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Criticising the Judges

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It is possible to evaluate the performance of judges by examining the logical consistency, literary quality, and responsiveness to social issues displayed in specific judgments. Using these criteria, the author argues that deficiencies in the Canadian bench are readily apparent. The state of our judiciary should be a matter of serious public concern but, in fact, there has been remarkably little public discussion of judicial inadequacy. The media and members of the legal profession have been equally circumspect. In Canada, contempt of court citations do inhibit criticism of the judiciary, but the law of contempt provides only a partial explanation for our quiescence. Our timidity is explained primarily by the place which courts hold in the Canadian ideological system. Our organic, Tory view of the world with its attendant respect for authority is rooted deeply. Courts, which are seen to be rational, systematic and principled problem-solvers, occupy a central role in our ideological system. No serious criticism of the judges will be undertaken until the deficiencies of the Canadian judiciary are perceived to be of a magnitude sufficient to be an ideological liability.

Il est possible d'évaluer la qualité du travail des membres de la magistrature en examinant certains arrêts pour y analyser la rigueur de la logique, l'emploi et la qualité de la langue ainsi que le traitement accordé aux questions sociales en litige. À la lumière de ces critères, l'auteur soutient que la magistrature canadienne souffre de faiblesses évidentes. Selon lui, cet état devrait susciter l'inquiétude du public, mais il constate que tel n'est pas le cas et déplore l'absence de débat sérieux au sujet de la question. Les média et les membres des professions légales se signaleraient par leur silence collectif. Au Canada, il semblerait que la menace de poursuite pour outrage au tribunal ait eu un effet dissuasif à cet égard. Néanmoins, l'outrage au tribunal ne serait qu'un seul facteur parmi plusieurs servant à expliquer cet état de chose: la timidité de la critique serait principalement attribuable, selon l'auteur, à la place de choix qu'occupent les tribunaux dans la structure idéologique canadienne. Notre perception organique de la société, d'origine Tory, et le respect de l'autorité constituée qui en découle, seraient fermement implantés chez nous. Les tribunaux, vus comme de puissants arbitres rationnels, justes et honnêtes, occupent un rôle prépondérant dans ce système idéologique. Une analyse critique des juges s'avérerait donc impossible avant le moment où les faiblesses de la magistrature auront atteint une dimension telle qu'elles seront perçues comme une menace à ce système.

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Synopsis

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Introduction

The general quality of the bench in Canada is, and has long been, low. I am not referring to the fact that certain judges, at one time or another, have engaged in questionable personal behavior.[1] These peccadillos are, I would suggest, simply the failings of individuals. They could be forgiven in a judiciary which had exhibited consistently high intellectual, professional, and literary skills. This has not been the case.

To state that the Canadian judiciary has had a history of being undistinguished is to express a personal opinion which is, by its nature, unprovable. There is no generally accepted standard by which one can measure judicial competence. Nor would there likely be agreement as to exactly what it is that should be measured. The purpose of this paper is not to "prove" that the Canadian judiciary is, as a whole, inadequate, although I will certainly argue that to be the case. What I really want to do is to explain why Canadian judges have not been subjected to extensive public scrutiny. The recent adoption of the *Canadian Charter of Rights and Freedoms*[2] adds significantly to this investigation. The *Charter* may impel the judges to intervene more actively in Canadian life, rendering decisions of a broadly social or political nature. The quality and performance of the judges would then have a directly discernable effect on people's lives.

Canadians, and particularly legal academics, have been reluctant until now to offer public criticism of the judiciary. Absent informed, sustained criticism rooted firmly in Canadian reality, it is little wonder that the judges continue to behave as if they performed their functions in a social void. A critical legal literature is essential to the judiciary.[3] That literature has de-

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[1] See Government of Ontario, *Report of the Commission of Inquiry into the Conduct of Provincial Judge Harry J. Williams* (1978), reproduced in (1978) 12 L.S.U.C. Gazette 161. In 1965, Mr Justice Leo Landreville was alleged to have behaved improperly before his appointment to the bench. A one member board of inquiry in the person of Ivan Rand, a former judge of the Supreme Court of Canada, examined the matter and appeared to accept that the allegations were made out. See the extract from his report in J. Lyon & R. Atkey, eds, *Canadian Constitutional Law in a Modern Perspective* (1970) 174-82. Subsequent litigation cast doubt on the Rand investigation. See *Landreville* v. *The Queen (No. 2)* [1977] 2 F.C. 726, (1977) 75 D.L.R. (3d) 380. For an example of a Canadian judge with an alcohol problem, see the fascinating article by Gosse, *The Four Courts of Sir Lyman Duff* (1975) 53 Can. Bar Rev. 482.

[2] Part I, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

[3] See Zeigel, *Some Aspects of the Law of Contempt of Court in Canada, England, and the U.S.* (1960) 6 McGill L.J. 229, 246. See also the address by Dickson J., Canadian Institute for the Administration of Justice Seminar on Judgment Writing (2 July 1981) and Russell, *The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts* (1982) 25 Can. Pub. Admin. 1, 33.

veloped only recently in Canada, largely within the last twenty years.[4] Even now there is little basis for self-congratulation among legal scholars. Indeed, Mr Justice Dickson launched recently his own judicial offensive against Canadian legal academics. As he politely put it:

> If I were to venture any criticism, it would be that the quality of good academic writing, published in any year, is meagre in relation to the number of legal scholars to be found in the law schools of the nation.[5]

The criticism is not new and others have been more blunt.[6]

The question remains: *Why* have Canadian legal academics allowed their critical faculties to atrophy? Why has the public been so quiet as well? In the first part of this essay I propose to discuss the deficiencies of the Canadian bench. In the latter part I will investigate the reasons for the apparent lack of public concern about the quality of the judiciary.

I. Deficiencies of the Canadian Bench

In attempting to evaluate the performance of judges, it would appear, on the surface at least, that one might look at the results reached in actual cases. But this approach is not as straightforward as it seems. How does one define results? Do we mean the concrete resolution of the matters in issue between the parties; or the effect of a particular decision on the development of legal doctrine; or should we refer to the social implications of the decision? If we look to the results achieved between parties, we are unlikely to advance our understanding very far because it is in the nature of an adversarial system that 50 *per cent* of parties will be unhappy with the outcome. If we attempt to assess results in terms of legal doctrine or social policy, we do little more than embark on an exercise in subjectivity which will soon lose any pretence of being an assessment of the judges themselves.

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[4] See the remarks of T. Symons in Association of Universities and Colleges of Canada, *Report of the Commission on Canadian Studies* (1975) 213-7. Professor D. Soberman was critical of much of what the *Report* had to say about legal education. He did agree, however, that the basic Canadian legal literature had yet to be written. See University Affairs (10 January 1977) 13. See also Murphy & Halevy, "Working Paper on Canadian Legal Publishing" in W. Twining & J. Uglow, eds, *Legal Literature in Small Jurisdictions* (1981) 129.

[5] Dickson, *The Role and Function of Judges* (1980) 14 L.S.U.C. Gazette 138.

[6] See Veitch & Macdonald, *Law Teachers and their Jurisdiction* (1978) 56 Can. Bar Rev. 714. This very interesting note also reprints a number of caustic observations about the judiciary. In 1936, Professor Fred Rodell made comments about American legal writing which can be applied equally well in Canada today: "There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground." *Goodbye to Law Reviews* (1936) 23 Va L. Rev. 38. Rodell returned to the subject twenty-five years later. He recanted on none of his original views and added some exceedingly critical remarks about the language — the "unintelligible gibberish" — normally employed in legal periodicals. *Goodbye to Law Reviews — Revisited* (1962) 48 Va L. Rev. 279, 287.

Despite these difficulties, I have decided to use judgments as the basis for my assessment of judicial performance. I do this for two reasons. First, we enjoy, we are informed regularly, a system of government predicated on the "rule of law", not the "rule of men". A central notion of the rule of law is that our affairs are directed in consonance with an established body of legal principles. These principles are applied in a systematic and rational fashion to concrete circumstances. Whether or not this notion is accurate is irrelevant. The important thing is that the idea of the rational, systematic application of principle is an important part of our ideological system. It is also an idea to which the main actors in the legal system are peculiarly committed. This is why judgments play such a central role in our legal system, for it is in the judgment of a court that the idea of applying principle is made manifest.[7] Secondly, judgments are peculiarly the work of judges. Judgments are what judges produce. If we assess the ability of a painter by looking at his paintings, we can assess judges by looking at their judgments.

More specifically, I will look in this Part at judgments of only the Supreme Court of Canada. In a hierarchical judicial system such as ours, decisions rendered by the final court of appeal are more significant than decisions made by other courts. For this reason, one should expect to find the most capable judges on the highest court.

But, the Supreme Court of Canada has had a century-long history of mediocrity. Albert Abel, who in his lifetime developed a reputation as a careful and meticulous commentator, once accused the Court of "shoddy craftsmanship", "floundering", and "ragged exposition".[8] I would respectfully concur. In the following section, I will suggest three criteria that can be used in assessing judgments and will then attempt to indicate the Supreme Court's shortcomings.

II. Criteria for Assessing Judgments

A. *Logical Consistency*

A judgment, that is the enumeration of a court's reasons for arriving at a particular result in a particular case, is primarily an exercise in justification.[9]

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[7] It may thus be surprising to note that there is no legal duty cast upon a trial judge to give reasons for a decision. See *Macdonald* v. *The Queen* [1977] 2 S.C.R. 665, (1976) 29 C.C.C. (2d) 257; *R.* v. *Urie* (1977) 38 C.C.C. (2d) 33 (Alta S.C., App. Div.). The fact that these were criminal cases may or may not be relevant. It has been held in a civil case that the failure of a trial judge to give reasons may, in the circumstances of the case, amount to a reversible error. See *Koschman* v. *Hay* (1977) 17 O.R. (2d) 557, (1977) 80 D.L.R. (3d) 766 (C.A.).

[8] See Abel, book review, (1974) 24 U.T.L.J. 318.

[9] From this perspective the concerns expressed by White, *The Evolution of Reasoned Elaboration* (1973) 59 Va L. Rev. 279 are not germane. The point is not to question what basis a court seeks to employ in justifying its decision, but to insist that, whatever basis is chosen, the justification be articulated in a convincing and intelligible fashion.

Its purpose is to persuade the reader that the result reached is both doctrinally sound and socially desirable. In order to achieve this purpose, a judgment must be systematically constructed and intellectually compelling. The failure of the Supreme Court of Canada on these two grounds is evident. Anyone familiar with our legal system can recall favourite examples. The majority judgment of Ritchie J. in *Lavell*[10] is mine. The judgment is, viewed simply as an attempt at logical exposition, incomprehensible.[11] It must be repeated that this is not a matter of agreeing or disagreeing with the result reached. It is a matter of finding the reasons advanced to justify the result unintelligible, fatuous, or, simply, unconvincing. It is a matter of being confronted with reasoning which would not persuade a child. Consider these additional examples. In *Reference re Alberta Statutes*, Cannon J. sought to show why the Social Credit government of Alberta found it necessary to attempt to control the press:

> It seems obvious that this kind of credit [*i.e.* Social Credit] cannot succeed unless everyone should be induced to believe in it and help it along. The word "credit" comes from the Latin: *credere*, to believe. It is, therefore, essential to control the sources of information of the people of Alberta.[12]

In *Re Nova Scotia Board of Censors and McNeil*,[13] a case involving the validity of a provincial censorship law, Mr Justice Ritchie essayed a novel foray into syllogistic reasoning. Thus he argued that, while the law in question addressed itself to public morality, there was no necessary congruence between morality and the criminal law. Therefore, he concluded, the law in question was not a criminal law.

B. *Literary Quality*

A judgment persuades, or should persuade, in addition, through its literary qualities. And yet here again one is on shaky ground. There are no accepted criteria of legal literary criticism.[14] But one looks almost instinctive-

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[10] [1974] S.C.R. 1349, (1974) 38 D.L.R. (3d) 481.

[11] This is not solely a personal opinion. It is shared by many first year law classes with whom I have sought unsuccessfully to unravel the decisions and by Professor Tarnopolsky, *The Supreme Court and the Canadian Bill of Rights* (1975) 53 Can. Bar Rev. 649, 667.

[12] [1938] S.C.R. 100, 144, [1938] 2 D.L.R. 81. See the useful comments by Tollefson in O. Lang, *Contemporary Problems of Public Law in Canada* (1968) 49. Tollefson, at 59, describes the passage quoted from the judgment of Cannon J. as "this dubious etymological approach".

[13] [1978] 2 S.C.R. 662, 692-3, (1978) 84 D.L.R. (3d) 1.

[14] As a not very successful attempt in this direction, see J. White, *The Legal Imagination* (1973), ch. v. See also Twining, "The Concept of a National Legal Literature" in Twining & Uglow, *supra*, note 4, 7 and 10. Remember also Karl Llewellyn's famous distinction between the Formal Style and the Grand Style. While I do not wish to argue the merits of one approach or the other, I do believe that an excessive attachment to formalism explains many of the literary clinkers dropped by the Supreme Court of Canada. See K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960).

ly for certain characteristics in judgments — precision, clarity, elegance of expression being among the more obvious. But how often does one find such qualities in Canadian judicial writing? One thinks of the grace and felicity which characterize the opinions of, to name but a few, Lord Mansfield, Lord Atkin, Lord Reid, and Lord Denning. One is hard-pressed to think of Canadian judgments that are memorable as literature. Mr Justice Mackay's judgment in *Re Drummond Wren*[15] glitters in an otherwise tedious landscape. Another exception can be found in the pronouncements of Mr Justice Dickson of the Supreme Court of Canada who has spoken out on the need for improvement in judgment writing.[16] He is also a fine judicial writer. His recent judgment in *Re Ontario Residential Tenancies Act, 1979*[17] is a model. His opinion of judicial writing in Canada is that while much is "of high quality, many of the judgments one reads show a strong tendency to be wordy, unclear, and dull".[18] Others have used harsher words. In 1960 J.G. Wetter referred to Canadian judicial writing as "an exercise in legal barbarism".[19]

I shall quote but two reasonably typical passages from two of Canada's most respected jurists, both of whom write abysmally. First, Mr Justice Rand in *Saumur* v. *City of Québec*:

> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realise is the residue inside that periphery.[20]

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[15] [1945] O.R. 778 (Chambers).

[16] See especially his address, *supra*, note 3. The initiative of the Canadian Institute for the Administration of Justice in this regard is very much to be welcomed. It is interesting that of the seven people who made up the faculty for this programme, six were from United States universities. Two recent Canadian publications contain advice and admonition for judicial writers: J. Wilson, *A Book for Judges* (1980) is generally pedestrian and discusses judicial writing, at 79-84, in a fashion which does not provide much of an example; R. Komar, *Reasons for Judgment: A Handbook for Judges and Other Judicial Officers* (1980) is both livelier and more critical, especially at 28-47. Wildsmith has criticised Komar's book on a number of grounds and, while many of the criticisms are apposite, Wildsmith's own writing is marred by so many infelicities as to call into question his standing as a critic. People who are capable of using words like "subsectionizing" should not throw stones. See Wildsmith's review of Komar's book in (1981) 59 Can. Bar Rev. 451, 455.

[17] [1981] 1 S.C.R. 714, (1981) 123 D.L.R. (3d) 554.

[18] Dickson, *supra*, note 3.

[19] He went on to say: "Its fundamental faults are: intellectual confusion, lack of discipline in literary composition, as well as length and thoroughness exceeding the requirements of each case." J. Wetter, *The Styles of Appellate Judicial Opinions* (1961) 313 quoted in Komar, *supra*, note 16, 29.

[20] [1953] 2 S.C.R. 299, 329, (1953) 106 C.C.C. 289.

And, second, Mr Justice Laskin (as he then was) in *R.* v. *Burnshine*:

> The process of construction must be related to prescriptions and standards under the *Canadian Bill of Rights* which, apart from the statute, might or might not be seen as relevant matters, and, even if seen as relevant, would lack the definition that they have as statutory directives.[21]

C. *Responsiveness to Social Issues*

Among the heavy responsibilities cast upon a final appellate court is that of producing judgments which respond to contemporary social and political concerns. The record of the Supreme Court of Canada is most dismal in this regard. It is not, at the risk of labouring the point, a question whether one agrees or disagrees with the responses adopted. It is simply that the resonses are incoherent and unintelligible.

One central concern should lie in defining the basic rights and freedoms of Canadians. What are the respective rights and duties of the citizen and the State? Reading the recent pronouncements of the Supreme Court of Canada, it is impossible to say. It would, in my view, be difficult to study the judgments in *Dupond* v. *City of Montréal*,[22] *Re Nova Scotia Board of Censors and McNeil*,[23] and *A.-G. Québec* v. *Kellogg's Co.*[24] and then to state with any degree of certainty or assurance, first, the respective jurisdictions of Ottawa and the provinces to encroach upon freedom of expression and, secondly, the corresponding rights, if any, of Canadians.[25]

A second concern is the role of women in Canadian society. Throughout most of this century, women have demanded that they cease to be subordinate to men. With painful slowness, the institutions, the ideas, and the formal rules

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[21] [1975] 1 S.C.R. 693, 713-4, (1974) 44 D.L.R. (3d) 584.

[22] [1978] 2 S.C.R. 770, (1978) 84 D.L.R. (3d) 420.

[23] *Supra*, note 13.

[24] [1978] 2 S.C.R. 211, (1978) 83 D.L.R. (3d) 314.

[25] The failure of the Supreme Court to concern itself with the protection of the citizen against the State has not gone unnoticed. See Tarnopolsky, *supra*, note 11 and Grant, *The Supreme Court of Canada and the Police: 1970-76* (1977-78) 20 Crim. L.Q. 152, 161 where the author remarked of one decision that "a totalitarian State could ask for little better". See also Whyte, *Civil Liberties and the Courts* (1976) 83 Queen's Q. 655 and Russell, *supra*, note 3, 12. Even judges have been known to comment upon the Supreme Court's seeming lack of interest in the protection of individual rights. Thus, in delivering his dissenting judgment in *R.* v. *Wray* [1971] S.C.R. 272, 304, Spence J. suggested that the decision reached by the majority would bring the administration of justice into disrepute. Mr Justice Spence has no doubt derived some satisfaction from the fact that the standard enunciated in his dissenting judgment has now become s. 24(2) of the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

of the legal system have begun to change in response to this demand. The Supreme Court of Canada has remained, in large measure, studiously unaware that anything was happening. In 1928, the Court decided[26] that women were not "persons" within the meaning of s. 24 of the *Constitution Act, 1867*.[27] In the 1970's, similar decisions came thick and fast. *Lavell*[28] saw the court uphold explicit sexual discrimination in the *Indian Act*.[29] In *Murdoch* v. *Murdoch*[30] the Court disregarded a lifetime of work by a woman. The labour that a wife had contributed to her husband's property would not entitle her to claim a share of that property on the dissolution of their marriage.[31] And finally there was *Bliss*.[32] Here the Court ruled that a section of the *Unemployment Insurance Act, 1971*[33] which created special rules concerning the entitlement of pregnant women did not amount to a denial of equality before the law by reason of sex.[34] In giving judgment, Ritchie J. adopted these words pronounced originally by Pratte J. in the Federal Court of Appeal:

> If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.[35]

It is a sad story. There is little reason to imagine that the appointment, in early 1982, of the first woman member of the Court, as welcome as it undoubtedly is, will lead overnight to a change in attitude.[36]

Finally, it is, I believe, common ground among students of Canadian constitutional law, regardless of where their jurisdictional sympathies lie, that the Supreme Court of Canada has made a mess of its responsibilities in

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[26] *Reference re Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867* [1928] S.C.R. 276. Fortunately, the Judicial Committee of the Privy Council was still Canada's final court of appeal. See *Edwards* v. *A.-G. Canada* [1930] A.C. 124, [1929] All E.R. Rep. 571 (P.C.).

[27] 30 & 31 Vict., c. 3 (U.K.).

[28] *Supra*, note 10. I am aware that the majority of the judges stated their reasons differently, but as noted above, I find the judgment of Ritchie J. incomprehensible and, therefore, utterly unpersuasive.

[29] R.S.C. 1970, c. I-6.

[30] [1975] 1 S.C.R. 423, (1974) 41 D.L.R. (3d) 367.

[31] To be fair, I must mention that the Court did take a different approach in *Pettkus* v. *Becker* [1980] 2 S.C.R. 834, (1980) 117 D.L.R. (3d) 257, where the majority found a constructive trust in favour of a common law wife which entitled her to one-half of the value of the assets in question.

[32] *Bliss* v. *A.-G. Canada* [1979] 1 S.C.R. 183, (1979) 92 D.L.R. 417.

[33] S.C. 1970-71-72, c. 48.

[34] Which is the standard laid down in s. 1(b) of the *Canadian Bill of Rights*, R.S.C. 1970, Appendix III.

[35] *A.-G. Canada* v. *Bliss* [1978] 1 F.C. 208, 213, (1977) 77 D.L.R. (3d) 609 (C.A.).

[36] See generally Anderson, *The Supreme Court and Women's Rights* (1980) 1 Supreme Court L.R. 457.

defining and shaping Canadian federalism. The emergence of the federal-provincial conference as the key institution of Canadian federalism expresses a long-standing lack of confidence in the judiciary on the part of Canadian politicians.

The Judicial Committee of the Privy Council was rejected because of its striking inability to confront the pressing questions of Canadian life. The Supreme Court of Canada embarked on its new role to the accompaniment of optimism and adulation.[37] Thirty years later the deficiencies of the Court had become obvious. As Dale Gibson put it: "[T]he Supreme Court of Canada has failed dismally to live up to expectations."[38]

I have not *proven* that the Supreme Court of Canada, over the years, has been deficient. To do so empirically would be impossible. The strongest evidence is anecdotal and the case can be made only by inference.

III. A Matter of Serious Public Concern

The state of the judiciary in Canada should be a matter of serious public concern. But this is not the case. One reason, obviously, is that most people don't care what happens in the legal system. Conceding this however, a major reason must be that there has not been sustained, forthright criticism of the judiciary either on the part of the legal profession or in the mass media.

Such criticism as one finds in law journals is restrained and polite: timid, an uncharitable person might say. The first critical monograph analysing the work of the Supreme Court of Canada did not appear until 1974.[39] The author of this work, Paul Weiler, noted accurately that "Canadian judges and lawyers are not used to systematic criticism of a court's performance".[40] Weiler's book, like the handful of academic articles which raise criticisms, avoids singling out individual judges and tends towards the abstract.[41]

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[37] See, *e.g.*, Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians* (1951) 29 Can. Bar Rev. 1038.

[38] Gibson, book review, (1974) 6 Man. L.J. 215, 215. An editorial, *Whither the Supreme Court of Canada?* (1973) 21 Chitty's L.J. 356 expresses both a wistful sense of disappointment and an injured national pride over the performance of the Supreme Court of Canada.

[39] P. Weiler, *In the Last Resort [:] A Critical Study of the Supreme Court of Canada* (1974).

[40] *Ibid.*, ix.

[41] See, *e.g.*, Abel, *supra*, note 8; Tarnopolsky, *supra*, note 11; Gibson, *supra*, note 38; *Whither the Supreme Court of Canada?*, *supra*, note 38; Gibson, *—And One Step Backward: The Supreme Court and Constitutional Law in the Sixties* (1975) 53 Can. Bar Rev. 621; Conner, *Images of the Court* (1979) 3 Prov. Judges J. 11; Kroll, *Should There be a Right to Challenge Judges?* (1977) 35 The Advocate 411; and Brett, *Reflections on the Canadian Bill of Rights* (1968-9) 7 Alta L. Rev. 294. Axworthy, "Are Judges Competent?" in L. Trakman,

Stories of any kind about the judiciary are rare in the mass media. There has been little critical writing about the courts in the popular press, although the few examples that exist are sharp and forthright. The strongest piece was written by Eleanor Wachtel, appeared in *Chatelaine* in March 1978 and was entitled, *The 10 Lousiest Judgments of the Seventies*.[42] A two-part series in *Maclean's* magazine in 1959 argued that judges are appointed largely on the basis of loyalty to political parties and discussed some of the prejudices that appointees bring to the bench with them.[43] A critical report on the criminal justice system by Jane Becker, entitled *The Lottery in Our Courts*, appeared in *Maclean's* in February 1962.[44] Alan Borovoy argued in *Canadian Magazine* in October 1977 that Canadian judges used the law of contempt of court to stifle criticism.[45] A four-part feature series by Ellie Tesher in the *Toronto Star* in 1982 involved deeper probing into the legal system than one usually encounters in the daily press.[46]

One is hesitant to claim that one's research is exhaustive, but for systematic, critical writing about the courts in the English-Canadian popular press, that seems to be it. Certainly there have been many stories in magazines and newspapers, primarily in the editorial pages, which comment on particular events in a critical way,[47] but, like much journalism in Canada, they are episodic and related only to their specific facts. Little attempt is made to subsume the events in question within any broader analysis. As an illustration

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ed., *Professional Competence and the Law* (1981) 112 is an excellent example of academic timidity. As an exception to the general approach, see Franks & Kenner, *A Proposal for a Saner Judiciary* (1977) 1 Legal Med. Q. 264. In this unusual little article, the authors argue the case for compulsory sanity tests for prospective judges. In its first few issues, the *Supreme Court Law Review* has been surprisingly forthright. See, *e.g.*, Berger, *The Supreme Court and Fundamental Freedoms: The Renunciation of the Legacy of Mr. Justice Rand* (1980) 1 Supreme Court L.R. 460.

[42] The article began:"Justice in the courts? That depends whether you're male or female. Down through the years both the lawmakers and judges have revealed themselves to be biased, bigoted, and sometimes downright contemptuous when it comes to dealing with women." Chatelaine (March 1978) 56.

[43] Katz, *Do Our Courts Dispense True Justice?*, Maclean's (1 August 1959) 13, (15 August 1959) 18.

[44] MacLean's (24 February 1962) 9.

[45] *To Judge a Judge*, Canadian Magazine (29 October 1977) 30.

[46] *Justice in the 1980s*, Toronto Star (8 February 1982) A-1, (9 February 1982) A-1, (10 February 1982) A-1, (11 February 1982) A-1.

[47] See, *e.g.*, the editorial, *A Year for a Life* which referred to "the poor, misguided judge" and concluded with the question: "Where is the justice?" in The [Toronto] Globe and Mail (24 June 1981) 6. In a similar vein, Pierre Berton wrote of one Manitoba Court of Appeal case concerning door to door salesmen: "This is justice?", Maclean's (9 February 1963) 48. In reviewing a book about the Stephen Truscott case, Kildare Dobbs noted that the book was intended to show clearly "that the Truscott trial was a solemn farce". Saturday Night (May 1966) 11.

of this phenomenon, one could point to editorials and news stories which allege that the courts are "soft on criminals". Such claims are often made where the offence in question involves children. Thus, in London, Ontario in late 1980 two men who had been convicted, in separate proceedings, of sexual offences involving children were awarded what many people viewed as lenient punishments. A considerable public outcry ensued. There were meetings and petitions. The London *Free Press* called one sentence "grossly inadequate". In the event, the sentences were appealed by the Crown. In both cases the terms of imprisonment awarded at trial were substantially enhanced. No one was cited for contempt.[48]

Politicians, and public figures generally, have been loath to give voice to views critical of the judges. In March 1971, Joe Borowski, a Minister in the Manitoba Government, criticised a magistrate in that province. In December 1975, André Ouellet, then federal Minister of Consumer and Corporate Affairs, questioned publicly the sanity of a Québec Superior Court judge. Both these individuals were convicted of contempt and their cases will be discussed more fully below. Perhaps the most spectacular public criticism of a judge in recent years came in May 1972 from David Lewis, then leader of the federal New Democratic Party. Referring in a speech to the behaviour of a judge in Québec who had sentenced three labour leaders to jail as "reckless ignorance", Lewis continued: "any judge who has the stupidity to impose the savage sentence of one year in jail on the three union leaders has no right to be on the bench".[49] Despite a public suggestion to this effect from a legal academic,[50] Lewis was not charged with contempt. Again, the point to be noted is the virtual lack of critical comment emanating from political figures. Colin Wright summed the matter up accurately and succinctly: "Canadians appear generally content to keep their criticism of the courts almost as muted and ponderous as the judicial process itself."[51]

The important question is — why? Why are Canadians, whether they be politicians or journalists or legal academics or lawyers, so reluctant to state publicly what many of them admit privately? How do we explain this generalised and long-standing reluctance to criticise the judges?

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[48] See the London Free Press (27 January 1981) A-6, (10 February 1981) D-1, (14 February 1981) A-1 and A-7. See also *R.* v. *Dalke* (1981) 59 C.C.C. (2d) 477 (B.C.S.C.).

[49] Quoted in List, *Lewis blames judge's 'reckless ignorance' for Quebec labour chaos*, The [Toronto] Globe and Mail (13 May 1972) 1.

[50] See Hunter, letter to the editor, The [Toronto] Globe and Mail (17 May 1972) 6. Hunter's letter was, in fact, critical of the existence of the offence of contempt of court, calling it "an anachronism". His argument was that since Borowski had been charged, so should Lewis.

[51] Wright, "Issues of Law and Public Policy" in Royal Commission on Newspapers, *Newspapers and the Law* (1981) 46, 60 (Research Studies, Vol. III).

IV. Law and Ideology

In this section I will attempt to answer the question posed above. It would be easy to assert that the absence of sustained criticism of our judiciary is due solely to the way Canadian courts apply the law of contempt. Contempt charges *are* intimidating. But the law of contempt provides only a partial explanation for our quiescence. The public, media and academic timidity is explained primarily by the place which courts hold in our ideological system. I will discuss the law of contempt in Canada and then I will investigate the underlying ideological question.

A. *Contempt of Court*

Contempt of court is an element of Canadian law which is both unclear and anomalous. It is said that there is a distinction between "civil" contempt and "criminal" contempt, although no one appears able to state the distinction precisely and it is conceded generally that the distinction is of little practical significance.[52] Contempt is the one criminal offence in Canada that is not given a statutory definition.[53] For this reason, there is no statutory maximum penalty, the maximum punishment awardable being, arguably, at the discretion of the trial judge.[54] Where an alleged contempt is directed at a particular superior court judge, there is nothing in law to prevent that judge from presiding over the determination of the accused contemnor's guilt.

Because contempt is not a statutory offence, a special, non-statutory procedure is normally followed in contempt prosecutions. The procedure is called summary process. It denies many of the rights traditionally associated with criminal prosecutions.[55] The presumption of innocence is inapplicable. The accused contemnor is ordered to show cause why he should not be committed for contempt; that is, the burden of proof shifts to the defendant. Further, the standard of proof required is unclear,[56] there is never an opportunity for trial by jury, and the accused can be forced to testify. In one recent case some judicial concern was expressed about such procedures,[57] but subsequent

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[52] See Borrie, "The Judge and Public: The Law of Contempt" in A. Linden, ed., *The Canadian Judiciary* (1976) 207, 221; Hugessen, *Comment* in Linden, 224, 229; A. Mewett & M. Manning, *Criminal Law* (1978) 408; and S. Robertson, *Courts and the Media* (1981) 20-1.

[53] See *Criminal Code*, R.S.C. 1970, c. C-34, s. 8.

[54] Hugessen, *supra*, note 52, 299.

[55] See Robertson, *supra*, note 52, 88-92. The procedure is discussed in detail in *R.* v. *Edmonton Sun Publishing Ltd* (1982) 62 C.C.C. (2d) 318 (Alta Q.B.).

[56] In *Edmonton Sun*, *ibid.*, 324 the Court did require proof "beyond a reasonable doubt" that the contempt "tends 'to obstruct or defeat the administration of justice' or that it shows 'disrespect of the court or its process' or that it tends 'to bring the court into disrespect' ".

[57] *Bergeron* v. *La Société de Publication Merlin Ltée* (1970) 14 C.R.N.S. 52 (Qué. C.A.).

decisions have rationalized these derogations from fundamental rights.[58] Mewett and Manning have essayed the extraordinary argument that shifting the burden of proof to the accused is acceptable because the accused, if convicted, can appeal against conviction or sentence.[59] The Law Reform Commission of Canada has made some half-hearted and equivocal recommendations for reform,[60] but none of these has been implemented so far.

1. Scandalising the Conrt

Having established a general context, I will turn now to an analysis of a specific aspect or branch of the law of contempt of court — scandalising the court. Scandalising the court is that portion of the criminal law which is brought to bear to punish individuals who say nasty things about courts or judges. This form of contempt is now unknown in England; there has not, it appears, been a successful prosecution for fifty years.[61] It is, unfortunately, alive and well in Canada.

The law of contempt generally is supposed to protect against interference with the due administration of justice.[62] Scandalising the court seeks to sanction, in the classic definition, "any act done or writing published calculated to bring a court or a judge of the court into contempt or lower his authority".[63] Such statements may involve either (a) scurrilous abuse of a judge or court, or (b) imputing improper motives to a judge or court.[64] We

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[58] *McKeown* v. *The Queen* [1971] S.C.R. 446, (1971) 16 D.L.R. (3d) 390; *R.* v. *Hill* (1975) 18 C.C.C. (2d) 458 (B.C.S.C.). See also Cavenaugh, *Civil Liberties and the Criminal Contempt Power* (1976-77) 19 Crim. L.Q. 349; Watkins, *The Enforcement of Conformity to Law through Contempt Proceedings* (1967) 5 Osgoode Hall L.J. 125.

[59] Mewett & Manning, *supra*, note 52, 411. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 9.

[60] See Law Reform Commission of Canada, *Contempt of Court: Offences Against the Administration of Justice* (1977) 59-61.

[61] There is some disagreement among the United Kingdom authorities as to when the last successful prosecution occurred. C. Miller argues in *Contempt of Court* (1976) 197 that there has not been a committal "in the post war years". G. Borrie and N. Lowe state in *The Law of Contempt* (1973) 173 that the last case was in 1931. The Phillimore Committee on Contempt of Court chose a case decided in 1930 as the last successful application in the United Kingdom. *Report of the Committee on Contempt of Court* (1974) Cmnd 5794, 68 [hereinafter *Phillimore Report*]. While referring to scandalising the court as "archaic", the Phillimore Committee recommended that an offence similar to it, although much morc carefully and narrowly defined, be retained. *Phillimore Report*, 68-71.

[62] See *A.-G.* v. *Leveller Magazine Ltd* [1979] A.C. 440, [1979] 1 All E.R. 745 (H.L.).

[63] *R.* v. *Gray* [1900] 2 Q.B. 36, 40, [1900-3] All E.R. Rep. 59.

[64] See *Phillimore Report, supra*, note 61, 68. Robertson is of the view that "imputing improper motives" is not a category of "scandalising the court", but a separate branch or form of contempt, *supra*, note 52, 59-74.

have on the highest judicial authority that scandalising the court is not intended to prevent criticism of judges or the courts. Thus Lord Atkin stated in *Ambard* v. *A.-G. Trinidad and Tobago*:

> But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrntiny and respectful, even though outspoken, comments of ordinary men.[65]

What I propose to do now is to look at the Canadian cases, sort them, more or less, into the two recognised categories of scandalising the court, assess the results of the decisions, and note some technical problems.

a. *Scurrilous Abuse*

It is not easy to define scurrilous abuse. Canadians have been found guilty under this rubric for: describing the judge and jury at a murder trial as being themselves murderers and, to boot, torturers;[66] saying that a judicial decision was "silly" and could not have been made by a sane judge;[67] calling a court a "mockery of justice";[68] writing of a particular proceeding that "the whole thing stinks from the word go";[69] accusing a court of "intimidation" and "iron curtain" tactics;[70] and vowing with respect to a particular magistrate, "if that bastard hears the case I will see to it that he is defrocked and debarred".[71] The people who made these statements were: a columnist in a major urban daily newspaper; a federal cabinet minister; the editor of a university student newspaper; a municipal politician; a reporter for an urban daily; and a provincial cabinet minister. On the other hand, a columnist for a large urban daily who described a coroner's inquest as "one of the worst examples of idiocy by public officials that I've ever seen" was acquitted.[72] The cases do not suggest any clear standard for determiming what is or is not scurrilous abuse. Courts have convicted on the basis of language which they found "vulgar, abusive,

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[65] [1936] A.C. 322, 335, [1936] 1 All E.R. 704 (P.C.). The reader is reminded of my earlier remarks about the respective literary abilities of English and Canadian judges.

[66] *Re Nicol* [1954] 3 D.L.R. 690 (B.C.S.C.).

[67] *Ouellet* v. *The Queen* [1976] C.A. 788, (1977) 72 D.L.R. (3d) 95.

[68] *R.* v. *Murphy* (1969) 1 N.B.R. (2d) 298, (1969) 4 D.L.R. (3d) 289 (S.C.).

[69] *Re Landers* (1980) 31 N.B.R. (2d) 113 (Q.B.).

[70] *R.* v. *Western Printing and Publishing Ltd* (1955) 111 C.C.C. 122 (Nfld S.C.).

[71] *Anger* v. *Borowski* [1971] 3 W.W.R. 434 (Man. Q.B.).

[72] *R.* v. *Fotheringham and Sun Publishing Co.* (1970) 11 D.L.R. (3d) 353 (B.C.S.C.).

and threatening"[73] or which exceeded the "bounds of temperate and fair criticism".[74] The New Brunswick Court of Queen's Bench recently advanced the extraordinary assertion that criticism which was "ungentlemanly"[75] was contemptuous. In order to amount to scurrilous abuse it appears that the statement in question must identify a particular judge or court. Beyond that, the crucial factor seems to be the literary taste of the presiding judge. If the judge finds the words used excessive then there will likely be a conviction.[76]

b. *Imputing Improper Motives*

Imputing improper motives is a concept that should be susceptible to more precise definition. What appears to be involved here is an allegation of partiality, bias or prejudice.[77] The cause or origin of the alleged improper motive is irrelevant. The allegation may be directed at the judiciary as a whole,[78] at a particular court or group of judges,[79] at a specific, named judge, or at a jury.[80] Contempts of this nature are viewed with considerable disfavour by the Canadian judiciary. Such statements are seen as undermining the reputation for integrity and fairness upon which, it is claimed, the independence of the judiciary is based. The extreme sensitivity of the judges in such matters is illustrated in *Re Duncan*.[81] Lewis Duncan was a lawyer, a Q.C. in fact, arguing an appeal before the Supreme Court of Canada in 1957. Duncan suspected that one member of the Court was prejudiced against him. It was Duncan's belief that this prejudice originated with a personal incident thirty years earlier and that it had been demonstrated in two previous cases before

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[73] *Anger* v. *Borowski*, *supra*, note 71, 446.

[74] *R.* v. *Western Printing and Publishing Ltd*, *supra*, note 70, 124.

[75] *Re Landers*, *supra*, note 69, 116. In *R.* v. *Edmonton Sun Publishing Ltd*, *supra*, note 55, 326, however, the Court held that the mere fact that material was "in very bad taste" did not render it contemptuous.

[76] Although it is not strictly on point, one should also note the *Georgia Straight* case. In 1969, an underground newspaper was convicted of criminal libel for having awarded a magistrate the "Pontius Pilate Certificate of Justice". *R.* v. *Georgia Straight Publishing Ltd* (1969) 4 D.L.R. (3d) 383 (B.C. Co. Ct).

[77] See, *e.g.*, *Re Nicol*, *supra*, note 66; *R.* v. *Western Printing and Publishing Ltd*, *supra*, note 70; *Re Duncan* [1958] S.C.R. 41, (1958) 11 D.L.R. (2d) 616; *R.* v. *Murphy*, *supra*, note 68; *Anger* v. *Borowski*, *supra*, note 71; *A.-G. Canada* v. *Alexander* (1976) 65 D.L.R. (3d) 608, [1975] 6 W.W.R. 257 (N.W.T.S.C.); *Re Smallwood* (1980) 25 Nfld and P.E.I.R. 198 (Nfld S.C.); *Re Landers*, *supra*, note 69; *R.* v. *Glanzer* [1963] 2 O.R. 30 (H.C.).

[78] See *R.* v. *Murphy*, *supra*, note 68.

[79] See *Re Smallwood*, *supra*, note 77; *R.* v. *Glanzer*, *supra*, note 77.

[80] See *Re Duncan*, *supra*, note 77; *Anger* v. *Borowski*, *supra*, note 71; *A.-G. Canada* v. *Alexander*, *supra*, note 77; *Re Landers*, *supra*, note 69; *R.* v. *Western Printing and Publishing Ltd*, *supra*, note 70.

[81] *Ibid.*

the Supreme Court of Canada in which he had been involved. There was some dispute as to what Duncan actually said to the court, but the essence was that he did not want Locke J. to be a member of the panel hearing his client's appeal and that he did not believe the administration of justice would be served if Locke J. remained on the panel. Accordingly, he requested that Locke J. withdraw. Kerwin C.J.C., speaking for himself and six other judges (not including Locke J.) had no hesitation in holding that Duncan's remarks were contemptuous. Duncan was ordered to pay a fine of $2,000 or, failing that, to serve sixty days in jail. This fine was one of the largest ever imposed in a Canadian contempt case.[82]

c. *General Considerations*

Some general questions remain to be answered with respect to scandalising the court. First, is truth a defence? This issue is unlikely to arise where the statements in question amount to scurrilous abuse, since truth or falsity has little to do with a statement being abusive or not. However, where improper motives on the part of a judge have been suggested, can the accused contemnor seek to prove the truth of such allegations? If I have written that judge X accepts bribes, can I escape punishment by proving that judge X is on the take? The answer is an equivocal *no*. There is no Canadian case directly on point,[83] but all the commentators, having made appropriate disclaimers, agree that truth is not a defence.[84] Secondly, is *mens rea* required? The question should be rephrased since, it will be remembered, the burden of proof is on the accused. Can the accused escape liability by establishing the absence of *mens rea*, that is to say, by showing that the statement in question was not intended to interfere with the due administration of justice? The answer here is clear. It is — *no*.[85]

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[82] For interesting background, see Honsberger, *Lewis Duncan, Q.C.* (1977) 11 L.S.U.C. Gazette 25. In *R.* v. *Flamand* (1981) 57 C.C.C. (2d) 366, 367-8 (Qué. C.A.), an accused person in a criminal proceeding was held to be in contempt for saying these words to the trial judge: "I no longer have any confidence in you, your Honour, and you know why. You are not fit to try this case because your own son is a member of the Provincial Police."

[83] Although Crown counsel argued in *R.* v. *Glanzer*, *supra*, note 77, that the truth or falsity of the statements at issue was irrelevant. Mayrand J.A., the one member of the Québec Court of Appeal who dissented in *R.* v. *Flamand*, *ibid.*, 368, suggested that truth might be a defence.

[84] See, *e.g.*, Miller, *supra*, note 61, 192-4; Borrie & Lowe, *supra*, note 61, 165; Borrie, *supra*, note 52, 213; Mazzie, *Criminal Contempt: Necessity and Procedure versus Fairness and Justice* (1972) 36 Sask. L. Rev. 295, 308; R. Megarry, *A Second Miscellany-at-Law: A Diversion for Lawyers and Others* (1973) 80-1; *Phillimore Report*, *supra*, note 61, 68-71 which recommended the creation of a statutory defence of truth *and* public benefit.

[85] See, *e.g.*, *R.* v. *LaRose* [1965] C.S. 318; *R.* v. *Barker* (1980) 20 A.R. 611, (1980) 53 C.C.C. (2d) 322 (C.A.); *R.* v. *Perkins* (1980) 51 C.C.C. (2d) 369 (B.C.C.A.). See also Shifrin, *The Law of Constructive Contempt and Freedom of the Press* (1966) 14 Chitty's L.J. 281, 293. In *Courts and the Media*, *supra*, note 52, 60-1, Robertson suggests that *mens rea* may be required.

Finally, what is the range of punishment that is awarded in such cases? The most common punishment is a fine. In 1963, the publisher of *The Division Court Reporter*, a periodical which alleged partiality and corruption on the Division Court bench, was fined $4,000, or about $12,000 in 1982 dollars. This is the largest fine in a reported case.[86] In 1969, the writer of an article in a student newspaper which described the courts as "simply the instruments of the corporate elite" was sentenced to ten days imprisonment without the option of paying a fine.[87] Occasionally, the contemnor may be ordered to apologise to the court. This may be imposed either in conjunction with,[88] or independently of,[89] a fine.

2. Contempt and the *Charter*

The *Canadian Charter of Rights and Freedoms*[90] may necessitate certain changes in the law of contempt. At this stage one can only comment on the *Charter* in a highly speculative fashion. I will, therefore, simply note the issues that might arise. The first is substantive. The *Charter* purports to guarantee "fundamental freedoms", including, in s. 2(b), "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". One could argue plausibly that either the law of contempt generally or, more particularly, the law concerning scandalising the courts, denies this right and is, therefore, "inconsistent with the provisions of the Constitution". As such it should be "of no force or effect".[91] Unfortunately, the matter is not quite so simple. Section 1 of the *Charter* provides that a law which limits or denies any of the rights guaranteed by the *Charter* may still be valid, if, first, the limits imposed are "reasonable" and, secondly, if they "can be demonstrably justified in a free and democratic society". Since the application of these standards to the law about criticising the judges will be determined by the judges themselves, it does not seem likely that the *Charter* will lead to substantial changes in the law.

A number of procedural issues may also arise. First, it could be argued that the *Charter* prohibits generally the enforcement of non-statutory criminal offences. Section 11(g) provides that persons shall not be

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[86] *R.* v. *Glanzer*, *supra*, note 77.

[87] *R.* v. *Murphy*, *supra*, note 68. For an attempt by a sociologist to compile evidence to indicate that the courts were viewed as precisely that, see MacDonald, *Contempt of Court: An Unsuccessful Attempt to Use Sociological Evidence* (1970) 8 Osgoode Hall L.J. 573.

[88] See *Ouellet*, *supra*, note 67; *Re Duncan*, *supra*, note 77.

[89] See *Anger* v. *Borowski*, *supra*, note 71; *Re Landers*, *supra*, note 69.

[90] Part I, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

[91] *Constitution Act, 1982*, being Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.), s. 52.

> found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.

Secondly, a case could be made that the summary process used in contempt prosecutions is rendered invalid. Section 11(c) purports to guarantee that a person "charged with an offence" cannot be compelled to be a witness against himself. Section 11(d) appears to transform the traditional presumption of innocence into a constitutional right enjoyed by accused persons in all criminal cases. Thirdly, the ability of a superior court judge to hear contempt proceedings involving himself is called into question. Section 11(d) guarantees a "fair and public hearing by an independent and impartial tribunal". Finally, the peson charged with contempt might be able to claim trial by jury as of right. Section 11(f) creates the right to a jury trial whenever "the maximum punishment for the offence is imprisonment for five years or a more severe punishment". Because of the nature of contempt as a non-statutory offence, the punishment is at the discretion of the judge, and the maximum punishment could, as a matter of theory at any rate, be five years or more. It should be stressed that the general limitation found in s. 1 of the *Charter* will also apply with respect to these procedural issues.

3. Effects of the Law of Contempt

It is evident that the existing law about scandalising the court in Canada is restrictive. There are legal limits on what may be said about the courts. Exactly *how* restrictive the law is, is more difficult to assess. The question has two aspects. First, as a matter of strict law, what is permissible? In theory, and as the Supreme Court of British Columbia held recently, one can say anything one likes about the courts as long as one does so "without abuse" and "without casting any aspersions on the motives of a judge".[92] This is, again in theory, the same standard as is applied in the U.K. The fact that no one has been convicted in the U.K. for fifty years, while, as we have seen, this has happened on many occasions in Canada, might suggest that in practice the standard in Canada is much stricter.[93] This suggestion is reinforced if one looks to the most recent reported case in the U.K., a case in which the Court of Appeal held that no contempt had been committed. Salmon L.J. stated confidently: "The authority and reputation of our courts are not so frail that

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[92] *R.* v. *Dalke*, *supra*, note 48, 479-80.

[93] See Powe, *The Georgia Straight and Freedom of Expression in Canada* (1970) 48 Can. Bar Rev. 410, 436.

their judgments need to be shielded from criticism".[94] Secondly, and the inquiry on this aspect must be even more speculative, to what extent does the law, as presently applied in Canada, function so as to inhibit criticism of the courts? My educated guess would be: quite a lot. We may profitably look to an analogy drawn from the law of libel. In *Cherneskey* v. *Armadale Publishers Ltd*,[95] the Supreme Court of Canada delivered a grandly illogical judgment that confused the law concerning the defence of fair comment in libel actions. It decided that the defence was not available to a newspaper with respect to opinions expressed in letters to the editor. This decision had an immediate and direct effect on the practice of newspapers. Nineteen out of twenty-eight Ontario newspapers surveyed by the Ontario Press Council reported that they had changed the way they handled letters to the editor. Many had adopted procedures which limited the range of letters they would publish.[96]

The incident makes it clear that restrictive legal standards do inhibit public discussion. At the very least, the existing law of contempt imposes a substantial degree of caution on writers and publishers.[97] Canadian journalists, to put it simply, are afraid to write stories which are critical of the judiciary. They are afraid of contempt proceedings. Enough working journalists have told me this that I must believe it to be true. Still, I am not convinced that the law on scandalising the courts is sufficiently restrictive to account for the limited amount of criticism that has been made.

B. *Ideology*

Law is both a product of the dominant ideology in society and a form through which that ideology is given expression.[98] The central ideological postulate of capitalist society is that of the abstract individual adrift in a sea of

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[94] *R.* v. *Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2)* [1968] 2 Q.B. 150, 155, [1968] 1 All E.R. 763 (C.A.). On another occasion he said: "I would not have any contempt. I think the law of libel takes care of anything you might say about a civil case, and if a judge is going to be affected by what is written or said he is not fit to be a judge." *Phillimore Report, supra*, note 61, 98.

[95] [1978] 90 D.L.R. (3d) 321, (1978) 24 N.R. 274 (S.C.C.).

[96] Ontario Press Council, *Annual Report, 1979* (1980) 32-9. Alberta, Manitoba, New Brunswick, Ontario, the Yukon, and the Northwest Territories have adopted statutory provisions designed to avoid the application of *Cherneskey*, *ibid.* See also Ontario Press Council, *Annual Report, 1980* (1981).

[97] Thus, even though the law in England appears to be more liberal than in Canada, there are suggestions that the fear of contempt proceedings has inhibited media criticism of the courts in that country. See S. Shetreet, *Judges on Trial* (1976) 192-6.

[98] See the recent statement of this view in C. Sumner, *Reading Ideologies* (1979). The relationship between law and ideology is explored in, *e.g.*, E. Genovese, *Roll, Jordan, Roll [:] The World the Slaves Made* (1976) 25; Hay, "Property, Authority and the Criminal Law" in D.

other such individuals, each seeking pleasure and avoiding pain. In the legal system, this postulate becomes the notion of equality before the law. Each individual is endowed with the rights and duties of the citizen, the formal equal of all others.[99] The judiciary is given primary responsibility for administering equality before the law. The instrument through which the law is applied must both represent itself, and be perceived, as adhering to the requirement of formal equality. Hence, "justice must not only be done, justice must be seen to be done". More precisely, the courts must be seen to be applying the law equally to all persons. They must be seen to be reaching decisions solely on the basis of legal considerations. They must be seen to be independent and impartial.

The legal system, then, bears heavy ideological responsibilities. Its main actors, in particular the judges, are bound to maintain the predominance of the ideology which is expressed in the law.[100] Thus, a certain physical distance must be created between the judges and the rest of society. For example, in 1980 the Ontario Ministry of the Attorney-General spent $104,000 on limousine services for judges, despite there being no legal authority for such expenditures. The Ministry justified its action by stating, according to a press report, that "judges could be put in embarrassing situations if they met jurors, witnesses or even the accused on public transit".[101] But this is evidently not enough. The judges must also be intellectually distanced from society. The social system as a whole, then, is bound to protect the ideological notions which infuse the role of the judges, and the judges' own perceptions of themselves, against attack. From this perspective, comment which casts doubt on the ability, integrity, or impartiality of the judiciary becomes by its nature subversive.

Hay, P. Linebaugh *et al.*, *Albion's Fatal Tree [:] Crime and Society in Eighteenth Century England* (1975) 17; E. Thompson, *Whigs and Hunters [:] The Origin of the Black Act* (1976), especially ch. x. An earlier exploration of the ideological aspects of law is found in T. Arnold, *The Symbols of Government* (1935) 128. He observed that "the center of ideals of every Western government is its judicial system". Unfortunately, Arnold did not develop a theory of ideology. As a result, his book is more of a debunking than a critical analysis. By 1960, Arnold appeared to have shed his earlier heterodox views and was expounding precisely the same ideological notions he had so vigorously castigated twenty-five years earlier. Thus, he admonished the Supreme Court of the United States to employ "undiluted reason" in order to "retain its authority and public appearances". He warned of the necessity to pursue constantly the "ideal of the rule of law" in order to have "civilized government". *Professor Hart's Theology* (1960) 73 Harv. L. Rev. 1298, 1311.

[99] This point is developed at length in Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law* (1977) 11 L. and Soc. Rev. 571.

[100] Thus, commented Viscount Simonds in *Shaw* v. *D.P.P.* [1962] A.C. 220, 267, [1961] 2 All E.R. 446 (H.L.): "...the supreme and fundamental purpose of the law, to conserve not only the safety and order, but also the moral welfare of the state".

[101] Speirs, *Spending on flowers, limousines queried by Ontario Auditor*, The [Toronto] Globe and Mail (8 December 1981) 5.

It would, however, be a gross oversimplification to suggest that there is little criticism of the courts in Canada because the judiciary is determined to impose its own ideological notions on an unsympathetic society. The dominant ideology in any society is, to a greater or lesser degree, part of the mental equipment of every member of that society. Certain other members of society are also given ideological roles to play, and also behave socially so as to maintain the dominant ideology. Thus, lawyers, academics and journalists, who are the relevant social actors for present purposes, have their parts to play. While the judiciary bears primary responsibility for ensuring that justice is seen to be done, the bar, the academy, and the mass media all play supporting roles in the great ideological drama [102] that is the legal system.

Let me add a final qualification. This is not the place to sketch out a full social theory of ideology. This has been done many times before and does not need to be done again. It is important, however, to stress that ideology is not a collection of lies or a confidence trick. It is a real part of the thought process of real people. Specifically, there are, first, many honest people who sincerely believe that the courts should be, and are, impartial; and, secondly, by and large the courts are, given the ideological equipment which judges bring to the bench, impartial. What I want to do now is to investigate the way in which these ideologically rooted notions about the role of courts are reflected in attitudes towards criticism of the courts.

As has been suggested, it is my view that Canadian judges possess an almost pathological antipathy to scrutiny or criticism from outside. Let us take as an example the present Chief Justice of Canada. In 1977, the Chief Justice gave a speech at the annual dinner of the Canadian Press in Toronto.[103] In his speech, the Chief Justice was critical of what he saw as the failure of the mass media to report adequately on the work of the Supreme Court of Canada. He suggested the existence of considerable public ignorance about the legal system and, particularly, about the Supreme Court. He argued that the media had a duty to inform the public about the legal system. In specific terms he advocated "more regular, more adequate reporting of [Supreme Court] decisions". He challenged the mass media: "Cannot the press... do much better than it has hitherto done?" [104] At the same time, however, he appeared to

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[102] In the course of reviewing Arnold's *The Symbols of Government*, *supra*, note 98, Willis described the judicial system as a "miracle play". (1936) 14 Can. Bar Rev. 278, 279.

[103] Address by Laskin C.J.C., *Public Perceptions of the Supreme Court of Canada*, Canadian Press Annual Dinner (20 April 1977).

[104] *Ibid.*, Laskin C.J.C. made the same point in a speech given to the Atlantic Provinces Law Conference shortly after his appointment as Chief Justice: "What is missing in the press coverage, or what is done too infrequently, is in-depth assessment". *The Supreme Court of Canada*, reprinted in (1974) 8 L.S.U.C. Gazette 248, 253-4.

suggest that while the media should inform, they should be reluctant to criticise. He stated that "there has hitherto been a well-understood convention that no attack should be made on the Courts, on the Supreme Court from a political perspective" and warned against "impugning judicial integrity".[105]

A year later the Chief Justice returned to these themes in a speech given to a seminar organised in Ottawa by the Canadian Daily Newspaper Publishers Association.[106] Laskin C.J.C. referred to the view, expressed in certain quarters, that the Supreme Court tended to favour Ottawa over the provinces in constitutional litigation. He replied that "[t]he allegation is reckless in its implication that we have considerable freedom to give voice to our personal predilections, and thus to political preferences".[107] He said of the notion that the judiciary should, or does, represent particular institutions or interests in society: "I know of no better way to subvert our judicial system".[108] The courts, he argued, welcomed criticism of their decisions, so long as it did not put in issue the integrity of the judges. He concluded that "aspersions on the Supreme Court" are "a disservice to one of our fundamental values, the rule of law, without which we cannot maintain our free society".[109]

Laskin C.J.C. returned to these concerns in 1982. In an address to the Annual Meeting of the Canadian Bar Association, he vigorously attacked the press over its reporting of the Canadian Judicial Council's inquiry into the behaviour of Mr Justice Berger of the Supreme Court of British Columbia. Many journalists had been critical of the stand which the Council took on the question of judges speaking out on public issues. This did not please the Chief Justice. Three times during his speech, he described the press as "ignorant". He accused them of "mischief-making" and claimed that they had not acted responsibly.[110]

In these examples, the Chief Justice has gone to the heart of the question this essay seeks to investigate. I do not know whether Bora Laskin is personally more or less sensitive to criticism than other human beings. The question is utterly irrelevant to the present analysis. The individual who gave these speeches did so not as Bora Laskin, but as Chief Justice of Canada. He

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[105] *Ibid.*

[106] *Judicial Integrity and the Supreme Court of Canada*, reprinted in (1978) 12 L.S.U.C. Gazette 116.

[107] *Ibid.*, 118.

[108] *Ibid.*, 121.

[109] *Ibid.*

[110] Address by Laskin C.J.C., Canadian Bar Association Annual Meeting (2 September 1982). For a lively journalistic reply, see Valpy, *A Rare Case*, The [Toronto] Globe and Mail (4 September 1982) 6.

was not saying that it was wrong to criticise the courts because criticism hurt his feelings. He was saying that it was wrong because it was subversive of the existing social order.

It also does not matter whether Chief Justice Laskin's perception is accurate. It may well be that outspoken criticism of the courts would strengthen the existing social order, but that is beside the point. To argue thus is to argue that we should have a different ideological perception of the role of the courts in Canadian society, or that the ideological functions of the courts should change. These may or may not be sound arguments. The point is that the Chief Justice was accurately expressing the content of the present ideology.

1. The Legal Profession

It is probably self-evident that the legal profession shares the general ideological orientation of the judiciary. What is striking is that the profession's views about criticism of the courts are almost identical to those of the judiciary.

For example, Rule 12 of the Rules of Professional Conduct issued by the Law Society of Upper Canada states: "The lawyer should encourage public respect for and try to improve the administration of justice." [111] The commentary on the rule enlarges on its application, thus:

> the lawyer should avoid criticism which is petty, intemperate or unsupported by his bona fide belief in its real merit...[W]here the tribunal is the target of unjust criticism, the lawyer, as a participant in the administration of justice, is uniquely able to and should support the tribunal, both because its members cannot defend themselves and because the lawyer is thereby contributing to greater public understanding of and thus respect for the legal system.[112]

An examination of the structure and composition of the Canadian Judicial Council and provincial judicial councils also reveals lawyers' fears of open criticism of the judiciary. The councils exist for the purpose, among other things, of investigating complaints about misconduct or misbehaviour on the part of judges.[113] Two points about such investigations should be noted.

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[111] Law Society of Upper Canada, *Professional Conduct Handbook* (1978) 36 [hereinafter *L.S.U.C. Handbook*]. (The handbook was re-issued in 1981, in substantially revised form. It continues to bear the publication date of 1978).

[112] *Ibid.*, 37.

[113] For the Canadian Judicial Council, see S.C. 1976-77, c. 25, s. 15 and for the Ontario Judicial Council, see R.S.O. 1980, c. 98, ss 7, 8.

First, in the case of the federal Council, all the persons who take part in an investigation are lawyers, while in the case of, for example, the Ontario Council, five out of seven are lawyers. Secondly, in both cases, the investigation is held in private. It seems safe to say that the legal profession supports the secrecy surrounding such proceedings, and, if anything, believes thcy are not secret enough.[114] One member of the profession was incensed when the Law Socicty of Upper Canada published the text of a report into the conduct of Harry A. Williams, a judge against whom allegations of consorting with prostitutes had been made.[115] But the desire not to have allegations of judicial wrongdoing made public goes further. What is the proper course of action if I as a citizen have what I am convinced is incontrovertible evidence of serious misbehaviour by a judge? Should I call up a reporter or write my M.P.? The view of the profession is clearly that these courses of action would be wrong. The proper thing to do is to bring the matter, in confidence, to the attention of the appropriate judicial council.[116]

The profession is also quick to respond to criticism coming from legal academics or from within its own ranks. In 1951, Professor John Willis published a spirited attack on a decision of the Supreme Court of Canada.[117] An outraged practitioner wrote to the editor of the *Canadian Bar Review* that

> while the utmost latitude must be allowed in criticising judges and judgments at the proper times, ...the dictates of good taste must surely impose some limits.[118]

At a deeper level, the writer of the letter seemed to regard it as positively immoral that Willis should seek to analyse the political and social attitudes of judges and the effect of those attitudes on judicial behaviour.

Paul Weiler evoked a similar reaction when he published *In The Last Resort.* As noted above, Weiler made some critical comments about the Supreme Court of Canada, but the criticism was very abstract, polite, and restrained. It appears, nonetheless, that there were those among the profes-

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[114] See, *e.g., Hearing on 2 Judges Secret,* Toronto Star (18 August 1977) B-7; Odam, *Judging the Judges Becomes the Issue,* The Montreal Star (24 February 1979) C-2; *The Whole Truth and Nothing But,* The [Toronto] Globe and Mail (4 May 1976) 6; Yaffe, *Mum's The Word as 2 Judges Face Morals Complaints,* The [Toronto] Globe and Mail (18 August 1977) 5; Jefferson, *Complaints About Judges Heard Only in Private,* The [Toronto] Globe and Mail (4 February 1980) 4.

[115] See the letter of Stinson, (1978) 12 L.S.U.C. Gazette 295.

[116] "Means exist through Attorneys-General and Judicial Councils for the investigation and remedying of specific complaints of official misbehavior and neglect; in particular cases these should be resorted to in preference to public fora and media." *L.S.U.C. Handbook, supra,* note 111, 78, fn. 5.

[117] Willis, case comment, (1951) 29 Can. Bar Rev. 296.

[118] Power, letter to the editor, (1951) 29 Can. Bar Rev. 573, 578.

sion who thought Weiler should be committed for contempt, not so much, in my view, because of the precise comments he made, but because he had had the temerity to undertake such a project in the first place.[119]

When members of the profession have found themselves forced into publicly discussing the judiciary, their distaste for such an undertaking is made evident. For example, the chairperson of the 1971 Canadian Bar Association symposium on the judiciary felt constrained to make this elaborate disclaimer:

> When word of this panel reached certain quarters it was suggested to me that matters of this kind ought not to be discussed in public, but only between gentlemen, in private... lest there be any misunderstanding, I wish to say that in organizing this panel, the Alberta Subsection on Constitutional Law in no way intends to imply the quality of judges in Alberta or in Canada is as a whole low.[120]

In the Toronto *Globe and Mail* of 5 September 1981, Clayton Ruby, a Bencher of the Law Society of Upper Canada, was quoted as saying that, with some notable exceptions, the persons appointed to the provincial court bench in Ontario were "Tory bagmen, backroom political hacks".[121] Three prominent Toronto lawyers took umbrage. They wrote a letter to the editor in which they sought to refute Ruby's claim. At the same time they restated the ideological position against criticising the judges: "Mr. Ruby does a disservice to the administration of justice and the confidence of the public in our judicial system by making such unfounded statements." [122]

The shock which the very notion of criticising the bench seems to induce in the profession is nothing new. The following words were written in 1873 by William Kerr, a Québec lawyer:

> In no profession does the horror of coming out boldly against abuses affecting itself, exist so strongly as in that of the Bar. . . .They have a dislike to washing the soiled linen of the profession in public; they are afraid of exciting the enmity of the judges if they attack the Bench, or any of its members.[123]

The words have lost none of their force today.

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[119] It was also suggested, apparently, that Professor Ian Hunter be committed for contempt for having characterized a judicial decision as "unrelenting imbecility". See Hunter, *Strange Passion in the County Court* (1970-71) 13 Crim. L.Q. 184, 184.

[120] MacDonald, remarks reprinted in (1973) 11 Alta L. Rev. 279, 280-1.

[121] See Steed, *McMurtry's double-header*, The [Toronto] Globe and Mail (5 September 1981) 10.

[122] Maloney, Humphrey & Bynoe, letter to the editor, The [Toronto] Globe and Mail (6 October 1981) 7.

[123] Quoted in Angus, *Judicial Selection in Canada—The Historical Perspective* (1964-68) 4 Can. Legal Stud. 220, 248.

2. The Media

It is my impression that the mass media share the ideological predisposition which has been noted. I infer this from the lack of mass media criticism noted above, although one must not discount the effects of both apathy and ignorance concerning the legal system. Where journalists are knowledgeable about the legal system, as is the case with court reporters, there exist implicit pressures on them, as well as defence counsel, social workers, and everyone else involved, to accommodate the performance of their roles to the organisational demands of the criminal justice system.[124] In any case, it seems that when stories are written about particularly outrageous judicial conduct, such conduct is portrayed as aberrant, atypical. Take the case of former British Columbia Provincial Court Judge Leslie Bewley. He observed from the bench in one case that "women don't get much brains before they're 30 anyway". This caused something of a storm. My reading of the media coverage of the incident is that the primary concern was that Judge Bewley himself, by his conduct, was undermining the public perception of the independence and impartiality of the bench.[125]

There is a palpable diffidence in the media when a story involves the legal system. In some cases this diffidence may be imposed by management. On 27 October 1970 the CBC issued a memorandum to all staff on the subject of "Policy in Matters of Public Controversy". The memorandum was obviously prompted by the events in Montréal of that month. It is, nonetheless, of broader interest. Staff were admonished that "accuracy, impartiality, good judgment and respect for the law are essential".[126] This diffidence may also be an expression of a journalist's own views. Thus, in writing of the September 1981 decision of the Supreme Court of Canada concerning the "patriation" of the Canadian constitution, Richard Gwyn observed: "It seems impertinent to criticise the nation's most distinguished, experienced, and by presumption, wisest, judges."[127] Like many members of the legal profession, many Canadian journalists seem to believe that criticising the judiciary is scandalous and subversive.

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[124] See Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession* (1967) 1 L. and Soc. Rev. 15.

[125] See, *e.g.*, Clarke, *What's Legitimate Price for Women's Rights*, The [Toronto] Globe and Mail (25 February 1978) 8.

[126] *Re Canadian Broadcasting Corp. and National Association of Broadcast Employees and Technicians* (1973) 4 L.A.C. (2d) 263, 264.

[127] Gwyn, *Constitutional Decision Damages Supreme Court Credibility*, [London] Free Press (2 October 1981) 7.

Conclusion

The law of scandalising the court is crystallized ideology. But the ambit of the ideology goes beyond the narrow terms of the law. The deficiencies of the Canadian judiciary have not been made the subject of widespread public debate because to do so would be to undermine the existing ideological perception of the role of the courts in our society. It is for fundamentally ideological reasons that the courts are insulated from intensive public scrutiny. It is said often that judges should enjoy special protection simply because they are not permitted to reply to criticism and because they have no opportunity for redress against persons who might defame them. This view is doubtful. As the discussion of Chief Justice Laskin's three speeches indicated, judges can and do enter into public battle with their critics.[128] On a much more mundane level, Canadian judges did not hesitate to make a number of public statements in December 1981 in which they sought to justify receiving pensions without having to contribute to them.[129]

The case of Mr Justice Thomas Berger of the British Columbia Supreme Court raised, in a stark fashion, the question of what judges might and might not say in public. Berger, a former leader of the B.C. New Democratic Party appointed to the bench by a Liberal government, had developed a reputation as an outspoken defender of human rights — particularly those of the Native peoples of Canada. He had, indeed, written critically of a number of Supreme Court of Canada decisions.[130] In November 1981, he made a speech and published an article in the Toronto *Globe and Mail* both of which pointed out what Berger saw as deficiencies in the proposed package of constitutional amendments. Another judge complained about these statements to the Canadian Judicial Council. The Council established a Committee of Investigation to look into Berger's conduct.[131] Berger was not intimidated and took to the pages of the *Globe and Mail* once more, this time to defend his own conduct.[132] The Committee of Investigation made its enquiry and reported thereon to the Council. The Committee concluded that Berger had acted in a

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[128] Mr Justice Dickson's view is simply that "judges traditionally do not respond to newspaper or other criticism". *Supra*, note 5, 162.

[129] See Strauss, *Judges Object to Paying for Pension Plan*, The [Toronto] Globe and Mail (7 December 1981) 1. On another plane, Chief Justice Deschênes of the Québec Superior Court published recently a book in which, among other things, he attacked vigorously both the legislative and executive branches of government in that province. See J. Deschênes, *The Sword and the Scales* (1979).

[130] See Berger, *supra*, note 41. See also T. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (1982).

[131] See Valpy, *But Have No Fear*, The [Toronto] Globe and Mail (7 May 1982) 6; Sheppard, *Probe of Berger Called Witch Hunt*, The [Toronto] Globe and Mail (7 May 1982) 9.

[132] Berger, *Fundamental Fairness at Stake*, The [Toronto] Globe and Mail (25 May 1982) 8.

way that was "unwise and inappropriate" by becoming "embroiled" in a matter of "great political controversy". It decided further that Berger's conduct would support a recommendation for his removal from office. The Committee in fact stopped short of such a recommendation because "[i]t is possible that Justice Berger, and other judges too, have been under a misapprehension as to the nature of the constraints imposed upon judges".[133] The Canadian Judicial Council, in my view, rejected this report. The Council resolved that while Berger had been "indiscreet", his actions "constitute no basis for a recommendation that he be removed from office". As a general rule, the Council stated that "members of the Judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of courts".[134] Chief Justice Laskin commented at length on this decision in his address to the Annual Meeting of the Canadian Bar Association in 1982. He stated the principle in this way: "[H]owever personally compelled a judge may feel to speak on a political issue, however knowledgeable the judge may be or think he or she be on such an issue, it is forbidden territory." [135] With all respect, this was not the same standard laid down by the Canadian Judicial Council.

What emerges from this analysis is that judges can and do make public remarks. The question what is permissible depends on the content of the remarks. Mr Justice Berger spoke out to demand that the rights of Native peoples be protected in the Constitution of Canada. He very nearly found himself removed from office. Around the same time, Mr Justice Monnin of the Manitoba Court of Appeal made reference, on the bench, to "drunken Indians". In the view of the Canadian Judicial Council, this remark was "unfortunate", but was not a proper basis for disciplinary action.[136]

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[133] Government of Canada, *Report of the Committee of Investigation to the Canadian Judicial Council* (1982) 23 (in the matter of Mr Justice Berger, an unpublished report) [hereinafter *Investigation Committee Report*].

[134] Canadian Judicial Council, Resolution of May 1982. The Resolution and the *Investigation Committee Report*, *ibid.*, were transmitted by the Canadian Judicial Council to Jean Chretien, the Minister of Justice, on 31 May 1982 and made public by him on 4 June 1982. This incident gave rise to some very critical journalistic writing about the judiciary, although, in fairness to the Council, the distinctions between the decisions of the Committee of Investigation and that of the Council itself do not seem to have been understood. Nonetheless, one was treated to the unusual spectacle of seeing words like "hypocrisy", "non-entity", "bonehead", "injustice", and "loaded verdict" used to refer to the judiciary in the popular press. See, *e.g.*, Fotheringham, *Hypocrisy of judges on high matched by "sneak" Chretien*, The [Ottawa] Citizen (8 June 1982) 8 and Lynch, *Justice Berger established as distinguished thinker*, The [Ottawa] Citizen (8 June 1982) 9.

[135] *Supra*, note 110.

[136] See *No action planned on Indian comment*, The [Toronto] Globe and Mail (1 October 1982) 10.

Further, there is no legal rule which would prevent a judge being a plaintiff in a libel action.[137] I must admit that I do not know of a case where this has occurred. Still, it is worth noting what happened in the incident reported as *Re Nicol.* [138] A writer, it will be recalled, had accused a judge and a jury of being murderers and torturers. The writer was committed for contempt. In addition, a number of members of the jury initiated successful libel actions against the writer.

The ideological systems in other capitalist states have developed from historical traditions which differ from Canada's. Thus in England, much wider criticism of the judges is permitted. In the United States, it is even encouraged. The organic, Tory view of the world with its attendant respect for authority is deeply rooted in Canada.[139] This older, pre-capitalist ideology still exerts powerful pressure. There is, inevitably, a tension between this traditional ideology and the ultra-individualistic demands of contemporary North American capitalism. It is in the resolution of this tension that the issues of how much and what kind of criticism may be directed at judges will be determined. At some point it will be perceived widely that the deficiencies of the Canadian judiciary are of a magnitude sufficient to be an ideological liability. At that point the content of the ideology will undergo a subtle shift. It will then be accepted that in order for justice to be seen to be done, for the integrity and impartiality of the administration of justice to be maintained, the protective covering must be removed from our judges.

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[137] Although there are rules which prevent judges being defendants in libel actions. See Feldthusen, *Judicial Immunity: In Search of an Appropriate Limiting Formula* (1980) 29 U.N.B.L.J. 73.

[138] *Supra*, note 66.

[139] See the classic exposition in G. Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (1965). See also C. Taylor, *Six Journeys: A Canadian Pattern* (1977).