratifs. Il s'ensuit que le rôle contemporain du juge peut se résumer, comme John Willis le disait déjà il y a 40 ans, à celui d'un haut fonctionnaire dans le *ministère du Règlement des conflits,* fonction qui doit évidemment être assumée avec toutes les nuances et les subtilités sous-jacentes à une telle qualification.[16]

Reconnaître la diversité des fonctions exercées par le juge dans le quotidien de son expérience en tant que magistrat et reconnaître également la diversité des mandats confiés aux tribunaux nous oblige à nous poser d'autres questions concernant les éléments qui composent la diversité du rôle du juge. Parmi ces questions s'en pose une, qui va au cœur de cette diversité de *règle* et de *rôle* – la diversité des clientèles et celle du profil des justifiables qui se présentent devant nos tribunaux.

D. Diversité des clientèles et des justiciables

Abordé à partir d'une perspective très abstraite, les clientèles de nos cours apparaissent toutes comparables. Elle est composée de demandeurs (appelants, requérants) ; de défendeurs (intimés), de mises-en-causes ; et d'intervenants. Mais cette simplicité conceptuelle trahit la complexité et la diversité concrète des parties qui se présentent devant le juge : un couple qui divorce ; un fonds de pension cherchant à acquérir une société commerciale ; un enfant blessé pendant un match de hockey entreprenant une poursuite en dommages-intérêts ; un fiduciaire sollicitant l'interprétation d'un testament ; une jeune fille désireuse de porter son foulard à l'école. Nonobstant cette diversité évidente, nous avons tous, en tant que juriste, cette propension à redéfinir les situations vécues par nos concitoyens en fonction d'un vocabulaire spécialisé qui propose une grande variété d'étiquettes préétablies – « justiciables, administrés, sujets de droit, revendiquants des droits ou de l'égalité » – qui viennent oblitérer l'humanité particulière de chacun et chacune.

De plus, force est d'admettre que la spécialisation des tribunaux, et celle des juges œuvrant dans les tribunaux de droit commun se traduit par une homogénéité relative des parties qui d'y présentent. Parce que nous avons depuis longtemps abandonné l'idée d'un tribunal de droit commun omni-compétent peuplé des juges omni-compétents à la faveur d'une foule de compétences spécialisées *rationae personae,* plusieurs juges ne voient aujourd'hui, sur une base régulière, qu'un petit échantillon des demandeurs et des défendeurs potentiels. À la division des petites créances, seules les personnes physiques peuvent normalement se porter demandeur. Le tribunal de jeunesse s'intéresse exclusivement aux enfants et aux adolescents. En droit de la famille, on ne voit que des personnes physiques.

Il en va de même des compétences limitées *rationae materiae* – faillite, logement, famille, immigration, jeunesse, travail – qui ont un impact direct sur la manière de juger. Dans certains cas la preuve *viva voce* est admise, y compris le ouï-dire. Dans d'autres, les parties sont souvent absentes, représentées par leur avocat, alors que dans d'autres encore, les parties doivent comparaitre personnellement. Dans certains cas, le juge assume un rôle particulièrement actif dans le déroulement du procès. Ainsi, lors d'une réorganisation

16. Aux États-Unis cette conception du rôle du juge comme gestionnaire des processus de décision par les autres est acceptée depuis au moins un quart de siècle. À consulter : J. Resnick, « Managerial Judges » (1982) 96 *Harvard Law Review* 374.

corporative, le juge gère le litige et propose souvent des pistes de solutions. Par opposition, dans d'autres cas – successions, liquidation d'un régime matrimoniale, ventilation des hypothèques de construction – l'évaluation des biens est généralement établie par des experts.

La diversité liée à la clientèle se manifeste également en fonction des objectifs poursuivis par les demandeurs. Devant le *Tribunal des droits de la personne* on ne voit que des demandeurs exigeant la reconnaissance d'un « droit fondamental » plutôt qu'un droit contractuel. En plus, plusieurs causes contemporaines ne sont reliées à aucune revendication individuelle. D'une part, le recours collectif favorise ainsi le regroupement de demandeurs porteurs d'un même grief alors ; ces demandeurs revendiquent, collectivement, un droit. D'autre part, dans d'autres dossiers, les demandeurs sont peu intéressés à la revendication d'un droit quelconque et agissent, selon l'expression consacrée, « de manière non-Hohfeldienne » – c'est-à-dire, en vue de faire avancer une cause politique. Ceci étant, il n'est pas surprenant que les parties défenderesses aient en contrepartie répondu à ces deux initiatives en recourant à la stratégie des poursuites-bâillons, c'est-à-dire en instrumentalisant les tribunaux pour obtenir un résultat qui n'a rien à voir avec l'objet déclaré de leur poursuite. [17]

De plus en plus, les litiges contemporains tendent à faire des juges des législateurs déguisés. La fonction *res judicata* du jugement et la finalité traditionnelle des actions en justice *(interest reipublicae ut finis litem)* est remplacée par la production d'une énoncé de principe qui remplirait la fonction *stare decisis.* Dans tous ces cas, ce n'est plus le « dispositif » que cherchent à faire consacrer les justiciables, mais les « motifs » de la décision.

Bref, le juge doit reconnaître que même les causes apparemment anodines et ordinaires révèlent une hétérogénéité extraordinaire de situations. Cette hétérogénéité de clientèles, de processus, d'objectifs, et de motivations favorise directement l'hétérogénéité des « modes d'adjudication » – thème que j'aborde maintenant.

E. Diversité de modes d'adjudication

Un des mythes récurrents entourant le processus judiciaire veut que, nonobstant la diversité de situations dont nous venons de faire état, tous les juges font, en dernière analyse, la même chose de la même façon. Ils sont tous les adjudicateurs d'un processus judiciaire lui-même invariable. Certes, comme tous les chefs-cuisiniers font également la même chose : le maître-chef du Château Frontenac prépare des repas tout comme le préposé aux frites chez McDonald. Mais dès qu'on explore les paramètres de ce qui fonde l'idée même d'adjudication, sa grande diversité est manifeste. Parfois, comme on vient de voir, il s'agit d'une diversité *rationae materiae :* faillite, famille, droit public, contrôle judiciaire, droit pénal, droit international. Parfois c'est une diversité provenant du stade même de litige, le long de la trajectoire judiciaire : requête interlocutoire, procès de première instance, appel. Le contexte substantif et institutionnel informe le processus décisionnel.[18]

Toutefois, nonobstant cette diversité, plusieurs auteurs insistent sur la singularité de la fonction judiciaire, singularité qui émanerait de l'unité théorique de l'idée d'adjudication. L'adjudication est le seul processus d'ordonnancement social qui (en théorie) fait nécessairement et exclusivement appel à la rationalité. Par contraste avec le processus électoral, la médiation, la négociation de contrat, et le tirage au sort, le processus d'adjudication dépend de trois rationalités fondamentales : (1) la présentation logique de la preuve et des arguments en regard de la règle de droit applicable ; (2) l'exposé des arguments raisonnés quant au rapport entre l'interprétation des faits et le sens de la règle de droit plaidée ; et finalement (3) la décision rendu par un tiers indépendant et impartial qui tient compte de la preuve et des arguments juridiques des parties.[19]

Malgré l'unité théorique qui fonde « l'idéal-type » de l'adjudication, le processus décisionnel est, sur le plan pratique, très diversifié. Rappelons qu'on dit souvent des tribunaux de première instance qu'ils sont maîtres des faits, que les tribunaux d'appel sont maîtres du droit et que la Cour suprême est maître des questions de politique juridique. Aussi vraisemblable que cela puisse paraitre, il faut reconnaître que tous ces éléments sont présents à tous les stades du litige. Comme nous le savons tous, les tribunaux de première instance prennent des décisions politiques et, en dépite de la règle voulant que les tribunaux d'appel ne font que corriger les erreurs de droit, il arrive qu'en matière de contrôle de l'administration, elles révisent fréquemment l'interprétation des faits.

De plus, et plus important encore, la *Charte canadienne des droits et libertés* et la *Charte des droits et libertés* du Québec ont toutes deux favorisé le recours aux tribunaux au détriment d'un recours au Parlement et à l'exécutif – à tel point que plusieurs professeurs, avocats, politiciens et journalistes prétendent que nos tribunaux (au moins en droit public) ne font plus d'adjudication. Toutes leurs décisions sont considérées comme des décisions politiques.[20] Les législatures et les gouvernements ont évidemment contribué à cette situation. Depuis des années, le gouvernement du Canada s'est périodiquement servi de la Cour suprême pour obtenir des décisions sur des « Renvois » et il en va de même des gouvernements des provinces dans leur recours aux Cours d'appel. Parfois la Cour suprême a été appelée à statuer sur des questions de droit *(Labour Conventions),* parfois sur des questions de justice *(Truscott),*

17. Voir notamment le Rapport du comité, *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)* (Québec : Ministère de la justice, 2007
18. Consulter C. Baar, « Judicial Independence and Judicial Administration : the Case of Provincial Court Judges » (1998) 9 *Forum constitutionnel* 114.
19. Sur ces diverses processus d'ordonnancement sociale, et le `trait particulier de l'adjudication, K.I. Winston, dir. *The Principles of Social Order : Selected Essays of Lon L. Fuller* (2d) (Oxford : Hart Publishing, 2002) *passim* et surtout « The Forms and Limits of Adjudication » à la p. 101, et « The Role of Contract in the Ordering Processes of Society Generally », à la p. 187.
20. Voir notamment A. Petter, « Legalise This: The Chartering of Canadian Politics » in J. Kelly and C. Manfredi, dirs. *Constitutionalism: Reflection on the Charter of Rights and Freedoms* (Vancouver : UBC Press, 2009).

parfois sur des questions d'amendement constitutionnel *(Rapatriement, Sécession du Québec),* et parfois sur la validité d'une loi particulière *(Assurance-chômage).* Les justiciables issus de la société civile en font autant aujourd'hui par le biais de « test cases » et par l'introduction de « contestations judiciaires sous la Charte » *(Thorson, McNeil, Edwards Books, M. v. H.).*

Examinons maintenant l'idée du juge, défini en tant qu'arbitre passif et neutre. Par contraste avec l'adjudication telle qu'elle est conçue dans le système inquisitoire, l'adjudication contradictoire reconnaît aux parties le privilège de gérer leur propre cause, c'est-à-dire, de rester maître de leur dossier. La chose est-elle toujours vraie à la Cour suprême, où le tribunal demande souvent aux parties d'offrir des arguments sur les points qu'elle veut bien entendre ? Et *quid* de la Cour des petites créances, où le juge est appelé à intervenir pour assurer l'égalité des armes entre les parties ? Dans l'une et l'autre situation les présupposées de l'adjudication contradictoire ne tiennent plus.[21] Prenons également les situations où le juge est appelé à trancher l'issu de milliers de causes par année – assurance-emploi, accidents de travail, régie de logement. Est-il raisonnable d'imaginer que le processus décisionnel reste le même, dans de telles situations, que celui qui préside à la décision de la Cour suprême, appelée à intervenir dans moins de cent causes par année, dans des dossiers plaidés par des avocats spécialisés ?

Finalement, de plus en plus, les juges ne tranchent plus les causes formulées d'une manière qui rencontrent les paramètres de ce qu'Aristote appelait la justice corrective. En matière de garde d'enfants, de successions, de divorce, de pensions alimentaires, les législateurs ne donnent pas aux juges les normes détaillées qui favorisent la prise d'une décision claire, concluant sur un « oui » ou un « non ». En effet les normes proposées en ces matières forment aujourd'hui un inventaire de critères subjectifs en fonction desquels le juge est appelé à rendre une décision de justice distributive (ou de nature politique) en pesant les multiples facteurs proposés par la législation. Il en est de même en matière de redressement des personnes morales en voie de liquidation, en matière de faillite, en matière de propriété intellectuelle, et dans la plupart des litiges mettant en jeu une attribution de droit public – de ce qu'on a déjà appelé « public law adjudication ».[22]

Bref, les citoyens et les gouvernements se servent des tribunaux à des fins non-adjudicatives – c'est-à-dire en vue de finalités qui ne sont pas clairement établies par des normes concrètes fixes, ni par des faits établis. Et même quand les juges répondent de manière très sage (comme dans le cas du Renvoi sur le mariage-gai), le Parlement et le gouvernement font dire aux tribunaux ce qu'ils n'ont manifestement pas dit. Nous sommes témoins, de ce que les élus, les concitoyens, les avocats, et les médias, manquent de respect pour la fonction judiciaire – ce qui mine la finalité première de l'institution.[23]

Pour conclure, il faut admettre que la conception unitaire de l'adjudication, entendue en tant que processus d'ordonnancement sociale et de règlement des différends, ne tient plus. Les tâches délégués aux juges sont trop variées ; les attentes des parties sont trop variées ; et les contraintes d'ordre matériel font en sorte que le juge contemporain est souvent appelé de jouer une multiplicité de rôles ; qu'il répond à cette situation en recourant à une multitude de procédés décisionnels différents.

F. Diversité des sociétés canadiennes et québécoises

L'État-Nation moderne (post-Westphalien) est fondé sur l'idée que l'État et la société doivent se confondre : un peuple, une nation, un État. Nonobstant la croyance des révolutionnaires de la fin du XVIII[e] siècle qu'il est possible de créer une société aussi homogène – sans classe sociale, sans différentiation fondée sur la région ou l'ethnie – le projet s'est estompé. De nos jours, peu de philosophes politiques acceptent cette prémisse unitaire. D'un côté, certains excès de nationalisme au cours du vingtième siècle, et, de l'autre, la reconnaissance du phénomène du multiculturalisme, ont mené – au sein des sociétés libérales et démocratiques – à l'abandon, de toute conception du monde fondée sur l'homogénéité supposée des citoyens et sur l'unité de la société.[24] Sociologiquement et psychologiquement nous vivons une ère de diversité, de multiplicité et de complexité.

Ceci dit, pourtant, les *Chartes* des droits constitutionnellement enchâssées semblent envisager encore cette possibilité : chaque citoyen y possède les mêmes droits et obligations. Notons, cependant, que cette égalité juridique n'impose pas une identité sociologique. De nos jours, l'amélioration des technologies de communication font voir les différentes identités qui, longtemps, dans la construction de l'identité humaine, furent cachées par la distance, par la prédominance de certaines religions où de certaines langues. À présent, d'autres identités sont en concurrence dans le cadre de tensions au milieu desquelles se retrouve le citoyen : identité ethnique ; identité basée sur le sexe et sur l'orientation sexuelle ; identité végétarienne ; identité basé sur la classe ; et ainsi de suite. Le droit et le juge sont appelés à transiger avec cette diversité identitaire – diversités qui est participe entièrement de la diversité sociétale. Prenons trois exemples : la reconnaissance de l'identité autochtone, l'accommodement raisonnable, et l'accès à la justice.

D'abord la question autochtone. Depuis 40 ans, les tribunaux ont essayé de rendre justice aux autochtones, en reconnaissant leurs pratiques, leurs coutumes et leurs croyances. Que la question soit

21. R.A. Macdonald and S.C. McGuire, « Judicial Scripts in the Dramaturgy of Montreal's Small Claims Court » (1996) 11 *Canadian Journal of Law of Society* 63-98 ;
22. R. Stewart, « The Role of the Judge in Public Law Litigation » (1975) 88 *Harvard Law Review* 1383.
23. R. Levy, *Shakedown: how corporations, government, and trial lawyers abuse the judicial process* (Washington: Cato Institute, 2004); R. Nader et W. Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America* (New York: Random House, 1996).
24. C. Taylor, *Multiculturalisme : différence et démocratie* (Canal, trad.) (Paris : Flammarion, 1997).

touche l'établissement de la sentence criminelle, l'étendu des droits ancestraux, les revendications territoriales, les relations familiales, la protection des enfants, ou la commerce, il a été nécessaire de reconnaître et de protéger la pluralité des communautés normatives autochtones. Les tribunaux sont venus à la conclusion que la spécificité du droit autochtone existe et que ce droit ne peut pas s'intégrer ou se fondre dans le droit étatique. L'intersection du droit autochtone et du droit canadien se conçoit mieux comme un exemple de ce qui ressort dorénavant du devoir des juges en matière de droit international privé : l'interaction entre deux ordres juridiques distincts et la reconnaissance mutuelle des normes issus de ces ordres juridiques différents. [25]

Deuxièmement, depuis quelques années le port des symboles religieux dans les écoles publiques a provoqué des réactions répressives dans plusieurs pays. Certains administrateurs d'écoles et certains parents contestent le port de *l'hijab* et du *kirpan.* Comme l'a si bien mis en évidence la Commission Bouchard-Taylor [26], le fondement de ces pratiques d'exclusion réside dans la crainte de l'autre – tout comme les Canadiens hors Québec du dix-neuvième et du vingtième siècles – craignaient, d'un côté, les Chinois, les Ukrainiens, les Italiens, et de l'autre les Catholiques et les Juifs. La prohibition d'une pratique est un acte d'affirmation culturelle qui a pour but d'imposer une définition pré-établie de ce qui peut être considéré comme « normal » – une normalité qui, sous le prétexte de valeurs communes à une société particulière, favorise l'imposition de pratiques et de croyances religieuses dont la valeur est souvent très conjoncturelle, l'imposition d'une référence ethnique, d'une culture ou d'une langue dominantes. Sans se demander si ces pratiques et croyances correspondent vraiment à des valeurs communes fondamentales, les membres de la société dominante entendent les imposer simplement parce qu'elles sont l'expression de leurs propres pratiques et de leur propres croyances en tant que groupe dominante. [27]

Cette réflexion m'amène à mon troisième exemple. Dans toutes les situations mettant en évidence un conflit quotidien, il faut se poser la question : est-ce que les normes et les institutions du droit étatique servent à répondre aux besoins du grand public et à ceux et celles qui réclament une identité non-dominante. Les résultats d'une étude menée au début de la décennie 1990 auprès des demandeurs devant la Cour de petites créances de Montréal offre une base empirique pour répondre à cette question. [28] Cette étude a permis de réaliser l'inventaire et l'analyse des dossiers de toutes les demandes soumise à la Cour pour une même année (environ 9000) et de les classer selon l'âge, le sexe, le niveau se scolarité, le revenu, la religion, l'ethnie, la citoyenneté des justiciables, etc. Ces résultats ont été comparés aux statistiques démographiques relatives aux caractéristiques de la population normalement desservie par la Cour et à un échantillon des demandeurs engagés dans un litige devant les autres cours de justice. L'étude a trouvé de vastes écarts en ce qui a trait à la sur-représentation et à la sous-représentation de certaines strates de la population : les demandeurs, blancs, anglophone ou francophone de souche, très scolarisés, âgés entre 35 et 55 y étaient clairement surreprésentés. En contrepartie, plus on s'éloigne de ce profil-type plus on s'approchait de celui des groupes les moins sous-représentés. Les femmes, immigrantes, de couleur, allophones ou anglophones, avec une faible scolarité, plus jeune ou plutôt âgée étaient de loin sous-représentées. Comment interpréter le fait qu'une institution étatique conçue spécifiquement pour accroitre l'accessibilité des tribunaux aux citoyens justement sous-représentés n'ait qu'un impact négligeable sur leur accès aux tribunaux ? Se peut-il que ces groupes ne soient pas intéressés par la justice étatique et qu'ils préfèrent constituer leurs propres systèmes de règlement des différends ? Se peut-il que nos tribunaux, bien que conçus pour répondre à tous les besoins de la société ne soient pas en mesure d'y faire face ? Faut-il admettre que le droit étatique ne bénéficie d'aucune supériorité particulière, peut-être parce qu'il s'agit justement du droit étatique, et que malgré la diversité que nous pouvons imaginer trouver au sein de l'institution judiciaire, cette diversité rencontre elle aussi ses limites en regard de la diversité plus profonde encore des sociétés qu'elle prétend encadrer et réguler ?

* * * * *

Pour terminer cette première partie, je reviens à mon introduction. L'examen de toutes les dimensions de la diversité de l'institution judiciaire nous rappelle que la question « quel juge pour quelle société » devrait se poser au pluriel tant en ce qui concerne le rôle du juge, qu'en ce qui concerne la diversité des sociétés – hétérogènes, distinctes, et entrecroisées – que comprend le Canada et le Québec. Plus diverse est la société, plus diversifiée sera la fonction judiciaire ; plus diversifiée la fonction judiciaire, plus diverse les qualités que doivent démontrer ceux et celles qui sont appelés à juger.

Part Two: Symbols of singularity -- *self* and *other*

Appreciating the diversity of the legal framework of judicature (what I've called the rule), and heterogeneity in the actual performance of judicial tasks by judges (what I've called their role) in modern-day Canada might lead one to conclude that all is diverse; all is multiform. But this is to miss the crucial commonality – the one constant, the one singularity – of the judicial function that holds all the diversities

25. A. Lajoie, dir. *Gouvernance Autochtone: aspects juridiques, économiques et sociaux* (Montréal : Thémis, 2007).
26. *Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles* (Québec : Éditeur officiel, 2008)
27. R. Macdonald et T. McMorrow, "Myths of Miscegenation" in B. Iancu, dir., *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Utrecht: Eleven Publishing, 2009).
28. R.A. Macdonald and S.C. McGuire, "Small Claims Courts Cant" (1996) 34 *Osgoode Hall Law* 509-551; "Tales of Wows and Woes from the Masters and the Muddled: Navigating Small Claims Court Narratives" (1998) 16 *Windsor Yearbook of Access to Justice* 48-89

of rule and role together. That inescapable singularity is the exercise of personal judgement.

Let me briefly frame the argument of this section.[29] The two main slogans by which liberal democracies claim their political legitimacy – the "Rule of Law" and "a government of laws, not of men" – seem to suggest that institutional constraints alone can control the wielding of executive authority and, more importantly, direct outcomes and eliminate personal judgement in the exercise of the judicial function. But all judges, all lawyers, all thoughtful citizens know that a legal rule – even a legal rule expressed canonically in a very detailed text – requires interpretation. Rules are neither self-applying nor self-executing. Judges, lawyers and citizens also know that in interpretation, something necessarily must be left to the judgement and good will of the person (citizen, official, and judge) engaging in the act of interpretation. Achieving a legal order – a "government of laws" – is, consequently, the affair of everyone: it requires "the (self) government of men".

How is this good will, this (self) government of men made manifest? In the first instance, rule-makers must be taken to desire citizens to guide their conduct by reference to the rules laid down. Acknowledging this is the rationale for the aspirational constraints on rule-making of the type propounded by Lon Fuller.[30] In addition, citizens must be taken generally to wish to orient their conduct by reference to these rules. This justifies the basic conception of law in a liberal democracy as a facilitator of human interaction rather than simply as a regulatory mechanism to achieve social control.[31] Finally, judges must be taken to desire to apply the law by reference to meanings that can be reasonably derived from the legislative text in question.

Nonetheless, however specific the *rule,* however well-defined the institutional and procedural structure within which judges are meant to operate, and however well-developed the notions of the judicial *role,* there remains an important area of discretion within which a judge may decide. No machine and no jurimetrics theory can produce "automatic results." Oliver Wendell Holmes' well-known epigram, "abstract propositions do not decide concrete cases" captures the point. For many, this is a frightening idea, for we have been conditioned to believe that discretion is evil. If judicial judgement ultimately rests on a "personal preference" of judges, it is thought, decisions will always be capricious, arbitrary, unpredictable and unfair.

Note that this fear is grounded in several assumptions that are simply asserted rather than demonstrated. One is that the considerations reviewed above – institutional structure, rules, roles, cultural conditions – have no purpose other than to overcome "personal prejudices". So, for example, we often hear that justice requires more detailed rules to rein in judges; and yet, as decision-makers, we often encounter situations where over-specification of a rule (and not its generality) is the root cause of *injustice.* Could we not take a different approach to rules and say that rules work best when they structure and channel judgement, rather than seek to eliminate it? When they focus of criteria of evaluation, rather than bright-line "off-on" outcomes?

A second assumption is that "personal needs, desires and predispositions" of judges will have no connection with what the legislature has decided it wants through its enactments. Here, one encounters a curious belief that those in authority necessarily have a personal agenda that is untethered to the society and community within which they live. Is it really the case that our judges are social deviants or have an innate inclination to radical iconoclasm?

A third assumption is that the "personal prejudices" of judges are constantly shifting, are unstable and unpredictable and therefore need to be reigned in and disciplined by external controls. And yet, those who make such a claim about the instability of judicial character through time have no hesitation in affirming the coherence of their "self" over time by invoking exculpatory phrases like: "Please excuse my behaviour yesterday; I just wasn't myself." To "not be oneself" means that one must have some relatively stable concept of self against which these departures can be measured.

In this section I shall consider more fully the inapplicability of these assumptions to institutionalized decision-making systems like courts – and in particular to courts and judges in Canada. I will also trace out how unthinking acceptance of these assumptions has typically led us to misconceive who we should appoint as judges, and how we should organize post-appointment judicial education.[32] Is it the case that there is an inevitable and unbridgeable conflict between the needs of the judicial *self* and the needs of society (the *other*) such that third-party decision-making is always to be feared? Or might it be that there are fundamental symbols of singularity that make the exercise of reasoned judicial judgement possible? Recall how Shakespeare expressed the counsel that Polonius offered to his son: "To thine own self be true, and it must follow as the night the day. Thou canst not then be false to any man."[33]

To test the Polonian hypothesis about the unity of *self* and *other* (community) I shall first consider how it is that a judge can actually come to live the injunction "know thyself". I also consider whether "self-knowledge" can be taught, and if so, how? I then pose the

29. In organizing this section, and in elaborating this introduction, I draw on W. Bishin and C.D. Stone, *Law, language and ethics* (Mineola: Foundation Press, 1973) Part IV, at pages 900-986.
30. L. Fuller, *The Morality of Law* (2nd ed.) (New Haven: Yale University Press, 1969) chapter II; "Freedom as a problem of allocating choice" (1968) 112 *Proceedings of the American Philosophical Association* 101.
31. L. Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction" [1975] *Brigham Young University Law Review* 89.
32. In suggesting that we may misconceive our appointment objectives I do not mean that the persons we actually appoint as judges are inappropriate. Fortunately, our behaviour in judicial selection is not consistent with what it is that we saying we are trying to do when we make appointments. See the discussion in R.A. Macdonald, «Nommer, élire, tirer au sort, vendre au plus offrant?… à propos le choix des juges» in P. Noreau, ed. *Mélanges Andrée Lajoie* (Montreal: Thémis 2008) 731-806. By contrast, however, I do believe that these misconceptions have had a nefarious effect on the way we conceive and deliver continuing judicial education. I address this second issue explicitly later in this Part.
33. W. Shakespeare, *Hamlet,* Act 1, scene 3, 78–81. Admittedly, among scholars there is some debate about whether Shakespeare intended these words of advice as ironic or as genuine. For present purposes, I take them as genuine.

question whether it is sufficient for judges to "know themselves" in the abstract, or whether the virtue of phroenesis flowing from self-knowledge has to flow from experience. I conclude by explaining why to know one's self is as important an educational imperative (not just for judges, but also for lawyers, law professors and other officials) as the more traditional professional admonitions to know the rules and to know one's role.

A. Singularity of personal pedigree – humility

Part One of this essay canvassed various structural features of the system of Judicature in Canada today. The portrait was of significant diversity – of institutional organisation, of constitutional status, of legal mandate, of clientele, of decision process – in brief of *rule* and *role*. Moreover, this diversity also extended beyond the formal judiciary. Many Canadians look elsewhere to find dispute resolution institutions that are more coherent with their understandings of everyday life and everyday law. For them, notwithstanding the structural diversity of the official system of Judicature, recourse to courts is at best a default. It is a second best alternative when they or their adversaries lose confidence in their indigenous systems of local law.[34]

This diversity and multiplicity in the system of Judicature in Canada today appears to be at odds with the design underlying the great reforms of common law judicature in the 19th century. The goal of these reforms was to bring all the disparate and competing judicial systems in England together within a single, integrated hierarchy, and to vest one court – the court of Queen's Bench (or in contemporary Canada, the superior court of section 96) with a general and unlimited jurisdiction.[35] At that time, the institutional omnicompetence of the *office* of Superior Court judge was predicated on the assumption that *judges* themselves would be omnicompetent. Now that we seem to be living in an era of judicial differentiation, however, it is worth posing the question (at least as a starting point for reflection and analysis) whether we still desire our judges to be omnicompetent, and if so, what exactly do we mean by omnicompetence.

In answer to these questions, it is useful to briefly recur to the conception of the senior judiciary contemplated by articles 96-100 of the *Constitution Act, 1867* as completed by the federal *Judges Act*.[36] Judges must be drawn from the bar of the province for which they will be called upon to sit and they must have ten years experience as advocates. They are appointed till age 75 and can only be removed for cause by a joint address of Parliament. Their salaries cannot be reduced or impaired by Parliament. Many claim that all these constitutional requirements are meant to ensure judicial impartiality and independence.[37] How exactly they each do so is, however, not self-evident.

One might accept that guaranteed tenure and remuneration enhance a judge's self-sufficiency and reduce the likelihood of accepting bribes from litigants or succumbing to threats from governments. The requirement that judges have ten years experience before the bar of the province to the courts of which they are appointed is less obvious. Presumably, the idea is that ten years of legal practice is a prerequisite to developing the instincts and reflexes of independence and impartiality necessary for judging in the province. The linkage is, however, not all that inexorable. First, not all advocates are legally-trained in the relevant jurisdiction, or even legally-trained, as the career of several prominent Ministers of Justice attests.[38] In addition, if the goal is to ensure a minimum of legal knowledge and experience, one might ask what is so special about being a member of the Bar. Why should not notaries in Quebec, or even law professors elsewhere be eligible for appointment? Even more generally one might ask whether it is true that there are certain competencies necessary to the task of judging that can only be acquired through formal legal training.

Consider what these competencies might be. It cannot be some special knowledge of the entire *corpus* of the law, since everyone admits that no judge can know "all the rules". Perhaps it is some type of technical knowledge – appreciation of the logic and limits of the adversarial system, or of the structural features and meaning of third-party adjudication. Yet even this is not a self-evident attribute of lawyers, nor something that only lawyers possess. Few would dispute that a professional commercial arbitrator with 30 years experience knows more about these two procedural mechanisms of third-party decision than a solicitor who has done nothing but real estate transactions or the drafting of wills and simple contracts for a like period. Perhaps, then, it is the idea that a legal training and practice necessarily heighten a person's capacity for impartiality and independence of judgement. But were we to accept this as the foundation of judicial virtue would not a wise religious counsellor or an experienced family mediator have an equal understanding of and capacity to exercise impartial and independent judgement, especially given the institutional guarantees of provided by sections 96-100?

In examining the criteria that are usually advanced to identify the type of person that should be appointed as a judge one quickly sees

34. I have addressed this connection between social diversity on unofficial dispute resolution in "The Legal Mediation of Social Diversity" in A. Gagnon, et al. eds., *The Conditions of Diversity in Multinational Democracies* (Montreal: Institute for Research on Public Policy, 2003) 85-111, and in "Normativité, pluralisme et sociétés démocratiques avancées: l'hypothèse du pluralisme pour penser le droit" in C. Younès and E. LeRoy, eds., *Médiation et diversité culturelle : pour quelle société* (Paris : Éditions Karthala, 2002) 21-38.
35. For an historical discussion see L. Huppé, *Le régime juridique du pouvoir judiciaire* (Montreal: Wilson & Lafleur, 2000).
36. See Judges Act, R.S.C. 1985, c. J-1. While the notion of judicial omnicompetence sub-jacent to sections 96-100 applies directly only to what are called section 96 courts, all provincial court judges – for example all judges appointed to the Quebec Court – are, within their jurisdiction rationae materiae of that court, presumed to possess the same intellectual omnicompetence. See, for example, Loi sur les tribunaux judiciaires, L.R.Q., c. T-16.
37. W. Lederman, "The Independence of the Judiciary" (1956) 34 *Canadian Bar Review* 769, 1139.
38. Some with uniquely a common-law training have been called to the Quebec Bar by special statute: for example, John Turner. Some with only civil-law training have been called to the bar of Ontario: for example, Jean Chrétien. During the 1990's, some Ministers of Justice – Alan Buchanan in Prince Edward Island, Marion Boyd in Ontario – had no formal legal training at all.

that "knowledge of the law" is insufficient and, at least when understood as "prior knowledge of the law", is in fact unnecessary.[39] Institutional omnicompetence does not, it seems, requires that judges being personally omnicompetent. Perhaps we should conclude that the criterion of membership in a law society is a proxy. We might think, for example, that in combination with other vetting procedures, it eases the task of identifying those who possess the most fundamental externally observable attribute of the judicial temperament: the absence of arrogance.[40] To be a judge is to show humility and to exercise restraint in all things. Yet supreme self-confidence – not personal abnegation – is the stock-in-trade of many of Canada's most successful litigators, the segment of the profession from which many judges are drawn today. Moreover, far from having the disciplined impartiality of the notary, for example, litigators are used to taking sides in judicial disputes. And yet, despite this professional career of disciplined partiality, the transformation of the litigator's *persona,* after appointment, is remarkable.

Here, then, is a paradox. The most important feature of being a judge, the absence of *hubris,* is neither directly nor indirectly related to the only formal criterion for appointment set out in the Canadian constitution. However, persons who have that pedigree are usually able to perform the various tasks assigned to judges with integrity, independence, impartiality and humility. So the question of personal pedigree reduces to this: if there is no statistically significant correlation between the pedigree of judges as members of a bar association and personal qualities we expect from judges, why is it that we have a judiciary of which we can be proud? In particular, we need to know how judges come to learn the limits of their office, and especially the line between the political choices that are a necessary part of all exercises of judgement, and the types of political choices that are meant to be vested in Parliament.

I attempt an answer to these questions in subsequent sections of this Part. For the moment I will simply suggest two temptations that confront judges who seek to instantiate humility in the performance of their office. The first may be called the Don Quixote temptation: the temptation, especially when a claim is framed as a *"Charter claim"* to render justice by righting the perceived wrong without reference to *rule* and *role.* To faithfully perform the judicial role, judges must understand the difference between "making the world a better place" by judging, and explicitly judging to "make the world a better place". The second temptation is the temptation of fame and the media acclaim (or disdain) it attracts. Judges must, despite the blandishments of Bar Associations, NGOs, law faculties, law professors and law students resist the invitation to become heroic figures ("rock stars" if you will).[41] For judges to be seen as judging for history is as compromising to the integrity of the judiciary as the open display of partiality.

The singular pedigree of judges is not, consequently, a result of their singular constitutional status or the fact of their having a legal training. Nor is it that they possess a heroic public image. Rather, it is that they possess a singular temperament – a temperament characterized by humility, modesty, self-restraint and fidelity to *role.* I turn now to a consideration of how we can frame our selection criteria and our programmes of continuing judicial education so that judges do possess the temperament that we believe should characterize their office.

B. Singularity of character - wisdom

Much has been written about the specific criteria that will enable the selection of a high quality judiciary. I do not propose to review that literature here. Nonetheless, it is worth noticing that both legislatures[42] and scholars[43] agree on three orders of qualities that are thought to be essential for all to possess: professional qualities; institutional qualities; and personal qualities.[44]

Among what may be called professional qualities one might note the following: (1) objectively measurable knowledge of the substantive law, of procedure and of professional ethics; (2) respect for institutional role and the adjudicative process; (3) impartiality – the quality of judging according to the file being presented, without reference to the particular characteristics of the parties, or the question to be decided; (4) independence – the idea that one must judge according to the case presented with reference to one's personal advancement in career and the popularity that one may or may not acquire from so deciding; (5) good judgement and maturity – not only about the particular case being argued, but also about human nature and human experience.

Of course, the specific content of some of these qualities and their relative weight can vary from situation to situation. Context matters. For example, few would argue that objective knowledge and good judgement in tax law are the same of objective knowledge and good judgement in family law or good judgement in environmental matters of the *Charter of Rights.*

39. See L Sossin, «Judicial Appointment, Democratic Aspirations, and the Culture of Accountability» (2008) 58 *University of New Brunswick Law Journal* 11; Subcommittee on the process for appointment to the Federal Judiciary, *Process for Appointment to the Federal Judiciary* (Ottawa: Parliamentary Information and Research Service, 2005).

40. See the essays collected in K. Malleson and P. Russell, eds., Appointing Judges in an Era of Judicial Power (Toronto: University of Toronto Press, 2006).

41. In the United States there have been proposals to select appellate judges by reference to criteria that would permit candidates to be ranked as against each other first instance judges. See S. Choi and G. Gulati, "A Tournament of Judges?" (2004) 92 *California Law Review* 299; "Choosing the Nest Supreme Court Judge: An Empirical Ranking of Judge Performance" (2004) *Southern California Law Review* 23. But as soon as one identifies and ranks such criteria, some judges will be tempted to cease judging on the merits of a case, but will judge so as to achieve a high ranking. See the discussion in L. Solum, « A Tournament of Virtue » (2005) 32 *Florida State University Law Review* 1365.

42. See, for example, *Courts of Justice Act,* L.R.Q., c. T-16, *Regulation respecting the procedure for the selection of persons apt for appointment as judges,* c. T-16, r. 5.

43. *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991); L. Epstein and J. Segal, *Advice and Consent: The Politics of Judicial Appointment* (Oxford: Oxford University Press, 2005).

44. This list is drawn from C. Baar, «Comparative Perspectives on Judicial Selection Processes» in *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) at 15, and from R.A. Macdonald, «Nommer, élire, tirer au sort, vendre au plus offrant?… à propos le choix des juges» in P. Noreau, ed. *Mélanges Andrée Lajoie* (Montreal: Thémis 2008) 731 at 768-776.

When then of institutional qualities? Most authors emphasize judicial conduct during a hearing. However, being a judge implies institutional commitments that are broader. The judiciary is at once a big bureaucracy and a lot of little bureaucracies. Hence key institutional duties like collegiality, productivity, and support for other colleagues in difficulty are mutually reinforcing and nested. But there is more; judges must respect the institution itself. This means, having the courage to speak to colleagues who are not doing their job. It also means accepting one's role, even when one is not a superstar or media darling. Courts flourish because of judges who enjoy and excel at performing the crucial everyday administrative tasks that may not immediately enhance their "reputation".

Establishing the necessary personal qualities is equally difficult. Obviously sobriety, courage, diligence, incorruptibility, modesty and reserve are traits that every judge should possess. This said, applying these criteria in concrete cases is not so easy. Once again, context matters. These criteria will play out differently depending on whether one is sitting in appeal hearing arguments from expert counsel who are well prepared, or listening to unrepresented litigants in Small Claims Court. A similar point could be made about criminal trials: the appropriate demeanor of a judge in the case of an accusation of a contract killing need not be identical to that in the case of a young offender who is accused or murder?. Still again, one could observe that impartiality and independence in relation to suits against the Crown need not point to the same criteria as courage and incorruptibility in relation to suits involving the mafia.

Psychiatrists observe that these criteria point to a more important idea that is harder to express: judicial wisdom. As a society, we legislate *rules* and *roles* to enhance institutional independence and impartiality because we recoil from the hard work necessary to design systems that would enable judges to acquire wisdom – to "know their *selves*".

To know ourselves means accepting that we are, in fact, many selves, and all these multiple selves are constantly competing for our attention and loyalty. The weak or the cowardly have given up trying to reconcile these multiple selves – accepting that they each occupy different psychic spheres; the self-indulgent and self-important adopt one of these selves as primary for all times and places, and can only live their lives in the mirror of that self. Maturity requires that we both acknowledge our multiple selves, and that we hold each one of these multiple selves up to the critical scrutiny of each of our other selves, and up to the scrutiny of all the other selves projected upon us by others. The office that judges hold in the eyes of non-judges depends on the office they are accorded – not on the office they claim for themselves. But paradoxically, the office they are accorded is a product of their ability to understand, in turn, those who accord them their office.

To sum up, judicial wisdom requires judges to acknowledge how much of their understanding is shaped by factors personal to them. And yet, these personal factors are multiple and are anchored in the communities and contexts of every judge's experience. Nurturing this capacity for self-reflexivity in multiple dimensions is both the necessary component, and the only useful component of what has come to be labelled "social context" education. Social context education must mean imagining oneself as one is imagined by others; it does mean being taught to imagine others as embodying some "essentialized" characteristics that are necessarily external to how one imagines oneself. In this light, it is obvious that all judging is contextual and that it is misconceived to attach a label to certain types of reflection so as to suggest that only some contexts, and only some people in some contexts, should receive particularized consideration.[45] The singularity of character that one associates with those holding judicial official is the wisdom to recognize that no knowledge of self is possible without knowledge of the other – and *vice versa*.

C. Singularity of ontology – life-long learning

The above discussion aims at what might be called the epistemological criteria for identifying the kind of person we wish to have as judges. But there is also an ontological question that must be addressed: "What does a judge think that she or he is meant to do as a judge?" Inevitably, this question is answered with a formula that is simple to state but difficult to put into practice: "to render justice according to law". The difficulty arises because the formula speaks to a task external to the judge, and not to the judge's own sense of self.

Of course, deciding what counts as law does have an external, factual reference point, just as deciding what justice requires has an empirical dimension. Both decisions shaped by particular contexts: this is why it is important to account for the structural diversities of the system of Judicature and the diversity of Canadian and Quebec societies noted in Part One. Not every judicial (or quasi-judicial) office requires the same abilities; and not every judicial (or quasi-judicial) office requires them in the same balance. Indeed our understandings of both law and justice, and the relationship between them, are incorrigibly plural.

The relative weight afforded to knowledge, character and personality, for example, will depend on the court, the substantive area of law in question, and the particular judicial function in issue. So, for example, Small Claims Court judges temper law with equity and good conscience; Supreme Court judges must overtly temper textual law with unwritten general principles of the constitution and general considerations of social policy. Typically judges in child

45. The fact that in criminal sentencing, for example, judges are meant to make the sentence "fit the criminal" as well as "fit the crime" is a central illustration of the point that judging is (and always has been) contextual. For a more general theoretical discussion of the relationship between the judicial role and the multiple societies that are found in contemporary Canada and Quebec, see R.A. Macdonald, "Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity" in M. Bussani and M. Graziadei, eds. *Human Diversity and the Law* (Brussels: Bruylant, 2005) at 43-70; "Should Judges Be Legal Pluralists" in *Aspects of Equality: Rendering Justice* (Ottawa: Canadian Judicial Council, 1996) at 229-234; "Recognizing and Legitimating Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada" in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 232-274.

custody, dependant's relief, divorce, corporate reorganizations, and bankruptcy cases are explicitly required to take into account a range of subjective criteria that cannot serve as bright-line rules for a decision based on a logic of corrective justice, but rather function as factors to be weighed in a decision-process that is clearly one of corrective justice.

A similar set of questions arise when picking judges to serve on particular courts. When is expertise so important that it outweighs ill-humour, and when is good judgement so important that it outweighs knowledge and expertise? For example, we might well expect (even require) judges who daily confront litigants and witnesses in the flesh to be more humane and compassionate than those who only deal with lawyers pleading appeals. Again, we might well require judges hearing complex tax, intellectual property and anti-combines cases to be well-versed in economics and finance, even at the expense of their knowing less about civil procedure?

In addition, as already noted, the relative importance of these abilities may differ depending on the substantive area in question, or on the particular judicial function in issue. Not only is it important to pay attention to the tasks that judges are actually performing and make judgements of suitability on that basis, it is probably crucial now to accept that the day of the knowledge-defined omnicompetent and omniscient Superior Court judge is now past. The more we accept the need for specialization not just substantively, but in relation to different judicial tasks – case management, mediation, injunctive relief, motions court, etc. – the more likely we are to pluralize understanding of the characteristics and qualities we expect in judges depending on the judicial function for which they are being selected.

So much for law. What then of justice? Classical private law adjudication is typically held to be exclusively a matter of corrective justice. This is why many have advanced the idea of "public law adjudication" as a way to account for distributive justice considerations. But there are further complexities in the quest for justice: however much, in theory, we may wish adjudication by judges be restricted to those cases where determinate ex ante standards are being applied to "cold facts", the mandate now being given to judges by legislatures is not exclusively of this type. Consider the famous example of demobilization at the end of World War II. Who gets to go home first: the unemployed day labourer who signed up in 1939? or the doctor, who signed up in 1942? or the electrician who signed up in 1944, but who Ministry of Labour says has the most important skill needed for relaunching the post-war economy? Here judges are confronted with having to decide between incommensurable conceptions of justice – first-in, first-out; general social utility; economic efficiency – and there is no obvious metric for determining which conception should trump.

Given these two structural foundations of judicial ontology – law and justice – and the inescapable need, in each act of judging, to reconcile their sometimes conflicting demands,[46] we should be modest in our expectations about our capacity to judge our judges at the time of their appointment. A comprehensive review of the extant legal literature suggests an excessive preoccupation with the judicial selection process, as if the integrity and quality of the judiciary were forever guaranteed by a good selection process.[47] To assume that the person selected as a judge at age forty or fifty is fully formed and will cease to grow and mature morally and intellectually is absurd. Many of the characteristics that we desire in judges may not be completely identifiable at the time of selection and many only develop through time with experience in performing the very task of judging.

Moreover, even if we could initially select the "perfect" candidate, to assume that judges are possessed of some magical capacity of self-direction and, if need be, self-correction flies in the face of all we know about human beings acting within institutional settings. Many of the most important lessons judges learn about how to best perform the judicial task flow from a wise encadrement within and management of the court to which they are named. This means helping judges learn how to learn, surrounding them by others similarly motivated, and rewarding them for pursuing such a career path.[48]

In this light, the fundamental attitude that judges must bring to the role they are meant to play is a commitment to life-long learning: life-long learning about law and justice certainly, but life-long learning about themselves even more importantly. Judicial continuing education must aim, like all continuing education, to embolden us to resist the siren songs of conventional adulthood and to retain the precious idealism of our youth – those moments of wide-eyed wonderment that impel the constant discovery and rediscovery of self. To the rationale for, and central practices of, judicial continuing education of this character I now turn.

D. Singularity of phroenesis – narratives of moral agency

The constant discovery and rediscovery of self is an ambition that conduces to what Aristotle called *phroenesis:* that is, moral sensitivity, perception, imagination and judgement informed by experience.[49]

46. I acknowledge that there is at least one widely accepted view of the judicial role that denies the possibility of such a conflict. The ethical theory of "legalism" – the idea that just conduct consists simply in the following of the rule laid down – presumes that justice requires no more than a commitment by judges to applying rules (assuming, of course, that the judge (1) knows what the relevant rules are, and (2) that their meaning is so obvious that their application in the particular case requires no exercise of judgement. For a discussion of the claims, and limits, of legalism, see J. Shkar, *Legalism* (Cambridge: Harvard University Press, 1964).
47. For a discussion of these issues see Peter McCormick, "Twelve Paradoxes of Judicial Discipline" (1998) 9 *Constitutional Forum* 105 and R.A. Macdonald, "The Acoustics of Accountability" in A. Sajo, ed. *Judicial Integrity* (Leiden: Nijhoff, 2004) at 171.
48. This is one of the most powerful arguments for designing systems of court administration to enhance their capacity to function collegially. For a pioneering study see C. Baar, *Judicial Administration in Canada* (Montreal: McGill-Queens University Press, 1981).
49. The ideas of the following paragraphs are developed in greater detail in R.A. Macdonald and Josh Wilner, "Living Together, Living Law" in *Mélanges Georges Légault* in L. Lalonde, et al. eds, (Sherbrooke: Éditions de l'Université de Sherbrooke, 2008) at 145-170.

For Aristotle, the capacity to be sensitive to the particularities of a given situation is a necessary condition for moral agency. Even if universal moral principles were to exist, they are not self-applying. The moral agent is never relieved of the responsibility for deciding. Ethical decisions can only be made in the moral *gestalt* of the moment. We are subject to the tyranny of context, not just in the interpretation and application of rules, but in our moral reasoning that sustains these interpretive acts. Nothing can substitute for deep deliberation in all situations of moral decision-making.

This explains the significance, and to my mind points to what should be the central component, of programmes of continuing judicial education. Obviously, continuing judicial education is important for purely instrumental reasons: keeping up to date, sharing solutions to new challenges confronting the judiciary, learning about social diversity, and so on. But continuing judicial education is even more important for what it says about one's attitudes to life and learning. That said, I have a special understanding of continuing judicial education however. For I believe that it is our sense of our self more than the intellect that is most in need of continuing education, most in need of nourishing and most in need of careful attention. "Who am I?" rather than the "What do I know?" that is the fundamental question.

Why do I believe in this focus for continuing judicial education? Principally, because a failure to attend to what might be called generically the humanities has led us to imagine that law partakes of the scientific culture of knowledge.[50] Unsurprisingly, therefore, most late 20th century views of law are scientistic in orientation. This includes critical approaches – for example, neo-Marxist, and most feminist and critical race theory perspectives – as well as more traditional legal positivist, law and economics, and neo-institutionalist approaches. All are grounded in three simple (and wrong) premises: first, that law is a coherent body of rules organized hierarchically by the State into an exclusive and knowable system; second, that these rules are sufficiently determinate that any particular legal result may be predicted in advance, regardless of the parties to a lawsuit and regardless of the judge in question; third, that the combined weight of legal training, years of law practice and the role morality of judging is alone sufficient to ensure that adjudication remains squarely within the assumptions of the existing political order.

As hypotheses about law in a world not populated by real human beings but only "rational calculators of individual interest" there is a certain plausibility to these assumptions. As an attempt to describe the judicial office, the types of persons we should appoint as judges, and the types of continuing education they should be provided, however, the models they generate are inadequate. A judge is not merely a specialist performing an office within a defined normative context: the State legal system. A judge lives a plurality of offices in a plurality of normative systems: in the family, in the neighbourhood, in the workplace, in the *"place public"*, and as world citizen. These other offices are as powerful in shaping perception and action as the State legal order that provides the formal "office" as judge.[51] And yet, when we ask only how much law does a good judge know, and when we design continuing education to respond only to that query, we narrow the field of self-discovery for judges.

This argues that when we ask only what the professional pedigree of a good judge is, we are getting the question backwards. Evaluation of a professional pedigree directs our attention to the external reflection of what a judge has been: what markers of accomplishment may be found in the file? It also makes the inquiry unidirectional: we content ourselves with asking "how are our judges seen?" or "what do we see in our judges?" But there are many elements of judicial character that are less visible even though just as important. To perceive these elements requires us also to ask "what do our judges see?" The latter inquiry presumes that insight flows from sight as much as sight flows from insight. Can judges see beyond the characterizations given by law – plaintiff or defendant, landlord or tenant, merchant or consumer, tortfeasor or victim, banker or customer? Can they imagine litigants as more than the physical presentation of a series of selves constructed by gender, race and class? To recognize that there is no presumptive priority to any of our social categories means acknowledging that class, race, gender, tortfeasor, consumer and tenant are all partial understandings of any person.[52]

For a judge to understand the question "how am I seen?" as being directed to the question "what do I see?" requires an orientation to knowledge that has been in decline in the late 20th century and early 21st century. For it requires a willingness to acknowledge the shifting character – in space and through time – of the assumptions upon which we build what it is that we think we know. To pursue the virtue of phroenesis means to hold even our most cherished tidbits of knowledge revisable based on our everyday experiences and interactions with others.

How then should judges and continuing judicial education attend to the question "who am I"? One powerful mechanism for doing so is allegory. The strength of allegory is that it captures the minutiae of moral life. Allegorical stories are a vehicle for *phroenesis* because they embody a form of expression that does not allow for a final, propositionalized message that is separable from the story itself, easily transmissible, formulaic, and universalized.

50. I derive this distinction between the humanities and the sciences (including the social sciences) from C.P. Snow, *Two Cultures: and a second look: an expanded version of the two cultures and the scientific revolution* (London: Cambridge University Press, 1965).

51. An alternative conception of law that explicitly accommodates and celebrates this plurality is presented in R.A. Macdonald and M.-M. Kleinhans, "What is a critical legal pluralism?" (1997) 12 *Canadian Journal of Law and Society* 25-46

52. This is why, however laudable the general objective of social context education for judges may be, it is fundamentally misplaced. Judges do not need to imagine social context as yet another "objectivized decisional factor" that an expert can teach. Far better to read Ralph Ellison's Invisible Man and Margaret Laurence's *The Stone Angel* – novels that speak to who one is – than to study the most recent ethnographic studies complemented by commentary about essential characteristics attributable to gender, race and class – material that "apparently" speaks to who someone else is.

Because our larger political community, our *nomos,* is inseparable from the narratives that shape and sustain it, and because these narratives emerge from lived experience, we can arrive at a better understanding of our normative universe through our telling and hearing stories of everyday life.[53] Stories unite events and people, and by ricochet, all the people who hear them, in a web of meaning. They show without propounding, and through this very showing they allow us to see, and even to know.[54] Telling stories provides occasions for self-revelation through imaginative communication with others.

Of course, every judicial judgement is a narrative, sometimes highly formulaic, as when written in the model now taught to judges in Canada, and sometimes less so, as reflected in the canon of Lord Denning. If it is true that we can arrive at a better understanding of the other through stories that attend to their particular circumstances, and if it is true that we learn of others by learning about ourselves, it follows that all judges must become story-tellers of their own lives. In this understanding, what we now teach about judgement writing in our continuing judicial education programmes is the opposite of what we should be doing. Judgement writing is about writing to communicate; writing to communicate is about writing beyond formulae and templates.[55] A key feature of continuing judicial education is education about what it means for judges to write in a manner that tells their personal stories through the words by which they communicate their judgements to the multiple publics – litigants, lawyers, other judges, politicians and citizens – they serve. The judgement is meant to reveal how and why a judge reached a particular conclusion and not just to recite its rationale: it is meant to lay bear what has been called the "process of discovery" in decision-making, and not just the "process of justification".[56]

E. Singularity of eudaimonia – the quest for virtue

Judges must write well. But they must also decide well. To decide well, they must live well. As judges, and more generally as human beings, they must reflect the virtue of *phroenesis.* The question then becomes "how is it possible to live a Good Life?" How do judges (as moral agents) translate the virtue of *phroenesis* into actions and justifications for actions in an interdependent world? Living well as a moral agent is inseparable from living well with others, whether these others being our professional colleagues, our relatives, our neighbours, our friends or the broader society within which we find ourselves. From attention to communal life as such there inevitably emerges a "thick" conception of the individual, a picture of the human being who is indissociable from others, and who is simultaneously engaged with manifold social interactions of multiple dimensions.[57] In such a picture, the Good Life may be defined as the life that conduces to *eudaimonia* ("happiness", "well-being", or, most accurately, from our present perspective, human "flourishing").

To embody excellence or virtue in living together with others does not, of course, mean avoiding or fleeing from interpersonal conflict; communication entails both conflict and consensus, both discord and harmony. In brief, human tension, struggle, and disagreement are integral elements of living well. From the premise that human life is essentially social – one consequence of which is that the solitary life of, say, a hermit, is somehow lacking – it follows that human flourishing requires the cultivation of an ability to live together with others. If we cannot live together we cannot truly live.

From this classical conception of *eudaimonia,* we can derive the idea of our telos (our purposes as human beings) as a horizon – as an "endless end".[58] This has significant implications for law and judging. No longer can law be conceived as just consisting of a fixed set of written propositions meant to prescribe and proscribe human behaviour by setting out minimum standards and allocating rights that define the claims people can make against each other. No longer are human beings cast as legal subjects to be regulated by an external force in which they do not participate. Despite this commonplace language of law, human beings are not "thrown under" *(sub-jacere)* the law, and judges are not just the agents of this subjugation.[59] However much in popular conception judges act as the carriers of official authority to dictate how human beings should live their lives, in practice judges know that their authority depends on their judgements being accepted by litigants. Understood this way, the judicial process can be characterized as the collaborative articulation of shared purposes through time.[60]

Eudaimonia and a virtuous life are concepts that are open to different interpretations by different people at different times and places. As a result, judicial *eudaimonia* depends on judges attending to the constant process of interaction between citizens and officials, to the constant process of interaction among citizens

53. For a collection that attempts to use narratives of the commonplace in this way see R.A. Macdonald, *Lessons of Everyday Law* (Montreal and Kingston: McGill-Queens University Press, 2002).
54. These ideas are drawn from S. Van Praagh, "Identity's Importance: Reflections of - and on – Diversity", (2001) 80 in *Canadian Bar Review* 605; and "Adolescence, Autonomy and Harry Potter: The Child as Decision-Maker", in (2005) 4:1 *International Journal of Law in Context* 335.)
55. The most compelling exposition of the difference between formulaic judgement writing and narrative judgement writing and of the salience of the latter is J. Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986).
56. The point is brilliantly developed in J.B. White, *Acts of hopes: creating authority in literature, law and politics* (Chicago: University of Chicago Press, 1994).
57. I have attempted to address this in "European Private Law and the Challenge of Plural Legal Subjectivities" (2004) 9:1 *The European Legacy* 55-66 and in "Here, There… and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in N. Kasirer, ed., *Étudier et enseigner le droit: hier, aujourd'hui et demain – Études offertes à Jacques Vanderlinden* (Montreal: Éditions Yvon Blais, 2006) at 381- 413.
58. The notion of an "endless end" was elaborated by John Dewey, "The Nature of Aims" in James J. Walsh & Henry L. Shapiro (eds.). *Aristotle's Ethics: Issues and Interpretations* (Belmont, California: Wadsworth Publishing Company, 1967) 47-119.
59. See R.A. Macdonald and D. Sandomierski, "Against Nomopolies" (2006) 57 *Northern Ireland Legal Quarterly* 610-633.
60. The expression is from Lon Fuller. See L. Fuller, "Human Purpose and Natural Law" (1956) 53 Journal of Philosophy 697; on the implications for the judicial role see L. Fuller, *The Morality of Law* (2d) (New Haven: Yale University Press, 1969) c. V.

conceived collectively, and to the constant process of dyadic interaction between citizens. Judges cannot separate themselves from the living law of living communities – of collectivities whose social dynamic is reducible neither to the life of individuals nor to a single, externally-imposed conception of the "good". There can be no judicial *eudaimonia* in the absence of a concern for human flourishing in all who we encounter – within and beyond whatever office we hold. Judicial virtue is directed to litigants, to colleagues and to citizens generally; a virtuous judge cannot but be a virtuous person.

Two main corollaries may be derived from these speculations about judicial *eudaimonia.* The first points to how judges should understand the potential of law in facilitating the quest for virtue and the Good Life. Notwithstanding the rhetoric of progress upon which industry of legislative law reform and judicial "improvement" of the law is built, we must come to accept that neither legislatures nor judges can simply will a just society upon us. Indeed, most modern legislative action does no more than attempt to solve the problems created, framed or acknowledged by previous legislative "solutions". Moreover, all experienced judges (but far fewer experienced advocates) know that the solution to law's problems is not more law. In recognizing that the efforts of legislatures cannot alone eliminate poverty, fix the environment, or ensure that invidious discrimination is ended, good judges also recognize that they have limited capacity to succeed where legislatures fail.

The second point is this. The quest for virtue, for the Good Life, is a quest that reaches towards a constantly moving horizon. Although judges can and do render justice within the constraints of their office, they cannot, and do not, *make* people good.[61] Making people good both ascribes a power to courts and denies agency to people. To conceive judging as making people good is to conceive judges as mere instruments to the ends of others and to misconceive what goals attend to the judicial process. Recognizing that judges cannot directly change "the way the world works" does not, however, mean that they have no role in promoting virtue. By their actions and by their words judges can and do change the way we imagine that the world might work, and in so doing help each one of us change "the way our world works".

Continuing judicial education must aim at enabling judges to recognize when they are being instrumentalized – by Parliament, by lobbies and by litigants. Knowledge of the world in all its complexity is a first step to avoiding manipulation by those who would turn judges into modern day oracles. Judicial virtue – *eudaimonia,* "flourishing" – demands education comprising opportunities to learn about virtue, by contrast with education simply about the means to achieve unchanging ends. It demands opportunities to explore our ends as well as the procedures by which we seek to achieve these ends.[62]

F. Singularity of uncertainty – liberating the human imagination

If we can be reasonably certain about the kind of judge we might require for the kind of society we now have, and if we can be reasonably certain about some of the qualities that such judges should possess – incorruptibility and sobriety, courage, temperance and impartiality, diligence and carefulness, intelligence and learnedness, craft and skill, practical wisdom – we still need to be able to determine whether any particular candidate for judicial office possesses these virtues.

But let us remember, we are engaged in a human process. As such, we should never pretend that any process can identify either the perfect (or even the best) candidate. We can identify those who are better than others, but as between them, how do we assess the relative merits of the top candidate in professional characteristics that ranks last on personal characteristics against the candidate who ranks first on personal characteristics and last on professional characteristics? All human beings have the vices of their virtues. We are all neither angels nor devils.

Moreover, people change. The question of "what judges for what societies?" poses itself poses itself throughout a judicial career. However much we expect the law and our judges to make and remake the world in a particular image that bears witness to truth, this truth remains necessarily immanent and indefinable: as immanent and indefinable as justice itself. However much the ambition of law is cast in terms of truth and justice between individuals, its real achievements will be in the domain of social justice. However much we want law to be scientific, it will always be human. If we over-invest in fail-safe mechanisms during the selection process, while under-investing in continuing judicial education, we will inevitably commit ourselves to choosing the candidate with the least downside risk over the candidate with the greatest upside potential. Should we not, rather, select for upside potential – a potential that highly correlates with a person's desire to learn?

However much we think law can be about propositional knowledge of things (like assembly instructions for IKEA furniture), we know that its real aspiration lies in the realm of self-knowledge: the realm of poetry, music, dance and art. To put the matter slightly differently, I believe that a necessary component of judicial education is the offering of intense, participatory seminars on our key cultural artefacts. At the risk of simply presenting a list, let me try to identify what a cycle of courts might look like, moving from literature, to film, to painting, to music, to architecture, to cultural narrative.

In a first year, for example, the choice could be between courses that study Shakespeare's tragedies, or Hugo's novels, or the great poets of the 1930's and courses that explore the Coen Brothers

61. One is reminded of the famous epigram of Reinhold Niebuhr "God grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference."
62. For a wonderful exploration of virtue in everyday life see the speech by Barry Schwartz : http://www.ted.com/talks/barry_schwartz_on_our_loss_of_wisdom.html

movies, or French cinema of Jean-Luc Goddard, Louis Maille, and François Truffaut. In a second year, it might be a choice between a careful study of the move from impressionism through cubism through Jackson Pollack, or the movement from Beethoven through Wagnerian Romanticism through a-tonal music. The third year of the cycle might present judges with a choice between attending to architecture – modernism, post-modernism, Bauhaus through to Frank Lloyd Wright and Frank Gehry or participating in courses on cultural myths – from Aesop, through Lafontaine, to the Brothers Grimm, to First Nations narratives. The point is this. To sit in judgement of others, one must first sit in judgement of oneself; and one sits in judgement of self through the mirror of the arts and humanities.[63]

In sum, we ought to ask of law and courts no more and no less than we ask of the arts and the humanities – that its forms and processes liberate the human imagination. We cannot for a moment allow ourselves the conceit that the right economic system, the right political reforms, the right curriculum for continuing judicial education, and the right psychotherapy will do away with unfairness, snobbery, resentment, prejudice, neurosis, and tragedy. If anything, the arts teach that life is not so simple – for this very unfairness, snobbery, resentment, prejudice, neurosis, and tragedy happen to be the particular subject matter of our cultural extroversions. Lionel Trilling famously wrote: "To the carrying out of the job of criticizing the liberal imagination, literature has a unique relevance... because literature is the human activity that takes the fullest and most precise account of variousness, possibility, complexity, and difficulty."[64] There is (and can be) no more meaningful programme of continuing judicial education than this.

Conclusion : Le courage d'être

Il est temps, maintenant, de conclure. Les citoyens, les avocats, les politiciens et les juges, avec raison, sont préoccupés par la question de savoir « qui doit être juge ? », par celle de savoir aussi « comment choisir nos juges ? » Nos tribunaux sont une institution politique fondamentale et nos juges sont les garants primordiaux du principe de légalité. Ainsi imaginer le système de judicature comme un système de gouvernance[65] c'est aussi se rappeler que la diversité extraordinaire des juridictions, des fonctions judiciaires, des enjeux et des régimes sont les juges ont la charge, exige aussi des juges une extraordinaire diversité de qualités et de compétences. Toutes les juridictions ne mettent pas en jeu pas les mêmes qualités humaines, non plus que le même équilibre entre ces diverses composantes de la compétence judiciaire. J'entends par là que, plus nous acceptons la nécessité de différencier ce que j'ai appelé les *règles* et les *rôles*, plus nous réaliserons l'unité fondamentale qui sous-tend l'acte de juger : la quête de connaissance de soi par la quête du *soi* d'autrui.

Bien sûr, la haute qualité de la magistrature n'est pas strictement fonction d'un processus de recrutement parfait. Une importance égale doit être accordée aux processus d'administration des cours, à l'attribution des charges, au transfert des dossier d'une juridiction à une autre, aux mécanismes de promotion, à la discipline, à la déontologie et aux conditions qui président l'imposition de réprimandes ou à la demande de destitution… et aux niveaux financier, au soutien du personnel de cour, aux règles de procédure civile, et ainsi de suite.[66]

Nos juges assument la tâche de rechercher la *phroenesis* tout au long de la période pendant laquelle ils exercent leur fonction. On pourrait concevoir un énoncé des devoirs déontologie judiciaire énumérant non seulement les obligations négatives mais aussi les obligations positives qui s'imposent au juge.[67] Ces obligations doivent comprendre la nécessité d'une formation continue, le devoir de lire de façons continue et avec curiosité, et le devoir de rester ouvert aux changements en cherchant des à comprendre de le sens des expériences nouvelles. En d'autres termes, pour maintenir une magistrature vertueuse et respectueuse des valeurs constitutionnelles qui sont propres à une société libre et démocratique toute au long de leur carrière, il faut s'assurer que le processus de recrutement des juges que nous connaissons ne soient pas minés par des processus sous-optimaux d'encadrement et de formation continue.[68]

En effet, ce sont ces processus d'encadrement après la nomination qui constituent la meilleure garantie d'une magistrature exceptionnelle – dans toute sa diversité. Ce sont également les moyens par lesquels nos juges apprennent à exercer un discernement vertueux dans toutes leurs activités – judiciaires et autres. Pour paraphraser Grant Gilmore « Aux enfers, nous ne rencontrerons que du droit, et les règles juridiques seront appliquées sans nuance, comme des recettes ; au ciel, par contre, il y aura peu de règles mais beaucoup de discernement, et la justice règnera. »[69]

Mais cette faculté de discernement – ce bon jugement – qu'est-ce au juste ? C'est le devoir de garder toujours à l'esprit les questions les plus profondes : Qui sommes-nous ? Quelles sont nos faiblesses ? Comment pourrons-nous arriver à nous connaître nous-mêmes ?

63. Let me enter an important caveat. I do not claim that culture necessarily humanizes, or that "high culture" necessarily acts as a prophylactic against barbarianism. Joseph Goebbels was a very cultured person – and a monstrous thug. The point of exposure to the arts and the humanities is not to study a Shakespearian play, for example, for its own sake. It is to see oneself, one's own life-challenges – personal and professional – and the life-challenges of lawyers and litigants as part of what it means to be alive. Without such continual challenge it is all too easy to slip into the complacency of believing that "exercising judgement" means simply following a pre-ordained decision-making protocol.

64. L. Trilling, *The Liberal Imagination* (New York: Viking Press, 1950).

65. L. Salamon, *The Tools of Government* (New York: Oxford University Press, 2002).

66. Sur ces points, consulter notamment, R.A. Macdonald, « Nommer, élire, tirer au sort, vendre au plus offrant ?… à propos le choix des juges » in P. Noreau, ed. *Mélanges Andrée Lajoie* (Montreal : Thémis 2008) 731 aux pages 800-06.

67. See *Ethical Principles for Judges* (Ottawa: Conseil canadien de la magistrature, 1998).

68. J'ai abordé ces questions dans une étude des processus de nomination, encadrement, formation et discipline en matière de droit adminsitratif. Les conclusions que j'y ai tirées me semblent également applicables aux tribunaux judiciaires. Voir R.A. Macdonald, « The Acoustics of Accountability: Towards Well-Tempered Tribunals » in A. Sajo, ed. Judicial Integrity (Leiden: Nijhoff, 2004 at 141.

69. Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1974) at 110-111 *(paraphrase de l'auteur)*.

Quels sont les connaissances que nous ne pouvons acquérir qu'en imaginant la vie des autres ? Et, finalement, d'où provient la capacité de reconnaître nos obligations envers autrui et envers nous-mêmes ?

Voilà, donc, le défi ultime : par quelle route arrivons-nous à cet état de grâce?

Ici, en conformité avec ce que je crois être les éléments au cœur de la formation continue des juges, je ne peux mieux faire que d'évoquer ce que j'ai déjà qualifié de « ressources culturelles ». Alors, je termine avec les paroles d'une chanson que j'ai apprise il y a quarante ans d'un poète, chansonnier et activiste extraordinaire. Il était un jeune homme brillant et troublé, qui a fini par se suicider. Toutefois cette chanson est un témoignage remarquable de ce que veut dire « vivre une vie vertueuse ». Comment rendre à chacun et chacune son dû, tout en rappelant que chaque individu, chaque être de ce monde, est doté du potentiel de vivre une vie vertueuse ?

Cette chanson, écrite par Phil Ochs en 1965, que j'ai révisé et traduit quelques années plus tard, en donne une réponse : notre vertu se manifeste par nos actes et nos croyances, telles qu'elles sont reflétées dans les vies vertueuses de ceux et celles que nous rencontrons au long de notre vie, et qui vivent vertueusement après notre mort. Elle s'intitule : *There but for fortune… / Où va la chance?*

Je vois la prison, je vois la nuit
Je vois le prisonnier qui pleure sa vie
Et je me dis souvent, quand je réfléchis au droit
Où va la chance – à toi ou à moi … toi ou moi?

Show me the empty eyes, clothes tattered and torn,
Hand out and hand me down since the day they were born,
And I'll show you the children, with so many reasons why,
There but for fortune, may go you or I … you or I.

Je vois des blessures, jamais guéries
Je vois le vagabond qui dort sous la pluie
Et je me dis souvent, quand je réfléchis au droit
Où va la chance – à toi ou à moi … toi ou moi?

Show me the bruises. Show me her fear.
Show me the broken love, he once held so dear.
And I'll show you a young man, with so many reasons why...
There but for fortune, go you or I -- you or I.

Je vois cette femme, au cœur perdu
Qui boit pour s'échapper à ce qu'elle est devenue
Et je me dis souvent, quand je réfléchis au droit
Où va la chance – à toi ou à moi … toi ou moi?

Show me the pistol, show me the note,
Show me the tortured life in the words that he wrote,
And I'll show you a young man, with so many reasons why,
There but for fortune, may go you or I … you or I.

Address

The Honourable J. J. MICHEL ROBERT
Chief Justice of Québec

This afternoon, we are going to tackle a question that is obviously a very delicate one, and that's why I took great care in entitling my talk: "Political Mobilization of the Law… Yes, But!" So you will understand that I don't intend to answer the question! Well, I'll answer it, but… with a certain number of shades of opinion.

To begin with, I would like to examine the changes that have occurred, especially since the end of World War II, and up to the beginning of the 21st century, because I believe that there were a certain number of changes that led us to the situation that we are in today. First we witnessed the creation of the United Nations and that was followed by the Universal Declaration of Human Rights; however, what also emerged was a whole series of legal instruments at the international, national and regional levels, and we can obviously mention all the pacts that were approved by the United Nations Assembly. Then the Council of Europe was established as well as the European Court of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and other international legal instruments as well. In addition, we saw the creation of supranational tribunals at the international level, and moreover, at the level of the major continents, and above all, we witnessed the proliferation of international treaties and international organizations of a continental scope. Of course, needless to say, there was also the Treaty of Rome and all its protocols, the European Union, the North American Free Trade Agreement, obviously including Canada, United States and Mexico, the agreements in Asia and Pacific, Mercosur in Latin America, etc. So there was a whole series of international legal instruments.

We also saw crime-related developments, which I would label as supranational, such as genocide and torture, and the extension of a certain universal jurisdiction on the part of the courts and tribunals to impose punishment on a worldwide scale, regardless of the situation, regardless of where the people happened to be and regardless of where the crimes were committed. And we can add here, of course, a certain duty to intervene on the part of the international community in certain national countries, when these supranational crimes were committed. Obviously, there is no need to mention here the events that occurred in the former Yugoslavia and Rwanda.

At the same time, we witnessed the globalization of financial markets, of manufacturing economies and of trade with, of course, a system of communication that has become worldwide and instant. In the past, it was said that the revolution – well, the rebellion – on Tiananmen Square couldn't have been possible without fax machines, because it was about at that time that fax machines started to play an important role. However, today, with the Internet, everything is instant. If something is happening in the world, then in the following seconds, and not minutes, but in the following seconds, the event is known worldwide.

This series of changes, and for the time being, I am excluding the adoption of an entrenched charter of rights and freedoms in Canada – constitutionally entrenched because, well, I'll get back to that point – but all these phenomena transformed and expanded the role of national courts and tribunals.

To begin with, we witnessed a sort of extension of extra-territorial jurisdiction and a relaxation of the rules of international private law – a relaxation, in fact, partially found in the new version of the *Civil Code* of 1994.

And so in a number of countries, to varying degrees and based on various instruments, added to the traditional role of the courts, which was, of course, to interpret and sanction national legislation on national territory, obviously with the state/nation concept… added to all this was control over the compliance of such laws with fundamental rights and, at times, like our Supreme Courts and our other courts in Canada, the power to set aside laws, pursuant to the entrenched charter with which we have become familiar and that we will discuss again a bit later on.

And so this gave rise to a potential conflict between legislative power and executive power on the one hand, and judicial power on the other. Needless to say, there was talk about judicial activism and about government by judges; all kinds of expressions were used to describe this new phenomenon. But also, these new phenomena changed the nature of the democratic regimes that we know in developed countries.

The regime that was mainly a parliamentary and sovereign regime has become a constitutional one and has come under, quote unquote, a certain monitoring by the courts. The courts consequently acquired the power to set aside laws or, in some cases, to declare them inconsistent with the constitution. The courts have therefore played a role, to some extent, in managing the government, along with the other two powers: the legislative and executive. Have we, for all that, become slaves of government by judges, government by judges that is not accountable and not democratically elected? I don't think so, but we must qualify a certain number of our statements and put things back into their true perspective. Those who are against judicial activism and who dream of going back to the Golden Age of the strict interpretation of the laws, according to the original intention of the constituents, run the risk of being disappointed.

However, in my own personal opinion, those who believe that the courts will have to make social and political choices instead of the governments that have become incapable of – or not very interested in – doing so, also run the risk of being disappointed.

Each power or authority must play its own role, according to its own operating rules and its own methods.

The legislative and executive powers play a political role in a constitutional democracy; the judicial power plays what I call a "policy" role, in that the courts ensure the protection of fundamental rights and freedoms. The legislative and executive powers have a role involving initiative: they propose laws. The courts generally act *"ex post facto"*, except in relation to References, which the governments have used to a great extent, I believe, both at the Federal and at the provincial levels, but which are entirely controlled by the governments. In other words, it is up to the governments to make References or not; however, the governments—for reasons that we could discuss at length – have used this Reference procedure many times, both at the Federal and provincial levels, which have led the courts to rule on matters even before the laws were adopted, and not in an *a posteriori* manner, but rather *a priori* in such cases.

It is a development that I believe is a recent one, especially in Canada. It is too soon to say whether this development is good or bad. I think that we must look at it with certain shades of opinion. However, it was particularly clear in the case of the *Reference re Same-Sex Marriage* and the *Reference re the Secession of Quebec*.

The government has many instruments and tools to make social and political choices; the courts have a relatively limited arsenal. We have rules of law, precedents and any tools that the parties are willing to make available to us, and we have to hand down our ruling on the basis of the instruments or documents or expert examinations that are provided to us, except for precedents and doctrine that we can, of course, search for ourselves and obtain therein the assistance we are seeking.

The government acts on behalf of a political ideology that is avowed, express and public; the courts act according to rules of law that don't convey any political ideology in themselves, but – it must be noted – are based on a certain number of moral rules underlying social consensus. The Chief Justice of Canada said so yesterday and others have repeated it this morning: the courts have a duty… not to be accountable for their decisions to the public, but to generally represent the society that they regulate or for which they settle disputes.

Each power or authority has its own operating rules. The government adopts laws within the scope of parliamentary discussions that are open and public. As for the court, on the contrary, it uses an adversarial operating system to hear the parties concerned, but it deliberates in private and decides in private. The deliberation and decision-making part is obviously carried out without the public being present.

The government is accountable to Parliament through ministerial responsibility, of course – Parliament, which represents all members of the public. The courts are not accountable, as such, for their decisions, and I must confess that they can't be accountable to the public at large in order to exactly play the role of independent arbitrators and protectors of fundamental rights that they want to play. We couldn't subject – if I may say so – our judgements to referendums or to surveys. I think that would destroy the very notion of independence and protection of such fundamental rights that is given to us by the various legal instruments. Judicial power, however – and it is important to take note of this and it is sometimes forgotten in our public debates on activism, for or against – I mean judicial activism, judicial power is much more limited than legislative power. And as someone mentioned, legislative power always has the final say or may have it when it has the courage to exercise and, above all, use the clause that is nevertheless a notwithstanding clause in section 33, which has been used extremely infrequently in our constitutional history. However, we can say, I believe, that aside from very exceptional cases, political power or legislative power has, or may have, the final say in socio-economic choices.

Now let's look at the situation prevailing in Canada, both before and after the *Canadian Charter of Rights and Freedoms*. The first point that we also often forget is that Federalism in itself is a factor in extending the jurisdiction of the courts, as the courts must arbitrate power struggles between the two levels of government. In other words, our courts – including the Supreme Court – didn't start setting aside laws as of 1982 or 1985, but rather from the beginning of the Canadian Confederation. Why? Because they inevitably had to settle disputes pursuant to the rule of division of powers.

The same phenomenon is confirmed in the other federations, and in the quasifederations, such as the Council of Europe and the European Union. A lot of decisions reached at the level of – for example – the European Court of Human Rights forced a number of member States of the Council of Europe to revise their internal legislation. Several decisions reached by the European Union and its regulatory bodies are also forcing the so-called national and sovereign States to revise some of their social choices.

The addition of a constitutionalized charter is also an essential factor, and particularly given the following considerations: The charters are generally written according to a legislative style based on civil law. In charters, general principles and general terms and conditions are stated, without defining, in detail, the nature of these terms and conditions. The *Canadian Charter of Rights and Freedoms* is no exception to this legislative model, and so the rights are defined there in a general manner: freedom of expression, freedom of thought, freedom of religion, etc. And of course, you know, all the freedoms that are listed in section 2 and thereafter.

And yet the very generality of the definition of fundamental rights forces judges to define the contents of these rights. During the first 25 years of our enforcement of the *Charter,* the Supreme Court endeavoured to substantially interpret the contents of these rights. By defining the contents of these rights, the courts inevitably make choices that I would call "socio-political" in general, and which obviously give them powers that largely surpass the traditional role that they used to be asked to play.

The second aspect of the *Canadian Charter* that forces us to play a much greater role is the primacy of the *Charter,* which is established by section 52, which makes the constitutional *Charter* non-overriding or establishes its primacy over all rules of law, including the rules of law in the *Civil Code* or in civil law, or all the rules of common law. It isn't only the laws, of course, that are of a statutory nature or of a legislative nature expressly adopted by the various legislative assemblies of the provinces or by the Parliament of Canada. As a result, the primacy of the *Charter* is really effective and is established under section 52. It isn't primacy that authorizes – as in the case of certain European governments – either the Supreme Court or the other courts to declare any provisions inconsistent with the *Charter* and to just stop there. Here, this clause in the *Charter* force the courts to declare as having no force or effect and to set aside, in practice, any provisions that are inconsistent with the *Constitution Act* and the *Charter.* So it's an extremely vast power.

The third aspect that seems extremely important to me as well is the statement that the rights don't have an absolute nature, in section 1, but that they may be subject only to such reasonable limits prescribed by law (or "rule of law", according to the French version of the *Charter*)[1] as can be demonstrably justified in a free and democratic society. Given this first section of the *Charter,* the courts are therefore called upon to first decide what a rule of law is, because that can pose problems; however, it is more of a technical problem. But where it becomes less technical is that the courts are called upon to decide what is reasonable and what is unreasonable, what is a free and democratic society. And at that point, obviously, our Supreme Court has stated that we could carry out an exercise of comparative law, that we could ask ourselves whether the other free and democratic societies that we know, are subject to limits on the laws that we are preparing to limit.

And even more difficult, section 1 asks us to decide what is *"demonstrably justified".* This is no easy task for the courts and it goes far beyond the traditional limits of the courts' role as we know it.

This task entrusted to the courts by the constituents, and not by the judges themselves, but by the political constituents under the circumstances with which you are familiar, is inconsistent, in my opinion, with the limited role that the judicial anti-activists advocate for judges. The debate is even greater in the U.S. than in Canada. One of my researchers pointed out to me that over a period of four years, from 2000 to 2004, there were over 1800 articles that had been published on government by judges and judicial activity or judicial activism.

Moreover, as we know, section 24 of the *Charter* gives judges remedial power, following a decision to set aside or invalidate provincial or Federal legislation. And the clause is written in such a way that judges have the power to create and invent – if I may say so – the remedy that they consider appropriate and just, in case of infringement upon the rights granted under the *Charter.*

So judges are given great discretion to formulate, if I may say so, the remedy in order to attain the objective of the *Charter,* which is respect for fundamental rights and the rights of fundamental freedoms, with a remedy that is extremely effective. Rarely do we find this kind of provision in many constitutional charters. I think that in England, the new legislation that is going to come into effect in 2009 merely allows the future Supreme Court to declare the provisions inconsistent with the constitution, leaving it to the lawmaker to look after taking the measures or deciding on the necessary remedy to make the provisions consistent with the *Charter.*

At times, there is a great temptation for the courts to intervene and stipulate the constitutional solution after having set aside the unconstitutional law. Some courts have perhaps occasionally given in to the temptation and I will avoid mentioning specific cases or giving concrete examples.

In general, judicial restraint is preferable, because the courts don't always have the necessary tools to make difficult socio-political choices in any legitimate political context. It is therefore often necessary for the courts to send the law back to Parliament, except under exceptional circumstances that aren't easy to define in advance.

In fact, there are a number of examples in our case law, either in courts of appeal or in the Supreme Court, where provisions of a law were set aside or the matter was sent back to the legislative authority or to other regulatory bodies so that they could make the socio-political choice that was necessary under the circumstances. I don't need to give you any examples. I think you are obviously familiar with the tobacco-related case and with other situations of this kind.

1. TRANSLATOR'S NOTE: Section 1 of the French version of the *Charter* states "*règle de droit*" (which means "rule of law"), rather than just "law", as stated in the English version of this section of the *Charter,* and this explains Chief Justice Robert's comment in the following sentence.

In such a situation, an attenuated or restrained interpretation – or "reading down" as it is commonly called – is less invasive than what I might call "reading in" (or an expanded interpretation), although "reading in" mustn't necessarily be excluded, because it is a matter of circumstances and conditions.

In my closing remarks, I would like to merely add the following: Invested with a new power, a new role in government management, the courts must exercise this power with moderation, within the strict limits that are necessary for attaining the objectives of the *Charter,* and fulfill the mission with which they are entrusted. Those who want to question this new role will have to be reminded that the courts didn't ask to play this role and that it was given to them almost unanimously, if I may say so, by political constituents, at the Federal, provincial and territorial levels.

And lastly, the proliferation of interest groups in the environment or other areas of activity, the advent of instant communications worldwide, the emergence of a form of direct democracy through the increasing number of referendums and the intervention of the Internet are, in my opinion, helping to maintain such a role on the part of the courts. Moreover, this role today is in keeping with the many expectations on the part of the public, considering the obvious changes in the legal actions that are referred to us.

So on that note, I thank you for your attention.

Address

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For reasons beyond our control, lawyer Jutras' talk cannot be included in the Conference Proceedings; however, as soon as it is available, the talk will be posted on the Conseil de la magistrature website.

Prepared Remarks

SEAN T. MCALLISTER
Executive Director of the SLAPP Resource Center
University of Denver, Colorado

"EMERGING ISSUES FOR STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPS)"

Introduction

Good afternoon. My name is Sean McAllister and I am an attorney and the Executive Director of the SLAPP Resource Center ("SLAPP Center"), a project housed in the University of Denver in my home state of Colorado. It is my honor to be here with you today. I want to thank your colleague André Ouimet for his assistance in bringing me here today.

The SLAPP Center is the pioneering nationwide nonprofit center dedicated to preserving the right of citizens to petition and otherwise communicate their views to government under the First Amendment of the United States Constitution. We coined the phrase SLAPPs, which stands for "Strategic Lawsuit Against Public Participation." The SLAPP Center serves as a professional and academic resource on SLAPPs through its research, policy development, advice and regularly files amicus briefs in high profile cases.

Beginning in 1969, the United States passed several environmental laws giving the public greater participatory rights in environmental decision-making processes and enforcement matters – such as the National Environmental Policy Act, and the Clean Air and Clean Water Acts. As participatory rights grew, the conflicts between private corporate interests a vocal private citizens grew. In the 1980's and 90's in the United States, two professors at the University of Denver began chronicling a trend of using civil lawsuits to punish people who petition the government or speak out on matters of public concern.

In 1996, Professors George Pring and Penelope Canan published "SLAPPs: Getting Sued for Speaking Out." The book discussed hundreds of cases in the United States where individuals, organizations, and businesses were sued for defamation, libel, slander and other alleged wrongs for speaking out on issues of public concern. Pring and Canan's book had an immediate and long lasting impact on this field of law in the United States.

My talk will briefly review the history and development of SLAPP suits in the United States. I will discuss the typical characteristics of SLAPP suits and give examples of these cases. Next, I will discuss the Constitutional, case law, and statutory protections under federal and state law in the United States addressing SLAPP suits. In this context, I will discuss the key elements of any model law aimed at limiting SLAPP suits. In addition, I will discuss some new trends in SLAPP suits in the United States.

Finally, I will make a few remarks regarding my understanding of SLAPPs in Canada. In addition to mentioning a few of the more high profile SLAPP cases in Canada, I will summarize the ideas of other scholars regarding how Canada can deal with SLAPP cases.

A key message of this talk is aimed at SLAPP filers. At least in the United States, SLAPP cases are almost always losers. The trend in recent years has been for sophisticated players to employ SLAPP cases less and less. What once was a battle of David vs. Goliath in SLAPP cases is now often a battle started by much smaller, less sophisticated entities.

Finally, my goal with this talk is to show that the SLAPP problem is really a tension between two competing interests. First, there is the interest of society in providing victims of defamation or slander access to the Courts to have their damages addressed. In opposition to this interest is the interest of society in promoting free speech and public participation without the fear that this speech will engender lawsuits aimed at punishing that speech. I believe that free speech should prevail in this tension. The experience in the United States has shown that the excesses and abuses of SLAPP suits can be ameliorated. However, it is unlikely that any law can ever completely end SLAPP suits. This is a problem to be managed rather than solved.

Constitutional Protections of Freedom of Expression in the United States

The First Amendment to the United States Constitution protects the right of people to "petition the government for a redress of grievances" and prohibits any laws "abridging the right of free speech."

The First Amendment covers any peaceful attempt to promote or discourage government action at any level (federal, state, or local) and in any branch (legislative, executive, or judicial). Protected activities include all means of expressing views to government:

- *filing complaints*
- *reporting violations of law*
- *testifying before government bodies*
- *writing letters to newspapers*
- *lobbying legislatures*
- *advocating before administrative agencies*
- *circulating petitions*
- *conducting initiative and referendum campaigns*
- *filing lawsuits*
- *and it protects peaceful demonstrations, protests, picketing, and boycotts aimed at producing government action.*

In a series of rulings supporting the First Amendment, the U.S. Supreme Court announced the *Noerr-Pennington Doctrine,* which holds that petitioning the government is protected and entitles the protected petitioning activity to immunity from private lawsuits under the First Amendment of the U.S. Constitution.

Under this doctrine, the SLAPP victim gets immunity unless the SLAPP filer can prove the petitioning was a "sham." A "Sham" means a statement was baseless, used the legal process as a weapon, or the statement was not aimed at procuring government action. Recent Court decisions have narrowed the application of the "sham" exception by explaining that a parties subjective motivation for petition the government (such as hoping for delay of the process even without reasonable expectation of victory) does not make petitioning a sham as long as the communication was intended to influence government action.

Now I'm going share the real secret of free speech protections in the US.

The key issue regarding the scope of protection of free speech in the United States is that the greatest protection is given to speech that is directly aimed at procuring a government outcome, such as speech for or against a government permit on a project. As will be explained below, the protections begin to weaken as speech becomes less and less directly aimed at a government outcome. For example, statements in letters to the editor or on internet blogs that do not directly advocate government action may or may not have immunity from liability under various anti-SLAPP laws. However, these indirect petition statements can legitimately be seen as attempting to influence public opinion and thereby indirectly affecting government decisions. As such, indirect petitioning can be an important element of public participation that should be entitled to protection.

Characteristics of a SLAPP Lawsuit

Generally, a "SLAPP" is a (1) civil complaint or counterclaim; (2) filed against individuals or organizations; (3) arising from their communications to government or arising from their speech on an issue of public interest or concern.

SLAPP filers frequently use lawsuits based on ordinary civil claims such as defamation, conspiracy, malicious prosecution, nuisance, interference with contract and/or economic advantage, as a means of transforming public debate into a private lawsuit.

The purpose of the lawsuit is to silence a critic rather than actually recover for real damages. A typical SLAPP suit will seek exorbitant damages as a way to intimidate the target. SLAPP suits typically name John or Jane Does as Defendants and will sue members of an organization individually rather than the organization itself.

SLAPPs are most often brought by individuals or corporations in the development context against individuals and community groups who oppose those developments. However, SLAPP cases arise in innumerable instances, such as police officers suing citizens for defamation when citizens complain about police brutality to the government. There are no ends to the areas of law where SLAPP suits can arise. The SLAPP Center's study shows that the following issues were the most common subjects of SLAPP suits:

1. *Real estate development = 38%*
2. *Criticism of public officials and employees = 20%*
3. *Consumer protection = 20%*
4. *Environmental = 16%*
5. *Human rights = 13%*[1]

The SLAPP Center's study shows SLAPP suits arise out of the following contexts in the following percentages of the total:

1. *Public hearings = 47%*
2. *Filing public-interest lawsuit = 20%*
3. *Reporting violations of law = 18%*
4. *Filing a protest = 8%*
5. *Circulating a petition = 3%*
6. *Peaceful demonstrations = 3%*

In the United States, most SLAPPs are not legally successful.

Victims win dismissal at the trial court level in approximately two-thirds of all cases. If victims do not prevail at the trial level, appeals courts typically reverse those loses. There are virtually no reported in-court SLAPP victories.

Nevertheless, while most SLAPPs do not succeed in court, they do succeed in other ways. The average SLAPP case in the United States takes 40 months to resolve. Mounting a legal defense requires

1. Some cases involve multiple claims arising from multiple contexts, which is why the total here is more than 100%.

a substantial investment of money, time, and resources. Many defendants settle these cases and agree to stop their advocacy rather than fight such a costly battle.

The resulting effect "chills" public participation in, and open debate on, important public issues. This chilling effect is not limited to the SLAPP defendants. Other people may be intimidated to refrain from speaking out on issues of public concern because they fear being sued for what they say.

The filing of a SLAPP also impedes resolution of the public matter at issue, by removing the parties from the public decision-making forum, where both the cause and resolution of the dispute can be determined, and placing them before a court, where only the alleged "effects" of the public controversy may be determined. For example, imagine a company asks for a zoning variance to place an incinerator in a residential area. When local residents object to the city council, the company sues them for "interference with contract." The judge hearing the suit cannot decide the real issues – the location of the incinerator – but will have to spend considerable judicial resources to decide the side issues of the alleged "damages" or other consequences of the public debate rather than the real issues.

Examples of SLAPP Cases

Every year, thousands of people are sued for participating in government or for speaking out on public issues. Some of the more high profile SLAPP cases include:

- *Sierra Club v. Butz* (California, 1972): This was one of the original SLAPP cases in the United States. The Sierra Club filed suit seeking injunctive relief to stop a logging project. The project's proponent filed a counterclaim alleging the tort of interference with business relations. This case established the principle that the right to petition the government can be a bar to private litigation. However, the Sierra Club was forced to spend hundreds of thousands of dollars to litigate this case over several years.
- *Webb v. Fury* (West Virginia, 1981): A coal company filed a defamation suit against an environmental group over statements the environmental group made to the regulators about the project. The Court dismissed the claim and held that the "sham" exception to liability does not apply even if the communication was done for malicious purposes as long as there was a legitimate government outcome sought by the petitioning.
- *Protect Our Mountain Environment* (Colorado, 1985): In this case, a citizen's group filed appeals to a zoning board to deny a rezoning application for a development. The developer filed a $40,000,000 USD lawsuit charging abuse of process and conspiracy in bringing a baseless appeal. Eventually, the Colorado Supreme Court threw the case out as protected speech, but not before the victims spent five years and enormous resources defending the case.
- *McLibel* (Britan, 1990-2005): In 1986, a small environmental organization published a pamphlet titled "What's Wrong With McDonald's," criticizing the food-giant's allegedly unhealthy production and distribution practices. The corporation sued for libel in 1990. Given Britan's plaintiff friendly libel laws, McDonalds won a judgment of £60,000 British Pounds. The victims later appealed this ruling to the European Court of Human Rights. In 2005, the EU Court ordered the UK government to pay the damages for failing to protect the Defendant's freedom of expression under the European Convention on Human Rights.

State Anti-SLAPP Laws and Model Law

In addition to the federal constitutional and case law protections from SLAPP suits, twenty-seven states have specific anti-SLAPP laws of some nature, designed to protect citizens who make statements to the government. The vast majority of SLAPP suits occur under state law in the United States. Generally, these state laws provide a procedural mechanism, such as a motion to dismiss or motion for summary judgment, that allows judges to dismiss SLAPP cases early in the process.

The numerous state laws have shown varying degrees of effectiveness. Most of these laws faced significant opposition from trial lawyers and big business when they were first introduced. As a result, many of the state laws have only limited application and effectiveness. There is a concern that unless something close to a model law is enacted, a compromised anti-SLAPP measure will not truly respond to the problem. In addition, further reform efforts may be stifled by a feeling that the problem has already been addressed. The point is to get as strong and comprehensive of an anti-SLAPP law the first time around. You may not get a second bite at the apple.

The early dismissal of SLAPP cases is a key component of ameliorating the chill of free speech rights that SLAPP cases produce. If cases are allowed to drag out, victims will be forced to expend the enormous resources to fight these cases. It would be meaningless to force victims to go all the way to trial to vindicate their rights. The purpose of the SLAPP lawsuit is to inflict costs on the victim. Once a case goes to trial, the SLAPP filer has already achieved its purpose.

Therefore, all of the key elements of a model law intended to prevent SLAPP suits are aimed at making this early dismissal a meaningful process. As such, the following additional elements are key provisions of model SLAPP laws:

- Broad Scope: In the United States, the strongest protections are for those statements directly aimed at procuring a government outcome. This, of course, includes writing letters to the government, testifying before government, or otherwise directly requesting relief from the government. However, an ideal anti-SLAPP law will have a broader scope to include both direct and indirect statements intended to influence government action or public opinion. For example, writing letters to the editor or posting an internet blog regarding a matter of public concern may be every bit as much intended to influence public opinion and therefore indirectly influence government action.

- **Scope of protections only limited by sham or bad faith exception.** In other words, only if the speech is used as a sham to interfere with a government approval process – or in bad faith with knowledge that the claims have no basis in fact, should the anti-SLAPP protections not apply. As noted, the subjective intent of the SLAPP target should not be considered relevant as long as there is a legitimate government outcome sought by the communication.
- **Shift burden of proof to SLAPPer.** While it is common for laws to place an initial prima facie burden on the SLAPP target to show that that the offending speech was protected by some Constitutional or statutory immunity, ultimately the burden should be shifted to the SLAPPer to prove that the claim is not attacking protected speech. If the burden remains on the target, the chill of a SLAPP suit will have its intended effect.
- **Expedited review of motions to dismiss.** In order to ensure that SLAPP cases do not drag out, Courts should be instructed to give such motions expedited review or high priority. In the United States, as noted, despite state laws calling for expedited review, it is common for cases to drag out at least 1-2 years before they are resolved.
- **Stay or limit discovery pending motion to dismiss.** At least in the United States, extensive and abusive discovery requests have become a hallmark of excessive litigation. In many cases, due solely to the exorbitant cost of discovery, cases are regularly settled to avoid these costs without any regard to the merits. In order to ensure that SLAPP victims are not forced to respond to excessive and abusive discovery requests, a model anti-SLAPP law should include provisions to limit or suspend discovery pending resolution of the issue. In some states, rather than prohibit discovery, only limited discovery is allowed pertinent to the question of whether the claim is a SLAPP suit or not.
- **Allow immediate appeal of denial of motion to dismiss.** As noted, if SLAPP victims are forced to vindicate their rights after a full trial on the issue, then the goal of the SLAPP filer will have already been accomplished – to inflict costs on the victim. Therefore, model SLAPP laws should include provisions for interlocutory or immediate appeal of the denial of motions to dismiss on SLAPP grounds. Appeals should be given expedited priority to resolve the matter quickly.
- **Recovery of attorneys' fees, compensatory, and punitive damages.** As a private practicing attorney, I view this provision as perhaps the most important way to prevent SLAPP cases. If the only costs to SLAPP filers is their own costs of the action (perhaps as little as tens of thousands of dollars), then many large actors will not be dissuaded from filing SLAPP suits. Large actors would simply calculate the benefit of filing a frivolous suit against their own attorneys fees. Such a regime is a recipe for continued SLAPP suits. If a SLAPP filer also may have to pay both the costs and attorneys fees to victims, and also potentially punitive damages, then many more SLAPP filers will hesitate to file frivolous claims. Punitive damages are appropriate only in the most flagrant cases, where the imposition of such extraordinary damages will also deter similar conduct. These provisions are known as "SLAPP-back" provisions.
- **Provide sanctions for frivolous SLAPP-back suits, but don't get caught in the endless circle of SLAPP-backs.** In California, which most people in the United States consider its own legal world, you are seeing a tiger trying to catch its tail under their anti-SLAPP law. Under California law, if someone files an anti-SLAPP motion to dismiss, and the Judge finds that SLAPP-back counterclaim was frivolous or without merit, the Judge may award fees to the original alleged SLAPP filer. This circle could never end in theory. The SLAPP victim could file a counterclaim, to which the SLAPP filer seeks sanctions for that claim being frivolous. The SLAPP victim could then seek sanctions against the SLAPP filer for seeking sanctions based on the original SLAPP-back. This could go on forever unless the law is made clear. I advocate not endlessly extending the law to responsive motions.

SLAPP-Back Suits

As noted above, creating an anti-SLAPP law with "SLAPP-back" provisions is essential. SLAPP-back provisions are those provisions that seek to deter this conduct, such as punitive damages and attorneys fees. Approximately half the states with and anti-SLAPP laws have specific statutory SLAPP-back provisions that allow for the recovery of attorneys fees and punitive damages from SLAPP filers who bring abusive lawsuits. In addition to specific SLAPP-back provisions under these laws, there are also common law claims that may provide an avenue for SLAPP victims to recover for their losses, including: malicious prosecution, abuse of process, intentional or negligent infliction of emotional distress, and others.

Numerous cases in the United States have employed the SLAPP-back provisions to produce stunning results in favor of victims. There are dozens of cases of multi-million dollar judgments against SLAPP filers that have sent a strong message about these abusive lawsuits. Examples of significant SLAPP-back victories include:

- *Tanner v. DeCom Medical Waste Systems:* A hospital worker was SLAPPed for criticizing a company seeking a permit for a waste incinerator by writing letters to the newspaper. The company sued for $1 million claiming libel against the worker. The hospital worker filed a SLAPP-back alleging abuse of process, malicious infliction of emotional distress and other torts. After a trial, this case resulted in the largest jury award for a SLAPP victim in the history of the United States: an astounding $86 million. The case was ultimately settled for much less.

- *Wegis v. Boswell Company:* Family farmers organized to oppose a ballot initiative that would have created enormous new water projects across their land in California. The water developers sued the opponents for $2.5 million claiming libel. The Court ultimately threw out the case and awarded the victims the largest ever Court-ordered recovery for a SLAPP-back suit of $11 million for abuse of process and deprivation of constitutional rights.
- *Shell v. Leonardini:* Shell sued a consumer advocate and union attorney for reporting to a state health agency about dangers with a Shell home plumbing product. The company voluntarily dismissed the case after the targets raise the First Amendment defense. The Court awarded the victim a $7.5 million recovery for malicious prosecution.
- *SOLE, Inc.:* One of the SLAPP Center's primary funders is a group of SLAPP victims. Local residents were sued for millions of dollars after speaking out against an incinerator planned near their neighborhood. The case went all the way to trial and the SLAPP filer agreed to drop his claims and pay the victims $1.5 million in a settlement of their SLAPP-back claims.

New Developments in SLAPP Law

While the existing state laws and federal protections have done a good job of addressing traditional SLAPP suits, these abusive lawsuits are continually evolving into new areas of law. Examples of new areas for SLAPP suits include:

- Internet SLAPPs: Without a doubt, this is the fastest growing and most difficult type of SLAPP suit. There are infinite ways in which Internet speech, whether through emails, blogs, or other on-line chat rooms, can engender potential SLAPP suits. The issue again is whether pure free speech on the Internet, with little or no connection to government action, deserves any special protection. Many people believe that their statements on such popular sites as Youtube.com or Myspace.com have broad reach and public impact. Therefore, the quasi-public forum aspect of these sites may justify some additional protections. Finally, there also remains the problem of what countries properly have jurisdiction over statements made on the Internet: the country where the communication originated, the country where it was received, or anywhere in the world where the message could have been perceived. These issues will ultimately have to be resolved as the Internet becomes the new public forum for the world.
- Veggie Libel Laws: In the United States, as elsewhere, agriculture is a foundational industry with significant political power. As a result, thirteen U.S. states have recently passed laws inhibiting critiques of industrial agriculture, such as concerns about GMO foods. These laws typical reverse the burden of proof in the United States and force the defendant to prove the statements were true or based on reasonably reliable science. The most famous example is U.S. talk show host Oprah Winfrey was sued for $10.5 million by the Texas cattle association for statements made on her program about the safety of beef. These laws undermine public participation by creating special rights for the agriculture industry.
- War on Terror SLAPPs: In the last few years, people have been sued for speaking out claiming that various organizations in the United States were funding terrorism under the guise of providing humanitarian assistance to the Middle East. A nonprofit named KinderUSA sued a journalist for $500,000 claiming libel after the journalist published a book linking the organization to terrorist funding. This subject is controversial as some believe these lawsuits are not abusive, but are just being focused on by ultra-conservative journalist as a way to encourage the war on terror.
- Libel Forum Shopping: As noted, the standards of proof and burdens on defendants are very different in the United States compared to commonwealth countries. As a result, the phenomenon of libel forum shopping has emerged in the last several years. Generally, because of the global nature of most communication, offended parties can likely obtain jurisdiction over claims in either western Europe, Canada, or the United States. This trend reinforces the need for greater consistence between nations in providing protections against SLAPP suits. If Canada, for example, is seen as more accommodating to SLAPP suits than the United States, likely over time more cases will appear in Canada. In response to this trend, two U.S. Senators have introduced legislation to prevent judgments obtained in foreign countries for libel, defamation, or slander from being enforced in the United States if the United States would consider those claims to be SLAPPs. This bill has passed one house of the U.S. Congress and is expected to gain momentum Mr. Obama is elected.

Thoughts on Canadian SLAPP Issues

Examples of SLAPP Cases in Canada

Though I am by no means an expert on Canadian SLAPP issues, I will make a few cautious remarks about the emerging issues in your country. There have been many high profile SLAPP cases in Canada. Among those cases includes:

- *Galiano Conservancy Association (GCA):* This was the first documented SLAPP case in Canada in 1991. The GCA lobbied against zoning changes that would have permitted a development to be built. The case was dismissed in 1993 after the GCA filed a countersuit and the plaintiffs quickly settled.

- *Fraser v. Saanich:* A developer sued the city of Victoria and eight local residents who opposed development of his resident care facility alleging conspiracy, interference with economic interest, and inducement to breach contract. The case was dismissed and the victims were awarded costs of the action.
- *Lubicon Lake:* An environmental organization, Friends of Lubicon (FOL), engaged in boycott activities against the Daishowa corporation in protest of the Alberta government granting rights to build a paper mill in territory claimed by the Lubicon Lake Indian Nation. The company sought and obtained a temporary injunction against FOL's boycott to prevent interference with Daishowa's business. In addition to the injunction, Daishowa sued FOL for $812 million in damages and sought a permanent injunction against the boycott.
- *INTEFOR:* Members of the Forest Action Network (FAN) were sued by a logging company, INTEFOR, after activists disrupted logging activities through direct actions such as blockades. INTEFOR obtained injunctions against FANs activities. However, the company also sued individual members of the organization for as much as $12,000 per activist, forcing the activists to travel thousands of kilometers to Vancouver to defend against the suit.
- *Lake Simcoe:* Ontario approved a billion dollar Big Bay Point project with the backing of the Innisfil town council. The developer, Kimvar Industries, has sued the opponents of this plan for $3.6-million for libel. Environmental Defence has intervened in the case.
- *American Iron and Metal Co.:* The company filed a $5 million lawsuit against two Quebec environmental organizations and several environmentalists, which had alleged the company polluted the Etchemin River. The lawsuit alleges that the defendant's colluded to harm its economic interests by obtaining an injunction against the project.

Canadian Constitution

The Canadian Charter of Rights and Freedoms, includes protections for the following "fundamental freedoms:" (a) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (b) freedom of peaceful assembly; and (c) freedom of association. However, there does not appear to be a direct protection for "petitioning" activity in the Canadian Charter. Moreover, my understanding is that the Canadian Charter normally only protects citizens against government action and might not be extended to protect citizens against private SLAPP suits. Coupled with the fact that Canada has very plaintiff-friendly libel/slander laws that presume damage from statements, do not require a showing of actual malice of the defendant, and place the burden on the defendant to prove the statements substantial truth, there is enormous potential for abusive SLAPP lawsuits in Canada unless specific protections are devised.

The resident expert in Canada on SLAPP cases is Professor Chris Tollefson at the Environmental Law Center of the University of Victoria. Professor Tollefson believes the Canadian Charter could be broadly interpreted to include protections against private actions that are SLAPP suits because of widespread societal effects of such lawsuits.

Professor Tollefson has created model anti-SLAPP legislation that mimics what has been done in the United States. The model Canadian law would create substantive statutory rights to public participation. To defend those rights, the model statute creates a pretrial motion to dismiss requiring the target to make a prima facie showing that the communications are protected by the Canadian Charter or the public participation statute. Once a prima facie showing is made, the burden would shift to the filer to show that the claim is not a SLAPP suit or not protected by the statute. If a SLAPP victim prevails on the motion to dismiss, costs and punitive damages could be assessed against the filer if the suit was brought in bad faith. Finally, Professor Tollefson advocates providing legal aid services for SLAPP targets given the broader public interest in protecting speech.

I have also reviewed the bill introduced in the Quebec legislature this summer, Bill 99. It appears to me a good start in addressing SLAPP problems in Quebec. There are numerous provisions of a model bill that I do not see in your proposed law, such as suspension of discovery, immediate appeal of denial of motions to dismiss, and what appears to be a very high standard to show the SLAPP filer made the claim in bad faith.

Conclusion

There is a growing international consensus that the right of people to participate in government decisions that affect their lives is fundamental. This right may be rising to the level of a customary international law norm. Numerous conventions in recent years have celebrated this principle, including the International Covenant on Civil and Political Rights, the Aarhus Convention in Europe (the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters), and Principal 10 of the Rio Declaration stressing the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. Participatory rights must be protected against intimidation by powerful interests. For this reasons, anti-SLAPP laws should be carefully developed and diligently updated to meet the new challenges of ever expanding communications.

Address

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THE LAW AS A POLITICAL PRESSURE TACTIC: THE CASE OF COLLECTIVE LABOUR RELATIONS

In its classic design, legal education postulates that between the law and politics, there is a presumed, impervious wall. As soon as they are accepted into the faculty of law, budding jurists are promptly introduced to the principle of separation of powers, whereby it is up to the legislative branch to set out the policies, with the judge's role being limited to interpreting the texts that formulate such policies.

Today, the entrenchment of the *Canadian Charter of Rights and Freedoms*[1] in the Constitution prompts qualifying such education, so that it is nuanced to a certain extent. By favouring the transition from parliamentary sovereignty toward constitutional sovereignty[2], the *Canadian Charter* has [TRANSLATION] "transformed the constitutional principle of separation of powers, which – until then – placed the courts in a category of their own among the Government institutions – a category on the sidelines of political activity".[3] In fact, the Charter has transformed the judicial function[4], by compelling the judges to state the law based on major constitutional principles and values[5], the contents of which have been largely unspecified (dignity, equality, justice, freedom…), forcing judges to inexorably occupy political territory.[6]

While jurists' traditional dissociation between the law and politics may therefore be in danger of obsolescence, it doesn't have more repercussions in civil society, where the law seems, more than ever, to be a [TRANSLATION] "mobilizable political resource"[7]. Of course, the political sphere continues to be the best place to ensure and further the rights of a community or a given group; however, in the era of the Charter of Rights, "the judicial arena is often an alternative to obstructing other spaces for expression and political debate"[8]. The courts may therefore be called upon to strengthen "any weaknesses of democracy by providing a voice and a remedy for those excluded from equal and effective democratic participation in our society"[9].

And so mobilization of the law for political purposes may be used to [TRANSLATION] set up a favourable power relationship"[10]. Nevertheless, it is resolutely not this path that the unions have traditionally preferred to take, in order to come out from underground and establish their legitimacy in their relations with their employers. It is in the political sphere that they initially invested their efforts to obtain recognition as legitimate representatives of employees in a workplace. And it is the legislative branch – as opposed to the judicial branch – that would eventually provide them with such recognition, acquired after a brave struggle. Only an affirmed legislative intent therefore allowed the unions to fully fulfill their role as agent of social change, in their capacity as political actor (I).

However, this intent is obviously no longer being expressed with the same force today. Along with the progressive decline in the rates of unionization noted in Canada, there is a certain stagnation in labour legislation.[11] Aware of the neo-liberal trend that has been prevailing since the 1980's, the Government "largely banks on the free process of market forces to regulate economic development, and rejects Government intervention[12]. Legislative action therefore

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1. *Canada Act,* 1982, 1982, ch. 11 (U.K.), in R.S.C. (1985), App. II, no. 44 (infra: "*Canadian Charter*").
2. *Vriend* v. *Alberta,* [1998] 1 S.C.R. 493, p. 563 (para. 131); *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217, p. 258 (para. 72).
3. Henri BRUN, Guy TREMBLAY & Eugénie BROUILLET, *Droit constitutionnel,* 5th ed., Cowansville, Éditions Yvon Blais, 2008, p. 794.
4. Michel COUTU & Georges MARCEAU (with the collaboration of Annie Pelletier and Karine Pelletier), *Droit administratif du travail : Tribunaux et organismes spécialisés du domaine du travail,* Cowansville, Éditions Yvon Blais, 2007, p. 42-43
5. *Id.,* p. 75.
6. BRUN, TREMBLAY & BROUILLET, *supra,* note 3, p. 788 et seq.
7. Pierre NOREAU, "Le droit comme vecteur politique de la citoyenneté. Cadre d'analyse pour l'étude des rapports collectifs entre majorité et minorités", in Michel COUTU, Pierre BOSSET, Caroline GENDREAU & Daniel VILLENEUVE (dir.), *Droits fondamentaux et citoyenneté : Une citoyenneté fragmentée limitée illusoire?,* Montreal, Thémis, 2000, 323, p. 330; Pierre NOREAU & Élizabeth VALLET, "Le droit comme ressource des minorités nationales : un modèle de mobilisation politique du droit", in Pierre NOREAU & José WOEHRLING (dir.), *Appartenances, institutions et citoyenneté,* Montreal, Wilson & Lafleur Ltée, 2005, 55, p. 56.
8. NOREAU (2000), *id.,* p. 330.
9. *R.* v. *Holmes,* [1988] 1 S.C.R. 914, p. 932 (Dickson J.).
10. NOREAU & VALLET, *supra,* note 7, p. 65.
11. Jean BERNIER et al. (dir.), *L'évolution des formes d'emploi et la redoutable stagnation des lois du travail,* 56e Congrès des relations industrielles de l'Université Laval, Quebec, Presses de l'Université Laval, 2001; Gilles TRUDEAU, "La grève au Canada et aux États-Unis : d'un passé glorieux à un avenir incertain", (2004) 38 *R.J.T.* 1, p. 48: [TRANSLATION] "Labour law is fossilized in North America at the present time."
12. Jacques ROUILLARD, "Les colonnes du temple néolibéral ébranlées", *Le Devoir,* October 3, 2008, p. A-9.

tends much more toward deregulation, privatization, market liberalization and tax relief than toward greater protection of social rights. The result: [TRANSLATION] "These changes have undermined the power relationship that the unions have in dealing with employers and have eroded their political influence"[13]. Under such conditions, politicians' apparent loss of interest in workers is likely to raise the mobilization of the law to the ranks of a new type of pressure tactic, with the judge, from now on, being urged to substitute for the legislature, in the quest for greater social justice. In this respect, the guarantee of freedom of association stipulated in the Canadian Charter offers new prospects (II).

I. THE UNION: A POLITICAL ACTOR

The *Constitution Act, 1867*[14], the act that founded Canada, chose to overlook the matter of labour relations, somewhat as though the Constituent wanted to erase the reality of it. At that time when economic liberalism was triumphant[15], employer-employee relations had something of the nature of mere contractual freedom, with work coming under "property" and "civil rights" in substance[16]. Strongly steeped in the principle of contractual autonomy, ordinary rules of law – which are expressed in common law or civil law – couldn't easily apprehend the "atypical" reality of collective labour relations, where a third party – the union – intervenes and "erects a screen"[17] in a relationship designed to be fundamentally bipartite between *one* employer and *one* employee. It was therefore on the sidelines of the law that union activity first unfolded (1.). However, the intrinsic inequality of relations between the employer and its subordinates aroused among the latter such a feeling of injustice that the legislature, through lack of power to repress it, channelled it by setting up a singular legal system that, to a great extent, was very separate from common law. This recognition of the union actor, by the law, gave it a legitimacy that would, as a result, foster the emancipation of social rights (2.).

1. Union action on the sidelines of the law

While the legal system in place at the beginning of Confederation was rather minimal, it already included the fundamental distinction between public law (mainly similar to criminal law) and private law. However, both of these spheres of law contributed, each in its own way, toward destroying what is called "freedom of union association" today. It was therefore clandestinely and illegally that the union movement built its foundation. Not only did the law, in times past, not recognize the legitimacy of the unions as "political actors", but it also even denied their existence from a legal standpoint.

For criminal law, the union phenomenon therefore could be likened to an illicit coalition, sometimes to violate a contract to the detriment of the employer[18], sometimes "to restrain commerce"[19] or "to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce".[20]

To therefore avoid potential legal action, for fear of being caught[21], [TRANSLATION] "some unions instead set themselves up as mutual benefit associations, types of cooperatives aimed at coming to the assistance of their members in case of accident, illness or death".[22]

In 1872, twenty-four union leaders in Toronto, who were on strike to have the working day in the printing industry be reduced to nine hours, were charged with criminal conspiracy.[23] The case created such a stir among the public that the Federal government, following the British example, worked out an exception to the law, in favour of "workers' associations". According to the terms used, "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful..."[24]. There is widespread consensus that through such legislative intervention, union activity, to a certain extent, [TRANSLATION] "became legal – granted, not through a general affirmation – but rather through immunities with regard to criminal law".[25] It was, so to speak, [TRANSLATION] "the first conquest of freedom of union association"[26], as modest as it may seem to be:

> *[TRANSLATION] "Although significant in itself, this legislative intervention did not appreciably improve the unions' position. [...] The laws of 1872 required, as a condition of accessing the benefits that they established, that the unions register with the government, which very few unions did. It was only in 1892 that the benefit of the liberalization*

13. Jacques ROUILLARD, "Les déboires du syndicalisme nord-américain (1960-2003)", *Bulletin du Regroupement des chercheurs et chercheuses en histoire des travailleurs et travailleuses du Québec,* vol. 30, no. 1 (79), spring 2004, 4, p. 22.
14. 30 & 31 Victoria, c. 3 (U.K.), in R.S.C. (1985), App. II, No. 5.
15. Fernand MORIN, Jean-Yves BRIÈRE & Dominic ROUX, *Le droit de l'emploi au Québec,* 3rd ed., Montreal, Wilson & Lafleur Ltée, 2006, p. 75 (para. I-64).
16. *Id.,* s. 92 (13).
17. *Noël v. Société d'énergie de la Baie James,* [2001] 2 S.C.R. 207, p. 228 (LeBel J., para. 42).
18. As it may be recalled, [TRANSLATION] "an employee who unilaterally violated his labour contract committed a criminal act": Laurent QUINTAL, "L'évolution des lois du travail et de la sécurité sociale au cours des 100 dernières années", *Gazette du travail,* Vol. 3, No. 4 – *édition centenaire* (centennial issue), p. 58. See, for example, *An Act respecting Masters and Servants in the Country Parts,* C.S.L.C. 1861, c. 27, s. 5, repealed in 1877 by *An Act to repeal certain laws making Breaches of Contract of service criminal, and to provide for the punishment of certain Breaches of Contract,* 40 Victoria, c. 35, s. 365.
19. According to the expression used in codifying the *Criminal Code* of 1892, 55-56 Victoria, c. 29, s. 516.
20. *Id.,* s. 520, paragraph a).
21. Antoine JEAMMAUD, "Les règles juridiques et l'action", *Recueil Dalloz Sirey,* 1993, 29e Cahier, Chronique LV, 207, p. 208.
22. As for Jacques ROUILLARD, *Le syndicalisme québécois : Deux siècles d'histoire,* Montreal, Boréal, 2004, p. 21, and Pierre VERGE & Gregor MURRAY, *Le droit et les syndicats : Aspects du droit syndical québécois,* Quebec, Presses de l'Université Laval, 1991, p. 14, they refer to [TRANSLATION] "friendship associations".
23. In particular, see Mark CHARTRAND, "The First Canadian Trade Union Legislation: An Historical Perspective", (1984) 16 *Ott. L. Rev.* 267.
24. *Trade Union Act,* 35 Victoria, c. 30, s. 2.
25. Christian BRUNELLE & Pierre VERGE, "L'inclusion de la liberté syndicale dans la liberté générale d'association : un pari constitutionnel perdu?", (2003) 82 *C.B.R.* 711, p. 737.
26. MORIN, BRIÈRE & ROUX, *supra,* note 15, p. 831 (para. IV-12).

of criminal law broadened to the Canadian union movement as a whole."[27]

While the stranglehold of criminal law was slowly being relaxed, the "civil" legality of union activity was not acquired for all that. On the one hand, the union associations were still obscure in the law, as they didn't even have a juridical personality. That [TRANSLATION] "structure of law"[28], whose main function is to allow "communication between the real world and the abstract, intellectual world of law"[29], didn't correspond to the unions' collective dimension; therefore, even if they succeeded in negotiating agreements with employers, they couldn't go before the courts to have their labour contracts honoured.[30] In the eyes of the law, the Union was therefore reduced to the ranks of a [TRANSLATION] "non-being".[31] While we can easily evaluate the considerable inconveniences of such non-recognition of the juridical personality, it must be acknowledged that it wasn't necessarily incompatible with the [TRANSLATION] "unions' aspirations of those times, which were more focused on freedom of autonomous action".[32] Not to mention the fact that [TRANSLATION] "the *de facto* associations could therefore escape the legal consequences of their acts".[33] Must we mention, as a reminder, that conducting illegal activities may, at times, be [TRANSLATION] "an expression of rejection, on the part of the majority, of both the justice and political systems"[34]?

However, not only would the civil courts become staunch guardians of legality, but they would also define it in such a way that freedom of union association would continue to be excluded from it, to a large extent. And so we then witnessed the era of "government by injunction"[35], the intrusion of judicial power in labour relations.

Employers that were subject to union pressure tactics, most often due to their categorical refusal to negotiate with the union[36], would immediately call upon judges to intervene. In turn, the judges didn't hesitate to issue injunctions in order to – as the case may be – put an end to a strike, stop or limit the use of picketing[37], ensure respect for the employer's property and free access to its establishment, prohibit a boycott[38], bring an end to the use of threats, intimidation or violence…[39]. And this is how [TRANSLATION] "injunctions became a formidable judicial weapon to serve employers in their merciless war against the growth of unionism".[40] Moreover, employers made the most of the law of civil liability in order to bring the unions under control[41], therefore contributing toward suppressing [TRANSLATION] "the freedom of action granted by the revocation of penal sanctions".[42]

In short, upon the employers' initiative, the judges became key players in collective labour relations starting in the late 19th century; however, the workers and their associations didn't take long in noting that on the scales of justice, the pan of freedom of association was distressingly light.[43] From there to concluding that judges weren't impartial and had a real bias in favour of employers, there was only one step that the union movement didn't delay in taking.[44] Obviously, its quest for better protection of freedom of union association prompted it to vest, instead, the sphere of political action.

2. Union activity legitimized by the law

At the beginning of the 20th century, the law tolerated union activity, but didn't do the same for promoting it; nevertheless, the country's rapid industrialization at the time required manpower in increasing numbers. And it is precisely through the strength of numbers that the workers would succeed in convincing elected officials of the need for policies that were more favourable to unionization.

Soon after the Great Depression that thunderstruck North America in the late 1920's, U.S. politicians desperately sought to ensure economic recovery. Legislative recognition of employees' right to collectively bargain for their working conditions was among the measures – grouped together under the evocative term of "New Deal" – intended to take the country out of its crisis.

27. TRUDEAU, *supra,* note 11, p. 14.
28. Édith DELEURY & Dominique GOUBAU, *Le droit des personnes physiques,* 3rd ed., Cowansville, Yvon Blais, 2002, p. 3.
29. *Ibid.* (quoting G. GOUBEAUX).
30. Joseph M. WEILER, "Le rôle du droit dans les relations du travail", in Ivan BERNIER & Andrée LAJOIE (coor.), *Le droit du travail et le droit urbain au Canada,* Royal Commission on the Economic Union and Development Prospects for Canada, Ottawa, Supply and Services Canada, 1986, chap. 1, p. 4.
31. MORIN, BRIÈRE & ROUX, *supra,* note 15, p. 865 (para. IV-28). In this regard, see *International Ladies Garment Workers Union* v. *Rother,* (1923) 34 B.R. 69, p. 79-80 (Rivard J.).
32. VERGE & MURRAY, *supra,* note 22, p. 116.
33. *Id.,* p. 123. Judy FUDGE & Eric TUCKER, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948,* Don Mills, ON, Oxford University Press, p. 29, 32-33 & 47, in fact mention, as a reminder, that employers apparently tried but failed to lobby the politicians for compulsory incorporation of the unions.
34. NOREAU & VALLET, *supra,* note 7, p. 65.
35. FUDGE & TUCKER, *supra,* note 33, p. 32.
36. As TRUDEAU (*supra,* note 11, p. 6) rightfully mentions, as a reminder: [TRANSLATION]: "Strike action and boycott of employers that resisted recognizing the existence of a union association or accepting its demands were the only response options that the union movement had to assert its point of view."
37. In the colourful language that contributed to his renown, unionist Michel Chartrand stated, back in 1976: [TRANSLATION]: "Each judge violates the *Criminal Code* more than the previous one. The right to strike and to picket has been in the *Criminal Code* since 1872. It would seem that the judges don't know this. They grant injunctions that force workers to stay 500 to 2,000 feet away from the plant and nothing can be done about it other than not to comply with these injunctions.": Michel CHARTRAND, *Les dires d'un homme de parole,* Edition prepared and introduced by Fernand FOISY, Montreal, Lanctôt éditeur, 1997, p. 215.
38. FUDGE & TUCKER, *supra,* note 33, p. 28.
39. Jacques ARCHAMBAULT, "'Injonctions et conflits du travail", (1979) 34 *Relations industrielles* 140, p. 149; Fernand MORIN, "L'injonction en temps de grève", (1977) 32 *Relations industrielles* 414, p. 430-431; Fernand MORIN, *Rapports collectifs de travail,* 2nd ed., Montreal, Thémis, 1991, p. 501.
40. TRUDEAU, *supra,* note 11, p. 10.
41. Harry W. ARTHURS, "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship", (1960) 38 *Can.Bar Rev.* 346; Harry W. ARTHURS, "Labour and the 'Real' Constitution", (2007) 48 *C. de D.* 43, p. 58: "Tort doctrines, such as conspiracy to injure, inducing breach of contract and wrongful interference with economic rights were developed with the transparent purpose of curbing union power."; BRUNELLE & VERGE, *supra,* note 25, p. 737. As pointed out by FUDGE & TUCKER, *supra,* note 33, p. 23: "Damage actions lodged against trade unions threatened strike funds, which enable striking workers and their families to survive".
42. WEILER, *supra,* note 30, p. 4.
43. FUDGE & TUCKER, *supra,* note 33, p. 26: "Workers and their unions saw that their privileges to strike and engage in tactics of persuasion were being eroded by a judiciary bent on preserving a scanted version of public order and protecting employers' rights of property and contract. To them, their precarious legislative victories were being attacked by judicial decree."
44. ARTHURS (2007), *supra,* note 41, p. 46 & 58; Judy FUDGE & Harry GLASBEEK, "The Legacy of PC 1003", (1995) 3 *C.L.E.L.J.* 357, p. 363-364; FUDGE & TUCKER, *id.,* p. 32.

Starting in 1933, a wave of strikes[45], punctuated with violent confrontations, swept through the United States; a government commission – the National Labour Board – was created to try and curb it, but its powers were rather limited. Democrat senator Robert Ferdinand Wagner – who was entrusted with the responsibility of chairing this Board made up of three employer representatives and as many union representatives[46] – came up against employer resistance in his various attempts to improve labour relations.[47] He then became aware of the need to provide a legal framework for the bargaining process, by radically changing the power relationship between employers and employees, to ensure a better balance by assigning greater powers to the unions. In his opinion, the [TRANSLATION] "social role of organized labour had to be recognized".[48]

Following a few unsuccessful attempts to have a bill passed to this effect[49], he tried again once more in February 1935.[50] This time, his perseverance proved profitable. On July 5 of that same year, U.S. President Franklin Delano Roosevelt placed his signature on the bill that had initially been passed by the House of Representatives:

> *[TRANSLATION] "This legislation concretely recognized the right of association, settled the details of the legal mechanisms making it possible for the workers to choose a union to represent them, gave it exclusive bargaining rights and prohibited a certain number of unfair practices in labour relations matters."* [51]

Apparently, the Wagner Act was based on four main objectives, the first two relating to mainly economic concerns and the others expressing more of a democratic concern:

1) *to promote industrial peace by reducing labour disputes, which are the source of social unrest that obstructs commerce*
2) *to restore "the purchasing power of wage earners in industry" so as to facilitate "the free flow of commerce" by curtailing pay cuts*
3) *to promote a fairer redistribution of wealth "by restoring equality of bargaining power between employers and employees"*
4) *to make workplaces democratic* [52]

Under these circumstances, by forcing the employer to recognize the employees' right to form or join an association of their choice to negotiate their working conditions, through collective action, the U.S. legislatures gave employees a powerful tool to fight against the omnipotent employers:

> *[TRANSLATION] "[...] there is no way for a worker to individually defend his most vital interests against employers' authority: only occasional collective action – a strike – or continuous action – a union – can rebalance, in employees' interests, a dialogue which, if engaged in individually, boils down to the statement for the employer, on the strength of its economic power, of its wishes.* [53]

The Wagner Act, [TRANSLATION] "the cornerstone of the labour relations system in the U.S."[54], was then imitated in Canada. Labour organizations, a number of which were satellites of U.S. unions, in a way [55], stepped up pressure against the Federal government, so that employers were obliged to take part in collective bargaining from then on.

On March 20, 1944, in the midst of World War II, *Wartime Labour Relations Regulations* [56], enacted by Mackenzie King's government under the *War Measures Act* [57], came into effect.[58] Like the Wagner Act and for the very first time at the Federal level, these regulatory standards guaranteed employees a genuine right to impose on their employer collective bargaining of their working conditions by the union of their choice.[59] Up until then, Canadian politics were mainly based on consensualism: the employer was free to recognize, or not, the union association chosen by the employees for the purpose of negotiating their working conditions.

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45. Arthur M. SCHLESINGER Jr., *The Coming of the New Deal,* Boston, Riverside Press Cambridge, 1959, p. 145: "In June 1933, the Bureau of Labor Statistics reported 137 new strikes, in July 240, in August 246; by September nearly 300,000 workers were out."
46. Joseph G. RAYBACK, *A History of American Labor,* New York, Free Press, 1966, p. 330; SCHLESINGER, *id.,* p. 146-147.
47. SCHLESINGER, *id.,* 148-149.
48. Serge DENIS, *Un syndicalisme pur et simple: mouvements ouvriers et pouvoir politique aux États-Unis, 1919-1939,* Montreal, Boréal, 1986, p. 215.
49. *Id.,* p. 215-216.
50. To find out the developments in and the content of the various texts that led to the *Wagner Act,* see Kenneth CASEBEER, "Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act", (1989) 11 I.R.L.J. 73.
51. Gérard DION, *Dictionnaire des relations du travail,* 2nd ed., Quebec, Presses de l'Université Laval, 1986, p. 507 *("Wagner Act").*
52. James J. BRUDNEY, "A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process", (1996) 74 *N.C. L. Rev.* 939, p. 950.
53. Jean RIVERO, "Les droits de l'Homme : droits individuels ou droits collectives ?", in Annales de la Faculté de droit et des sciences politiques et de l'Institut de recherches juridiques, politiques et sociales de Strasbourg, *Les droits de l'Homme: droits collectifs ou droits individuels,* tome XXXII, Paris, Librairie Générale de Droit et de Jurisprudence, 1980, p. 20.
54. René LAPERRIÈRE, "États-Unis d'Amérique", in Antoine LYON-CAEN & Antoine JEAMMAUD (dir.), *Droit du travail, démocratie et crise en Europe occidentale et en Amérique,* Paris, Actes Sud, 1986, 189, p. 192.
55. René LAPERRIÈRE, "Canada et Québec", in Antoine LYON-CAEN & Antoine JEAMMAUD (dir.), *Droit du travail, démocratie et crise en Europe occidentale et en Amérique,* Paris, Actes Sud, 1986, 169, p. 170; Marie-Ange MOREAU & Gilles TRUDEAU, "Les modes de réglementation sociale à l'heure de l'ouverture des frontières: quelques réflexions autour des modèles européen et nord-américain", (1992) 33 *C. de D.* 345, 375; WEILER, *supra,* note 30, p. 32.
56. O.C.P.C. 1003, February 17, 1944, in *Canadian War Orders and Regulations,* 1944, vol. I, Ottawa, 1944, p. 465.
57. R.S.C. 1927, vol. IV, c. 206.
58. *Journals of the House of Commons of the Dominion of Canada,* vol. 84, 1945, 8 George VI, 202.
59. Judy A. FUDGE, "Voluntarism, Compulsion and the Transformation of Canadian Labour Law during World War II", in Gregory S. KEALEY & Greg PATMORE, *Canadian and Australian Labour History: Towards a Comparative Perspective,* St. John, Committee on Canadian Labour History, 1990, p. 81; Robert P. GAGNON, Louis LEBEL & Pierre VERGE, *Droit du travail,* 2nd ed., Quebec, Presses de l'Université Laval, 1991, p. 27; Gérard HÉBERT, "La législation sur les relations du travail au Canada et le C.P. 1003", (1995) 50 *Relat. Ind.* 85, 94: "L'obligation de négocier constituait le cœur de la loi".

Caught in the trap of its own logic, which consisted of trying to justify consensualism while imposing wage ceilings in order to control inflation, the Federal government was driven into a corner.[60] Privy Council Order no. 1003 would serve as an outlet for it, so to speak.

This Federal order recognized employees' right to be a member of a union, to take part in its legitimate activities, to elect bargaining agents by means of a majority vote, so that the employees elected in this way could undertake negotiations in order to enter into a collective agreement (labour contract). Initially designed as a temporary measure, while the war was on[61], this collective bargaining system subsequently remained intact and therefore paved the way for the *Canada Labour Code*[72], which is still in force today.[63]

In Quebec, it was also in 1944, through the *Labour Relations Act*[64] – passed just two weeks before the Federal government's Privy Council Order 1003[65] was issued – that the Quebec legislature made collective bargaining for working conditions by a duly accredited union a real "right" that could be enforced against the employer. Quebec distinguished itself, in this way, from the majority of the other Canadian provinces, which – during the World War – [TRANSLATION] "suspended their legislation and saw to it that the regulations (of wartime labour relations) were applicable within their jurisdiction."[66] Fearing that Ottawa would take advantage of the war to try and extend its hold over the whole sphere of labour relations – considered to come under provincial jurisdiction[67] – Quebec's National Assembly hastened to pass legislation.[68]

Drawn up on the basis of the U.S. model[69], the *Labour Relations Act* was the very first attempt by the Quebec legislature to develop collective labour relations.[70] This law was perceived as being a [TRANSLATION] "way of ensuring peace in the industry and of bringing about, without any direct intervention on the part of the government, the establishment of more appropriate working conditions".[71] Although the *Labour Relations Act* has since been subsumed under Quebec's *Labour Code*[72], the basic principles that it promoted still very much exist today.[73]

These main principles, modelled on the Wagner Act and common to all legislative collective labour relations regimes in force in Canada, may roughly be summarized as follows:

a) recognition of employees' right to associate in order to freely form a union association and take part in its lawful activities

b) establishment of a procedure aimed at having a specialized administrative tribunal (a labour relations board) determine the representative nature of the union association or the membership of the bargaining unit

c) granting exclusive representation to the union chosen by an absolute majority of employees in the bargaining unit

d) protection of employees' right to collectively bargain for their working conditions:

   - *by prohibiting certain practices deemed to be unfair*
   - *by requiring the parties to negotiate in good faith*
   - *by giving the parties vast discretion with regard to the content of the collective agreement*
   - *through the possibility of exercising, at very specific times, recourse to strike or lock-out in order to influence the course of the negotiations*

e) affirmation of the compulsory effect of the collective agreement and introduction of an exclusive arbitration procedure in order to ensure compliance.[74]

It is mainly political demands, made by the union movement, that prompted the elected representatives to entrench these principles in labour legislation. These principles are the outcome of an incessant battle on the part of the unions to obtain legal recognition favourable to their development, of course, but also to their autonomy, and in particular, in relation to judicial power.

II. THE JUDGE: A POLITICAL ALLY?

If we had to show, from a historical standpoint, the unions' ultimate motivation for obtaining institutional recognition by the law, it would probably lie in their craving for greater autonomy in their relations with employers. In this respect, judges' intervention to thwart – particularly by means of injunction – the pressure tactics applied by the union was invariably compared to unjustified interference, in favour of the employer, in relations that are nevertheless already fraught

60. FUDGE, *id.,* p. 89.
61. Laurel S. MACDOWELL, "The Formation of the Canadian Industrial Relations System During World War Two", in Laurel S. MACDOWELL & Ian RADFORTH (dir.), *Canadian Working Class History; Selected Readings,* Toronto, Canadian Scholars' Press, 1992, 575, p. 579, 583 & 590.
62. Rodrigue BLOUIN, *La juridiciarisation de l'arbitrage de grief,* Cowansville, Les Éditions Yvon Blais Inc., 1996, 20; Gregor MURRAY & Pierre VERGE, *La représentation syndicale : visage juridique actuel et futur,* Quebec, Presses de l'Université Laval, 1999, p. 11.
63. R.S.C. 1985, c. L-2 (hereinafter called the "*Canada Labour Code*").
64. S.Q. 1944, c. 30.
65. *Id.,* s. 3; Pierre VERGE, "Bref historique de l'adoption du monopole de la représentation syndicale au Québec", (1971) 12 *C. de D.* 303, p. 308.
66. WEILER, *supra,* note 30, p. 11.
67. On this presumption, see: *Northern Telecom Canada Ltd* v. *Communications Workers of Canada,* [1983] 1 S.C.R. 733, p. 749 (Estey J.), 772 (Dickson J.) & 779 (Beetz J.).
68. HÉBERT, *supra,* note 59, 101; Jacques ROUILLARD, *Histoire du syndicalisme au Québec,* Montreal, Boréal, 1989, p. 250.
69. LAPERRIÈRE, *supra,* note 55, p. 173; MORIN, *supra,* note 39, p. 32 (para. 0-28); Pierre VERGE & Guylaine VALLÉE, *Un droit du travail ? Essai sur la spécificité du droit du travail,* coll. Le droit aussi..., Cowansville, Les Éditions Yvon Blais Inc., 1997, p. 114.
70. MORIN, *id.,* 273 (para. III-17).
71. GAGNON, LEBEL & VERGE, *supra,* note 59, p. 27.
72. *Ibid.*
73. MURRAY & VERGE, *supra,* note 62, p. 11.
74. Christian BRUNELLE, *Discrimination et obligation d'accommodement raisonnable en milieu de travail syndiqué,* Cowansville, Éditions Yvon Blais, 2001, p. 37-38.

with inequality. In this context, we mustn't be surprised that the political demands made by the union movement to obtain government recognition also find expression in an intent to keep judicial power at a good distance away from collective labour relations (1.).

However, faced with a modern government shaken by various "crises" (a *budget* crisis, an *effectiveness* crisis, an *ideological* crisis and a legitimacy crisis…[75]) and that seems powerless, if not indifferent, toward the increasing inequalities, could it be that we are witnessing judicial power being restored to favour, a judicial power called upon as a reinforcement, to support the freedom of union association underlying the general freedom of association guaranteed by the Charter of Rights (2.)?

1. Collective autonomy in the face of judicial power

In their very design, labour codes leave relatively little place for judicial power. According to the legislature's original intent, the judge's intervention in collective labour relations was to be only under exceptional circumstances. This is accounted for by the fact that labour law is marked by a strong will for autonomy.[76] It is based on the premise that it is the parties to the labour relations themselves that are in the best position to agree, with full autonomy, on the rules that will govern their relations.[77] In unionized work environments, this concept is very deeply rooted; therefore, during most of the 20th century, [TRANSLATION] "[it] is collective autonomy that has been the preferred and dominating purpose of public politics in matters relating to employment"[78], with collective bargaining allowing [TRANSLATION] "the workers to exercise their ability *to govern themselves all by themselves*".[79]

Under such conditions, no wonder that the collective agreement was labelled the "law of the parties"[80] and that it was likened, no more no less, to "the workplace Charter"[81], to the internal system of corporate values[82], as if to better stress the normative completeness[83] – if not the supremacy – that the parties tend to attribute to it.[84]

In fact, the government has long refused to interfere in working conditions applicable to unionized working environments, preferring to leave the determination of the contents of the collective agreement to the free process of negotiation between the parties. This, in fact, explains why the terms of collective agreements may vary considerably, not only from one area of activity to another, but also from one company to another, based on its own reality.

As for the response to breaches of mutual obligations agreed upon by the parties to the collective agreement, there again it involves autonomist aims, which the legal system of collective labour relations is meant to reflect. On the one hand, the parties may determine themselves, through negotiation, the conditions that must be met by an employee in order for that employee to be able to have access to recourse when subject to a prejudicial measure attributable to the employer. For example, it isn't rare for an employee in a precarious job to be obliged to have worked a pre-determined number of working days or working hours, as set by the collective agreement, before being able to benefit from the grievance procedure that is provided for therein.[85]

On the other hand, even in cases where the collective agreement doesn't contain any probationary period, it is nonetheless the union that remains the real grievance holder, in the great majority of cases. In this capacity, it may, of course, submit this grievance to arbitration; however, it may just as well withdraw from it or opt to settle it by a private agreement, depending on the evaluation that it makes, based on the interests of the employee *and* all the members of the bargaining unit.[86] As long as the Union's decision in this regard does not involve any "bad faith" or "arbitrariness" nor any "discrimination", for example, it remains irrefutable.

And lastly, it should be mentioned that grievances don't fall within the jurisdiction of the law courts. Instead, it is the grievance arbitrator who has *exclusive* jurisdiction to determine "whether the conduct giving rise to the dispute between the parties arises either expressly or inferentially out of the collective agreement between them".[87] One fact that is significant, to say the least: it is the parties themselves who, in most cases, have the responsibility of appointing and compen-

75. COUTU & MARCEAU, *supra,* note 4, p. 24-27.
76. Guylaine VALLÉE, "Le droit du travail comme lieu de pluralisme juridique", in Céline SAINT-PIERRE & Jean-Philippe WARREN (dir.), *Sociologie et société québécoise : Présences de Guy Rocher,* Montreal, Presses de l'Université de Montréal, 2006, 241, p. 242 et seq.
77. Pierre VERGE, Gilles TRUDEAU & Guylaine VALLÉE, *Le droit du travail par ses sources,* Montreal, Thémis, 2006, p. 54 et seq.
78. VERGE, TRUDEAU & VALLÉE, *id.,* p. 59.
79. WEILER, *supra,* note 30, p. 63 (emphasis added).
80. *Isidore Garon ltée* v. *Tremblay; Filion et Frères (1976) inc.* v. *Syndicat national des employés de garage du Québec inc.,* [2006] 1 S.C.R. 27, p. 67 (LeBel J., diss., para. 98); BRUNELLE, *supra,* note 74, p. 48 & 253; Denis NADEAU, "La *Charte des droits et libertés de la personne* et le droit du travail au Québec : naissance d'un " nouveau salarié " dans un droit en mutation", (2006) *R. du B.* (Numéro thématique hors série) 399, p. 404 & 409.
81. GAGNON, LEBEL & VERGE, *supra,* note 59, p. 525. Professor VALLÉE, *supra,* note 76, p. 246, talks instead about a [TRANSLATION] "*negotiated* workplace charter" (emphasis added).
82. Donald D. CARTER, "The Duty to Accommodate: Its Growing Impact on the Grievance Arbitration Process", (1997) 52 *Ind. Rel.* 185, p. 186.
83. *Université McGill c. St-Georges,* [1999] R.J.D.T. 9 (C.A.), p. 29: [TRANSLATION] "...the collective agreement has been recognized as the law of the parties; it is placed *at the top of the normative hierarchy* of labour relations." (our emphasis) (Zerbisias J., *ad hoc,* diss., not contradicted on this point); Denis NADEAU, "L'arbitrage de griefs : vecteur d'intégration des droits de la personne dans les rapports collectifs du travail", in TRIBUNAL DES DROITS DE LA PERSONNE et BARREAU DU QUÉBEC (dir.), *La Charte des droits et libertés de la personne : pour qui et jusqu'où ?,* Cowansville, Éditions Yvon Blais inc., 2005, 153, p. 161. According to Professor VALLÉE, *supra,* note 76, p. 246, it is [TRANSLATION] "…the particular historical legitimacy of collective labour relations institutions [that] explains the *preponderant* status that they were recognized as having in relation to other applicable legal systems in workplaces" (emphasis added).
84. NADEAU, *id.,* p. 157-158.
85. In *Isidore Garon ltée* c. *Tremblay; Filion et Frères (1976) inc.* c. *Syndicat national des employés de garage du Québec inc., supra,* note 80, p. 99 (para. 183), LeBel J., dissenting, quite rightly pointed out that [TRANSLATION] "temporary or probationary employees generally don't have any protection against dismissal without just and sufficient cause".
86. *Centre hospitalier Régina Ltée* v. *Labour Court,* [1990] 1 S.C.R. 1330, p. 1349 (L'Heureux-Dubé J.); *Noël* v. *Société d'énergie de la Baie James, supra,* note 17, p. 232-233 (LeBel J., para. 54 & 55).
87. *Weber* v. *Ontario Hydro,* [1995] 2 S.C.R. 929, p. 963 (McLachlin J.); *Bisaillon* v. *Concordia University,* [2006] 1 S.C.R. 666, p. 686 (LeBel J., para. 33).
88. Robert P. GAGNON, "L'indépendance des arbitres : une exigence fragile et vitale", in BARREAU DU QUÉBEC, Service de la formation permanente, *Développements récents en droit du travail dans le secteur de l'éducation,* vol. 235, Cowansville, Éditions Yvon Blais, 2005, p. 88; Gilles TRUDEAU, "L'arbitrage des griefs au Canada : plaidoyer pour une réforme devenue nécessaire", (2005) 84 *Can.Bar Rev.* 249, p. 265 et seq.; Diane VEILLEUX, "L'arbitre de grief face à une compétence renouvelée…", (2004) 64 *R. du B.* 217, p. 264 et seq.

sating this arbitrator.[88] – which shows the autonomy they have in regulating their relations!

The fact of granting this exclusive jurisdiction to the grievance arbitrator is obviously not just a matter of chance. First and foremost, it was intended to be a response to the inefficiency or ineffectiveness of the traditional judicial structures, which are particularly poorly adapted to the singular – "collective" (we might say) – reality of labour relations:

> *[TRANSLATION] "[…] the grievances that protest against the ordinary courts relate to the very nature of these courts, to their traditional way of operating, to the rules of procedure to which they are subjected, to the long delays that result from them as well as to the often prohibitive cost that may prevent the parties from asserting their rights."*[89]

The desire of the parties to the collective agreement to [TRANSLATION] "remain masters of their own procedures"[90] also definitely militated in favour of grievance arbitration. In this respect, even though this matter seems rather scantily documented, it is not impossible that the unions' preference for this forum may be accounted for by their past lack of success before the judicial courts – which might partially be explained by the fact that the lawyers appointed to the judiciary mostly come from professional circles that are more sensitive to employers' interests.[91]

Be that as it may, while the legislature left relatively little doubt about its intentions to reserve the jurisdiction of enforcing and interpreting collective agreements for grievance arbitration boards, the law courts took their time in grasping the legislature's message.

In the name of the superintending and reforming power that has been granted to them under the Constitution, superior court judges have often intervened in the past to replace their interpretation of the collective agreement or the law with that of the grievance arbitrator. This [TRANSLATION] "inordinate use" of judicial control was often accounted for by the concern to bring the arbitrators back into the old ways of [TRANSLATION] "essentially liberal private law".[92]

However, since the early 1980's, "the beginning of the modern era of Canadian administrative law"[93], the superior courts have gradually abandoned the artificial and formalistic method[94] and have generally shown restraint in re-examining arbitration awards, out of consideration for the now recognized expertise of grievance arbitrators with regard to collective labour relations:

> *"In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system."*[95]

Of course, stricter compliance with this principle of deference doesn't officially prevent the parties to the collective agreement from using the judicial review process for instrumental purposes, whether to save time in order to bring about a negotiated settlement or to financially weaken the opposing party, for example. Nonetheless, strict compliance with the principle of deference may contribute toward dissuading the parties to resort to judicial review, which inevitably limits the judges' intervention in collective labour relations. Under such circumstances, collective autonomy is greatly strengthened.

However, the beginnings of this modern trend of administrative law – which bears witness, in its own way, to the relinquishment of a certain judicial conservatism in social matters[96] – coincided with the end of the so-called "thirty glorious years" (1950-1980), a favourable period that made it possible for the union movement to benefit from the legislative structures newly established on the heels of the Wagner Act. Within this context of sustained job creation, which therefore ensured the expansion of their numbers, the unions were urged to manage change and "progress", mainly by making collective bargaining deal with pay increase rates.[97] As a result, [TRANSLATION] "collective bargaining then made it possible to share productivity gains – i.e., give the workers a better standard of living, through pay increases as well as improve employee benefits and reduce work time."[98]

These union gains, obtained through direct negotiation with employers, then served as an inspiration for the legislature, as collective agreements became, in the eyes of the legislature, a wealth of ideas for implementing social policies:

> *[TRANSLATION] "Historically, the collective agreement played an important role in developing and implementing various social security measures for workers' well-being. For a long time, i.e., until World War II, the collective agreement,*

89. Émile GOSSELIN, "Nature et raisons d'être des tribunaux du travail", dans *Les tribunaux du travail,* XVI^e Congrès des relations industrielles, Québec, Presses de l'Université Laval, 1961, 17, p. 33.
90. *Id.,* p. 40.
91. COUTU & MARCEAU, *supra,* note 4, p. 13-14; Stephen BRICKEY & Elizabeth COMACK, "The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?", (1987) 2 *Can. J. Law & Soc.* 97, p. 99: "Granted, members of the Canadian judiciary, for example, have by and large been recruited from the ranks of capital and hold a reputation for their conservative orientation to decision making".
92. COUTU & MARCEAU, *id.,* p. 326.
93. *Dunsmuir* v. *New Brunswick,* 2008 SCC 9 (LeBel J., para. 35).
94. *Id.,* para. 43.
95. *Id.,* para. 49.
96. COUTU & MARCEAU, *supra,* note 4, p. 52. Along the same lines, ref.: Michel COUTU, "Le Tribunal des droits de la personne comme " gardien de la Constitution "", in TRIBUNAL DES DROITS DE LA PERSONNE and BARREAU DU QUÉBEC (dir.), *L'accès direct à un tribunal spécialisé en matière de droit à l'égalité : l'urgence d'agir au Québec ?,* Cowansville, Éditions Yvon Blais, 2008, 87, p. 94-95.
97. MORIN, BRIÈRE & ROUX, *supra,* note 15, p. 79 (para. I-68); Also see: FUDGE & GLASBEEK, *supra,* note 44, p. 389-390.
98. François AUBRY, "Le plein emploi, mythe ou réalité ?", *L'Action nationale,* vol. 88, no. 1, janvier 1998, p. 128.

to some extent, played a back-up role in this respect, in the absence of public plans. In this regard, at the unions' instigation, the collective agreement was the precursor of public plans for hospitalization insurance, health insurance and pension or disability plans."[99]

It is in this way that the unions played a non-insignificant role in developing many social laws. Over those years, they became a powerful political actor,[100] and a number of reforms that they successively demanded, supported and then defended, have benefited – and incidentally still benefit – the general public.

Nevertheless, the economic recessions that marked the start of the eighties and nineties, combined with the rise in neo-liberal ideology, the intensification and globalization of competition, rationalizations, job cutting, reorganizations or shutdowns of companies, budget cuts and the obsession with a zero deficit in the public sector, created an extremely unfavourable context for the union movement. In fact, the rates of unionization in Canada have been declining since the late seventies, particularly in the private sector.[101]

In this respect, while in the past, the Government had shown itself to be relatively sensitive to union demands, by favouring collective bargaining as a preferred means of recognizing "citizenship at work"[102], today, it is subject to substantial pressures [TRANSLATION] "to reduce its protective role on the labour market and limit its intervention in managing the economy".[103] These pressures, on which the Government doesn't always make the desired stand, tend to limit certain social programs and favour deregulation and privatization of certain services.[104]

Under such conditions, the unions' political action is more essential than ever. However, it could happen that it isn't enough to effectively thwart the attacks against freedom of union association. And what if judicial power – the enemy of yesteryear – were now to become an ally in this respect?

2. Freedom of union association protected by judicial power

When politicians remain indifferent to the problems faced in working environments, they inevitably force the unions to find an alternate solution to assert their demands and thereby hope to change public policies. In some cases, the judicial arena may constitute this alternate solution.[105] In fact, [TRANSLATION] "the courts have become the place to be heard for groups that parliamentary establishments in Quebec and elsewhere in Canada largely refused to listen to".[106] Accordingly, *court action,* simultaneously conceived of as a form of [TRANSLATION] "political participation"[107], and as the [TRANSLATION] "last recourse in political mobilization of law", may make it possible to obtain [TRANSLATION] "confirmation of rights that were believed to be acquired, but whose exercise is politically or materially compromised…".[108] In this respect, the *Canadian Charter of Rights and Freedoms,* due to its fully constitutional nature, has vast potential to offer.

Paragraph 2*d*) of this Charter recognizes that "everyone" is entitled to "freedom of association". During the debates that preceded the adoption of the Charter, the elected officials had suggested that at the end of this clause, it should be added "including freedom of union association and collective bargaining".[109] This proposal wasn't accepted, however, mainly because the concept of "freedom of association" was considered to be broad enough to include freedom of union association.[110] However, as things turned out, the courts didn't interpret it in the same way.

To define constitutional "freedom of association", the judges, from the outset, established a distinction between associational activity, on the one hand, and the objectives of the association, on the other, such that "freedom of association protects only the associational aspect of activities, not the activity itself".[111] In fact, this freedom was reserved for "the individual and not [for] the group formed through its exercise"[112]:

99. Jean BERNIER & André C. CÔTÉ, "Les accords d'entreprise au Canada", in Irena BORUTA & Henryk LEWANDOWSKI (dir.), *Les accords d'entreprise,* Acta Universitatis Lodziensis, Folia Iuridica 46, Chaire de droit du travail et de la sécurité sociale de l'Université de Lodz, Pologne, 1991, 15, p. 17.
100. Harry W. ARTHURS, "Developing Industrial Citizenship: A Challenge For Canada's Second Century", (1967) 45 *Can.Bar Rev.* 786, p. 807; Donald D. CARTER, "Canadian Labour Relations under the Charter", (1988) 43 *Ind. Rel.* 305, p. 307; Mona-Josée GAGNON, *Le syndicalisme : état des lieux et enjeux,* coll. Diagnostic (vol. 17), Quebec, Institut québécois de recherche sur la culture, 1994, p. 77; Gregor MURRAY & Pierre VERGE, "La représentation syndicale au-delà de l'entreprise", (1994) 35 *C. de D.* 419, p. 428 & 450. The Supreme Court of Canada unanimously recognized the legitimacy, and indeed, the necessity for unions to engage in political and social activities in order to conscientiously promote workers' interests: *Lavigne* v. *Ontario Public Service Employees Union,* [1991] 2 S.C.R. 211, p. 289 & 291 (Wilson J.), 333 (LaForest J.) and 350 (McLachlin J.). Along the same lines, see: David WRIGHT, "Unions and Political Action: Labour Law, Union Purposes and Democracy", (1998) 24 *Queen's L.J.* 1
101. Ernest B. AKYEAMPONG, "Aperçu statistique du mouvement syndical ouvrier", *L'emploi et le revenu en perspective,* vol. 9, no 4, hiver 1997, 50, p. 60 (Table 6); Ernest B. AKYEAMPONG, "Le mouvement syndical en transition", *L'emploi et le revenu en perspective,* vol. 5, no. 8, August 2004, p. 5; René MORRISETTE, Grant SCHELLENBERG & Anick JOHNSON, "La syndicalisation : tendances divergentes", *L'emploi et le revenu en perspective,* vol. 6, no. 4, avril 2005; GOUVERNEMENT DU QUÉBEC, Ministère du travail, *La présence syndicale au Québec en 2007* (written by: Alexis LABROSSE) [Online: http://www.travail.gouv.qc.ca/publications/rapports/bilanrt/pres_synd2007.pdf]
102. ARTHURS, *supra,* note 100.
103. MURRAY & VERGE, *supra,* note 62, p. 111.
104. *Id.,* p. 112.
105. NOREAU (2000), *supra,* note 7, p. 330-331; Judy FUDGE, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* case in Canada and Beyond", *Industrial Law Journal,* vol. 37, no. 1, March 2008, 25, p. 26 & 46.
106. Marie-France BICH, "Défense et illustration du droit québécois", *Sociologie et sociétés,* vol. XXXVI, no. 2, automne 1994, 57, p. 82.
107. NOREAU, *id.,* p. 339.
108. NOREAU & VALLET, *supra,* note 7, p. 68. Accordingly, as pointed out by JEAMMAUD, *supra,* note 21, p. 211: [TRANSLATION] "In the final analysis, the interest lie with mobilization of the rules of law…".
109. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada,* Ottawa, 1st session, 32nd legislature, Issue no. 43, Thursday, January 22, 1981, p. 43:68 (Svend Robinson, New Democrat M.P.).
110. BRUNELLE & VERGE, *supra,* note 25, p. 714.
111. *Canadian Egg Marketing Agency* v. *Richardson,* [1998] 3 S.C.R. 157, p. 227 (Iacobucci and Bastarache JJ., para. 105).
112. *Reference Re Public Service Employee Relations Act (Alb.),* [1987] 1 S.C.R. 313, p. 397 (Mcintyre J.).

"[…] freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual."[113]

Understood in this way, freedom of association has mainly protected "the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal"[114], and without being exposed to any interference on the part of the employer in setting up this association.

That being the case, even if exercising the right to strike could constitute the last recourse for a union, to achieve its objectives, that has in no way changed the fact that a Federal law[115], or a provincial one[116], could prohibit recourse to this pressure tactic, without this legislative option being able to be questioned on the authority of the *Canadian Charter.*

In keeping with the same logic, the majority of judges concluded that collective bargaining, even though it may "be the essential purpose of the formation of trade unions", [it] "is not an activity that is, without more, protected by the guarantee of freedom of association". According to the Supreme Court of Canada, since it wasn't "an activity that may lawfully be performed by an individual"[117], the legislature could restrict it without striking a blow at the freedom of association recognized by the Constitution.

We had to wait for the *Dunmore* judgement, handed down at the end of 2001[118], until it was accepted to add to this interpretation any notion of "individual", of a more significant collective dimension.[119] Called upon to rule on the validity of an Ontario law of 1995, which repealed another – adopted two years earlier – under which agricultural workers in the province had obtained the right to unionization, the Supreme Court of Canada declared the repealing act to have no force or effect on the legal foundation of paragraph 2*d*) of the *Canadian Charter.*

The Court recognized, for the very first time, that freedom of association can protect activities that are "collective in nature", in themselves, i.e., that "cannot, for one reason or another, be understood as the lawful activities of individuals". Aptly stressing that "individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot"[120], the Court added:

"[…] because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be 'the lawful activities of individuals'. Rather, the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d). […] It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning."[121]

For the Court, the "kernel" of freedom of association therefore included "the statutory freedom to organize […] along with protections judged essential to its meaningful exercise, such as freedom to assemble, freedom from interference, coercion and discrimination and freedom to make representations and to participate in the lawful activities of the association."[122] The Court reached these findings in favour of workers whose distinguishing features, it stressed, were their political impotence, their lack of resources to associate without state protection "and who, all in all, remained vulnerable "to reprisal by their employers".[123] It should be mentioned that this particular background fact was not obviously conducive to bursts of enthusiasm with regard to the question as to whether the Court was going to subsequently widen this gap that suddenly opened in its jurisprudence or whether it was going to work, instead, toward closing it.

Based on the decision reached in *Health Services and Support – Facilities Subsector Bargaining Assn.* v. *British Columbia*[124], handed down on June 8, 2007, it is the first assumption that tends to be confirmed. In this case, six unions and eight unionized workers claimed their constitutional freedom of association against a provincial law that was intended to reduce costs and facilitate efficient management of employees in the health care sector, by granting the employer more latitude to set up the working conditions as it pleased. This law, very quickly passed in order to cope with a "crisis

113. Id., p. 409.
114. *Id.,* p. 391.
115. *Public Service Alliance of Canada* v. *Canada,* [1987] 1 S.C.R. 424.
116. *RWDSU* v. *Saskatchewan,* [1987] 1 S.C.R. 460.
117. *Professional Institute of the Public Service of Canada* v. *Northwest Territories (Commissioner),* [1990] 2 S.C.R. 367, p. 404-405 (Sopinka J.).
118. *Dunmore* v. *Ontario (Attorney General),* [2001] 3 S.C.R. 1016.
119. Jamie CAMERON, "The 'Second Labour Trilogy': A Comment on *R.* v. *Advance Cutting, Dunmore* v. *Ontario,* and *R.W.D.S.U.* v. *Pepsi-Cola*", (2002) 16 *S.C.L.R.* (2d) 67, p. 83.
120. *Id.,* p. 1039 (Bastarache J., para. 16).
121. *Ibid.*
122. *Id.,* p. 1078 (para. 67).
123. *Id.,* p. 1060 (para. 41).
124. [2007] 2 S.C.R. 391.

of sustainability" in the health care system, according to the expression used by the Government[125], included, in particular, provisions meant to facilitate recourse to sub-contracting. For the employees concerned, this forced change of employer was inexorably accompanied by a considerable drop in wages[126], a deterioration of employee benefits and a loss of job security.[127] The law moreover had the effect of making null and void important provisions of collective agreements that were in effect at the time and prohibiting any real negotiations on certain matters.

Right away, the Court admitted that the "narrow focus" of freedom of association, which was the result of its initial decisions on the topic and which included only "individual activities" "has been overtaken by *Dunmore*".[128] According to the Court, the constitutional concept of freedom of association includes, from now on " a procedural right to collective bargaining"[129]:

> *"[…] the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment."*[130]

Freedom of association guaranteed by the Canadian Constitution therefore includes a real "collective right to good faith negotiations and consultation".[131]

For the Union movement, it was [TRANSLATION] "considerable progress"[132], a victory that was as important as it was unexpected. In fact, to say the least, it is surprising to see judicial power suddenly defend freedom of union association, inferred against all expectations of the *Canadian Charter,* whereas history reveals, instead, judges' propensity to repress most demonstrations.[133]

The fact nonetheless remains that the *Canadian Charter* definitely adds to the range of pressure tactics made available to unions. If public labour policies get tougher (or collapse) in favour of employers, the unions will be able not only to mobilize their members to try and soften government action, but also to mobilize the judges precisely for this purpose.

That being the case, the constitutional right to collective bargaining "is a limited right". On the one hand, it mainly concerns a "process": the attainment of union members' objectives and the results to which the bargaining is likely to lead benefit from no constitutional protection. On the other hand, the guarantee of freedom of association doesn't imply the right to demand a particular model of labour relations or a particular method of collective bargaining. The Canadian system of collective labour relations, based on exclusive union representation, therefore doesn't inevitably have any constitutional basis. And lastly, only *substantial* interference in freedom of association may justify a judicial review of the legislation being attacked.[134]

In order for the court to be able to decide that a government measure is substantially interfering with freedom of association, two conditions will have to be met: First, the measure will have to impact on "subject matter important to collective bargaining".[135] Secondly, this measure will have to have been imposed without any respect for the "fundamental precept of collective bargaining – the duty to consult and negotiate in good faith".[136]

Accordingly, in *Health Services and Support,* the Court considered legislative measures whose impact is:

> *i) not to allow the unions to limit, through collective bargaining, the employer's power to resort to subcontracting;*
> *ii) to do away with the provisions of existing collective agreements that impose on the employer an obligation to consult the union before resorting to subcontracting;*
> *iii) to prohibit the provisions of collective agreements that restrict, on the one hand, the employer's power to layoff employees and that limit, on the other hand, exercising bumping rights on the part of employees who are laid off in this way;*

"constitute a significant interference with the right to bargain collectively".[137] Such interference, the Court decided, could not be justified in a free and democratic society.

This sudden change in case law, with regard to the scope of constitutional freedom of association, is largely due to the important role that the Court seems willing to recognize international law as having from now on. In fact, in international law, the Court sees "a persuasive source for interpreting the scope of the *Charter*".[138]

Since the right to strike is at the heart of freedom of union association in international law[139], should we not deduce that it also forms an integral part of freedom of association within the meaning of the

125. *Id.,* p. 406 (McLachlin and LeBel JJ., para. 4).
126. Eric TUCKER, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada", *Labour/Le travail,* vol. 61 (Spring 2008), 151, p. 154.
127. *Id.,* p. 155.
128. *Health Services and Support – Facilities Subsector Bargaining Assn.* v. *British Columbia, supra,* note 124, p. 415 (McLachlin and LeBel JJ., para. 28).
129. *Id.,* p. 433 (para. 66).
130. *Id.,* p. 442 (para. 89).
131. *Id.,* p. 450-451 (para. 107).
132. Pierre VERGE, "La Cour suprême, le " droit " à la négociation collective et le " droit " de grève", (2006) 66 *R. du B.* 391, p. 392.
133. TUCKER, *supra,* note 126, p. 171.
134. *Health Services and Support – Facilities Subsector Bargaining Assn.* v. *British Columbia, supra,* note 124, p. 443-444 (McLachlin and LeBel JJ., para. 91).
135. *Id.,* p. 447 & 451 (para. 97 & 109).
136. *Id.,* p. 447 (para. 97).
137. *Id.,* p. 461 (para. 136).
138. *Id.,* p. 438 (para. 78).
139. BRUNELLE & VERGE, *supra,* note 25, p. 730-735. As pointed out by Professor TRUDEAU, *supra,* note 11, p. 41: [TRANSLATION] "Strike action is recognized by international law as an essential tactic available to workers to assert their economic and social interests."

Charter? While legal logic should demand a response in the affirmative[140], as for the Court, it preferred to fuel the mystery on the matter by preserving its leeway for the future, in so doing. In fact, there are no other explanations that can hold in order to justify this affirmation whose obviousness, however, is very evident in light of the facts of the decision: "We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association"…[141]

Needless to say, the unions won't fail to make the most of the potentialities of the decision. To solely take the example of Quebec, laws intended to limit the number of bargaining units in the social affairs sector[142], on the one hand, and to deny the status of "employee" (within the meaning of the *Labour Code*) to home childcare providers[143] or those who serve as intermediate family-type resources among children or adults in difficulty[144], on the other, these were declared inoperative pursuant to the constitutional guarantee of freedom of association.[145]

Other fundamental issues might eventually have to be debated before the courts, on the unions' initiative. We know, for example, that strike action continues to be "a special vehicle of expression of worker solidarity, and as such, an instrument of political and ideological demands."[146] And yet, in the name of the objective of "industrial peace", well-rooted in collective bargaining, exercising the right to strike is so well-defined by labour codes that strike action is prohibited there, all throughout the term of the collective agreement.[147]

Consequently, given the present state of the law, workers who feel they have been wronged by some government measure that is contrary to their occupational interests may not take joint action to stop working all together, as a political pressure tactic against the government, unless, by some coincidence we might say, they are within a period set by labour legislation and during which exercising their right to strike has been established.[148] However, the day is perhaps not so far away when the unions will invoke their constitutional freedom of association to contest the restrictions that present labour legislation is imposing on their "mere freedom to engage in a political strike"[149]:

> *[TRANSLATION] "Being strikes conducted against the public authority, thereby pursuing a vast, but genuine occupational interest, the restrictions that may be placed on these strikes by the law governing collective labour relations therefore go against freedom of union association."*[150]

Nevertheless, even if large-scale union activities, such as strikes, were likely to eventually be excluded from the constitutional protection offered by freedom of association, such activities might still find refuge, sheltered under the freedom of expression guaranteed by paragraph 2*b*) of the *Canadian Charter.*[151] And this is how the right to form picket lines[152] or distribute leaflets, for example, to call upon consumers to boycott the employer[153], are considered to be expressive activities that come, *a priori,* under constitutional freedom of expression.

Conclusion

It has previously been written that [TRANSLATION] "a courtroom isn't an appropriate platform for drawing up a collective bargaining policy".[154] That statement still holds true today.[155] The political forum must continue to be the union's best place for advancing workers' cause, strengthening their freedom of union association and promoting greater social justice:

> *[TRANSLATION] "In an area as controversial, conflictual and delicate as labour relations, the open, public and democratic procedure of the legislature is infinitely preferable to the closed, narrow and limited procedure of the courts."*[156]

However, faced with a Government that is still sometimes insensitive to the inequalities that are all too often found in relations between employers and employees, the unions have access to a new

140. FUDGE, *supra,* note 105, p. 43; Robert P. GAGNON, *Le droit du travail du Québec,* 6th ed. (under the direction of Yann BERNARD, André SASSEVILLE and Bernard CLICHE), Cowansville, Éditions Yvon Blais, 2008, p. 506-507 (para. 600); VERGE, *supra,* note 132, p. 398. As stated by Professor Jean BERNIER, [TRANSLATION] "Freedom of union association: collective and individual rights", in Rodrigue BLOUIN, Jean-Paul DESCHÊNES, Jean SEXTON and Alain VINET (dir.), *Le Code du travail du Québec 15 ans après…,* Actes du XXXIVe Congrès des relations industrielles de l'Université Laval, Quebec, Presses de l'Université Laval, 1979, chap. 3, p. 59: [TRANSLATION] "From its collective standpoint, freedom of union association includes, of course, […] the right to collective bargaining *and its legitimate consequence – the right to strike*" (emphasis added).
141. *Health Services and Support – Facilities Subsector Bargaining Assn.* v. *British Columbia, supra,* note 124, p. 412 (McLachlin and LeBel JJ., para. 19).
142. *An Act respecting bargaining units in the social affairs sector and amending the Act respecting the process of negotiation of the collective agreements in the public and parapublic sectors,* R.S.Q., c. U-0.1.
143. *An Act to amend the Act respecting childcare centres and childcare services,* S.Q. 2003, c. 13.
144. *An Act amending An Act respecting health services and social services,* S.Q. 2003, c. 12.
145. *Confédération des syndicats nationaux* c. *Québec (Procureur général),* 2007 QCCS 5513 (CanLII); [2008] R.J.D.T. 87 (C.S.) (in appeal: no. 500-09-018310-078); *Confédération des syndicats nationaux* c. *Québec (Procureur général),* 2008 QCCS 5076 (CanLII); D.T.E. 2008T-885 (C.S.). For comment relating to the first of these two decisions handed down by the Superior Court of Quebec, which expresses certain reservations in relation to the soundness of the interpretation adopted with regard to recent jurisprudence of the Supreme Court of Canada, see Pierre VERGE, "La protection constitutionnelle du droit à la négociation collective et le réaménagement légal de représentation collective dans le secteur des affaires sociales du Québec" ([TRANSLATION] "The constitutional protection of the right to collective bargaining and legal reorganization of collective representation in the social affairs sector in Quebec): *C.S.N.* c. *Procureur général du Québec",* (2008) 14 *C.L.E.L.J.* 99.
146. TRUDEAU, *supra,* note 11, p. 5.
147. *Labour Code,* R.S.Q., c. C-27, s. 107; *Canada Labour Code,* R.S.C. (1985), ch. L-2, s. 88.1.
148. VERGE & MURRAY, *supra,* note 22, p. 358-359.
149. *Id.,* p. 365.
150. Pierre VERGE, *Le droit de grève : fondements et limites,* Cowansville, Éditions Yvon Blais, 1985, p. 222.
151. Judy FUDGE, "Lessons From Canada: The Impact of the Charter of Rights and Freedoms on Labour and Employment Law, in Keith D. EWING (dir.), *Human Rights at Work,* London, Institute of Employment Rights, 2000, chap. 7, p. 186.
152. *RWDSU* v. *Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573, 587-588 (McIntyre J.); B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214, 230 et seq. (Dickson CJ); R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156, 172-174 (McLachlin CJ and LeBel J., para. 32-35).
153. *U.F.C.W., Local 1518* v. *Kmart Canada Ltd.,* [1999] 2 S.C.R. 1083, 1099 - 1107 (Cory J., para. 21-33).
154. Gérard V. LA FOREST, "Droit du travail et Charte à la Cour suprême du Canada", in Brian D. DRUCE (dir.), *Le travail, le chômage et la justice,* Montreal, Thémis, 1994, 245, p. 246.
155. BICH, *supra,* note 106, p. 80.
156. Guy ROCHER, "Les fondements de la société libérale, les relations industrielles et les Chartes", in Rodrigue BLOUIN et al., *Les Chartes des droits et les relations industrielles,* Actes du XLIIIe Congrès des relations industrielles de l'Université Laval, Quebec, Presses de l'Université Laval, 1988, 1, p. 15.

pressure tactic: recourse to judges, [TRANSLATION] "guardians of the Constitution"[157]… and therefore of freedom of association.

Nevertheless, caution is still a must. In the present state of the law, the case law door recently opened to freedom of union association is still not open wide, and a sudden wind (from the right?), may come and close it again at any moment. And no matter what people say, within today's socio-economic context, it may not be so much the Government, but rather judicial power, that holds the key…

157. COUTU, *supra,* note 96, p. 96 et seq.

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THE LEGITIMACY OF THE CONTEMPORARY JUDGE AND THE PUBLIC IMAGE OF THE JUDICIARY AMBIGUITY AND TRANSFORMATION OF AN AUTHORITY FIGURE

The theme of this conference – *"Which judge for which society?"* – prompts us to reflect, out of necessity, on the public image of the judge – the image that the judge projects in the public sphere. This image obviously leaves its mark on public opinion. We can fully evaluate this image only by inquiring directly at the source – that is, by asking the public itself. However, we also know, as pointed out by Roderick A. Macdonald in this publication of the conference proceedings, that this image is the product of constant media reconstruction. In particular, Florian Sauvageau makes such remarks in this regard, which may also be found on these pages.

We will especially strive, here, to construct an image of the contemporary judge, based on the public's opinions and attitudes. Underlying this opinion poll, a more general question is asked: a question about the legitimacy of the judge as a figure of authority.

1. The judge in contemporary democratic society

Such questioning is extremely important within democratic societies. The democratic principle is largely based on the notion of consent. What distinguishes these societies from authoritarian or totalitarian ones is citizens' right to play a role in defining their own destiny. From a personal standpoint, it is recognition of individuality. From a collective point of view, it's the notion that society must orient itself based on the will of the majority[1]. The democratic ideal therefore doesn't just purely and simply boil down to implementing (or imposing) one system of government in particular. To some extent, as Alexis de Tocqueville aims to show, it is a cultural fact[2], whereby the will of the majority isn't just the basis for a form of tyranny of the majority[3]. Democratic life implies a certain predisposition on the part of the public, toward one another. It places citizens of all origins, or all statuses, side by side, in a relationship of equality. It is a demanding ideal. From the standpoint of the organization of political power, it simultaneously implies recognition of the equality of the public's participation in public life, and also the public's ability to appoint those who hold public authority, or else contest the value of the decisions reached on their behalf. It follows that the right "not to agree" is fully part of the democratic principle. As a result, democratic society, within its very principle, is an anti-authority society. It constantly brings into play the conditions whereby public authority is exercised.

We immediately understand that this starting point makes relations between the public and traditional institutions particularly difficult. It is a tension from which the judiciary can't escape itself. The difficulty associated with a judge's status in the democratic public sphere must be especially acknowledged. For reasons that are well accounted for from a socio-historical point of view, the judge is in a position hinging on two very different conceptions of authority: that is, between a traditional conception and a rational, legal one (and therefore a more "modern" one) of legitimacy. Within a traditional conception of legitimacy, the public authority of a person is based on a status whose validity is solely earned, by itself, through the person's age. The priest, the head of a family, the monarch, the seignior, the shaman or the medicine man were able to benefit from the support of this type of so-called traditional legitimacy. It is valid to the extent that it always has been. That's what we learn from Max Weber, one of the fathers of contemporary sociology[4]. Designated authority, hereditary authority, authority established by rite or co-opted by the previous incumbents of this same authority – all these terms of designation are characteristic of incumbents of a traditional type of power.

1. John LOCKE, *Traité du gouvernement civil,* Paris, GF Flammarion, 1984, (par. 95), p. 250 et seq.
2. Alexis DE TOCQUEVILLE, *De la démocratie en Amérique* (Tome 2), Paris, Librairie Médicis (Éditions M, Th. Génin), 1951, (Parts 2 & 3), p. 129-389 and Pierre MANENT, *Tocqueville et la nature de la démocratie,* Paris, Commentaire Julliard, 1982, 181 pages.
3. Alexis DE TOCQUEVILLE, *De la démocratie en Amérique* (Tome 1), Paris, Librairie Médicis (Éditions M, Th. Génin), 1951, (Part 2, chapter 8), p. 129-389.
4. Max WEBER, *Économie et société* (volume 1), Paris, Plon (coll. Agora), 1995, p. 285 et seq.

In modern societies, we find a different method of legitimization, characterized – on the one hand – by the greater place occupied by the law and, on the other, by the recognition of "elected" authorities. He who holds power is the person who fulfills the legal conditions of his designation. It is the legal-rational legitimacy. Within democratic governments, constitutional law generally establishes electoral-type mechanisms: the holder of legitimate power is "legally elected". In a socio-historical (and liberally-inspired ideological) context built on the principle of equality of citizens, authority can, in fact, be recognized only with regard to the person to whom the others have entrusted it. Modern times therefore establish the idea of legitimacy based on consent. This principle constitutes a questioning of authority "in itself". It denies the idea of a traditional type of legitimacy.

We know that in the political arena, the legitimacy of legislative authority (in a variable way, depending on the political regime) and that of executive authority are based on the electoral principle and, more broadly still, on the principle of universal suffrage. On the other hand, we know that aristocracy or monarchy no longer have more than a symbolic or back-up function, even in a system based on British parliamentary tradition. Today, those who have political authority are elected officials.

By extension, we assume that granting political authority is a condition that guarantees that those who act in place and stead of their fellow citizens have the same interests and the same values. This is the principle of representativity. By that, we mean a number of things: both the notion that they are authorized, vis-à-vis (representatives) of the other political societies, to speak on behalf of those who have appointed them as their representatives, and also that those who hold such authority status have the values and references of those who appointed them and that their deliberations reproduce, to some extent, those of the society with itself.

This is a truth that has already been known a long time. In reading Montesquieu, we note this extraordinary idea of a man back in the 18th century, that those who hold power must have interests that are so similar to those who are under their power, that by serving their own interests, they are always more or less prompted to serve the interests of those who are under their authority. As for the function of a judge, he adds just as subtly that the position of a judge must not be the privilege of a specific class, but that judges must be chosen from among those for whom they will then be called upon to rule on a case:

> *[TRANSLATION] "The power of judging mustn't be given to a permanent senate, but rather exercised by people taken from the body of the population at a certain time of the year, in the manner stipulated by the law, to form a tribunal that lasts only as long as necessity so requires. In this way, with the power of judging – so tremendous among men – not being attached either to a certain government nor to a certain profession, it becomes virtually invisible and null. We don't constantly have judges before our eyes; and we fear the judiciary and not the judges."*[5]

We must, of course, put everything into the more general context of Montesquieu's writings; however, the overall principle still remains: Insofar as possible, judges and the public must share the same vision of the world, if not the same interests and the same aspirations. Rather than abstractly and naively stating that those who hold authority must be more virtuous than those who are subject to this authority, Montesquieu more prosaically affirmed the necessity that those who hold public power must exercise their authority under conditions and in keeping with references that are in accordance with the aspirations and representations of the individuals who are subject to the exercise of their power[6].

In exercising the authority with which he is entrusted, the judge encounters that particular difficulty of not benefiting from the representative (elective) legitimacy on which the contemporary criteria of public legitimacy is nevertheless based. On the contrary, his appointment is more generally the result of an atypical personal and professional development. Not everyone can become a judge and, in our political tradition, judges are not the winners of any election. A judge's appointment, when it comes in the form of a legal-rational type of legitimacy (we're thinking here of the provisions of the *Courts of Justice Act*), actually refers to an older, traditional method of legitimization. This situation requires, on the part of the judiciary, a constant reflection on the conditions whereby, in the absence of representative or electoral legitimacy, they must, in some way, muster the support of those who depend on their authority, in a context where authority "in itself" no longer benefits from the same public recognition as in previous centuries.

That's the big difference. Historical reality and the judge's particular institutional reality simultaneously require that he personify the social values of the community where he is assuming his judicial functions, at the same time as he must show a certain reserve. To reiterate an expression that has become canonical, he must occupy "a place apart"[7]. The question is more specifically one of knowing how the judge can, at one and the same time, be the carrier of the social values embodied in the law, while keeping a certain distance from society itself. That is a complex challenge to undertake, even though the judiciary has generally managed to do so over recent years, and in a number of different ways. I think that all the place occupied today by the judiciary's training activities give evidence of the way by which this necessary relationship between judicial activity and the changing geometry of values and social relations

5. Louis DE SECONDAT, baron de La Brède & DE MONTESQUIEU, *De l'Esprit des lois, in Œuvres complètes* (Tome II), Paris, Librairie Gallimard, 1951.
6. We might say "in keeping with the same 'social representations' ". We are referring here to a notion taken from social psychology. In this regard, read the text (which has now become a classic) by Denise JODELET, "*Représentation sociale : phénomène, concept et théorie*", Paris, PUF (Coll. Fondamental), 1984, p. 357-389.
7. Martin L. FRIEDLAND, *A Place Apart: Judicial Independence and Accountability in Canada,* Ottawa, Canadian Judicial Council, 1995, 401 pages.

is ensured. And the same applies to the diversity of the profiles of judges. There are many more women in the judiciary today than there were 35 years ago. This is an aspect that makes it possible to ensure that the judiciary personifies, in its own way, the community on behalf of which it assumes a certain authority. More and more, we find judges involved in other spheres of activity than the strict sphere of judicial activity per se, and without such public presence taking anything away from the duty to act in a reserved manner[8].

The whole question surrounding the changes in the field of judicial deontology over time is obviously at stake here. The development of deontological law poses the question of conditions likely to stimulate and maintain public confidence in the judiciary. These ideals (and these duties) are mainly based on the idea that the judge, both in Court and in public, must demonstrate conduct such that the public is able to identify with it. These aren't exceptionally stringent requirements, but rather conduct that we expect everyone in society to adopt. We are referring here to the predictable conduct of an ordinary individual in an ordinary society. And in this regard, deontological requirements – even if they refer to certain specifics of the judicial function – very broadly concern – in reality – a set of very common situations – and I would dare say, daily ones at that. In addition, the changes in deontological law over time as well as the development of judicial conciliation, or the changes in the administration of justice, are modifying both the judge's role and the act of judging – in such a way that without their authority directly stemming from a representative function, judges are managing to build – through constant adjustments to their practice – an increasingly contemporary form of their legitimacy. This doesn't mean being trendy, being popular or being famous… But quite simply and obviously for everyone, being the judge of a certain society.

We must openly admit that this is an ongoing challenge and I think it's a challenge that is much greater today than it was 40 or 50 years ago, at a time when authority was still considered to be in and of itself. A self-supporting social reality.

To add a bit of perspective to all this, we must recognize that this reality doesn't apply only to the judicial institution. It also poses a problem for the scientific community as well. Researchers are simultaneously faced with the need to protect themselves from the constant movement in their own society, at the same time as they must remain on the same wavelength as their own society, in order to prove the relevance of the scientific activity. Here, the problem is no less important than the one with which the judiciary is faced.

Other institutions face this problem as well. The way to respond to the problem obviously varies according to the characteristics of each one. In the case of the judicial institution, we are trying here to explore the question based on the findings of a survey conducted among Quebecers on the public's expectations of today's judge. We note that these expectations are extremely difficult to meet; however, such demands are probably not insurmountable.

Of course, these are survey findings. Above all, they give us an opportunity to reflect out loud on the difficulties inherent in exercising the judicial function in today's world. The findings of such a survey must therefore not be taken literally or at face value. They convey attitudes and opinions. It is therefore a snapshot. It's up to you to make the movie. This survey data nevertheless explains the public's expectations toward members of the judiciary. Based on the findings of a longitudinal analysis, we note the great stability of these attitudes and opinions over recent years[9]. Once again, it is a chance to reflect together on the social significance of judicial activity. The survey was conducted during September and October 2008 among 1,001 residents of Québec[10].

The judge: an object of trust and distrust

The initial problem is the public's trust with regard to the judicial institution and to the figure of the judge himself.

First let's look at the trust that the public places in the judicial institution. The survey data refers to an observation often made over recent years. A bit less than two-thirds of the population consider the judicial institution to be one in which we must place our trust. Other institutions are much more easily the target of public denunciation, particularly in the political world, we believe.

TABLE 1: THE PUBLIC'S TRUST IN THE JUDICIAL INSTITUTION

Would you say that you have great trust, sufficient trust, little trust or no trust in the courts?

Level of trust	%
Great trust	6.4
Sufficient trust	56.0
Little trust	26.5
No trust	8.0

We note here that 6.4% of respondents state that they place "great trust" in the judicial system and 56% place sufficient trust in it, which is quite an acceptable rate of response. A survey that we conducted in 2006, based on exactly the same question, gave rise to exactly the same findings[11]. So it is therefore very strong.

Obviously, all this doesn't mean that the judicial institution can rest on its laurels with regard to this image which, a priori, is a reassuring one, or to the impressionistic definition of public opinion concerning

8. Pierre NOREAU & Chantal ROBERGE, *La déontologie judicaire appliquée,* Montréal, Wilson et Lafleur, 2008, 319 pages.
9. Pierre NOREAU, *La confiance du public, fondement de l'activité judiciaire,* Québec. A talk given to judicial administrators, *Ministère de la justice,* September 2006, PowerPoint, 76 slides.
10. More precisely, the survey was conducted by Legendre Lubawin Marketing inc., September 15 – October 8, 2008. The sample of 1001 respondents is made up of adults age 18 and over living in Québec. The results have a 3.1% margin of error, 19 times out of 20.
11. NOREAU, op. cit. note 9.

the judges' work. It must be recognized that one-third of the participants in the survey stated that they distrust the judicial institution.

Beyond the judicial institution, the respondents also show a certain trust in the judges themselves, and particularly when we compare this trust with that which they show toward other figures of authority or other public actors.

TABLE 2: TRUST PLACED IN FIGURES OF AUTHORITY

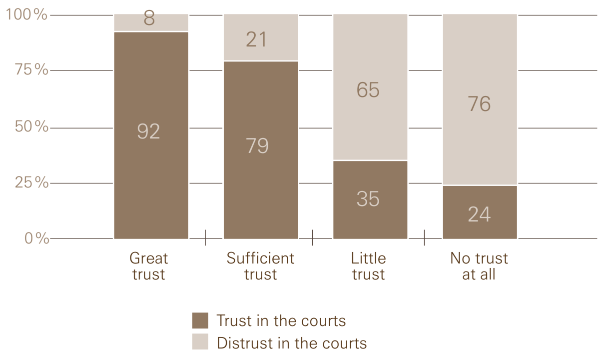
Do you trust…

Social figure	%
Lawyers	48
Reporters	51
Judges	63
Police officers	76
Notaries	78

We can obviously be surprised that the population states that it places more trust in police officers than it does in judges. There is definitely a lot to say about this. In the absolute, we moreover know that the respondents to a survey of this type don't spontaneously realize that judges are lawyers, first and foremost… But there is no doubt here about the impact of the status given to the judge. The trust placed in the institution corresponds to that which is placed in the figure of the judge.

Previously conducted surveys have demonstrated that the trust from which judges benefit was often greater than that which was placed in the judicial institution. Within the survey that we have just conducted, the trust shown toward judges is equivalent to that which is placed in the justice system. That being the case, one general rule still stands: the less trust you show toward judges, the less you will trust the judicial institution. In fact, when all is said and done, the actor often makes the institution.

FIGURE 1: TRUST IN THE JUDGE AND IN THE INSTITUTION [12]



It is likely, in fact, that the judge is the best messenger of his institution, its best defender. The difficulty lies in the fact that judges are quite absent from the public sphere and, as Florian Sauvageau regularly points out, quite absent from the sphere of the media. Moreover, we know that this image is conveyed by that which is built by the media. There is consequently a risk of a loss of control over the image. This doesn't prevent noting, once again, the strong correlation between actor and system, judge and judicial institution.

2. The foundations and conditions of public trust

With regard to the factors that build trust or mistrust on the part of people subject to the jurisdiction of the courts, and more generally, on the part of the public as a whole, the factors in play are often the same. The reason for the public's main fear is the judge's partiality, the notion that the wealthiest people subject to the jurisdiction of the courts are favoured when they go before the courts, that judges are not independent of political authorities, that recourse to the courts results in litigants' losing control over their problems and that, in any case, people subject to the jurisdiction of the courts understand relatively little of what is taking place in the Court – which unfortunately, in many cases, is quite true.

TABLE 3: FEARS AND OPINIONS WITH REGARD TO COURTS

Favourable or unfavourable opinions of judges (%)

Opinion	Yes	No
The judges really try to be fair with all the parties involved.	74	26
In court, we lose control over our problems.	61	39
When they go before the courts, litigants generally don't understand what is happening.	52	48
Judges are dependent upon political authorities.[13]	53	47
Wealthy people are inevitably favoured by the judges.	68	32

These perceptions are harmful to the judicial institution as a whole, but they also have effects on the level of trust from which judges benefit. If you support the idea that the wealthy are favoured by the courts, there are excellent chances that you also have less trust in the judges that preside over these courts. If you consider judges aren't independent from political authorities, you may also question their public legitimacy to a certain extent. These criticisms and perceptions undermine the trust that people would otherwise place in the figure of judge as a public actor.

Other factors also play a major role in building public trust or distrust toward the judicial institution and the judge. Age, for example, plays a major role in all these aspects[14]. Young people – and this is some-

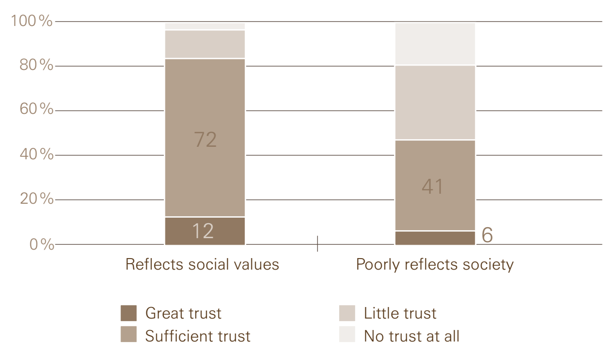
12. p ≤ 0,000
13. In Canada, judges are totally independent from political authorities.
14. From a sociological point of view, age is often considered to be an indicator of socialization; year of birth in fact determines to which cohort each respondent belongs, during what historical period he was socialized, in what social context, according to what particular values, etc. We then talk, depending on the case, of the period effect, the cohort effect and the life cycle effect.

thing with which we should be delighted – place more trust in the judicial institution than older people do.

Similarly, respondents with the most schooling tend to place greater trust in judges than those with less. These are tendencies that must be taken into account, given the great diversity of the conditions that characterize the population of people coming under the court's jurisdiction.

Another important factor – and perhaps this is the conclusion that must be reached in this regard – is the cultural factor. The following question was asked to the people taking part in the survey: "Do you consider the courts' decisions reflect very well, rather well, rather poorly or very poorly the values of Québec society today?" The findings are clear.

FIGURE 2: TRUST AND CONSISTENCY OF COURT JUDGEMENTS WITH SOCIAL VALUES[15]



Here we note a very clear correlation between some people's perception that the decisions reached in the courts are not consistent with the values of society, and their tendency to have a negative opinion toward the institution in its entirety. This is an important aspect that accounts for the connection that must exist between the judge and his society of reference. The judge must be the judge of that society… *Which judge, for which society?*

So we essentially go back to the same problem. And that's something on which we must collectively know how to reflect. The law, as Montesquieu again pointed out, must be so specific for each society that it seems impossible to imagine that any rule of law whatsoever can be transposed, from one legal system to another, without this rule being subject to a complete reinterpretation in that other context.

For each society, its own law; that's the central idea in Montesquieu's treatise entitled *De l'Esprit des lois* (officially translated into English as "the spirit of the laws"). The spirit of the laws is first and foremost the particular spirit of each community. That's what the survey data partially illustrates. The courts – beyond the formalities characteristic of legal discourse – relay the values that are hopefully shared ones.

We understand the tension here – the "dialectic" – at the heart of which lies the judge, informed of both the law and the tacit values of legal normativeness[16]; between formal and material rationalities of the law[17]. This difficulty is transposed in our study, in the tension placing opposite one other two conceptions of the judge, two types of ideals: a more *open* and a more *closed* conception of the judge. *Which judge for which society?* – this notion reflects images full of contrasts, as we will now see.

The first type to which we refer here is that of the judge as a figure of authority, whereas the second one refers to the judge defined as a social figure. To build these two types, we have integrated a whole series of variables. More specifically, we asked the respondents if they tended to prefer more of a severe judge or a more understanding one; a judge that is different from or similar to the other members of the public; a judge that is more conservative or more open, more withdrawn from public life or more publicly involved[18].

We note what a dilemma the judge is faced with here… and the public as well. Moreover, the findings bring to light the ambiguity of the public image of the judge. In fact, 62% of the members of the public prefer a judge who is more severe than one who is more understanding. When we come across such findings, we immediately say to ourselves: "I'm going to go back to the database; there must be a coding error!" But the measure is clear. People stated that they prefer a severe judge over an understanding one. That being the case, they nevertheless hope to have a judge who is similar to themselves. We immediately grasp the difficulty of the situation. The respondents expect that the judge will be open and involved socially, on the one hand, but nevertheless inflexible, on the other....

TABLE 4: EXPECTATIONS OF THE AUTHORITY JUDGE AND THE SOCIAL JUDGE

For a person like yourself, would you say that you prefer judges to be:

Figure of authority	%	%	Social figure
Severe	62	38	Understanding
Different	24	76	Similar
Conservative	31	69	Open
Withdrawn	30	70	Involved
Inflexible	64	36	Flexible

15. $p \leq 0.000$
16. The notion of dialectic refers, in general, to a back-and-forth effect between two terms. As this notion has been able to be used by authors such as Hegel, it assumes the opposition of a thesis and an antithesis – in short, a tension that finds an answer within a synthesis which, without marking a victory of one term over another, would include both of them. (TRANSLATOR'S NOTE: Thesis-antithesis-synthesis is also known more simply as problem/reaction/solution.)
17. Max WEBER, *Sociologie du droit,* Paris, PUF (coll. Recherches politique), 1986, 242 pages and Michel COUTU, *Max Weber et les rationalités du droit,* Paris, PUL/LGDJ (coll. Droit et Société), 1995, 257 pages.
18. The question was stated as follows:
Q.11 For a person like yourself, would you say that you prefer judges to be: 1) rather severe or rather understanding; 2) rather different from other members of the public or rather similar; 3) rather conservative or rather open; 4) rather involved socially or withdrawn from public life; 5) rather flexible or rather inflexible.

Within the scope of this type of research, we can't postulate that people are misinterpreting their own point of view. In our survey findings, there is always an underlying rationality, even behind data that seems contradictory. It is this logic that we must know how to find.

Nevertheless, it does seem that we have a "little problem" here with our members of the public. This apparent contradiction can probably be analysed. The public hopes that the judge will be a person like themselves, but a bit more severe than they are: someone who, once and for all, "will get the job done". A female judge to whom I submitted these results spontaneously came to the conclusion that basically, people subject to the jurisdiction of the courts are looking for a parent, for an institutional transposition of parental authority. This image isn't worse than any another. As a sociologist, I obviously wouldn't go so far as to say that, even though the parental figure is a strong social reference. However, these findings account for the fact that the judge has a very special mission to fulfill, and the ambiguity of the judge's public image must be recognized.

With regard to the answers given to our questions, there are distinctions between the various categories of members of the public – for example, between women and men. We therefore note that women prefer a judge who is a bit more severe and inflexible, while men prefer a judge who is a bit more withdrawn from the public sphere and a bit more flexible.

A clear correlation also exists between the respondents' positive (or negative) perception of judges' public image and their expectations of the authority figure that judges must personify. We therefore note that people who have a generally positive image of a judge expect that this judge will be similar to them and be more flexible than severe.

TABLE 5: TRUST IN THE JUDICIARY AND EXPECTATIONS WITH REGARD TO THE JUDGE

For a person like yourself, would you say that you prefer that judges be:

Image of the judge	Rather severe	Rather understanding[19]
Positive image	57	43
Negative image	74	26
Image of the judge	**Rather different**	**Rather similar[20]**
Positive image	20	80
Negative image	33	67
Image of the judge	**Rather inflexible**	**Rather flexible[21]**
Positive image	61	39
Negative image	72	29

Similarly, the respondents expect the judge to be rather understanding, whereas the image of a severe judge more spontaneously emerges in the minds of people who have a critical point of view about judges' activity. The same data accounts for the fact that people subject to the jurisdiction of the courts who have a rather critical conception of the judiciary expect judges to be more severe and more distant. Their criticism very likely corresponds to an expectation that has not been met. It no doubt more spontaneously refers to judges from criminal jurisdictions rather than to administrative judges or those in private law.

To summarize, let's take another look at our two types of ideals: that of the social judge and that of the figure of authority.

TABLE 6: IDEAL TYPE OF SOCIAL JUDGE AND AUTHORITY JUDGE

For a person like yourself, would you say that you prefer that judges be:

Figure of authority	Social figure
Severe	Understanding
Different from other members of the public	Similar
Conservative	Open
Withdrawn from public life	Socially involved
Inflexible	Flexible

To begin with, let's assume that with regard to these two major categories, all the cross-tabulations are not significant. That being the case, older people tend to more spontaneously support the image of the authority judge rather than that of the social judge. This can be explained: These are people who have been socialized in a society that itself was organized into much more of a hierarchy than the one we know today; therefore, they expect that the judge will still be in keeping with the image with which the judge is traditionally identified as a judge. Level of income is also a significant variable. We note, on reading the data, that people whose income is neither very low nor very high, and who, from a strictly financial point of view, are members of the middle class, expect the judge to be more in keeping with the image of an authority judge, whereas the image of the social judge is much more pronounced among people at the two ends of the income scale. This is an interesting point that refers to distinctions that also have a political connotation, as noted in research on electoral sociology[22].

On a totally different scale, the more the respondents expressed their trust in the judiciary, the more their expectations tended toward the social judge. On the other hand, the respondents who were the most distrustful of judges' activity expect the judge to personify the image of the authority judge.

19. $p \leq 0.000$
20. $p \leq 0.000$
21. $p \leq 0.001$
22. We are referring here, in particular, to the research of sociologist Pierre DROUILLY and to the research conducted in Quebec, in the field of electoral sociology, over the past 30 years.

The factor of court experience or inexperience

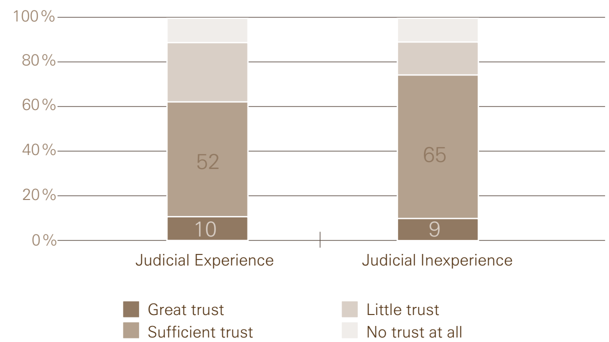
One final factor is worthy of our consideration – that of the respondents' court experience or inexperience. Going before a court of justice always leaves a certain impression. It is an experience in itself. Such an impression obviously has something to do with the litigant's legal experience and completes what we can moreover call his "legal socialization"[23].

The question being asked here is a simple one: Is the fact of having had experience in the court, or not, likely to fuel the public's trust or distrust toward the judicial institution?

We are taking all scenarios into account here: People who have experience as a party to a proceeding, those who have gone to court as a witness and those who have accompanied a relative or a friend there. Based on the findings of the survey data, the respondents' court experience may have a certain impact on the public image of the judge or on the trust the public has in the justice system. We also turned our attention, in particular, to three different aspects of court experience: the court experience of respondents, the perception that this experience has been positive or negative and, in the case of respondents directly concerned by the case, the feeling of having won or lost their case.

The first observation: The respondents having some court experience have less trust in judges than those who have never gone to court (Figure 3). This observation coincides with the findings of other research conducted on court experience and we should examine this as well[24].

FIGURE 3: JUDICIAL EXPERIENCE AND TRUST IN JUDGES[25]

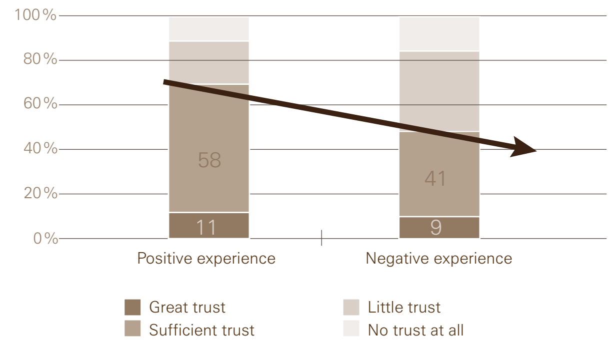


The question immediately poses the problem of the way that litigants go through their experience in court and the way they are received and heard. It probably also poses the problem of the costs of justice and the relations between practitioners and clients. It is therefore a very general problem, where the judges also play a role and whose consequences directly affect their public legitimacy and that of their activity.

That being the case, the most decisive factor here is still the fact of having had a positive experience or not, as shown in the following figure (Figure 4). It clearly emphasizes that all things considered, while court experience or inexperience plays an important role in the trust that the public places in the judiciary, it is the nature of this experience that is the most important factor – or at least, the most distinguishing one. While 69% of the people subject to the jurisdiction of the courts who express a positive experience claim that they trust judges, this percentage falls to 50% among those who consider their experience to be negative.

FIGURE 4: POSITIVE EXPERIENCE OR NOT

Would you say that you have great trust, sufficient trust, little trust or no trust in the judges.



And lastly, we studied the outcome of the cases in which the litigants were involved. More specifically, we tried to see whether the fact that the respondents won or lost their case had an impact on the trust they place in the judiciary. Of course, this factor has real, direct effects; however, from a statistical point of view, it is the least significant variable of the three that we have just examined[26]. It is so insignificant, in fact, that it would be very risky for a sociologist to establish a clear correlation between the fact of having won and lost, and the fact of having a positive or negative image of the judiciary. All this means that it isn't so much the fact of having won or lost in court that makes the difference here, but most likely the way that one is received there.

23. Chantal KOURILSKI-AUGEVEN, *Socialisation juridique et conscience du droit,* Paris, LGDJ (coll. Droit et société Recherches et Travaux 2), 1997, 193 pages. Also read, in the American tradition, Jérome PÉLISSE, "*A-t-on conscience du droit ? On Legal Consciousness Studies*", in Genèse, no. 59, June 2005, p. 114-130 and Patricia EWICK & Susan S. SILBEY, *The Common Place of Law: Stories from Everyday Life,* Chicago, University of Chicago Press, 1998, 318 pages.
24. NOREAU *op. cit,* note 9.
25. $p \leq 0.000$
26. The rate of significance, within this cross-tabulation of data, surpasses the 5% mark on which the methodological standard in the field of quantitative research is based. From this viewpoint, we are rejecting any cross-tabulation that would have more than 5% chance of having been produced by pure chance or accident.

Conclusion

The most surprising findings of this survey lie in what I would dare call "the demand for authority" found among the people subject to the jurisdiction of the courts. This is particularly surprising within a society where authority is always regarded with suspicion. At least, there is a reality to take into account here, which, in the minds of the great majority of the public, doesn't seem to be contradictory to the image of a judge who is open and socially involved.

The comparison of the social judge with the authority judge perhaps places judges with very different vocations back to back. It isn't at all certain that we're talking about the same judge here. In some way, we have evoked this – the authority judge no doubt responds more to the profile of the judge working within criminal and penal jurisdictions, whereas the judge sitting on the bench in civil, family or youth matters corresponds more to the profile of the social judge. Similarly, it is likely that judges in the provincial court and Superior Court as well as judges in the Court of Appeal and Supreme Court exercise their functions in ways that are comparable in some respects, but that differ in other ways. These are subtleties that can't be determined by an ordinary person who forms in his mind a rather general idea of the judges' work and the act of judging. To begin with, we should probably ask ourselves, when working on this type of data, what the public really understands about the judicial institution. On the other hand, this avenue requires that we carry out a more extensive consideration of the necessary interactions between the public and the courts.

Such interaction must be made within the public sphere, and the media plays a fundamental role within this common sphere. In addition, correctly reflecting on the way that the figure of the judge is transposed within the public sphere implies that we study the judicial function itself as well as its importance and significance to the public today. If we intend to ensure that people subject to the jurisdiction of the courts understand what is happening within the judicial institution, if we want their expectations of justice to be reasonable, in light of what can be achieved within a human institution, the judiciary must reflect on the way it can occupy part of this public sphere in the future. That is the challenge that all major institutions face today.

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COURT LIFE AND THE MEDIA

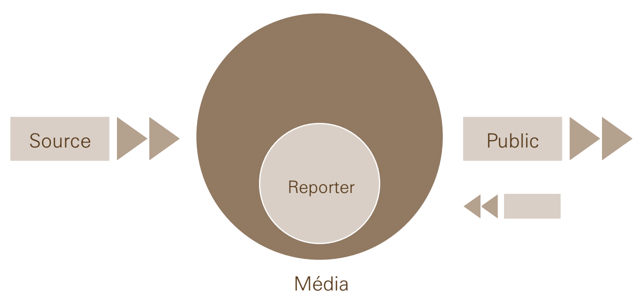
I would like to immediately go back to two observations that Pierre Noreau left us with in his closing remarks: Judges must be more present in the public sphere. And the media plays a basic role in this sphere of activity. The media and journalists, in fact, who substantially contribute toward shaping the image of judges and the courts and the perception that the public has, are – to some extent – an unavoidable filter. For the past several years, judges have been pondering over the relations – and sometimes difficult ones – that they have with journalists, and they have been looking for ways of improving these relations. We won't be able to achieve this without a better understanding of the public and how the media functions. And my remarks are largely aimed in this direction.

Although judges can find consolation by telling themselves that the public places more trust in them than in journalists, as shown in the findings of the study that Pierre Noreau and I conducted, nonetheless, we can say that they are at the mercy of the media. And so are their rulings. That is what my colleagues David Schneiderman, David Taras and I explain on the very first pages of a book devoted to relations between the Supreme Court and the media (1). The Court, we say about the Supreme Court – but this can apply to all the courts – can't play its role if its rulings and the reasons underlying them are not properly conveyed to the public. And to do so, the courts need journalists; however, the opposite is also true. Journalists and the media can't fulfill one of their most important functions in democracy – to be the "eyes" of the public in the courts of justice – without a certain cooperation on the part of the judicial system. The title of the "classic" book by Rodolphe Morissette, *La presse et les tribunaux : un mariage de raison,* clearly illustrates this necessary "cohabitation" (2).

At times, there is an enormous difference between what is important to a judge in a ruling and what may be important to a journalist. In our book, which I will get back to soon, we talk about a "clash of cultures" between judges, journalists and the media. Press organizations, which choose the topics that will be covered and select the news that will be retained at the time of a hearing or in a ruling, are guided by logic that is different from the one on which the courts are based. "They (the judges) are dependent on and at the mercy of the journalists who report on, interpret, and place their own meanings on judicial rulings", which isn't necessarily what the judge would have chosen.

And the journalist really seems to have the last word. However, "judge-journalist relations" are more complex. The journalist forms part of a system, a body that runs from its sources upstream, to the public downstream, and all of whose components contribute toward shaping the news. In the case of coverage of court proceedings, judges, lawyers and litigants (the sources) form part of this system and, in their own way, influence the journalists' work. A judge's eloquence and witty remarks might hold their attention more than the grounds for his ruling, just like the comments of a lawyer or the conduct of a witness. News making is the journalist's role, but also literature and movie-making as well.

FIGURE 1: THE MEDIA SYSTEM



It is with this media system in mind that I will soon explain the operations of the tool with which the Supreme Court has equipped itself, or rather the position that it created in the 1980's, in order to improve its relations with journalists and to provide a better understanding of its rulings. And with great success at that. In our book, we discuss the Executive Legal Officer (the position that was created), as the cornerstone of relations between the Court and the journalists. All courts could, I think, draw inspiration – at least in part – from what the Supreme Court does. I will also briefly talk about the present developments in the media world and the growing importance of the new media and the Internet – a more widespread world that is more complex than the world in which the former types of media evolved. The former types of media contributed to the social consensus, to a certain social order (the “manufacturing consent”, as it is called by Noam Chomsky (3), who describes them as government spin doctors); the new media, on the contrary, forge a world of fragmentation and diversity. Presence in the public arena now depends on these new media that you can’t ignore.

Understanding the public

The public is also part of this media system. In a market world such as that of the media, its ability to influence the system is quite obvious. Whether the objective is commercial or public service, it is just as important for the media and the journalists to understand the public as for the judges. The survey findings, and in particular those that concern “judge-journalist relations”, provide us with a few interesting reference points.

TABLE 1 - INTEREST IN COVERAGE OF COURT CASES

Would you say that you are very interested, quite interested, not very interested or not at all interested in media coverage of court events nowadays?

Interest in media coverage of court events	%
Very interested	11
Quite interested	47
Not very interested	30
Not at all interested	10
Don’t know	2

First, let’s turn our attention to the public’s interest in court cases: 58% of the people questioned told us that they are either “very interested” (11%) or “quite interested” (47%) in media coverage of court activities. The wording of the question is important. It concerns coverage of court cases by the media. At first glance, it’s a finding that isn’t exciting in the least: 10% of respondents aren’t interested at all. However, things are different when the question is placed in a broader context.

TABLE 2 – JUSTICE AMONG VARIOUS TOPICS OF INTEREST

Among the following topics dealt with in the media, which are those that are of personal interest to you?

Topics of interest	%
The environment	79
Culture	72
Education	71
Justice	72
Politics	53
Sports	42
Fashion	33

When people are asked to tell us about their personal interest in various topics dealt with in the media, justice ranks enviably high on the list of suggested subjects. Only the environment is more interesting (this marked interest in the environment comes as no surprise and is found in other surveys as well). Justice is just as interesting as education and culture and much more so than politics, fashion or sports. We may worry that the respondents are so little concerned about politics. However, we may also think that it is the coverage by the media, which are mainly interested in “politicking” and partisan quarrels, that the public finds tiring. The findings show, in fact, that social issues (the environment, education, justice), which are also political issues in the noble sense of the term, hold people’s attention. A topic may be of interest to you, but the coverage by that media may, on the contrary, get on your nerves. That subtlety is an important one.

Now let’s look at the use of the media. How do the members of the public get their news?

TABLE 3 - USE OF THE MEDIA

To get the news, do you quite often or rather rarely turn to:

Media most often consulted	%
Magazines	25
National newspapers	28
Internet	45
Regional newspapers	59
Radio	60
Television	84

Table 3 illustrates the almost extreme dominance of television – the main source of the public’s news for the past few decades: 84% of respondents get their news quite often from television, by far much more than over the radio (60%), which ranks second. These findings also show that the “decline” of the older types of media mustn’t be exaggerated. On the other hand, the television that we mention today has nothing to do with the big news time in the 1970’s and 1980’s, which brought together hundreds of thousands of people to watch the same late evening news report. Today, the public grabs a bit of news on TV in the morning, here and there, on such 24-hour news networks as RDI, LCN and the others, during the day – in short, television remains dominant, but it is no longer the screen projecting the consensus of opinion, as in years past. Table 3 also shows the growing importance of the Internet as an information source for the public at large; the findings are even greater in this case than in other surveys, and I’ll come back to this point a bit later.

One final word on the dominance of television and the resulting consequences. Television prefers emotions over thought, action over ideas. Television also needs images, and images are rare or very ordinary in courts of justice. The selection criteria for TV journalists' news are based on the nature of the media. Within the media system that I initially described, the journalist must take into account the constraints imposed by the media, just as he must put up with the commercial nature of the press organization that employs him.

TABLE 4 – THE INTERNET... A MATTER OF GENERATION [1]

To get the news, do you turn to the Internet quite often or rather rarely?

Age cohort	Often	Rarely	Never
18 – 34	61	23	16
35 – 54	49	22	29
age 55 and over	26	19	55

The Internet... a matter of generation. Table 4 clearly shows that the increasing popularity of the Internet is particularly significant among youngsters: 61% of 18-34-year-olds use the Internet quite often to get the news. Only 16% never use it. At the other extreme of the age pyramid, among those age 55 and over, 55% of respondents never turn to the Internet to get their news. The difference is enormous. The upcoming generation – the people that Americans are calling the "Millennials", born between 1977 and 1997 – are changing the ways of getting news and are turning the media world topsy-turvy. If you want to get these young people interested in court cases, it's on the Internet that you'll find them. The curve in Figure 2 is particularly revealing.

FIGURE 2 – THE INTERNET... A MATTER OF GENERATION [2]

To get the news, do you turn to the Internet quite often or rather rarely?

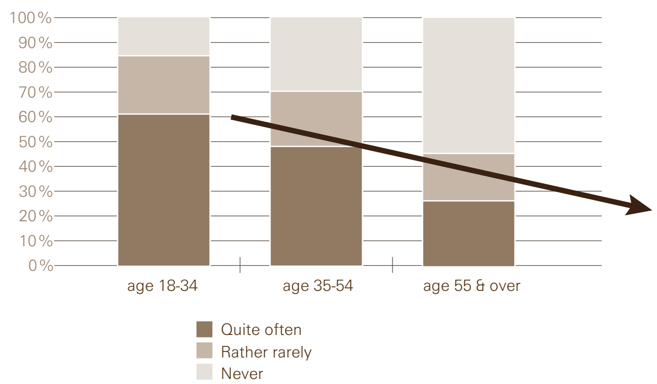
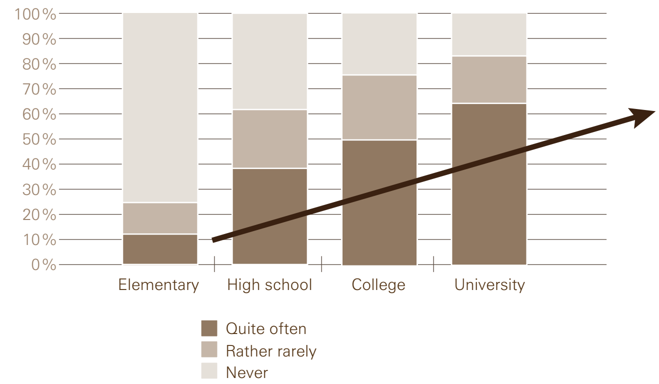


FIGURE 3 – THE INTERNET... A MATTER OF GENERATION... AND SCHOOLING [3]

To get the news, do you turn to the Internet quite often or rather rarely?



The Internet is a matter of generation, but also of schooling and education. The more schooling a person has, the more that person has recourse to the Internet to get the news. However, everyone, or almost everyone, watches television. Youngsters and university students a bit less so, but the differences are much less significant. Of all media, television is the one that everyone shares in common, above all else.

TABLE 5 – MEDIA-COURT RELATIONS

Opinions on relations between the media and the courts (%)

Statements	Yes	No
The media provides enough news and explanations to understand court activities.	60	40
The media covers the court-related news of interest to me.	76	24
I prefer to get my news on current court-related events from a number of media, rather than from just one.	88	12
I prefer to get my news from television rather than from the newspapers.	67	33
The media cover court-related news in too sensational a way, without taking interest in the real matters at hand.	86	14
Judges should speak in the media more often.	64	36
TV cameras should be able to film what is happening in the courts of justice.	53	47

Let's go back to looking at "media-court relations". We submitted a certain number of statements to the people we questioned, while asking their opinion on each one of them. The findings are uncertain. The respondents are both satisfied and discontent over the news provided on the courts' activities by the media. On the one hand, 60% of respondents think that "the media provides enough information and explanations to understand the courts' activities",

1. $p \leq 0.000$
2. $p \leq 0.000$
3. $p \leq 0.000$

and better still, 76% consider the media covers the court cases that interest them. Those findings are positive. On the other hand, 86% of respondents say that "the media covers court-related news in an overly sensational manner, without taking an interest in the real matters". In short, the public is interested in matters of justice, but what the media is reporting is leaving them ambivalent, to say the least. And lastly, nearly two-thirds of the respondents would like the judges to have a greater presence in the media. But how? And in what media?

Table 5 shows, once again, the importance of television to the public, in obtaining news: 67% of respondents say they prefer to get their news on television, rather than in the newspapers. The opinions are divided when the people questioned are asked whether the television cameras should be able to film what is happening in the courts of justice: 53% of respondents say "yes", while 47% say "no". These divided opinions differ from the highly majority opinion of journalists who, for the past many years, have been asking that TV cameras be present in court rooms.

Personally, I have a rather finely-shaded opinion in this regard. Theoretically, I agree with the presence of cameras in court rooms, but I know full well what would happen as a result, in practice. The results would resemble what is created by having cameras in legislative assemblies. Few people watch the parliamentary channel, the long debates, the serious proceedings in committees, etc. What the majority of people see of the legislative assembly's proceedings are 30-second clips selected on the TV news, the shouts, the heated exchanges during the question periods, all of which give a bird's-eye view of parliamentary life. We would probably have similar results with court life. Few people would watch a potential channel devoted to court cases. And I would be surprised to see the newscasts dwell on the complex and often abstract issues of civil proceedings. The juiciest criminal cases and the most colourful stories would make the news.

How the media operates

And that brings me to the second part of my remarks, which Schneiderman, Taras and I have called the "clash of cultures" between judges and journalists. What you see in the televised news probably doesn't always correspond to what you would have retained from a court hearing or ruling. Why? This question can be answered by taking a brief look at how the media operates and the constraints faced by journalists. Television, whose dominance we have just seen, changed the news world and journalism in a virtually dramatic way in the 1970's and 1980's. Television needs not only action and emotion; it must also personify the subjects that it deals with in "characters". TV journalists will focus little on the grounds for a court's ruling, and even less so if it is complicated and if they have no one to "interpret" the ruling. The journalist needs the comments of a few actors, preferably one who says "black" and the other, "white" – objectivity makes this necessary! And since the judges don't talk, it is often the parties' lawyers who comment on the ruling. When the case deals with an important social issue, it is the pressure groups – the lobbies – who do so. The reactions to the rulings dominate the coverage. Often, people will comment on a ruling that no one has really explained and the terms of which the public will never know.

The notion of time also separates journalists from the world of justice. The judge – and I'm not saying this in a derogatory way – has time to reflect and hand down his ruling. Some people criticize judges for taking too much time, perhaps, but in my opinion, it is also very good that we can take our time. As for journalists, they don't have time on their side. They are asked to be on air as soon as the ruling is issued, if not before! In our book, we quote the testimony of Rainer Knopff, a professor from the University of Alberta, whom the journalists often ask to comment on Supreme Court rulings. He explains that journalists phone him to get his reactions to rulings that have just been made, that he hasn't yet read and that the journalist hasn't read either, and that such a journalist asks him to comment immediately… and preferably briefly! "I mean it's the blind leading the blind," he remarks. In fact, I have experienced similar situations in the cases of CRTC decisions that I'm asked to comment on. You have the time to read only the news release, the summary that the CRTC has made about its decision. Your turn comes after the summary, you have 15 or 20 minutes, you read the highlights of the decision and you dive in. In the case of court rulings, the commentators don't even have any news releases! Being in the public sphere means being subject to contortions. If we want to live with the media, we must accept the rules of the game.

What types of cases interest the media? Those that make it possible to relate stories, that appeal to the emotions, that contain a conflict situation, that concern important moral issues. Cases that inflame opinion. When we were preparing our book, the analysis that we made of the year of Supreme Court coverage, from September 2000 to September 2001, clearly shows this. What are the cases that held the media's attention during this time? The Latimer case, that sad story of a farmer from Saskatchewan, accused of murdering his daughter suffering from cerebral palsy – a daughter whose suffering he wanted to end. And then there was the Sharpe case, which involved possession of child pornography. There was also a heartrending case in British Columbia, where a young, white woman, a beauty queen, seized custody of a child born from an affair with a black basketball star. The father wanted custody of the child so that the child would be raised in a black family, in keeping with tradition, etc. This story caused quite a commotion in Canada's English media, and on television in particular, because it was a story filled with emotion, providing wonderful pictures, because journalists love to tell stories and the public likes this type of story.

How can we make sure that other cases, just as important but less gripping, are at the very least explained to journalists who will therefore be better able to decide on their relevance? I am therefore going back to the Supreme Court and to the role of the Executive Legal Officer, a position created in the 1980's, in response to the demands made by journalists who wanted someone to help them understand the language of court rulings. Initially, it was a type of chief of staff of the chief justice, whose relations with journalists obviously occupied only part of that person's time. With passing years, the duties of the Executive Legal Officer with regard to the media have evolved and another para-legal officer position was created in 2001. The latter devotes half his time to journalists. At the beginning of the Court's sessions, this officer therefore explains the upcoming cases and indicates why some are very important from a legal standpoint, as he will then explain the rulings issued, etc.

In this way, the Court could certainly influence the media, stressing certain aspects of a ruling that it wants to emphasize, or to "spin", in order to enhance its image. But that's not the perception of the journalists that we encountered at the time of our research. Which explains the success. Journalists believe that the political world is trying to manipulate them as much as they think that the Supreme Court's liaison officer, while serving the Court's interests, first and foremost serves the public's interests. The proof is this testimony: "He (the executive legal officer) is really providing information in the noble sense of the term. (…) They want the Court to be covered well, they want their decisions to be well understood."

I mentioned at the beginning that the media world was quickly changing. We used to live in a world of scarcity, under the pedant of the newspapers and a few major editorial writers, and then a few newscasters presenting daily televised newscasts. Today, we live in a world of abundance. The media have increased in number, they are less and less the unavoidable filters that I evoked at the beginning of my presentation. The sources may speak directly to the public, without going through the media. The public is also more present and active. Interactivity is one of the characteristic traits of these new media. The system in which the journalist evolves and conveys the news has exploded.

In days gone by, the dominant media – the "megaphones" if not of the major institutions, at least of the established order – announced every day what the public was supposed to know. They created the consensus. Today, everyone can have a voice in the matter. And so we have social networks or blogs that provide an opportunity for members of the public to express themselves or to dialogue with journalists. Blogs exist in the legal world, as in the political world. Jurists have their own blog; there are blogs for activists, blogs that review blogs, and some have great influence. The phenomenon is obviously more widespread in the U.S. The media world is now all this. In this new world, how do we find our place in the public sphere? Beware of those who suggest a miracle formula to answer this question. All I know is that it is more complicated now than it was before.

My conclusion will be brief. I would like to close with a quote. I think that it is necessary to be present in the public arena, but in a moderate way, with reserve. We mustn't seek to be everywhere and in all debates. The courts must, above all, avoid sinking into public relations, with spin doctors and other image enhancers. In 1985, in a book entitled *No Sense of Place,* scholar Joshua Meyrowitz wrote that authority was enhanced by "distant visibility" and weakened by "excess familiarity". In our book on the Supreme Court and the media, my colleagues and I add: "Respect and reverence can only be maintained with distance. One can argue that much of the court's positive image with the Canadian public and with journalists, and its ability to exercise symbolic authority, have come from maintaining that certain distance."(4) To my mind, this applies just as much to the other courts.

(1) Sauvageau, Florian, Schneiderman, David and Taras, David. The Last Word. Media Coverage of the Supreme Court of Canada. UBC Press, 2006.

(2) Morissette, Rodolphe. La presse et les tribunaux : un mariage de raison. 2004 (2nd edition), Wilson et Lafleur.

(3) Herman, Edward S. and Chomsky, Noam. Manufacturing Consent. The Political Economy of the Mass Media. 1988, Pantheon Books.

(4) Sauvageau, Schneiderman and Taras, op. cit., p. 209.

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THE JUDGEMENT AS A COMMUNICATION TOOL

The act of judging, as we all know, is a demanding one that is arduous at times and often thankless. There are many pitfalls, but the satisfaction of fulfilling a useful role makes up for the inconveniences. Is the judgement mainly an act of communication? We should describe it more precisely as a two-fold act, one of whose key components is communication. In reply to the question "What purpose does the judgement serve?", a number of answers spontaneously come to mind: "To render justice", "to make a ruling on a lawsuit", "to resolve a problem", "to settle a dispute", "to put an end to a contestation", "to decide on a matter for the parties concerned", "to penalize the violation of a rule of society", etc. All these answers are correct; however, the main and essential purpose of a judgement is to resolve a dispute, to put an end to a conflict situation, to determine guilt and its consequences.

But is this main and essential purpose of a decision truly fulfilled if the decision is not understood, if it is poorly communicated…

To properly fulfil its role in society, justice must be understood, and the better it will be understood, the better it will be received, if not accepted. Having the judgement accepted may be the secret dream of all judges; however, reality doesn't always coincide with dreams. We must content ourselves with the hope of being understood. From then on, the judgement becomes the judge's means of communication, and the only one, at that.

The judge has the obligation of appropriately conveying the court's message. Taking the readers' needs into account is one of the judge's duties, and the challenge gets bigger as the number of unrepresented litigants increases; however, since judges have been using language as a professional tool for a long time, they are very experienced in doing so. And the new judges must very quickly become communicators.

Since it's established that the judgement is an act of communication, the judge must therefore ponder over the nature of the message, who his audience consists of (for both oral and written judgements) and the most useful way of conveying the message.

An act of interiority, reflection and analysis at the outset, the judgement expresses, in concrete terms, the decision that the judge has reached in his mind. However, before adapting the presentation of his message to convey it to the outside world, the judge must take his immediate audience into account, while bearing in mind the variety of judicial services users.

In the first chapter of his Guide du savoir-écrire, Jean-Paul Simard summarizes the functions of writing as follows:

> *[TRANSLATION]*
>
> *"WHY DO WE WRITE?*
>
> *"We generally write to express ourselves or to address someone, in order to be understood. Writing, like language, then becomes sort of a link to others. It makes it possible to assert oneself while communicating with others. And that's why there are many purposes in writing. In general, writing is considered to have two main functions: The expressive function: writing so that we can be read and understood. And the communicative function: writing to reach out to others. The ability to express oneself and communicate is considered to be one of the basic characteristics of human behaviour.*
>
> *"Into these two main functions, we can incorporate two others: the creative function and the logical function.*
>
> *[…]*
>
> *"The purpose of the logical function is to represent and translate thought. To become a "message", this function must follow the medium of words and syntax structures of that specific language. Writing then serves as a means of conveying thought, which becomes communication, thanks to writing. Writing also has the infinitely delicate and difficult role of making sure that it is clear. That's why the logical function implies ceaseless work on the linguistic material, to make it correspond to thought as closely as possible. It is during these efforts that thought is developed and becomes clearer; it is through the very act of writing that it takes shape. Writing, in fact, makes it possible for thought to become aware of itself, to organize itself, to arrange itself for the purposes of communication."*[1]

1. Jean-Paul SIMARD, *Guide du savoir-écrire,* Montréal, Les Éditions de l'Homme, 1998, pp. 17-18.

This passage may certainly be applied to writing a court decision.

The potential audience of a decision is made up of a variety of readers: the members of a group, in the case of a panel of judges; the members of legal professions, including law professors, students and the media, whose role in informing the public is essential; and the reviewing or appeal courts. First and foremost, the parties and their lawyers will be the immediate readers, the "obliged readers", according to the expression used by Professor Fernand Morin[2]. From one judgement to another, the diversity of the audience changes, and also its scope, which will vary depending on the topic or the nature of the decision.

The judge's challenge is therefore to write in a language that can be shared, a language that is simple and coherent, and therefore clear. Writing simply and clearly is a matter of politeness and respect toward the reader.

Already in 1930, in one of his letters of advice *(Lettres-conseils)* to a young writer, priest Théophile Moreux stressed the importance of the clarity of a text, by giving the following advice:

> *[TRANSLATION] "Always remember that in the art of writing, there are exceptions to every rule, other than this one: There is never any reason to infringe clarity. And so if, after having revised a sentence twenty times, to make it more elegant, you feel that it still lacks clarity, don't hesitate to sacrifice harmony."*[3]

* * * * *

I. THE JUDGEMENT AND ITS COMMUNICATION TOOLS

Generally speaking, the judgement is in keeping with ancestral standards, both for its structure and for the consistency of its presentation. Based on tradition, these standards provide a certain reliability of the points of reference and predictability in the way of conveying the message. It's an approach developed by jurists over time.

And so, in keeping with this long-standing tradition – we need only consult court reports of judgements or decisions published in the 19th century to take note that the approach has remained the same – the matters in dispute are dealt with as well as the narration of the facts pertaining to the enforcement of rules of law, first of all, and then the respective claims of the parties are summarized, and lastly, in closing, there is a discussion – a type of presentation of the grounds of the judge or the panel of judges, whereby the reasoning prompts the pronouncement. Over time, each jurisdiction moreover develops its own identifying approaches, its own rituals and even, at times, a few odd habits, whose obscure wording may occasionally be disheartening. All courts, all judicial or administrative tribunals, shouldn't be reluctant to periodically re-examine their writing habits in order to evaluate them from the standpoint of current requirements of communication and legal clarity. In this way, we will be able to make sure that texts are written simply and based on the needs of the reader – the reader who wants to understand as easily as possible, whether it is a reader concerned by the decision or not.

Professor Jean-Claude Gémar expressed this very appropriately, in these terms:

> *[TRANSLATION] "But when the judge administers justice, when he states the law, and when, in so doing, he speaks to the parties, they expect to understand him. After all, it is their case and their rights! The social dimension of the judgement takes on its full value here and the judge's role, its importance, regardless of the tradition that inspires him."*[4]

And recently, Judge Ian Binnie of the Supreme Court of Canada recalled the judge's duty:

> *"1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large."*[5]

Coming within a certain traditional framework, the judgement, while being a form of reasoning, mustn't serve only to display the judge's knowledge – knowledge that is obviously nurtured by the arguments of counsel hired by the parties. Even though the judgement is closely related to the constraints of law and to the demands of jurisprudence, it also fulfils an important educational role. In this regard, it is therefore better if the judgement is understood, so that "the message gets across" and therefore it's better if it's not too heavily peppered or spiced with quotes from case law or doctrine.

> *"For it is through speech that wisdom becomes known, and knowledge through the tongue's rejoinder."*
>
> *(Ecclesiasticus, Chapter 4, verse 24; 2 B.C.)*

Many texts have been written on the topic of judicial writing, where various formulas for efficient writing and communicating are presented. It would be out of place to list them here, as they can easily be consulted.

However, I need only stress one essential aspect: the narration of the facts. The strength of the judgement lies in the facts. It is the most important part, because without the facts, there is no judgement and no applied reasoning. All the more so in criminal matters, because we must often deal with motions to exclude the evidence;

2. Fernand MORIN, *Les présupposés de la règle de droit – Essai sur le non-dit du droit,* Montréal, Éditions Liber, 2006.
3. Abbé Théophile MOREUX, *Science et Style,* G. Doin & Cie, Éditeurs, Paris, 1930, p. 111.
4. Jean-Claude GÉMAR, *Préface, Écrire la décision,* Éditions Yvon Blais, 1996.
5. *R.* v. *Sheppard,* [2002] 1 S.C.R. 869 and *R. v. Braich,* [2002] 1 S.C.R. 903.

therefore, it's important for the trial judge or the appeal judge to substantiate the relevant facts well, and for the trial judge, in particular, to specify what facts he consider to have been proven. When the lawyers scrutinize the decisions for the appeal, they often plead that the judge failed to take into account a consideration that was given in evidence or that he neglected certain important facts.

And so the greatest care should be taken, at this crucial writing phase, not only so that the judgement is based on a factual and well-supported foundation and so that it is not too demolished in appeal, but first and foremost, so that communication with the parties and potential readers is very real. We may also better evaluate its immediate impact, of course, but also the potential impact of the judgement, over time, as the judgement often contributes to the development of law.

In fact, when a litigant wants to convince the court that a decision may or may not serve as a guide or precedent, he will be obliged to thoroughly examine the facts set forth in that decision, in order to request a similar application or, on the contrary, for it to be dismissed—which explains our insistence on the attention to be given to writing the facts that are relevant to the outcome of a case.

And that leads me to address a second topic: the subject of time.

* * * * *

II. TIME AND THE JUDGEMENT

A. The time spent preparing the judgement

Time, an ally or an enemy, is closely related to the judicial decision: It may speed up or delay the process.

A necessary component of reflection, time goes with the preparation of the judgement; however, it is important for this close correlation between the two to remain under the immediate control of the judge.

The time involved in preparing the judgement – even though all too often it tends to drag on – should really be short, in order for the judgement to be in keeping with the requirements of efficient communication and the real objectives of communication. Because if the judgement takes too long in coming, it will be received with impatience, and even with spiteful anger, marked by the disappointment of having had to wait a long time. The level of anguish isn't always taken into sufficient consideration, nor the extent of the stress of those who are concerned, above all, with a judgement that is long in coming.

Obviously, time isn't the same for everyone; however, for public opinion, the notion of a short time or a long time mainly depends on the real or perceived acuteness of the disputes.

As we know, judges face major time constraints and many time limit factors. But it bears repeating that the onus is on the judge to maintain control over time.

In some situations, the judge deliberately lets time pass, in the hope that the parties negotiate or find a basis of agreement themselves and settle their dispute. In this way, the judge uses a passive form of mediation, promoting dialogue rather than coercion, since in certain cases where emotions run high, among other factors, "time often settles the problem".

However, in the majority of cases, time isn't an ally. The parties have long awaited their hearing date(s) and want to see an end to the dispute. Whether we preside over penal or civil matters, urgency is often the order of the day.

Writing a judicial decision must therefore be adapted to the time constraints in order to quickly respond to these expectations on the part of the public. It is therefore important to get going on it as soon as the hearings are over. Memory of the case is at its peak, concentration of the mind is at its best and the arguments are still resounding in the judge's ears. It is therefore important to begin writing the first draft within 24 hours after reserving judgement or adjourning for further consultation of judges. You may object, by saying that it takes time to reflect on the matter. And that's true for determining the final outcome, but it isn't necessary for narrating the issues, the relevant facts and the parties' legal claims. Making it a rule to start writing right away forces the mind to concentrate on the problems involved and obliges the judge to eventually put the stream of ideas in order.

At this point, I would like to quote the remarks made by Maurice Garçon, in his book about judicial eloquence:

[TRANSLATION]

"Most men fine-tune their thoughts, once and for all, only once they have pen in hand.

Pure meditation makes it possible to discover the idea or the reasoning and to develop the logical order of one's assertions; however, subject to distraction, intenseness of thought alone rarely provides the discipline that is necessary for expressing it. One thought leads to another, the association of ideas prompts us to stray from the precise concern which, alone, at that time, should control everything.

The obligation to write forces a person to focus his attention and obliges him not to drift away from the subject. A person who writes makes alterations, deleting here and there, revises and polishes his sentence. At the same time as he disciplines his thought and deepens it, he censors what he produces and forces himself to avoid the inaccuracies of nasty constructions and terms whose use is so unpleasant for the person listening to them."[6]

6. Maurice GARÇON, *Essai sur l'Éloquence judiciaire,* Éditions Corréa Buchet / Chastel, 1947, p. 84.

Quite obviously, the requirements of readability will increase the writing time, as they impose on the writer many revisions of the text in order to make it clear and accessible to as many people as possible. But this will be in the interest of better communication.

In this respect, there is a certain advantage of having a panel of judges do the writing for courts where such a panel presides, as such writing allows for immediate revision of the texts by the other members of the panel, and therefore, refinement of the language and the expression of thought. On the other hand, the obligation of obtaining the assistance of the other members of a panel or tribunal may cause delays in the final pronouncement of the judgement, not to mention the possibility of disagreement, whereby writing the text will delay the disclosure of the court's decision.

Sometimes the tasks involved in writing are shared among the members of a panel, when it is urgent to hand down a decision, due to important social or economic imperatives. This can affect the readability or the consistency of the language and prove detrimental to efficient communication of the message. Attentive revision of the text, before it is conveyed, is all the more necessary in such cases.

Writing judgements has definitely been made easier, in a spectacular way, since so much progress has been made in computer technology over the past few decades; nevertheless, on the other hand, such technological progress is a hazard for correction fanatics, for text perfectionists, for the eternally dissatisfied and for re-reading addicts. However, we must resist such excessive habits.

As it may be recalled, the Supreme Court of Canada recently overturned a guilty verdict and ordered a new trial be held[7] because the judge, in finding the accused guilty at the hearing, which took place four months after the end of the trial, had added that he would file written reasons for the judgement before long. Over eleven months after he made that conviction, the judge filed his reasons. This was obviously a concrete case; however, it was an opportunity for the highest court in the country to mention certain major principles as a reminder:

> *"14. … No one disputes that, in the circumstances of this case, it was incumbent upon the trial judge to give reasons to justify and explain the verdicts of guilt. This was particularly important given the relatively complex and circumstantial nature of the evidence presented against Mr. Teskey. Mr. Teskey was entitled to know why he was convicted. The reasons were also necessary to inform the grounds of his appeal from conviction properly. Interested members of the public were also entitled to see for themselves whether justice was done here. Furthermore, in the particular context of the appeal, the reasons were necessary to provide a meaningful review of the correctness of the decision.*

"15. It is clear that the oral reasons given at the time of the verdicts do not meet the standard set out in Sheppard. It is equally clear that the extensive written reasons that followed do – provided that they reflect the reasoning that led the trial judge to the verdicts. Without that link, the purpose of giving reasons is defeated and their consideration do not contribute to a meaningful appellate review. The issue arises in this case because of the lack of concomitance between the announcement of the verdicts and the delivery of the written reasons. Had the verdicts been announced only at the time the written reasons were delivered, even – as here – more than 14 months after the conclusion of the evidence, the requisite link between the decision and reasons that led to it could not be questioned. Of course, inordinate delay in rendering a verdict can give rise to other concerns, but not to the issue which occupies us on this appeal.

"16. A judge is not precluded from announcing a verdict with "reasons to follow". In the context of a civil case, Arbour J.A. (as she then was) aptly stated the following in Crocker v. Sipus (1992), 57 O.A.C. 310 (C.A.), at para. 15:

> *"The needs of justice in a given case may be better served by an announcement of the disposition of the matter as soon as the deliberation process is completed but before full written reasons can be made available to the parties. The mere filing of a notice of appeal after the disposition has been announced does not bar the consideration on appeal of the reasons released subsequently.*
>
> *The same principles apply in penal matters.*

[…]

"18. Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it. […]

"21. As reiterated in S. (R.D.), fairness and impartiality must not only be subjectively present but must also be objectively demonstrated to the informed and reasonable observer. Even though there is a presumption that judges will carry out the duties they have sworn to uphold, the pre-

7. *R.* v. *Teskey,* 2007 SCC 25.

sumption can be displaced. The onus is therefore on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the reasons constitute an afterthe-fact justification of the verdict rather than an articulation of the reasoning that led to it."

[The bold type is not in the original decision.]

We wish to mention, again, that even if the judge must be thorough, it is always to his advantage to be brief. Boileau stated: [TRANSLATION] *"A person who doesn't know how to limit himself, never knew how to write." (L'Art poétique).* That, too, is an essential requirement of communication.

* * * * *

Oral judgement and written judgement

As closing remarks on this aspect of time spent in preparing the judgement, here are a few comments on certain distinctions between the orally delivered judgement and the written one.

Delivering an oral judgement is definitely one of the ways available to a judge to control judgement time. Obviously, each judge favours one method or the other, depending on his own preferences and on the nature of the dispute.

The same communication principles apply to either method: take the audience into account or the readers who are the receivers of the message (the judgement) and have the intention to convey this message well. In addition to the advantage of cutting down on time, the oral approach has many others. An orally-delivered judgment encourages brevity and facilitates direct communication as the judge can see and be seen, can "feel" whether the message is understood, whether it is well received or not, the judge can inflect his voice, change the tone to support the message and even repeat it. The judge can easily go over his explanations if he is convinced that the people concerned with his message express their lack of understanding in one way or another, for example, on hearing a term with which they are unfamiliar. A judgement delivered in writing doesn't have the advantage of this type of feedback. In short, a judgement delivered orally, in the presence of the parties, favours direct and better gauged communication.

Nevertheless, the oral language of the judgement must be at the same level as the written judicial language; therefore, using familiar, emotional language that is too repetitive, along with gesticulations or ambiguous body movements, is out of the question.

There are two risks, however. To begin with, preciseness of expression and terms may present problems orally, whereas writing makes it possible to revise, delete and correct. The second stumbling block comes from the possible disorganization of thought when the judgement is delivered as soon as the legal proceedings have been completed. Taking a few minutes or a few hours to put one's ideas in order helps better structure the presentation of the oral decision.

Just as for the written judgement, the orally-delivered judgement should be as brief as possible, depending on the nature of the matter and its complexity, of course. *"What is brief and good is twice as good."* (Balthasar Gracian, a 17th-century Spanish writer)

* * * * *

"The anvil lasts longer than the hammer." (Italian proverb)

B. The lifespan of the judgement

The *useful* life of a judgement varies considerably, depending on whether it is a judgement that is adjudicating a dispute that is out of the ordinary in some way, that expresses a precedent or that creates a new case law standard; it may be very short or extremely long, but on the whole, the useful life, over time, is rather uncertain.

It is nevertheless established that judgements bear witness to an era and occasionally serve as search tools for historians, sociologists and frequent law researchers.

But whoever has served as a judge for over 25 years and forces himself to reread all the judgements that he has written, whether trial judgements or appeal judgements, knows how quickly the legal situation changes, how some decisions last over time, whereas many quickly become obsolete, except for the sometimes crucial role played in the life of the people concerned, first and foremost.

Computer technology increases the obsolescence of older judgements, which are not all electronically indexed.

Mention was previously made of the educational role of the judgement – a role that confirms the importance of efficient communication. There again, clearly specifying the chronological order of the facts is of prime importance, particularly in the case of a judgement that has historical significance, and therefore, a longer useful life. The greatest care must also be taken to ensure the clarity of the words. "The first quality of style is clarity," said Aristotle[8]. For instance, what purpose does the following sentence serve – *"It is in that year that the construction of the new bridge was in the news headlines."* – if we don't know either the context of the event or the date or when it took place in time, nor even between which shores the bridge was then built? It's a banal example, I agree, but one that illustrates the lack of preciseness that we can encounter in court decisions.

It should be mentioned that at times, the judgement outlives the author, and that long after his death, we hear it or we still quote the

8. Aristotle, *Rhetoric III,* II; 4 B.C.

diktats from it or certain powerful statements made by a given judge. But that's more of an exception.

In short, despite the variations in the lifespan of a judgement – a lifespan that is often unpredictable, in fact – the qualities sought in a judgement remain the same, for all decisions (in both civil and penal matters):

- *the quality of the writing: clarity, conciseness*
- *the strength of the analysis of the facts*
- *the strength and clarity of the reasons*
- *the ability to simplify and to favour simplicity in conveying the messages*

CONCLUSION

"The mechanics of judging are very complex; we have no idea how complex if we haven't served as a judge ourselves…," wrote Guy Thuillier at the beginning of his publication entitled *L'art de juger*[9]. Further on, he added:

> *[TRANSLATION] "In fact, the origins of judging are very muddled: judging is a complex chemistry. We are neither in an intuitive system nor in a system of pure legal logic (as some commentators lead people to believe); we are in a mixed sphere that is vague and undetermined…"*[10]

Whenever a judge starts writing a judgement, he undertakes – to some extent – a fight against himself, a fight against the anxiety over being faced with an empty page, against the worries over indecision and imprecision, against the feeling of inadequacy in the face of certain complex aspects of the disputes and against the constant fear of time that is dragging on, the time limit that is hard to control, all the more so because the judge is occasionally submerged by the number of cases to handle.

Professor Gémar also stated:

> *"The acid test that writing a judgement represents is particularly trying for anyone who has to write the law. We know the difficulties that the judge must face in a country such as Canada, where two major traditions of legal writing and expression of justice collide. To which should be added the language difficulties per se, due to the involvement of more than one language at the same time and the reciprocal influences stemming therefrom."* [11]

Added to all these challenges that the judge must meet is the obligation of efficient communication.

However, these challenges are a rewarding experience for each judge, and almost always a victorious one. Rewarding, through the invigorating mental exercise, through the feeling of having been useful in the chain of administration of justice, and as well, through the pleasure of making a useful decision and of putting his thoughts into words.

Because as a judge, it is important, as a decision-maker, to constantly reinvent oneself, to question one's habits, in order to keep one's enthusiasm very keen as well as one's ability to start afresh – those essential ingredients for all cognitive functions and all real communication with others.

This obligation to communicate, on the part of the judge, continues to be of vital importance for the public's confidence in the administration of justice and the respect that this same public will show, in the long term, to those whose basic mission is to arbitrate their obligations, while protecting or respecting their rights.

BIBLIOGRAPHY

1. CÔTÉ, Pierre-André et FRÉMONT, Jacques, *Actes du 4e Congrès international de l'Association internationale de méthodologie juridique – Le temps et le droit,* Éditions Yvon Blais, Cowansville, 1996
2. GARÇON, Maurice, *Essai sur l'éloquence judiciaire,* Éditions Corréa, 1947
3. GÉMAR, Jean-Claude, *Préface, Écrire la décision,* 1ère édition, Éditions Yvon Blais, 1996
4. LINDON, Raymond, *Le style et l'éloquence judiciaires,* Éditions Albin Michel, Paris, 1968
5. MAILHOT, Louise, *Écrire la décision – guide pratique de rédaction judiciaire,* 2e édition, Éditions Yvon Blais, 2004 (see selective bibliography)
6. MORIN, Fernand, *Les présupposés de la règle de droit – Essai sur le non-dit du droit,* Éditions Liber, Montréal, 2006
7. SIMARD, Jean-Paul, *Guide du savoir-écrire* (chap. I), Les Éditions de l'Homme, Montréal, 1996
8. Théophile MOREUX, L'Abbé, *Science et Style – Conseils à un jeune écrivain,* G. Doin & Cie, Éditeurs, Paris, 1930
9. THUILLIER, Guy, *L'art de juger,* Éditions Economica, Paris, 2001

9. 2001, Éditions Economica, p. 7. This publication contains a very complete analysis of the various facets of the role of judging, both for the judge alone and for the judge on a panel. Even though the author is in the European system of administration of justice, his publication – barely 75 pages long – should be translated into a number of languages, as he makes such a fine analysis that can prove useful to the other judicial systems.
10. Id., p. 20.
11. Cf. note 4.

Address

The Honourable RENÉ DE LA SABLONNIÈRE
Senior Associate Chief Judge Court of Québec

This presentation – on the overall topic of "The Judiciary and the Media" – consists of two parts. The first part will provide a brief look at certain accomplishments of judges in Canada, in relation to communication with the public at large, concerning the law in general. The second part will present a section of the communications guide *(Guide sur les communications)* developed by a committee of judges from the Court of Québec, following certain unfortunate incidents faced by one of our colleagues a number of years ago. This section of the guide specifically deals with media crisis management.

The Honourable Michel Robert, Chief Justice of Québec, at the opening of the courts in Montréal on September 4, 2008, mentioned – after having listed the reforms brought about by the various courts:

> *"However, there is one aspect of the reforms where we could achieve greater progress – that is, with regard to explaining the justice system to the general public, through the media.*
>
> *The justice system is still very mysterious to the general public and is often incomprehensible to the leaders of our society.*
>
> *The officials of the court don't seem to have a great talent for simplifying our language, which – both oral and written – is still inaccessible, despite the recent efforts made in this regard."*

He then urged the presidents of the Bar associations in Québec City and Montréal to use their interpretive skills in this regard. I would like to point out that, in my opinion, he was urging them to explain the justice system in general and not encouraging them to discuss any particular cases in the media.

CANADIAN EXPERIMENTS

In Canada, in order to explain the justice system, a few experiments are under way and seem to be producing positive results. I have chosen three examples – which aren't exhaustive – with regard to what is being done in our country.

Judge Hugh Stansfield, Chief Judge of the Provincial Court of British Columbia, takes part in televised shows and answers the questions of TV viewers that have been sent to him in advance by regular mail or e-mail. The most relevant and interesting questions are selected by the judge, and the host of the show asks the questions.

In Manitoba, Judge Ray Wyant, Chief Judge of the Provincial Court, takes part in a monthly radio broadcast where he answers the listeners' questions. It is a live, open-line show. The questions aren't screened and there are no interventions. This situation is a bit more risky, as it is produced without any "safety net"; however, according to Judge Wyant, it seems to go very well and have a positive impact on his area.

In Québec, since John Gomery has retired, he has appeared on the CBC television network a number of times to explain certain court decisions. He does this with unofficial status, based on his vast experience as a judge.

It seems to me that these three situations are contributing toward demystifying and clarifying the justice system.

COMMUNICATIONS GUIDE

Now let's take a look at the communications guide *(Guide des communications)* written by a committee of judges in the Court of Québec.

Without going into too much detail, I will summarize a problem case that we experienced with the media and which prompted us to write a guide for judges *(Guide à l'intention des juges)* in this regard.

One of our colleagues, with an unblemished career, highly regarded and respected by his colleagues and by the attorneys submitting their cases to him before the court, was presiding over a sexual assault trial concerning three accused parties and one victim. At the time of the sentencing, the judge used an expression which – taken out of context by the media – misinterpreted his line of thought. That misinterpretation made the judge say that the accused parties hadn't demonstrated any violence in committing the offence. At least, that's the way it was reported in the media.

What the judge wanted to imply is that sexual assault is a violent act in itself, but beside the act per se, there hadn't been any other violence committed against the victim. His analysis prompted him to note, at the time of the sentencing, that certain aggravating factors, such as physical injuries, were not involved.

> *He expressed himself in these terms:*
>
> *"… Was there any violence? There was psychological violence; however, the testimony, by Dr. Têtu, I believe, doesn't mention any (-) any bruises, any physical violence, at least not any that is provable…"*

Following those articles, there was an angry outcry on the part of the media and victim protection associations. There were also a lot of complaints filed with Québec's judicial council (the *Conseil de la magistrature*) and the defence filed an appeal. I'll tell you straightaway that following a complete examination of the file, Québec's judicial council found no reason to intervene, as it didn't perceive any breach of the code of ethics, and the Court of Appeal also didn't intervene with regard to the substance or the sentence.

I'm telling you about this incident because it is interesting from a crisis management point of view. In fact, the Court was caught off guard by the avalanche of criticisms from the media and from victim protection organizations. This crisis wasn't well managed, due to our lack of experience and organization.

Since the judge found himself all alone to face this crisis, he consulted a professional communication firm, through his lawyer. The firm advised him to grant an interview on a Radio-Canada broadcast (which was called Le Point at the time), in order to put things back into context. A seasoned Radio-Canada broadcaster interviewed him, saying something like the following:

> *" Mr. Justice, you were taken to task by the media and by various victim protection organizations with regard to a decision that you rendered. You claim that this situation is unjustified. Tell us what you have to say in your defence…"*

The angle of the camera (a view from above) gave the impression of a person who was crushed, not to say "guilty". Even before uttering one single word, the judge was already condemned, given the fact that on television, the image counts 70%; the tone used, 20%; and what's said, counts only 10%.

In short, this broadcast didn't produce the results expected. The judge – both by the image and by the content of his remarks – didn't manage to turn sympathies around in his favour, and quite the contrary.

Following these events, the Court of Québec's Management retained a professional communication firm, other than the one that had advised the judge, in order to instruct it on how to interact with the media and, in particular, in the case of a media crisis. Following this firm's recommendations, a committee made up of judges of the Court was formed to examine these. What came out of this committee was a guide for judges of the Court of Québec, with regard to the media.

Four sections of this guide provide advice on ways of communicating with the public and the media in various situations – the first, in a court room; the second, how to react in cases of real or feared media controversies; the third, what to do in impromptu media interventions; and lastly, what to do in case of a requested interview that a judge decides to grant, for various reasons.

As its title indicates, it is a guide for judges of the Court and not a compendium of directives. It helps give the judges food for thought on the attitude to adopt in various situations and helps to make them feel secure with regard to the support they can obtain from the Court. It sets out guidelines and frames the choices available to judges when faced with various media events.

Above all, this guide isn't a form of encouragement to grant interviews. On the contrary, it is expressly written, at the beginning of the second section:

> *"Don't take part in any interviews, unless in very exceptional situations and after discussing the matter with all available resources."*

SECTION 2 OF THE GUIDE: MEDIA CRISIS

The purpose of my remarks is aimed at particular situations – which are rather limited in number, all in all – that are unjustly detrimental to the administration of justice and to the judge that has rendered a decision that is subject to a media controversy. I'm not broaching the question as to whether if, in general, judges should more often grant interviews. In this regard, I recommend you read the presentation given by the Honourable Guy Gagnon, Chief Judge of the Court of Québec, right here, on August 19, 2008, during "Judges' Day", within the Canadian Bar Association's conference.

My remarks are being made following these issues and deal specifically with media controversies.

The main observation that surfaces following the experience we had, and that I just related to you, is that it's important to be able to react quickly, in a measured and appropriate manner. All the parties involved must be identified in advance, and each one must know the role he will have to play. Time is the most important constraint of all. A response that is late in coming, although correct, may no longer be of any interest to the media, which has already gone on to other news. There is no place for improvisation or beating around the bush. To prevent an event from getting out of hand in the media, it's a must to be equipped with a system that has stood the test of time and that makes it possible to take the appropriate remedial action, if need be, in keeping with our obligation of reserve and in deference to the other institutions that may be called upon to express an opinion on the matter, such as higher courts or the judicial council.

A procedure has been set up, providing for two steps: the first concerns the judge involved and the second, the role of judges in a management position.

A) THE JUDGE:

With regard to the judge involved, his coordinating judge must be informed of any situation placing one of his judges in a struggle to cope with a media crisis. He must meet with the judge, comfort him and encourage his colleagues to support him in order to avoid any feeling of isolation. In fact, we have learned from experience that when a judge is grappling with a media crisis, colleagues' normal reflex is to show discretion and self-restraint so as not to antagonize him or make him feel ill at ease. Generally, a vacuum is created around the judge, and the judge – feeling that his colleagues are avoiding him – may interpret this attitude as being a condemnation and conclude from all this that they already consider him to be at fault. It is therefore important to inform the other colleagues that the judge is facing a difficult time and that his friends can do something about it, if only to comfort him.

The judge concerned by the media crisis, insofar as possible, must try to continue normally carrying out his professional work. If he withdraws at a time when he is subject to criticisms in the media and if he is in breach of the stipulated obligations, such as sitting on the bench, for example, the media and the public may therefore conclude that his behaviour is revealing a feeling of guilt. Judges are given some advice in this regard:

- *Don't grant any interviews, unless in exceptional circumstances and after having consulted the available resources.*
- *Avoid resolving the controversy alone.*
- *Avoid cutting yourself off from everything and everyone.*
- *Be receptive to the collaborative efforts of colleagues and friends.*
- *Remain calm, insofar as possible.*
- *Don't make any rash decisions.*

The judge must be reminded that he can hire a lawyer, paid by the Justice Department, who can advise him and, if need be, intervene on his behalf, before the public. The judge may also take advantage of the Judges Counselling Program, set up to help judges.

And lastly, the coordinating judge informs the judge in question of the steps that will be taken by the Court's Management in order to manage the situation. The coordinating judge also reminds the judge in question that a mechanism is in place, that a team is immediately looking after his case and that he will be kept abreast of any decisions and steps to take, if need be, even before any of that is actually done.

B) THE COURT'S MANAGEMENT:

As for the Court's Management, the coordinating judge compiles the facts, such as information from the recording of the hearing or a copy of the contested decision, the news reported in the media, the location and courtroom as well as the date and time when the incident in question occurred.

This information is sent, within the following hour, to the office of the Senior Associate Chief Judge, who must inform the other colleagues at the Chief Judge's office as well as the members of the advisory committee, so that everyone available can take part in the reflection. The advisory committee is made up of the Senior Associate Chief Judge and 4 judges from the three divisions of the Court. These judges have taken part in developing the media guide *(Guide sur les medias).*

A meeting is held within the hour, in person, by conference call or videoconference, with the chief judges and the members of the advisory committee who are available. Insofar as possible, everyone must immediately get out of what they are doing and take part in the meeting.

At that meeting, an analysis must be made as quickly as possible so that a decision can be reached in the best interests of the administration of justice. This decision must be made as quickly as possible in order to be in a position to respond to the media, if need be, while the incident is still in the news. If the news was published or broadcast in the morning, it is important to be able to have reached a decision before noon, so that a response is announced in the news at the noon hour, which is prime time.

The office of the chief judge has retained a communication advisor who is familiar with the particularities, obligations and mechanisms of the Court. This advisor has agreed that if we consult him on an urgent basis, he must look after the file accordingly.

A decision is reached on what course of action the Court will take, and the judge is informed of the decision.

The decision reached may be "not to intervene" and, in that case, an explanation of the reasons is given to the judge. If there must be an intervention, it may be carried out by means of a news release, a press conference to be held by a judge in authority or by the judge's lawyer or by a representative of the Canadian Bar Association or the Barreau du Québec, or merely by means of an interview.

The purpose of creating such a structure is to promote fast decision-making in order to remedy an erroneous situation, if need be, and to prevent what I would describe as a "media flare-up". In fact, we have noted that when one media issues incorrect news, it may subsequently be announced by other media, without checking further, and that news then flares up more and more.

On a final note, I wish to mention that we must remember that our leeway is quite limited. Our ability to intervene is mainly confined to the falsehoods and errors contained in the news coverage. It is inappropriate to intervene with regard to any criticism – however severe it may be – of a decision that has been rendered, provided that the news coverage of the facts is correct. When the news coverage of court decisions contains errors and it discredits the judge and the judicial system, the appropriateness of intervening under such circumstances must be examined.

Address

The Honourable JOHN H. GOMERY
Retired Judge of Superior Court of Québec

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THE IMPACT OF THE MEDIA ON THE JUDICIARY

I hope you will forgive me if I begin on a personal note. My interest in the interaction between the media and the administration of justice was certainly sharpened by my experience as an inquiry commissioner, which occurred towards the end of my career as a Judge, but this interest began earlier, at the time when I acted for five years as the Chair of the Copyright Board of Canada, from 1999 to 2004.

This was a part-time job which I could fairly easily combine with my functions as a supernumerary Judge of the Superior Court. It brought me into contact with the radio and television industries, which were regularly appearing before the Board to contest proposed tariffs for their use of copyright material, mostly musical compositions and performances.

The tariffs were being proposed by organizations representing the owners of copyright, and it was the Board's task to determine regulatory tariffs that would provide fair compensation for the enforced use of their property.

To determine what would be fair, at the hearings of the Board, its members, which included myself, had to examine the financial consequences of its tariffs for the media concerned, and for me, it was both educational and most revealing to learn about the enormous sums of money involved in the business operations of the modern media.

Public broadcasters like the CBC, Radio-Canada and their provincial counterparts are subsidized by government funding, but for commercial radio and television networks, almost all of their revenues are derived from advertising. It follows that the content of radio and television broadcasting, both private and public, is greatly, and some would say entirely, influenced by its ability to attract an audience which will be exposed, more or less willingly, to the pitch of corporate interests wishing to sell their products.

The very existence and profitability of the media concerned is dependant upon their success in attracting an audience.

Now, that audience wants, above all, to be informed and entertained, and is willing, apparently, as the price of the information and entertainment, to be subjected to advertising messages that may or may not be pleasing to listen to and to see.

The media must continually feed the ever-increasing appetite of the public, for whom, in the second half of the 20th century, television has become the principal means of passing its leisure time, and also its principal means of being informed of current events, called the news. The news may not be the richest source of advertising revenues, but it is an excellent means of attracting and holding an audience, which becomes accustomed to watching the channel which best presents news information and analysis. One of the most productive and reliable sources of information with which to entertain the public, under the guise of news reporting, is to follow what is currently happening in the courts, a subject for which the public seems to have an endless fascination.

Having received this preliminary education about the media during my time with the Copyright Board, I was not as surprised as I would otherwise have been by the attention given to the inquiry commission over which I presided for almost exactly two years, from February 2004 to February 1, 2006, the date when the Commissioner's final report was delivered. All the same, the media attention which the commission received was overwhelming.

I quickly lost my former comfortable status as an obscure Quebec Judge, which was the way I was described in newspaper reports published at the time I was appointed, and became so well-known and recognized that I am now frequently asked to speak to such august assemblies as this one. I must tell you that my temporary status as a celebrity was a surprise to me, and remains difficult to explain. I am today no wiser or more deserving of attention than I was previously.

I have learned that for most people, the fact that your face has often appeared on the television screen and in the newspapers is enough to convince them that you are suddenly more important and praiseworthy than you were before that occurred. Whether you like it or not, perception becomes reality. As a cynic once remarked, the only thing that counts is not what you say, but did they spell your name right.

My experience of becoming a public personality has led me to reflect upon the relationship between the judiciary and the media, and these reflections are what I propose to talk about today.

Some of our legal traditions go back to the time of the Roman Republic, which refined and developed the notions of Justice. Justice, with a capital "J", was identified as the objective of the Law, and Judges were expected by the Romans, as they are today, to always keep in mind that their decisions should, ideally, produce a just result. And it was the Romans, I believe, who started to produce in their art and statuary the image and symbol of Justice, in the person of a goddess named Justicia.

It might be interesting to speculate about the reasons why Justice was feminized at a time when women had virtually no legal rights and were not at all involved in the administration of the Law or the Courts, but let us leave that question aside.

What I want to recall to your attention today is the fact that she was, and still is, I believe, portrayed as being blindfolded. She holds in one hand the scales of justice, to assist her in weighing the merits of the matter being litigated, and in the other hand, she holds a sword, to remind us that retribution and punishment are part of Justice.

But the blindfold is not so easy to explain. It is usually proposed that the blindfold prevents Justicia from identifying the parties who are appearing before her, and that impartiality will be the result, but as those of us know who have had the task of sorting out right from wrong, and of distinguishing truth from falsehood, it is most useful, indeed necessary, to see and assess the parties who come before the courts. The notion of having to decide cases blindly is not an entirely attractive concept, except that it reminds us of the need for impartiality in the administration of justice.

Another explanation offered for the blindfold is the circumstance that in many cases, for example in practically all cases of criminal prosecution, the person accused of committing a crime is obliged to defend himself or herself against the power, authority and influence of the state, the same state that organized the system of administration of justice, and that appointed the Judges called upon to apply the law.

The notion of Justice, with a capital "J", requires newly appointed Judges to immediately forget who named them and to fail to recognize the representatives of the state when they appear in Court. This inability to see and recognize your former friends would certainly be facilitated by a blindfold. But Justicia, without peeking out from behind her blindfold, must surely be aware of the identity of the people who come before her.

She knows, too, that her reputation for impartiality and independence will be greatly enhanced if she hears and decides cases publicly. Over the centuries, our civilization has seen it confirmed again and again that secret courts and secret trials do not produce just decisions. One of the first steps taken by an authoritarian or despotic ruler is to limit the freedom of the press and other media, and to restrict access to the nation's courtrooms, to prevent the public from knowing what is going on there.

We can all agree – can we not? – that Justice requires that the law should be administered openly, but how can Justicia know the courtroom is open and full of spectators if she is blindfolded? Should she not be assured that what she is doing is being observed by the society in which she operates?

Up until about one hundred years ago, the interest of the public in the administration of Justice was for the most part local, and only occasionally national. Many, probably most, citizens were either illiterate or restricted their reading material to the Bible. Newspapers and magazines were far less widely distributed than they are today.

If a trial of some sort was taking place in the local courthouse, those interested in following the proceedings could usually find a place for themselves in the courtroom and observe first hand the presentation of the evidence and the forensic skills of the lawyers.

The presiding Judge did not have to concern himself (at that time the Judge was invariably male), with media coverage, because most of the time there wasn't any. We should remind ourselves that radio and television have been on the scene for less than a century, and that until the Second World War, newspapers were almost exclusively local. This meant that a Judge was free to behave very differently from what is expected today.

Over the 50 years of my legal career, judicial conduct has had to evolve very rapidly. When I started to practice law before the courts, in Montreal, in the late 1950's, some of the Judges before whom I appeared allowed themselves a latitude in what they said, and how they behaved in court, which simply would not be tolerated by the Canadian Judicial Council today.

I don't mean to suggest that all Judges of that era were deficient by today's standards. Of course, most of them were fine jurists, hard working and admirable examples to follow and imitate, but those of you who are as old as I am will acknowledge, I believe, that the standards of today were not respected by an appreciable proportion of the judiciary as recently as 40 or 50 years ago.

Some were openly irritable and bad-tempered, some were not as hard-working as they should have been and some made little attempt to hide the fact that they were disinterested in what they were doing.

Many Judges rarely spoke or asked a question, leaving the way clear for the more aggressive and unscrupulous members of the Bar to bully and intimidate witnesses, and sometimes their opponents. As a general rule, in my early years at the Bar, Judges were non-interventionist, and spoke in Court only when it came time to rule upon an objection, or when it was time to render judgment.

Even today, some respected authorities will argue that it is entirely proper and fair for the Judge to leave the trial entirely in the hands of the lawyers, to remain aloof and passive, and to avoid controversy by saying nothing, no matter what is happening in the courtroom.

A more prevalent opinion, which has been supported by relatively recent judgments of the appeal courts, including the Supreme Court of Canada, holds that in order to conduct a fair trial, the Judge must preside, and presiding requires the Judge not only to maintain order in the courtroom, but also to assure that the evidence is fully and fairly presented, asking questions and seeking clarifications as necessary. It is now believed that the Judge also has a duty to protect witnesses from overly aggressive counsel, and to intervene as necessary if a witness is obviously reluctant to tell the truth, or the whole truth.

The Oxford English Dictionary defines the word "preside" to mean "to exercise superintendence, direction or control", and Webster adds to this the notion that presiding includes the regulation of proceedings.

We live in an era in which an increasing proportion of litigants do not have legal representation when they come to court, and whether the presiding Judge likes it or not, they expect him or her to give them guidance and assistance.

Let us remember also that the alarming cost of legal representation is such that attempts have to be made to shorten trials as much as possible; consequently, the presiding Judge cannot any longer comfortably sit there and not say a word. The day of the sphinx-like Judge is past.

What accounts for this evolution? I have mentioned a couple of contributing factors, but my proposition to you is that the principal reason for the change in judicial conduct and in the manner of conducting trials is the increased attention given to the administration of Justice by the media.

And, since the evolution has, in my opinion, led to improved judicial conduct, and to a better court system, producing better trials and better judgments, the attention of the media should be acknowledged to be generally a good thing.

I don't suggest that Judges should try to attract more media attention to their trials; in any event, this is not necessary. But it does seem to be logical that Judges should not be trying to restrict the access of the media to their courtrooms.

The reporting of court proceedings by the media is in many ways deficient; it tends to be overly superficial, and to emphasize the sensational. Sometimes, it is simply inaccurate. This makes Judges reluctant to interact in any way with the media, but that reluctance should be tempered by the realization that the presence of the media in the courtrooms tends to make the Judge perform his or her functions in a better way, and presents an opportunity to improve the public's perception that the administration of justice is performing its functions appropriately.

Let me talk for a few minutes about the relationship of the judiciary with the media, and how their interaction might enhance the image of the judiciary if the judicial system were to remove the symbolic blindfold, to recognize that what its Judges are doing is being closely observed by the media and by the public to whom the media are reporting, and that overall, that close observation is a positive influence on the administration of justice.

Much of the time the public ignores what is going on in the courtrooms of Canada, because most litigation involves private disputes between individuals or public or private corporate interests of various kinds. These disputes, and how they are resolved, are matters of little or no interest to the general public.

In fact, it can be a bit frustrating for a Judge, who has worked hard to deal with a case that involves questions that the Judge thinks should be of general interest, perhaps raising interesting and unprecedented points of law, to see that the carefully reasoned and impeccably drafted judgment he or she has worked so hard to prepare is entirely overlooked by the media, or at best is dealt with in a few lines or a ten-second sound byte.

But occasionally a Judge finds himself or herself presiding over a trial that has attracted media attention. This seems to happen most often in criminal matters, or where there has been some sort of a sensational scandal; suddenly there are media representatives in the courtroom or in the courthouse corridors, and reports on the progress of the trial start to appear in the newspaper or on the radio or television.

Now if the Judge in such a situation seeks to have the approval of the public for the performance of his or her judicial functions, the Judge surely cannot do so by talking directly to the media, to tell it what is going on in the trial and how it is progressing, because there is a long and honourable tradition, that has become an ethical requirement, that Judges should not speak directly to representatives of the media about a pending matter, either during the trial or after judgment has been rendered.

Of course, you are probably thinking that Judges should not in any case be seeking publicity or the approval of the public or anyone else, with the possible exception of the Court of Appeal, and to a great extent you are right. Rather than seeking to win in the Court of public opinion, the Judge should be dispassionately concentrating only on coming to the right conclusions about the case, according to the appropriate principles of law and justice, whether those conclusions are popular or not.

That is the rationale for the rule that Judges should not speak directly to the media. Anything that a Judge might have to say during the trial could be, and probably will be, interpreted as an indication that the Judge has come, or is coming, to a premature conclusion about the eventual outcome of the hearing that has attracted media attention. As we all know, Judges are not supposed to make any final determinations about the outcome of a case until all of the evidence has been presented, and counsel for interested parties have made their final submissions.

This is, by the way, one of those counsels of perfection that is extremely difficult to apply in real life, because it often is obvious to a Judge in the course of a trial that some witnesses are more reliable than others, or that the legal or factual basis for the case upon which one of the litigants is relying is unfounded.

Nevertheless, it is advisable for the Judge to try not to reveal his or her appreciation of the matter or of the evidence until everyone has had their say.

This is true because the Judge does not wish to appear to favour one side or the other, and also for another more practical reason: Judges who have been initially impressed favourably or unfavourably by a witness, or by some element of the evidence, sometimes have to revise their initial impressions in the light of later developments, and they risk looking foolish if they say something about the credibility of a witness which they have to retract subsequently.

I learned this lesson very forcefully during the hearings of the Commission of Inquiry into the sponsorships program; probably you know what I'm talking about. The embarrassment is more acute if an offhand remark made by the presiding Judge, which may seem to indicate how he or she is thinking, finds its way into the newspapers, especially if the remark is later shown to be incorrect or unjustified.

The rule has to be that even if a Judge has started to incline in favour of one party or another on the basis of the Judge's appreciation of the evidence, it is best to say nothing and to keep an open mind and to appear to keep an open mind, right up until the last moment, no matter how difficult that may be in some cases.

As for comments about the matter, to the media or to anyone else, after Judgment has been rendered, they have to be avoided as well, because the Judgment should contain a summary of all of the reasons for the Judge's decision. If additional remarks are made, they could be interpreted as supplementary reasons, leaving everyone, including the Court of Appeal, if there is an appeal, in a state of confusion as to the real reasons why the Judge decided as he or she did.

So, to sum up, the golden rule for Judges is to say nothing publicly about a case being heard, either during the trial or later.

Unfortunately, the question does not stop there, because indirect communications may be made by the Judge to the observer of what is going on in the courtroom, or may seem to have been made. Such indirect communications may have a lot to do with how the public and the media perceive the Judge's attitude and performance of his or her judicial role. I'm talking now about the manner in which the Judge conducts the trial, and how he or she may, by indirect communication, enhance or diminish the public's perception that the judicial system is fair and just.

Let me explain what I'm talking about when I refer to indirect communications.

Although Judges generally prefer that the presentation of evidence be left to counsel for the parties, as I have already mentioned at certain times, it is necessary to put questions to a witness, either because the Judge does not understand the testimony, or because it is incomplete or needs to be explained. A Judge has a duty to know and understand what a witness is saying, and it is perfectly legitimate, indeed necessary, to intervene to have a proper appreciation of a witness' evidence.

For example, let us remember that witnesses promise and undertake to tell not only the truth, but also the whole truth; if a Judge senses that a witness is concealing certain relevant facts by evasive and incomplete answers, he or she should not let the record remain incomplete. It is really the responsibility for counsel in cross-examination to put the necessary questions to the witness concerned, but it happens that counsel may overlook an important point. It also happens that counsel may not succeed in getting satisfactory answers from a reluctant witness, even when the questions are straightforward. A question from the Bench might succeed in persuading such a witness to supply information which he or she would prefer not to disclose.

The difficulty with judicial interventions of this kind is that in a highly publicized case, the media tend to pounce on them as indications of what the Judge may be thinking, or in which direction the Judge is inclining.

In the same way, the media will sometimes report on body language, facial expressions or other indicia as revealing how the Judge is reacting to the case being put before the court by one side or the other.

Some Judges succeed in hiding their feelings and reactions better than others when startling revelations or contradictions, or other unexpected evidence, is presented. Those of us who get red in the face when we are annoyed or surprised find it difficult to disguise our emotions.

Interventions and involuntary reactions by a Judge do not constitute attempts to communicate with the media or the public, or to influence public opinion, but they may have that effect in spite of the Judge's best efforts to the contrary. Based upon the media perception of how well or badly the Judge is conducting the trial, they may approve or disapprove of his or her performance, whether or not the Judge is seeking such approval.

Similarly, public opinion of the Judge's performance may be affected by media reports on their perception of how attentive he or she appears to be, how rapidly objections are dealt with, how many notes the Judge is observed to make, how diligently the Judge keeps to the schedule for the hearings, and how patiently or impatiently the Judge seems to listen to arguments put to the court by counsel.

What I'm saying, in effect, is that the Judge's manner of discharging his or her functions on the Bench constitutes a form of communication to the public, without the Judge deliberately intending to communicate or to influence public opinion. For that matter, the media reports on the Judge's performance of his or her duties may be an accurate or totally inaccurate reflection of what the Judge is thinking, and the Judge is helpless to do much about it.

There is an exception to what I have said about the avoidance of direct communications to the media. In some circumstances it may be necessary to set the record straight, where a media report on a continuing trial contains incorrect information of sufficient importance that it is appropriate to correct it, either by a press release or by a declaration by someone, preferably not the Judge involved. Let me give you an example, based on a somewhat disagreeable personal experience.

During the Oka crisis many years ago, I dismissed from the Bench an application for a provisional order of injunction presented by the operator of an ambulance service who wanted the Court to order the dismantling of police road-blocks that limited and slowed access to the Akwasasne Reserve. A newspaper report of the hearing attributed statements to me that I had supposedly made during the hearing of the application in a very crowded courtroom, attributions that were simply untrue, as was established beyond any doubt by a transcript that only became available a few days later. In the meantime I was being heavily criticized for what I had allegedly said, in the press and on radio talk shows. A lawyer engaged on my behalf called upon the newspaper in question to publish a retraction and an apology, which it did and the matter died there. I was only notorious on that occasion for a few days.

This is the kind of a situation where a Judge may find it necessary to have someone communicate directly on the Judge's behalf with the media. In the Province of Quebec, the usual practice in such situations is for the Chief Justice of the Court concerned to make whatever declarations to the media that are deemed necessary or advisable.

The reluctance of Judges to give media interviews or to otherwise reveal details about their personal lives, histories as well as their personalities and attitudes, is to a great degree, unsatisfactory from the point of view of media representatives, who believe, probably correctly, that the consumers of their reports and broadcasts are curious to know more about these mysterious creatures called Judges, who may have created strong impressions in the minds of the public as good or bad representatives of the administration of justice. Who among you would not like to know more about the lives and personalities of certain Judicial personalities who have received intense public attention, for example Judge Amy St. Eve, who presided over the Conrad Black trial in Chicago, or Judge Lance Ito, who handled more or less successfully the trial of O.J. Simpson in Los Angeles, or, closer to home, Mr. Justice Peter Hryn who not long ago acquitted Mr. Felderhof of insider trading of Bre-X shares, after a very long trial. Public curiosity about the private lives and habits of Judges can be very intense, and an argument can be made that it is preferable to satisfy the desire to know more about certain Judges who are, for one reason or another, suddenly thrust into the limelight, rather than to leave it to the imagination of journalists, desperate to write something on the subject, who may describe the Judge concerned on the basis of fragmentary and sometimes incorrect information.

I would like to propose to you that the time when Judges remain totally exempt from public scrutiny is coming to an end. In the past, public attention and curiosity about Judges were less than what they are today. When I was a young lawyer in the 1950's and 1960's, appointments of Judges to the Supreme Court of Canada and to the provincial Courts of Appeal did not give rise to much, if any, media attention, whereas today the public expects to be informed not only about the candidate who is eventually appointed, but also about other candidates who may have been considered. We live in an information age where it is increasingly difficult for anyone in a position of influence to be totally free from attention by the media.

I leave it to those responsible for the drafting of the code of conduct which governs the ethical standards of what Judges may or may not do to consider the extent to which it may be desirable to loosen some of the restrictions that the Code imposes at present. Personally, I believe that Justicia should take off her blindfold, and accept that the media attention that she is getting contributes to an improved administration of justice.

I believe also that the judiciary could enhance the public perception of our judicial system in two ways; first of all, by using comprehensible and simple language, in Court and in judicial decisions, remembering that the main reason for giving reasons is to inform the parties why the Judge decided as he or she did. There is a sad tendency to write reasons for judgment to impress and persuade the Court of Appeal, instead of communicating with the consumers of judicial services. The second way to improve the image of the judiciary, and I am now speaking as someone who, since his retirement, is asked occasionally to publicly comment upon and analyze legal matters and decisions, would be to have shorter and simpler judgments. As the years go by, they seem to get longer and longer, especially at the appeal level. Too often, the principal reason for the Court's decision is difficult to discern.

Before concluding, I think I should say a few words about the relationship, with the media, of a Judge appointed to head a public inquiry.

A democracy depends for its success on an informed population. One of the keys to the success of a public inquiry is that it take place publicly, for all the world to see, and that the public is satisfied that the facts being examined are completely and thoroughly exposed. Most often the inquiry has been ordered to determine the factual reasons for a public scandal or tragedy, giving rise to a controversy.

I am of the view that it is not possible or even desirable for a Judge named to preside over a commission of inquiry to avoid all contact with the media, as the Judge would in the case of an ordinary trial. First of all, the Judge is not acting, strictly speaking, as a magistrate, but rather as an inquiry commissioner, mandated by the government to embark on a fact-finding inquiry in a matter of public interest. The Inquiry Commissioner is not mandated to make findings of criminal guilt or civil responsibility.

Instead of dealing with a trial of competing private interests, where the general population has no real stake in the outcome, the commissioner is examining a controversial matter of great importance to the public; the public has a right to know how the inquiry is proceeding, and a right to form its own opinions about the issues. In this context, media coverage should be not only tolerated but encouraged.

Unfortunately most Judges, and I include myself in that number, are poorly prepared for the media exposure to which they will be subject when named as an inquiry commissioner. They have had little or no experience with journalistic serums or interviews, and are not accustomed to the unflinching gaze of the television camera. The learning experience will be abrupt and difficult, and errors of judgment can have painful consequences.

Nonetheless, being in the spotlight is an unavoidable part of presiding over a public inquiry, and it is not, I suggest, a bad thing for the commissioner to demystify his or her role and objectives by being occasionally accessible to media representatives. The question is how much access is enough, and how much is too much. Since that question is now pending before the Federal Court, I think it is best to say no more.

Thank you for your attention.

Address

Mr. GUY CANIVET

Member of the Conseil constitutionnel de France

I would like to begin by saying how much of an honour it is to be among you as a guest of this conference of Canadian judges during the 400th anniversary celebrations of the founding of the Quebec City. I am honoured to be here at this time, because it provides an opportunity to highlight the ties between French and Canadian judges and, more specifically, between the Cour de cassation, France's Supreme Court, and the Supreme Court of Canada.

Your conference asks the question: *"Which Judge for Which Society?"* As part of my modest contribution, I would like to reformulate the question and ask: "To whom is directed the court's judgment?"

Some people say that judges draft their decisions out of sheer vanity. We all have seen judges' narcissism in action. No need to discuss it any further, since that's not the issue here. Setting aside all Freudian considerations, is a judgment directed toward the parties to a dispute? Does it address the judicial corps? The interest groups involved? The State? A national group, minorities that form the group or the international community?

That's the classic judgment rhetoric question that Chaïm Perelman, for example, has thought a lot about in terms of justice's audience. As you know, a judgment's primary purpose is to address the parties and adjudicate a dispute, but beyond that, what? Beyond that, and much like the law it applies, a judgment seeks to secure all types of relationships within the national community and is obviously received by its full audience. In France, we talk about the people, the public in whose name justice is carried out. In France, the public is indivisible. In other words, the legal decision will uniformly address the national community. If like in Canada, however, the national community or community of citizens is multicultural, judgments take on their own meaning for and within a framework of diversity. Lastly, if a decision is of transnational interest, a Court's decision will be read around the world. In the latter case, the judgment will have an impact on multiple identities and take on a cosmopolitan dimension.

Let me tell you an anecdote that illustrates this multiple dimension of a judgment. In Fall 2005, the Chief Justice of Canada was a guest of honour of the French Senate. She was asked to speak at a luncheon about the ruling issued by the Supreme Court of Canada on the same-sex reference. Beverly McLachlin explained Canadian marriage law, the conditions under which a private member's bill aimed at broadening the institution to include same-sex couples had been adopted, the specific procedural conditions under which the Supreme Court had been approached, the questions that were asked and the content of the ruling by the Court under which same-sex marriage was consistent with the Canadian Charter of Rights and Freedoms.

These senators, all those gentlemen of a certain age – not that there was any uncertainty about their age – were dubious about the potential transposition of such an institution that would drastically change family law in France. But they were sure of one thing. They knew the importance of the ruling issued by the Supreme Court of Canada, because the very same issue of marriage between homosexuals, as we call them in France, was being debated by the French public, and in the legal arena as well. These senators knew that the matter had often been settled in the supreme courts of the world, be it in South Africa or in North American federal systems, based on the supreme courts' interpretation of fundamental rights.

And we can clearly see that for these senators and for the rest of the world as well, the decision rendered by the Supreme Court of Canada had an exemplary effect, but could also have a ripple effect that risked spreading by contamination and overturning French law.

Although ruling in accordance with Canadian federal law, the decision by your Supreme Court had and continues to have an impact around the world. Starting with an issue debated in most States, it gave the viewpoint of a leading Court and major legal system, placing the issue and solution among the decisions that have been or will be handed down elsewhere. Through its authority and the strength of its conviction, your Court has an influence on future decisions in other legal systems.

In this instance, the judgment has a scope that transcends national space when it reaches other countries and other specific legal bodies. Thus, you could say that with the global circulation of judgments, the cosmopolitan dimension of justice is very much a reality. Judges are well aware of that, which leads them to take a stand for or against highly diverse legal traditions. In some cases, their decisions have a supranational impact, resulting in a cosmopolitan attitude. It's the transition from this reality to the cosmopolitan resolve that I would like to discuss.

What is the cosmopolitan audience of a court judgment?

If we look at the same-sex marriage example again, we know that it involves more than just national systems; it's an international issue. In the spirit of equality of sexual practices, demand for marriage is global throughout gay communities, which want to extend and benefit from the right to marry. And the strategies they develop in countries around the world, including France, are universal strategies. The closed decisions by French courts are founded on an international rationale.

In a 2007 decision, the Cour de cassation, France's Supreme Court, refused to extend the institution of marriage to include same-sex couples, referring to the European Convention on Human Rights, which does not preclude French legislation. Other French courts based their decisions on a comparison of how systems have evolved by saying, although it is actually incorrect, that same-sex marriages became more widespread in the world generally because of the law rather than jurisprudence.

The decision and discussion about these issues clearly eliminate the differences between the internal and international order.

German sociologist, Ulrich Beck, who pondered cosmopolitanism issues extensively, says that we have to understand that reality itself is cosmopolitan now. Among the explanations he offers, he first points to the crisis in the world community, which is the interdependencies evidenced by global risks and civilization's resulting shared destiny due to these interconnected systems. The interdependence of legal systems does away with barriers between the interior and exterior, ourselves and others, as well as the national and international.

A prime example is the development of anti-terrorism laws. We know that after September 11, 2001, every State had to toughen up anti-terrorism legislation to ensure global security. We also know that in the majority of systems, supreme courts had the difficult task of reconciling the potential impact of tougher anti-terrorism laws with fundamental freedoms. It was a complicated situation that opposed loyalty to the jurisdictional order that institutes those laws with rule of law principles. Courts were torn between the need to establish global security through the complementary nature of these anti-terrorism measures, but also to uphold the principles of democracy.

The Supreme Court of Canada couldn't evade the problem either. In a case heard on June 23, 2004 and decision handed down on that same day, the Supreme Court expresses this difficulty very well, and I quote:

> *"The purpose of the Anti-terrorism Act – said the majority of the Court – is to prosecute and prevent terrorism offences. Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law. The challenge for democracies in the battle against terrorism is to balance an effective response with fundamental democratic values that respect the importance of human life, liberty and the rule of law."*

In substance, we find the same viewpoint and opinion in the decisions or opinions of leading judges, including: Aaron Barak, President of the Supreme Court of Israel in a 1996 judgment; Lord Bingham in a December 2004 decision by the House of Lords; and Justice Stephen Breyer in a recent decision by the Supreme Court of the United States on June 12, 2008 in Boumediene versus Bush on the matter of access to American courts by detainees of the US military prison in Guantanamo.

All of these decisions are linked together, because they rule on the same problem – based on different rights and often fundamentally different freedoms – and all arrive at the same conclusion. They build a convergence of court judgments, a unique jurisdictional policy that can be summarized by the following concept: Let States establish effective measures to ward off the terrorist threat without renouncing the founding principles of democracy.

This type of jurisdictional policy convergence by national supreme courts is not limited to terrorism. It occurs every time issues go beyond a state's internal framework and become global. As a result, judgments have an impact on global interests. You also see it every time a court's authority and ruling have an influence on justice rendered elsewhere. I'd like to examine the transition from impact to influence.

A judgment has global impact when it affects interests that go beyond national borders, either because it relates to common or public global resources or interferes with the world economy. We all know that there is a geographical dimension inherent in the concept of common or public global resources, because these resources are of interest not only to states or groups of states, but to all the world's people. And resources are important not only for current generations, but for future generations as well. The best example is environmental conservation, in addition to the management of scarce resources, such as: water, air, access to knowledge, management of major health threats, etc. All of these issues need to be regulated globally, and global regulation is ultimately the reality, fate or mission of the world's great courts.

As soon as it's a matter of regulating how resources are shared or accessed, people will invariably turn to Supreme Court decisions for guidance in matters, such as human rights, environmental protection or health.

When human rights are included in major international conventions and applied by supreme courts, the supreme courts will in fact be globalizing the concept of human rights.

There are examples of this form of globalization in the increasingly shared viewpoints of the world's leading courts, which is evidenced by the way in which they address issues like torture or the right to life. With respect to torture, one need look no further than the decision rendered by the House of Lords in the Pinochet case where, the Chamber (British court) used an original approach and decided to overlook the immunity from prosecution granted to Pinochet as a head of state or former head of state. The Chamber allowed his extradition to appear before the Spanish court and face charges of torture committed in another country, i.e., Chili, where Pinochet was the head of state and in support of victims, although they had nothing to do with the English justice system.

Human rights pressures were clearly sufficient to overlook major international justice conventions and extradite a former head of state to a system where he would have to face criminal charges for torture without the case having any impact at all on the English justice system.

The Supreme Court of Canada had to ask itself the same question: Can we allow the extradition of a person to a legal system in a foreign country where he risks being tortured? In 2004, the Supreme Court had to rule on the extradition of a Sri Lankan national from the Tamil community accused of terrorist acts on Sri Lankan soil. Due to the risk of torture, the Supreme Court quashed the extradition order against him.

When you look at how the position of the Supreme Court of the United States has evolved on the death penalty, it's easy to understand the international pressure to uphold fundamental rights and the viewpoint of the world's leading courts on the issue.

Between 1986 and 2005, the Supreme Court of the United States limited the application of the death penalty, by excluding its application first to offenders with serious mental illnesses, under two decisions, and then extended the limitation to include minors. The pressure from the international community and international conventions, even those not ratified by the United States, is apparent in the rulings by the Supreme Court of the United States. One need only read the majority opinion by Justice Kennedy in the 2005 decision to understand how the process works in the mind of an American judge. He wrote:

> *"The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."*

Ultimately, it's the difference between the normative aspect of non-ratified international conventions – the normative of decisions rendered by other courts on the same issue – and the moral pressure that it exerts on a Court judge who decides, by handing down such decisions, not to stand out in the global community as someone who does not uphold fundamental freedoms.

You could take the same examples in the environmental or health fields and quote the decision of, say, the Court of Justice of the European Communities on the environment as applied to international conventions, and particularly the Kyoto accord, with respect to restrictions on greenhouse gas emissions. The decision rendered by the Court of Justice of the European Communities had a dual effect. It restricted greenhouse gas emissions, thereby limiting environmental damage in both Europe and the world as whole, since it affects all global balances, but it also served as an example by leading the way and showing other courts how to proceed.

There was also the ground-breaking ruling on the environment by the Supreme Court of India. It applied international conventions in India, a densely populated country, which is proof of its proactive approach to environmental protection. As a result, the Supreme Court of India has earned a worldwide reputation for environmental protection.

With respect to health law, some examples include a well-known trial before the Supreme Court of South Africa, pitting all the world's major pharmaceutical industries against a South African law. To fight major pandemics, and particularly HIV, the law required that drugs be produced at a lower cost although it was detrimental to patent-holders and would risk destabilizing worldwide drug inventions. The trial was stalled, because in the face of worldwide pressure the major pharmaceutical companies dropped their lawsuit given the humanitarian issue at stake. It served as an example for a more recent case in 2007 before a provincial Indian court where a pharmaceutical laboratory sought to overturn an Indian law that allowed the production of generic drugs, which again threatened major pharmaceutical patents. The Indian court decided to dismiss the case brought by the Swiss pharmaceutical industry. The convergence of supreme court decisions is visibly playing a part in worldwide health governance.

The dual impact of these decisions is obvious when you read them. They settle problems immediately, have a direct effect and impact, but they also have a ripple effect and an influence.

To learn how a Court decision can have an influence, we studied the matter extensively and realized that two main factors give a global dimension to a decision. The first factor is the power of reasoning. In other words, the logic and convincing nature of the arguments used. With this approach, it would be simplistic to say that Common Law court decisions have more influence than civil court decisions and, more specifically, that French court decisions, characterized by deductive reasoning, are generally considered very narrow.

Above all, I would focus on the dimension related to the values behind a Supreme Court decision. A Supreme Court can only have an influence if the values it elicits from its own legal system manage to convince other legal systems to adhere to them. In other words, to be read, understood and adopted in the world's other courts, a Supreme Court decision must also uphold values from its own system that are understood or shared by the worldwide legal community.

Openness, tolerance, humanity, justice, equity, balance and proportionality are characteristics that give a decision an international dimension. From this viewpoint, you have only to consider the above-mentioned decisions by major courts with respect to anti-terrorism, which in some ways are founded on or refer to the universal and shared values of democracy.

This ethical dimension has also influenced Supreme Court of Canada rulings that apply the principle of reasonable accommodation to reconcile the religious freedoms of minorities with principles of social organization in the workplace, schools, commerce or housing. By giving substance to the recognized values of these minorities and making them compatible and reconcilable with those of the national community, their decisions are obviously global in scope. However, it's up to the judge to give that scope to a decision. And thus I come to the cosmopolitan attitude of judges.

How do judges manifest a cosmopolitan attitude? In two ways: First, by opening up their jurisprudence to include an understanding of other people, cultures, customs and values. This was apparent in the Supreme Court of Canada jurisprudence on the wearing of the kirpan where the Court clearly wanted to accept the values of a minority community and make them compatible with national values.

The decisions rendered by the Supreme Court of Canada have also been duly noted by French judges who are required to adhere to closed principles regarding religious freedom, as dictated by the principle of secularism entrenched in the constitution. This is what governs the limits of openness to others in rulings by major courts.

The second way to espouse another culture's values in jurisprudence is the principle of judicial hospitality, which means allowing foreign communities to plead before national courts whenever human rights are involved.

One example of judicial hospitality is the way in which French and other European Jews obtained satisfaction through compensation for the despoilment they suffered during the war and for the Shoah. French Jews or their descendants took the matter to the French courts seeking compensation for what they had suffered at the hands of the state or individuals. The French courts could not find a compensation principle to give them satisfaction. Through their associations with other courts, they used US law founded on an American legal principle from 1789 that entitles any victim of a human rights violation to refer a matter to an American judge, even if the dispute has nothing to do with American justice.

A judge in Brooklyn accepted their case and the French banks, which played a key role in the lawsuit, had the French state agree to set up a compensation system and fund. As a result, the detour via American justice enabled Jewish communities to obtain compensation in France. Clearly, dialogue among courts can help promote and uphold human rights.

In closing, I would like to say that the philosophy of the Enlightenment sought to achieve world peace by one or actually three simple principles: A single world government, universal law and a single court to apply it.

Everyone knows that world government is a utopian idea, at least if the government is simply a transposition of the state government principle. Decisions by international courts are not always enforceable – even when it's a matter of human rights or crimes against humanity – either for political reasons or to reconcile major adversarial or inquisitorial legal systems. In the 19th century, the purpose or challenge of comparative law was to establish one universal law. It now seeks instead to reconcile the laws of the world in what one French philosopher calls orderly pluralism.

Given the continuity and convergence of decisions by national supreme courts on matters of global importance, can orderly pluralism be achieved if decisions are based on a national legal identity yet within a global community of shared values? Can national supreme courts build a worldwide reality and global governance through law? Perhaps this would enable us to revisit the 18th century philosophy question: What is Enlightenment? I believe that German philosopher Ulrich Beck provides an appropriate answer:

> *"To have the courage to make use of one's cosmopolitan vision and to acknowledge one's multiple identities – to combine forms of life founded on language, skin color, nationality or religion with the awareness that, in a radically insecure world, all are equal and everyone is different."*

Thank you.

Allocution

The Right Honourable LORD JUSTICE ROBIN JACOB[1]

KNOWLEDGE OF THE WORLD AND THE ACT OF JUDGING

Lord Chief Justice Hewart once famously said: "Justice must not only be done but must manifestly and undoubtedly be seen to be done.[2]" Did he require more than was necessary? Is it enough if justice is seen to be done: never mind if it is actually done? A purist might say not. But hear me out. In ancient China it is said there was a mythical one-horned beast called the xiezhi – the beast of justice. You put the plaintiff and defendant on either side of it. The one it touched with its horn lost. Not only was this much quicker and cheaper than all our current procedures, but it satisfied the population. Justice was seen to be done. From the point of view of society all was well. The same went for trial by ordeal, whether of fire, water, knives or some other horror – a process carried out not only in mediaeval Europe but in many other countries and cultures.

Behind these methods of trial was the notion of a God directing justice. Incidentally we still have vestiges of that – most particularly in the taking of the oath. Swearing to tell the truth by Almighty God is the default method for a witness – and it can still actually work. I once had a young Muslim man, made to lie by his overbearing and dishonest father, choke as tried to take the oath on the Q'uoran.

Thing have moved on. Society now expects the act of judging to be carried out by a rational process of assessment and weighing of evidence: not only in relation to fact finding, but also in relation to the interpretation of the rules of law itself. For justice to be seen to be done, the modern judge must give reasons – to explain to a critical public why he or she decides a case. What can best place a judge to carry out this task?

I start by saying what will not do – pomposity. A judge is a person of power and authority. There is a real danger it can go to his or her head. Common lawyers even have a word for this – "judgitis." I do not know whether other legal systems have a similar special word: whether they do or not I am sure they know the phenomenon.

In early years of the industrial revolution and well into the 20th century, in my country and I suspect most other common law countries, society placed the judge on a particularly high pedestal. Society itself encouraged judgitis. They even wanted it so that it could be ridiculed, as they still do. Here is a story from the Edwardian era about a particularly pompous, self-important man called Mr Justice Darling. A celebrity of the time was a music hall artist called George Robey – a household name. There came a case where F.E. Smith – later Lord Chancellor – was before Mr Justice Darling. He mentioned George Robey in the course of his address. "Who is George Robey?" asked Mr Justice Darling. F. E. Smith smiled: "Oh my Lord, he is the darling of the music halls."

Judgitis continued.. In the 1936 Chief Justice Hewart, in his speech to the Lord Mayor's Banquet: "Her majesty's judges are satisfied with the almost universal admiration in which they are held." And the press said nothing.

These days I believe that judgitis is a disease somewhat under control – though no one should ever think it can be eliminated and the fight against it must go on. It is think a personal fight for each judge.

The next thing to be avoided – an aspect of judgitis - is to appear unworldly. As if the things that are part of the life of the ordinary citizen are below his or her exalted status. Legend has it that a judge in the 1960's once asked "Who or what are the Beatles?" It was a legend – the story is attached to no particular judge, but it was credible. The press have told the story often since and will continue to do so.

So judgitis and remoteness are undesirable attributes. What about those which are desirable? Following the theme of "appearance" with which I started, a modern judge must at least appear to have knowledge of the world – I suppose we all ask teenage children or grandchildren about the names of popstars and celebs so as to at least appear "with it". In a music case involving Bruce Springsteen, when his counsel got up I said: "Now I am supposed to ask, who is Bruce Springsteen" in a what, with hindsight, seems a rather pathetic attempt to show I was at one with the common man.

But appearing to be at one with the common man – to be "with it" – is not enough either. The judge must more than superficially wordly – he (by which I include she) should in fact be so. Sometimes judicial reasoning explicitly appeals to knowledge of the world. Long ago, in 1877, Lord Justice James asked this question in a passing off case:

1. A member of the Court of Appeal of England and Wales – in charge of the Intellectual Property List.
2. *R* v. *Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233)

"Now, what could have been the only motive which can be suggested to a man of the world by a man of the world of the Defendants in doing that"[3]?

And in considering whether a magistrate was right to hold that what was really a permanent garage was not a "structure" because it was made of canvas on a fixed frame, Lord Goddard said:

I think, therefore, that we must hold that the magistrate did not direct himself properly in this matter. Had he asked himself, as a man of the world, as an ordinary citizen - the man on the Stoke Newington bus - whether it was a structure. I think that he must have come to the conclusion that this was a structure[4];

And of course the favourite child of the common law, the reasonable man – the man on the Clapham omnibus[5] - le bon père de famille as you say in Quebec - is a man of the world.

So, from the point of view of public acceptance of what we do, we must seem to be in touch – to have knowledge of the world. How is that to be achieved? The only really effective way to seem to be something is to be it. In reality it is not enough to seem to be in touch. You can't get away with pretending all the time. So a judge actually does require knowledge of the world.

This truth has important implications in at least two ways: how judges are to be chosen, and whether and if so how they are to be trained.

I start with judge appointment. The biggest difference across the world is between systems which have career judges and those which have judges appointed from practising lawyers. I once discussed this with a distinguished German lawyer was about 50 years old at the time. I said: "would you like to be judge?" After a long pause he said: "You know, I have never thought about it – because it is not possible in Germany". Then, after another pause, he added: "But, yes." I thought what a pity. The German judicial system was the loser. I have had similar discussions with French lawyers – with much the same response. The divide broadly follows the divide between common law and civil law countries. A few countries, e.g. Holland, have a mixture between career only and bar appointed judges. Some throw in appointment of academics.

As regards knowledge of the world, I suspect few would challenge the proposition that a bar appointed judge is better placed than a career judge. A judge whose only worldly experience is school, law at university, judge school, judicial continuing education and actual judging is not given much of a chance to learn the ways of the world. That is not to say that there are not many fine civil law judges for there are. But it is surely easier to judge if one has experience of actual clients and of actual case preparation. The best gamekeepers were once poachers; as the saying goes "set a thief to catch a thief". There is confirmation from the opposite perspective: a good friend of mine, Jan Brinkhof, was the widely respected President of the Court of Appeal in the Hague. In his early 50's he changed course, becoming a practising lawyer for the first time. He says he was surprised to learn what real clients (and opponents) were like, that he wished he had had such experience when he was a judge. Another judge I know, Judge Lv Guo Quang, Vice President of the Shanghai No.2 Intermediate People's Court, spent three years during the Cultural Revolution out in the country planting vegetables. He did not like it much, but the knowledge of the world he gained has surely helped him as man and as judge.

I turn to the process of judicial appointment. I can only really talk about what we do in England and Wales (remember Scotland is different). Other countries will have different systems but I suspect all of them have moved or will have moved along similar lines. In England it was once it was simple and cheap – but far from "transparent". A man from the Lord Chancellor's Office went round the judiciary and a few select others (e.g. the Chairman of the Bar) and took what were called "soundings." The Lord Chancellor then made an appointment. Formally it was by the Queen – in the case of Court and Appeal and House of Lords judges on the recommendation of the Prime Minister. That is how it was done when I was appointed 15 years ago. Moreover there was no requirement of any prior training or judicial experience by way of sitting as a deputy judge. Other countries worried about this sort of thing earlier. Here is a story from the USA: Chief Justice Burger held a conference about judicial appointments where the need for prior assessment and training was discussed. A man from the Lord Chancellor's department was there as an observer. He was heard to murmur: "I don't see the problem. All we do is take a barrister and turn him round."

Now things are different. There is political if not public pressure for greater openness and for diversity. A Judicial Appointments Commission was established in April 2006. It has a lay Chairman and 14 Commissioners, five judicial, five professional and five lay. The presence of the lay members shows something significant about a public perception that judges should have knowledge not merely of law but of the world. You would not sensibly put lay people on a panel choosing a brain surgeon or a professor of physics – though I daresay sometimes it is done. The Commission has explicit goals of equal opportunities and diversity of race and sex, though at the same time the ultimate criterion is merit. It goes about its work in an elaborate and necessarily bureaucratic way. People have to apply to be judges – even write an essay about why they think they would be good at it. Consultation forms are sent here there and every-

3. *Orr-Ewing v Johnson* (1877) 13 Ch. D 434 at p.451
4. *LCC v Tan* [1954] 1 WLR 371
5. Attributed to Lord Bowen

where – followed by elaborate short-listing and interviews. It costs nearly £9m a year to run – and that does not include any of the time put in by consultees.

Are English judges any more aware of the world, more diverse, as a result of all this? Not so far. It is early years but the number of women or black or Muslim appointees remains low. It will change in the future – simply because more able lawyers of these groups are coming through to appointable age. For myself I doubt whether the expensive change from secret soundings has produced any better, or indeed, different results. What has changed is perception – the appointees are seen to be chosen more fairly and to more "of the world" then in times past.

Before finishing with judicial appointment I end with a question to which I do not know the answer. I have noticed that the proportion of women judges in Canada seems to be much higher than that in England or indeed anywhere else in the common world I have been. I do not know why and would like to. I would add that there is a very high proportion of women judges in France. One Judge told me why. She said: "we are paid very badly – like nurses – so we 'ave 'usbands who earn the money."

Next, and briefly, judicial training. Some countries have long had a substantial continuing programme of judicial training. Germany, which spends more on its judiciary per head of population, has two permanent judicial training facilities for its Judges. In England we once had none. Now we have a Judicial Studies Board with an annual budget of about £8m – which of course does not include the cost of training provided by judges. This body clearly helps a lot with judicial awareness – and provides an important means of keeping judges in touch. Other countries are increasing judicial training – both of a formal kind and the informal kind provided by things such as this conference.

Of course none of this can really make us men or women with great knowledge of the world. It can help somewhat, but really it all depends on the individual. We can but do our best to remain aware, to listen, to read. For in the end knowledge of the world is, or ought to be, an aspiration for everyone, whether they are judges or not.

Address

The Honourable LOUIS LEBEL
Justice of the Supreme Court of Canada

THE ACT OF JUDGING BETWEEN KNOWLEDGE AND DISTANCE FROM THE WORLD

Introduction

The 2008 Judges' Conference is examining the figure that the judge cuts in society. Not only the judge's image, but also the reality of the judge's position. What are society's expectations? How can they be met, while keeping within the constraints of the act of judging, and in particular, the judge's obligations of reserve and neutrality? How can the judge be in the world and yet distant from it, informed about his world, but kept in strictly controlled ignorance of it? How can this aporia be resolved?

My comments will examine how certain aspects of these problems arise in carrying out the act of judging. Without a doubt, it is the most characteristic act of the judge's profession. To state the law, to adjudicate between contradictory claims and to determine the facts between true and false – all this is at the very heart of the judge's activity. He can be a judge-mediator, a conciliator, an administrator or sometimes, an agent of the State; however, at one point or other in his career, the judge must face the difficulties inherent in the act of rendering a judgment. The rules governing the life of a judge are intended to control this act of judging, in order to ensure its integrity.

The traditional symbols of justice illustrate both the social perceptions of the judge's role as well as the constraints of the judge's profession. Sometimes justice holds the scales even: We want it to be fair, within the strictest sense of the term – that is, capable of maintaining equality between the parties, without any prejudice nor any favour. At other times, we carve out justice, with our sword in hand, fearlessly and efficiently, ready to decisively make a ruling, once the pans of the scale have tipped. And sometimes it happens that we depict a blind justice, with blinders over our eyes, but always holding the scales equal.

Would blindness and ignorance then be the necessary conditions for justice, for the act of judging, for keeping the pans of the scales balanced? Would ignorance, protected by blindness, be a necessary guarantee for the act of judging? The nature of the rules of deontology and the basic structures of civil and penal proceedings may suggest this. And yet, don't the need for knowledge and concern about the world recognize that there is an obligation of culture and initiative, so that the act of judging remains appropriate and effective in the life of society? Judicial independence can't be based on ignorance, passiveness and fear of change. The ethics of distance from the world mustn't drift – even unconsciously – toward the acceptance of ignorance of the world and society.

I. DISTANCE FROM THE WORLD

A. *Deontology, independence and ignorance*

Canada belongs to the family of liberal democracies. Among the basic components of the political structures of this type of society is an independent justice intended to ensure compliance with the principle of everyone being subject to the law – the "rule of law" as it is called in common law. While the independence of this justice comes under the constitutional order, it is also based on a tradition that calls for the presence of a person who is neutral, and for that, impartial and independent, in order to settle disputes over the rights and obligations of the members of the society. The influence of this tradition creates expectations that require the adoption of behaviours that are compatible with the neutrality of this impartial third party – the judge. Preservation of this neutrality seems to imply the creation of a veil or a screen that separates the judge from the world around him, to ensure his listening skills and the integrity of his decision-making power. The rules of deontology governing the judges' life and work are based on this will. This deontological control may even create the perception that judicial independence is based on absence from and ignorance of the world.

I would like to mention an example of such control in the *Judicial Code of Ethics*[1], which applies to judges appointed by the province of Québec. This Code, devised in very general terms, contains elements that prompt us to conclude in the judges' duty to remain ignorant and distant. Under the clauses of this Code, the judge "...should be, and be seen to be, impartial and objective."[2]. To achieve this, he must guard against conflicts of interest, and therefore get out of situations where his detachment would be compromised or would seem to be[3]. Section 6, in fact, prohibits him from taking part in activities that are incompatible with his judicial role, that would make him "stray", in the eyes of the public. Serenity and

1. *Judicial Code of Ethics,* c. T.-16, r. 4.1.
2. *Judicial Code of Ethics,* s. 5.
3. *Judicial Code of Ethics,* s. 4.

reserve are imposed upon him. The *Judicial Code of Ethics* outlines the image of the judge who is distant from the unrest in the world. To preserve his serenity, he places himself on the sidelines of this world and not in it. This view is widespread in Canada. For example, it is also the view reflected in the general principles of deontology recommended by the Canadian Judicial Council, which strongly insist on the need for a judge to distance himself from the society around him[4].

These rules try to protect the judge and his judicial role. Whether laid down in the law or left to tradition, these rules nevertheless have the same effect, in their will to ensure the judge's neutrality, through his distance from the society around him. Some critics would claim that such rules perhaps place the judge in a bubble, that deprives him of sufficient contact with the prevailing climate.

In fact, the judge – first and foremost – distances himself from public controversies. If he were to become involved, public opinion would criticize him for abandoning his reserve, and the deontological rules would his involvement against him. The judge can't become a social activist[5]. The public is even concerned about the activities of the judge's spouse[6]. Nor is the judge allowed to be a business person. In fact, the question of the judge's investments remains a delicate issue, so much so that at times, one wonders whether he shouldn't give up all direct investment activities and entrust the management of his assets to third parties or trustees.

Even the judge's intellectual activities sometimes become suspicious. Is he allowed to write? Is he allowed to collaborate on legal literature? Is he authorized to teach his own opinions on various matters or to express his views in this regard? Various attitudes have been adopted. I have sometimes heard it said that in the past, chief judges and chief justices had taken the very firm stand that their judges had to limit their writing strictly to their own judgements. That wasn't was my own personal experience, however, but some of my colleagues seem to have had different experiences, based on the accounts of a few of them who confided in me in this respect. And judges mustn't forget, either, about the need to cut off their relations with former clients, associations and even certain charitable activities. For example, contemporary deontology strongly advises judges against taking part in fund-raising activities, other than those that are carried out within the judiciary. In addition, nowadays, involvement in certain types of social activities, in non-profit organizations – such as colleges or hospitals – is vehemently discouraged, particularly due to conflicts of interest in which their own staff or third parties may sometimes be involved with the government. Nor can we imagine a judge working as a reporter in the media. Such a deontological approach therefore leaves the judge in potential isolation. Independent and presumably impartial, because he is sheltered from outside influences, he must be prepared to listen to what is proposed to him, but not repeat his own suggestions.

B. *Civil proceedings and judicial ignorance*

The Rules of Civil Procedure, which I will examine mainly from the standpoint of current law in Québec, also reflect the legal tradition expressed by the deontological principles. These rules aim at confining judicial knowledge. They intend to lay down the proper use of judicial ignorance.

Two features characterize the attitude of the law of evidence and procedural law in this regard: first, there are limitations imposed on judicial knowledge, and secondly, restrictions on the judge's initiative to acquire further knowledge of the facts of a given case. These features confirm the will that the judge maintain his impartiality, because of his inability to develop any of his own pre-conceived opinions about a case and about these problems. The integrity of his decision-making ability would be guaranteed, because the law imposes a duty on him to be unaware of certain matters and to depend on the litigant to inform him, as a general rule.

This observation is inferred from the very contents of the rules that structure judicial knowledge. Indeed, article 2806 *C.c.Q.* provides that " No proof is required of a matter of which judicial notice shall be taken." Article 2809 *C.c.Q.* moreover stipulates that: "Judicial notice shall be taken of any fact that is so generally known that it cannot reasonably be questioned." Judicial notice or judicial knowledge therefore consists of two principles: The first principle requires that the judge take cognizance of certain well-known facts. It even presumes that he knows them. Furthermore, while this principle doesn't prohibit him from knowing other facts, the second principle demands that he act as though he was unaware of them. In fact, it forbids him from conducting himself as though he were aware of the facts pertaining to a dispute, despite the knowledge that he actually has of it. Nevertheless, I doubt that this prohibition has any practical impact. The judge's personal knowledge of the geography of a place or the habits and customs of a community will have its effect on the case, in one way or another; however, at least theoretically, this second principle implicitly raises even artificial lack of knowledge with regard to a guarantee of judicial impartiality.

The rule reflects a deeply rooted distrust of judicial objectivity. It strives to preserve good listening skills, understood as a virtue that is primarily passive. Of course, the judge must certainly have knowledge of the relevant facts in order to hand down his decision. He is allowed – and even obliged – to be familiar with the well-known facts. We could discuss, at length, the nature of these well-known facts; however, over and above this basic knowledge – and as a rule – the judge depends on the parties for his knowledge of the case.

The organization of civil proceedings in Québec reinforces the scope of this rule. For instance, in articles 290 to 292 of the *Code of Civil Procedure,* it is affirmed, in substance, that the trial primarily

4. *Canadian Judicial Council: Ethical Principles for Judges,* Ottawa, 2004, ch. 6.
5. Ref. *Ruffo c. Le Conseil de la magistrature du Québec,* 2005 QCCA 1197, par. 59-60.
6. Re *Pinochet,* (1999) 2 W.L.R. 272.

"belongs" to the parties and their lawyers. They are the ones who define the dispute and its factual framework. They therefore determine the potential scope of judicial knowledge. The civil proceedings do not deny any and all possibility of judicial intervention. Article 292 *C.p.c.* reflects its concern for giving the judge any opportunities to take initiative and even imposes on him the obligation to try to prevent injustices. But when all is said and done, although the trial involves public authority and calls upon its services, to a great extent, and despite the fact that the powers of the judge's intervention are extended, the trial still "belongs" to the parties. Within a judicial system that is very different from the one we have in Canada, the *Cour de cassation* in France recently mentioned this fact[7].

In appeal, for example, before the Supreme Court of Canada, the same basic attitude prevails. No doubt, there are some exceptions making it possible to present new evidence; however, the Supreme Court generally reaches its decisions on the basis of facts established by the parties. Moreover, it prohibits itself from automatically raising arguments that aren't based on facts in the appeal case. The nature of its action are therefore often defined by the procedural framework adopted by the parties[8].

This attitude is even more clearly imposed in penal law. The trial "belongs" to the Crown and to the defence. The judge officially knows only the evidence presented by the parties. When a jury is formed, exclusion of the evidence that is considered to be inadmissible often imposes on the jury members their ignorance of sometimes important aspects of the factual situation submitted to it. A judge without a jury must also try and forget the evidence that he rejects – and this turns out to be a delicate thing to do. Is it always realistic? I can't assert this too strongly. However, the compulsory nature of doing so confirms the limits of judicial knowledge and the importance of judicial ignorance. The existence of such ignorance therefore comes well within that will for distance from – if not ignorance of the world, which I mentioned earlier. Nevertheless, are we not overconcentrating on the rules of protecting such judicial impartiality and independence? Do we not dwell too much on these sole obligations? Are we not neglecting the importance of the judge's information obligations that might have an impact on the efficiency and effectiveness of the rules of judicial knowledge? Shouldn't we recognize the existence of the judge's duty to have some personal culture, and the existence of an obligation to be attentive to the world and to have knowledge of it and explore the nature of all this?

C. *The judge's duty to be cultured*

Judicial deontology hasn't turned its attention very much to the contents of the judge's positive obligations with regard to the development of his knowledge, and even less so, to the contents of his general culture. And yet, how useful would a judge be if he was ignorant of everything in the world in which his contemporaries live? Can he hover above the world like an extra-terrestrial being, where he nevertheless continues to live, and then descend there only to show his wisdom by delivering his judgements? In fact, can he be wise if he is unfamiliar with his environment, if he becomes unaware of what it is?

The codes or rules of deontology continue to be very concise with regard to this matter. For example, the Court of Québec's *Judicial Code of Ethics* states that: "The judge has a duty to foster his professional competence." The *Ethical Principles for Judges,* published by the Canadian Judicial Council, demonstrate that they are a bit more aware of this aspect of the judge's duties; consequently, in chapter 4, dealing with the judge's diligence, section 2 recommends a principle of development of knowledge and skills on the part of the judge.

> *"Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office."*

In chapter 5, on the right to equality, the comments note the presence of a duty to be informed about the diversities of contemporary society, add a warning about common prejudices and stress the importance of attention to changes in society[9].

However, the judge's diligence-related obligation is still understood, above all, as a duty to know the law and the methods of conducting trials and managing judicial affairs. Today, in my opinion, carrying out this obligation doesn't cause very many problems. Based on my experience, the members of the judiciary show concern for preserving and developing their legal knowledge. Resources – and sometimes vast ones, at that – are made available to them for this purpose, as confirmed by the activities of Canada's National Judicial Institute and the judges' participation in seminars and symposiums organized by the various courts. Work-related pressures and lack of time may, of course, make it difficult for them to attend such activities. Despite these obstacles, this obligation is nonetheless well understood and diligently fulfilled.

However, the problem of the judge's skills and diligence must be considered from a broader point of view. I will now examine it within the perspective of a judiciary whose members – like those in Canada's judiciary – are generally appointed to the bench between the ages of 40 and 50, after having worked in the legal world for 15, 20 or 25 years, upon graduating from university. At that time, following their appointment, they go through a necessary severing of ties with the networks in which they were integrated, to sufficiently distance themselves from their former clients and their fields of activity. Often, they stop seeing the groups with whom they worked a long

7. *Assemblée plénière,* December 21, 2007, *Cour de cassation de France, Bulletin d'information,* April 15, 2008, p. 19.
8. *Supreme Court Act,* R.S.C., 1985, ch. S-26, s. 62; also ref. B. Crane and S. Brown, *Supreme Court of Canada Practice,* Thomson Carswell, Toronto, 2008, p. 129 et seq.
9. Principles, comments, pp. 24-25.

time. If they do cross paths with the people they worked with, their conversations become marked by caution and reticence. They inevitably lose major sources of information about what's happening in society. The deontological rules that I mentioned earlier restrict their social or charitable activities. When I was appointed to the Court of Appeal of Québec, I had the impression, at the time, after a few months, that if I didn't no longer know anything, then at the very least, I was finding it hard to follow what was happening in society, and even more so, what was happening in certain business circles in which I used to work. I had the feeling that I was cut off from the world, to a certain extent. Other judges have no doubt gone through the same experience. In the Bar association, they sometimes gently make fun of this transition, describing it as like entering a monastery.

I might express a few reservations about such a description, though, as it nevertheless reflects a risk – that of the judge's dropping out of the society around him. And dropping out of society in this way leads to the risk of viewing the legal system as a closed entity, whereas it comes very much within the whole life of society.

It is therefore vital to clearly understand the importance of the judge's obligation to maintain those of his skills that the principles of deontology recognize. It's not just a matter of maintaining his legal knowledge, as important as it is. This obligation expresses a duty to be open to the world and to have personal culture, which goes beyond the mere development of legal knowledge. It also prompts a refusal to be passive and lazy in conducting judicial affairs. While a judge may no longer be a player in society, except through his actions in judicial activities, he must nevertheless remain an attentive observer of society. To fulfil this role, he must continue to be attentive and concerned about keeping informed. I'm not talking here about an obligation for encyclopedic learning. Long gone are the days when a human being could claim that nothing in the realm of knowledge was unfamiliar to him. The scope of human knowledge as well as the diversity and abundance of information today inevitably make us aware of the fact that we don't know everything. It isn't expected that judges turn themselves into scholars, that they have to simultaneously be philosophers, mathematicians, literary critics, economists, agronomists, etc. We're already finding it difficult enough to be good jurists. Nevertheless, general culture is as important today as it was at the time when, back in 1930, the great American judge Learned Hand stressed the basic role of such disciplines as history, philosophy or literature, for judges, in carrying out their profession[10]:

> *"... I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supple institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which makes it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined."*

The contents of culture vary over time. Developing the mind and the attentiveness that it fosters still remain. Culture remembers the past, is aware of the present and is a vision of the future. It is important to know what is happening in society. We must listen, observe and become sufficiently well-informed in order to perceive social and cultural trends. We must also pay more attention to areas of activity that are sometimes akin to judicial life, due to their impact on the matters submitted to us. I'll mention a few of these: For example, in the field of economic life, it is necessary to understand world trends, economic problems and their repercussions on the practice of law, as related to business. The difficulties encountered by many judges in the scientific field are well-known[11]. In our country, except in jurisdictions that are a bit specialized, how many judges are familiar with scientific developments and the problems that they raise? Without immersing themselves in-depth in the field, judges should remain informed about the questions that arise in this area of activity, and informed, as well, about their existence – at least at a level of general culture. And so, regardless of our own personal convictions, we therefore can't ignore the cultural importance of religions either, and their influence, nowadays, on the problems in society and in the law.

The same need for knowledge may sometimes be reflected in a more practical way, in the judge's day-to-day life. The increase in computer technology should make us aware of the importance of this field. If we don't understand the scope of the changes that it is creating, we may be unable to understand the scope of their effects on the workings of certain rules of procedure. For example, we may perhaps forget that preliminary examinations concerning information kept mainly on a computerized database may pose very different problems from those of the examinations and information research we knew 30 or 40 years ago.

We must remain interested in the major life-changing trends in society in order to prevent law from being cut off from the social

10. Hon. Learned Hand, *Sources of Tolerance,* (1930) 79 *University of Pennsylvania Law Review* 1, p. 12.
11. I. Binnie, *Science in the Courtroom: The mouse that roared,* (2008) *Advocates Society Journal,* September, p. 11.

fabric to which it applies. Some of the problems experienced in Canada's family law, beginning in 1970, after Federal legislation on divorce came into effect, might have stemmed – at least in part – from the fact that a certain number of judges were unaware of the actual conditions within the families' lives and the impact of the social changes in this field on their organization and functioning, and particularly with regard to women's role.

We Canadian judges have faced the difficulties and challenges of a given generation and we have been appointed to the bench at a time when problems relating to new strata of society are appearing. We must therefore strive to become attentive to the emergence of these problems and constantly remain on the *qui vive.* We must avoid focusing solely on examining the world we knew; instead, we must strive to foresee the features of the world that will evolve.

At the same time, these research skills must continue to be "critical" in nature. We mustn't forget that the judge's profession is also based on exercising a critical sense that is necessary for preserving freedom of judgement. This doesn't mean absorbing all intellectual trends of the times or adopting all current social theories with blind faith. On the contrary, the knowledge that we maintain or develop about a given environment and its history makes it possible to further keep a critical distance and to preserve the impartiality that is needed to properly carry out the judicial role.

And so I'm convinced that the obligation to protect professional skills is not a narrow-scope duty. It is an obligation involving vast awareness, attention and activity. Ultimately, it will allow the judge to better carry out his responsibilities and to take the initiatives that are sometimes necessary in performing his tasks. The obligation will prevent the judge from seeing himself as a passive instrument of justice. Those days are gone, if, in fact, they ever existed at all. Changes have led us in another direction. The methods that have been implemented, the alternate techniques of settling disputes, case management and the problems caused by the rise of self-representation of litigants are all demanding a different attitude. And that requires a will to be cultured, aware of and attentive to the social environment, the ability to take a critical approach toward ourselves and others, the desire to do and not have a laissez-faire attitude. Judges aren't social activists. They have no arguments or theories to defend; however, the efficiency and effectiveness of justice prohibits judges from being ignorant and passive, and require that they fulfill a compelling duty to maintain and develop their culture. The ethics of distance from the world are not those of ignorance from that world.

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