Articles

A JUDGE AND HIS CONSTITUENCIES*

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More than twenty years have passed since I last visited the Manitoba Law School. I came to Winnipeg in 1954 to attend the Annual Meeting of the Association of Canadian Law Teachers, an organization then barely five years old. We were a handful of law professors, and our host was the late Dean Tallin, a man of extraordinary vigour, who headed a very small full-time faculty. The School was then under the joint sponsorship of the University of Manitoba and the organized Bar of the Province, with its own governing Board. The Chairman at the time was the late Chief Justice E.K. Williams, whose career was unusual in its blend of scholarship, successful practice and leadership in the organizations of his profession, marking out a path of glory which led inevitably to the Bench. The present distinguished Chief Justice of Manitoba, my admired friend the Honourable Samuel Freedman, had then just two years' service as a member of the Bench which he has now adorned for more than two decades.

It was entirely predictable that the Manitoba Law School would become fully a faculty of the University of Manitoba, with a richer programme and a larger full-time faculty. It was equally predictable that Chief Justice Freedman would establish a national reputation as a creative Judge, writing brilliant, incisive judgments which have enriched Canadian jurisprudence. So much for predictability and now to a fact. The fact is that I came here in 1954 as a professor, I return

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as a Judge. A waggish friend of mine remarked, shortly after I was appointed to the Ontario Court of Appeal in 1965, that I had not gone very far. "You have moved", he said, "from ivory tower to ivory tower". I wonder how he would have characterized my move to the Supreme Court of Canada in 1970.

It is now ten years since I was given the opportunity to assume judicial office. Had I remained a professor, it is hardly likely that anyone would charge me today with living in an ivory tower, and certainly not if I happened to be on staff at the University of Manitoba. But what of Judges, and especially appellate Court Judges, who necessarily live quite cloistered lives, guarding their traditional independence of private or public influence in order to be better able to discharge their judicial duties with the impartiality that is a hallmark of their office? Are they today the lone inhabitants of the proverbial ivory tower, becoming more remote from the society in which they serve the longer they remain on the Bench? Is this the dilemma that attends the acceptance of judicial office?

Every Judge, at some time in his tenure, must have dwelt – certainly I have – on the isolation that is associated with his work. It is not that there is continuing or even intermittent solitude because, at worst, the Judge has the daily association of fellow Judges and Court supporting staff. Personal friendships may be maintained, although this may be difficult if there has been an uprooting, involving a move to another location. A measure of ordinary social relations may be enjoyed, proportioned to available time and inclination. Even professional legal relations may be maintained, with organizations of the profession and with law schools to a prudent degree, associations of a kind that may be of profit to the Judge in his work. Above all, there is the continuing comfort of family, of wife and children or husband and children, as the case may be.

Yet all this being said, the work of the Judge is so personal, so private, so confidential as to exert an inward pull, obliging the Judge to shun associations or public involvements that might reasonably be regarded as compromising impartiality and integrity. Nonetheless, although the work of a Judge has an inward pull, it must be carried out for external reception, for outward consumption. We do not elect our Judges in this country; yet though they be appointed, they have a variety of constituencies to serve, "consumer" constituencies, (if I may use a current expression), to which the Judge must respond by reason of the nature of the judicial function and the judicial role.

What are these constituencies and what are the responses that they may reasonably expect from the Judge's work and from the decisions that are its fruit? It is no longer sensible, if it ever was, to seek to depersonalize the judicial role by saying that the Judge owes fidelity only to the LAW, that the Judge is merely

the instrument that brings forth the law, as if the judicial function consists in pulling the right levers or pushing the relevant buttons. This type of priesthood is now in disrepute as a description of the day-to-day work of the Courts, and particularly the appellate Courts; and what is of present concern is whether the public expectation has not swung so far to the other extreme as to regard the Judge as invariably having freedom of choice in the decisions he or she makes, being even able to institute new policies or alter existing ones and to provide the necessary framework for them, if only he would. If there is in this a compliment to the judiciary or an indication of confidence in its work, I would not wish to turn it away merely because it may be associated with an exaggerated opinion of the scope of the judicial function. I would like to think that the compliment or the confidence would be tendered, and certainly accepted, under a statement of the scope of the judicial function and of the nature of the judicial role that I regard as more consonant with the place of the judiciary in our scheme of government.

That consonance, as I view it, will emerge as I enumerate what I have called the constituencies to which a Judge – and I speak particularly of an appellate Judge – must address himself, and as I try to assess the expectations he ought to meet in respect of each of them. His constituencies include the immediate litigants, their counsel, the Bar at large, fellow Judges and Judges of other Courts, governments and legislatures, the law schools and certainly the public. Not every case, and not every decision in every case, whether the Judge be a trial Judge or a Judge of an appellate Court, will involve the Judge in meeting the expectations of all these constituencies concurrently. For the trial Judge particularly, many of the cases he tries, whether alone or with a jury, will raise issues so local or so personal to the immediate litigants (they may turn, for example, on credibility) as not to require anything but the endorsement of the record or the recording of the jury's verdict; and a first appeal may not carry the case beyond its immediate local or private interest.

Nonetheless, whether the case raises issues of interest only to the immediate litigants or raises larger issues, the litigants and their counsel expect of a trial Judge a fair hearing, patience and an evident appreciation of the issues. Counsel have, of course, an obvious responsibility to be co-operative to those ends. The litigants too, under today's simplified procedures which downgrade technicality, have a legitimate expectation that their case will be disposed of on the merits rather than on some procedural or technical basis unless this is inescapable.

A recurring question is non-jury trials and at the appellate level is whether reasons should be given. There is no legal requirement of this kind, and it is quite unnecessary in a great many cases that come

to trial before a Judge alone, and equally unnecessary in a great many cases where the appellate Court's judgment affirms the trial Judge. Where the judgment at trial is to be reversed, it is customary to give reasons, however brief they may be on occasion. It is the practice in the Supreme Court of Canada not only to give reasons when reversing the judgment appealed from but generally to reserve judgment when there is any probability of such a reversal. In a busy appellate Court like the Ontario Court of Appeal it is literally impossible for the Court to reserve judgment in every case in which there may be reversal of the trial Judge; and in the majority of such cases, oral reasons are given after an interval following the conclusion of argument, or at times immediately thereafter without even leaving the Bench.

I am not as personally aware of the practice in other appellate Courts. Their disposition to reserve judgment or to deliver it from the Bench may depend as much on their volume of work as on the particular case in appeal. The build-up of a large number of reserved judgments will, obviously, protract the conclusion of litigation, and especially so if there is any thought of a further appeal to the Supreme Court of Canada. Yet I am confident that no appellate Court, no appellate Judge is so committed to the clearance of the Court's docket as to sacrifice the interests of litigants and to be insensitive to what I think is a duty to be of help to the Supreme Court of Canada in cases that demand thoughtful consideration rather than hasty determination. There is a pride of office as well as duty that would make such a sacrifice abhorrent.

A difficulty recurrently faced in the Supreme Court of Canada with respect to reasons comes up when none are given by an appellate Court in affirming the judgment at trial, which may also have been given without reasons other than what appears by an endorsement of the record. When appeals as of right lay, the Supreme Court had to struggle in such cases with issues that even short reasons might have put to rest, and I often wondered whether counsel thought of approaching the appellate Court and asking it to supply reasons to assist the Supreme Court in dealing with the appeal.

Now that all appeals to the Supreme Court in civil cases must come by leave, the absence of reasons by the appellate Court, especially if compounded by the want of reasons of the trial Judge, is bound to create problems upon an application for leave. Reliance will inevitably have to be placed upon counsel to explicate the ground or grounds upon which the decision below turned. However, if counsel are not in agreement on what those grounds were, can the Supreme Court determine the matter without seeking from the appellate Court a statement of those grounds? This issue may have to be faced more squarely in the future than was necessary in the past unless the practice be adopted, which I think would be too arbitrary,

of refusing leave if there are no reasons from the Court whose judgment it is proposed to challenge on further appeal.

Reasons for judgment, following upon a courteous hearing, provide reinforcing proof to the litigants that their case has been carefully considered. But they are also proof of the Court's recognition of its duty to meet the continuing expectation of the Bar that they be able to see how an existing principle of law is applied or distinguished in particular fact situations or, indeed, how an existing principle is extended or contracted, or how it is adapted to new situations. Obviously, a Court is very much duty bound to give reasons if it is ready to enunciate a new principle let alone re-examine an existing one.

I am also of the opinion that there is value, as part of the continuing supervision of an appellate Court over the development of the law, in restating legal principles in more contemporary terms where the governing authorities are fairly old and where they have not been re-examined for some years. The Supreme Court of Canada has given some evidence of this approach in its recent appraisal of some of the older authorities on occupiers' liability. True enough, this was induced in large part by a re-examination of trespasser's liability by the English Courts. Yet where, as is the case with us, we have the advantage of considering the work of sister Courts in Great Britain, in Australia, in the United States, to take some obvious examples, it is only common sense to re-assess our own jurisprudence when leads are provided by Courts with which we share a common legal heritage. An appellate Court, and certainly a final appellate Court, is charged not only to decide the immediate case but also to declare the law of the Province or of the country, as the case may be. In the discharge of this task, it cannot but be sensitive to currents that eddy from kindred legal systems.

There is another office that reasons for judgment may serve. They may be expected to confront the issues raised by counsel and to face up to at least the main authorities cited by counsel as relevant to those issues. The Bench expects that counsel will come with his or her case well prepared and with authorities discriminatingly chosen and not simply amassed to overwhelm the Court. It expects candour from counsel and must be equally candid in dealing with counsel's submissions in any written reasons. Only those counsel who participate in a trial or in an appeal will know at once how selectively the Court has dealt with the arguments that they advanced and whether the relevant authorities have all been considered. What is left out of reasons for judgment may be as significant for the law, certainly for the particular decision, as what is stated in them. But it may require searching analysis of the record and of the briefs of argument as well as of the reasons before any conclusion can be drawn on this score. Just as Courts are entitled to have from counsel all relevant author-

ities, whatever side of the case they support, so too, in my opinion, are counsel in a case and the Bar at large entitled to expect that the Courts will face up to the relevant authorities that are cited and to relevant submissions that are made of them. Often it happens that some submissions that are advanced are rejected out of hand or are dealt with summarily without calling on an opposite party to reply to them. I think it useful, although it cannot be the invariable practice, for the Court to mention the rejected submissions in its reasons for judgment if judgment has been reserved on other aspects of the case regarded by the Court as material.

I turn to consider the interrelations of our various Courts and the expectations that exist as between inferior and superior Courts in the judicial hierarchy. Our scheme of judicature is such that the Supreme Court of Canada can be considered as standing at the top of the judicial system in every Province and of course at the top of the system of federally organized Courts. As among provincial appellate Courts, or as between them and the Federal Court of Appeal, I know of no rule of either law or practice that requires any one of them to defer to the judgments of another merely because it is prior in time. The Supreme Court of Canada had occasion to comment on this recently in respect of an appellate Court judgment on a matter of federal criminal law (see *Wolf* v. *The Queen*, [1975] 2 S.C.R. 107, at p. 108-109), and it is *a fortiori* true that there is no legal or other obligation upon any provincial appellate Court to follow the judgment of another such Court in a matter of provincial law. To accept it on its merits as a governing principle where there is no judgment of the Supreme Court of Canada on the issue is, of course, another matter. It is just as open, however, to a provincial appellate Court to accept the principle of an English judgment or an Australian one or an American one or one from some other jurisdiction when there is no governing judgment of the Supreme Court of Canada.

One of the functions of the Supreme Court is, of course, to resolve conflicts in legal principle, or in the application of legal principle, between provincial appellate Courts. The existence of such conflicts provides a ground upon which leave to appeal should ordinarily be granted. There are a number of illustrations of this function of the Supreme Court. A recent one is *Wolf* v. *The Queen*, [1975] 2 S.C.R. 107, where the Supreme Court had to resolve the difference between the Alberta Appellate Division and the Saskatchewan Court of Appeal on a point in the law of perjury as prescribed by s. 120 of the *Criminal Code*.

Just as the Supreme Court of Canada has a legitimate expectation that provincial appellate Courts or the Federal Court of Appeal, as the case may be, will provide assistance through their reasons in sorting out the issues upon which a further appeal may be likely, so

those Courts and, indeed, all Courts in Canada have a legitimate expectation that the Supreme Court will speak clearly and confront through its reasons the issues upon which an appeal to it is founded. This is the ideal which must, however, be tailored to particular circumstances present in the appeals entertained by the Supreme Court. What then is its practice in disposing of its case load?

Because I am speaking of a practice and not of an inexorable pattern of behaviour, I can do no more than indicate the guidelines upon which the Court operates, guidelines, I should hasten to add, as I see them. It is important that I emphasize this personal assessment because judicial independence has its internal as well as its external operation; the Judges are independent *inter se* as well as against the outer world.

A case in appeal may be one where the trial Judge has been affirmed by a unanimous Court of appeal; it may be one where the trial Judge has been affirmed by a divided Court of appeal; it may be one where the trial Judge has been reversed by a unanimous Court of appeal; it may be one where the trial Judge has been reversed by a divided Court of appeal; it may be one where the Court of appeal, either unanimously or by a majority, has either affirmed or reversed on different grounds, that is, it may be one where the affirmation or reversal has been on a reappraisal of the facts, or on a different view of the applicable law on the facts as found by the trial Judge. Where the judgment appealed from has itself interfered with the judgment at trial, the interference may have been to substitute a different result or to order a new trial or perhaps merely to vary the judgment at trial.

As a general rule, the Supreme Court has not been disposed to interfere with judgments in cases which have come to it on concurrent findings of fact by the two Courts below. This was the practice when there were appeals as of right in civil cases; and now that there is a requirement of leave to appeal, it is doubtful that leave will even be given in a case where the judgment is based on concurrent findings of fact. If an appeal is entertained by the Supreme Court, and it is in a case in which the Courts below have been of the same view, the Supreme Court may be satisfied to dispose of the case summarily after hearing counsel for the appellant if it has not been persuaded that there is anything doubtful about the reasons of the Court of appeal to warrant it in calling upon the respondent. If the Court does call upon the respondent it will usually reserve judgment. Where judgment is given summarily after hearing only counsel for the appellant or, in some situations, after hearing counsel on both sides, it is not usual to give extended reasons. In the majority of cases where the Court disposes of the appeal summarily (and I remind you that these would be cases where the two Courts below have been of the same mind) a simple statement of affirmation of the decision

below is standard. There are, however, instances where the Court, on a summary disposition, has given very brief reasons on the substantive questions raised by the appellant, reasons of perhaps a paragraph or two in addition to the specific disposition.

It is only rarely that the Supreme Court will in a summary way reverse a decision of the Court of appeal without reserving judgment to enable it to give extended reasons. If there should be any disposition to a reversal after hearing counsel for the respective parties, judgment will ordinarily be reserved. Judgment will generally be reserved where the Courts below have differed and so too where there has been a dissent in the Court of Appeal.

There are, of course, cases which because of their obvious public importance or because of the consequences that flow from the result, as for example, murder appeals, that are almost invariably reserved for consideration by the Court, even though they come up after concurrent opinions of the Trial Court and the Court of Appeal. In constitutional cases and in cases involving the action of public authorities under national legislation, to take two examples in areas where it is desirable that the final appellate Court be heard, judgment will be reserved for that purpose; and so too in any other field of law where the Supreme Court has not theretofore spoken.

These then are the guidelines as I have perceived them in my experience. Needless to say, summary disposition without hearing the respondent or after hearing both parties, is not a practice that depends merely on a majority view; the Court would generally have to be unanimous on the procedure and on the result before it will dispose of an appeal summarily. Prior to 1975, prior that is to the introduction of the general requirement of previous leave to appeal, there had been a progressive increase in the number of appeals that the Court disposed of from the Bench. The pressure on the Court's time – and it should be noted that the Court sat five days a week during each of its three terms – made it necessary for the Court to be somewhat peremptory with many run-of-the-mill cases if it was to be able to devote itself to issues that demanded considerable reflection. Thus, to take a few figures, in 1970, the year I joined the Court, summary dispositions from the Bench amounted to 28 per cent of our total case load for the year; in 1972, the percentage rose to 34 per cent and in 1973 it was a little higher, nearing 36 per cent. In 1974, however, it dropped to 24 per cent, but, so far in 1975 (taking into account the cases heard in the first two terms of the Court ending on June 30), the summary dispositions have again risen and are running at the rate of 34.5 per cent of the case load.

I suspect, certainly I hope, that the percentage of appeals disposed of from the Bench will go down now that previous leave to appeal must be obtained in all civil cases and such leave remains the general requirement in criminal cases. A refusal of leave does not necessarily

mean that the case would be summarily dealt with if it was heard on the merits. However, leave when given should be an indication that the Court believes that an arguable point of law is involved which the Court should consider and it is fair to surmise that the consideration can only be properly given if, in the vast majority of the cases taken for hearing, judgment is reserved.

Governments and legislatures represent a very special constituency that Courts and Judges address. The bulk of judicial work in appellate Courts is concerned with legislation and with executive or administrative action thereunder, so that whether governments are formally involved in an appeal as parties or not, they are, and so are the Legislatures, an unseen presence in most appellate adjudication. Where the validity rather than or as well as the integrity of legislation is involved in litigation, intervention is permitted to any government which is not already a party, and legislation to this effect is general throughout Canada. It is usual for the federal government to intervene in support of federal legislation whose validity is attacked and, similarly, common for provincial governments to intervene in support of the attack. In reverse, where provincial legislation is challenged as being unconstitutional, the province directly affected will generally be joined by some if not all of the other provinces in support of the legislation while the federal government will generally but not always support the challenge to validity. At times the federal government has chosen to remain on the sidelines but it has also been known to intervene in support of provincial legislation rather than in opposition to it.

Where merely the integrity of legislation, in the sense of its proper construction and application, is in issue in any litigation, governments, unless they are direct parties, must leave it to the particular parties to the litigation to battle out the meaning and scope of the legislation. Governments can only be spectators, however interested they may be in the outcome. They and the enacting Legislatures have a legitimate expectation however that the Courts will be hospitable to the legislative object or legislative purpose so far as it is disclosed by the legislation or is otherwise discernible, and will not seek to thwart it in the course of construction. I do not think that Judges today challenge this proposition, but this does not mean that they can properly pursue fidelity to object or purpose – assuming there is agreement on what it is – at the cost of infidelity to the very terms of the legislation which is under examination. Certainly, if there is incompatibility between purpose and the language used to express it, the latter must govern. We are thrown back inevitably to the approaches to construction, and on this I have spoken recently in my reasons for judgment in *Hill* v. *Hill*, a split decision of this Court handed down on October 7, 1975, and I wish to borrow, for present-

ation here, a few sentences that I then wrote. I said there that the decision in a particular case as to the meaning and application of a statutory provision is not determined simply by the choice of one principle of construction rather than other:

> The relevant question is surely that of determining why one approach is selected rather than another, involving therefore a consideration of the factors that bear on the selection. I assume in this connection that different results will flow according to the selection made. This is not however invariably so. In the vast majority of the cases where statutes have to be interpreted and the interpretation determines the result, it makes no difference which canon of interpretation (be it the so-called literal rule or the golden rule or the mischief rule) is chosen.
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> There are contradictions or difficulties in all of the canons that have been usually relied on. Judges may disagree on what the plain meaning is even when they agree that it is the plain meaning or literal approach that should prevail. Similarly, Judges may disagree on what is the social purpose of a statute, although agreeing that under the mischief rule that is what they should seek in construing a statutory provision. In my view, we cannot escape making our own determination of purpose, or policy, regardless of the canon that is invoked; indeed, we make it when we purport to apply one canon rather than another.

I have the impression that most Judges, in the course of their careers as such, have the experience – certainly I have had it – of dealing with legislation which they personally find unfair or otherwise objectionable, but to which they must give effect upon the construction that, as a matter of their professional integrity, they must place upon it. In some such cases, Judges have been known to express their opinion about the legislation for the attention of the Government and of the Legislature whose enactment it is, but, usually, not an opinion that is simply a personal reaction but one that can be supported upon an objective and, indeed, professional basis. I should think that governments would find such comments helpful, and they can also be of assistance to law reform commissions which are charged to be alert to incongruities in the law with a view of recommending their elimination. A recent illustration may be found in the majority reasons of Pigeon J. in *The Queen* v. *Popovic and Askov*††, in which judgment was handed down on October 22, 1975.

I regard the relations between the Judiciary and the Law Schools, between the Judges and the law teachers as involving reciprocal expectations. A former law teacher cannot but feel gratified that those relations are very cordial in this country. The cordiality has in no way been impaired by the fact that the modern-day law school is no longer completely absorbed with the work of the Courts; its interests, properly in my opinion, extend to the administrative process, to the arbitration process, to the interrelation of the law with other social disciplines, to comparative legal institutions, to legal philosophy. The judicial process, judicial decisions remain quite

†† Since reported at (1975), 32 C.R.N.S. 54 (S.C.C.) – Ed.

central however, because we still believe in impartial adjudication to settle disputes between citizen and citizen, between citizen and State.

I recall that in my first years on the Bench I was exposed to a sentiment among some law teachers that the Courts had ceased or, if not, were ceasing to be relevant to the problems of our society. I challenged this sentiment then, and challenge it now if it still persists. I suspected at the time that what lay behind the sentiment was a concern that judicial decisions were too arid, not sufficiently infused with evidence of an awareness of the social considerations that underlay both common law and legislation. Involved in this sentiment was a feeling, if not a conviction, that the Courts were not prepared to stretch traditional limits of adjudication but rather were continuing to take a narrow view of what is and what is not justiciable.

I think that this criticism had greater merit fifty years ago than it has now. Moreover, a component of the criticism lay in the marked difference between the daily work of the law teacher and the daily work of the Judge. The former was and is able to touch law at its raw edges, to limit his or her concern to the intractables, to the deficiencies in the law as he or she sees them. The Judge, be he or she a trial Judge or an appellate Judge, is obliged to deal with the cases that come forward; there is no choice open to the Judge to slough off the routine and to apply himself or herself only to the exotic, to the marginal issues, to those cases that may be used to express a philosophy of law or to exhibit a sociological examination of legal doctrine. Not every case provides an opportunity for this kind of reflection. Nor do I think that the Supreme Court of Canada has neglected opportunities afforded to it to tackle new issues or re-open old ones. It has exhibited in its recent decisions a willingness to expand the law as to standing to challenge the constitutionality of legislation; it has opened to a degree the door to intervention by responsible and interested organizations in litigation raising issues under the *Canadian Bill of Rights*; it has expanded tort liability in the matter of hazardous products and in respect of recovery for economic loss unattended by physical injury; it has given more flexibility to the law of occupiers' liability.

Law Schools have improved considerably since my day as a law student. That improvement has had its influence on the Bar and, consequently, on the Bench. Let us not forget the movements in society that have taken place in the past three decades; they have necessarily involved movements in the law, in legislation certainly and in the common law as well. The law schools have had a good deal more to chew on, and the anxieties of our age were bound to affect their operation if they were to be sensitive to their duty to treat the law as a living, a social force within a democratic order whose values

would be reflected in and be protected by the legal system.

To me, Judges and law teachers, even more than Judges and members of the Bar, are allies in a common cause, the supervision of our legal system, the assessment of the development of doctrine and the improvement of the administration of justice from a more embracive point of view than is possible for members of the Bar, whose day-to-day work is particularized in the interests of various clients. That alliance has been furthered by the spreading engagement of law clerks, usually recent graduates in law, who fill the combined role of research assistant and eminence grise. The Judges of the Supreme Court of Canada have had law clerks for not quite a decade and their assistance has enabled the Judges to infuse their reasons for judgment with a wider range of supporting references than the pressure of their work load would otherwise have permitted. The legitimate expectation of the Law Schools, the law teachers and law students is that Judges, (especially Judges of the Supreme Court of Canada who deal with largely marginal cases), if they write, should do so with clarity and with demonstrable awareness in the significant cases of where their reasons fit in the jurisprudential parade on the subject. I think it may fairly be said that this is an expectation which the Judges themselves see as part of their work, but it must remain a matter of individual judgment whether a particular case calls for a jurisprudential exercise. The law teachers have the last word on how well this expectation is being met, and Judges recognize that critical comments on their judgments are an essential part of the duty of the legal profession to keep the body of law under continual scrutiny and review.

It would take me too far afield to speak here of the expectations that law schools should meet either vis-a-vis Judges or vis-a-vis the Bar in general or vis-a-vis the public. This is not my theme here and it will suffice to emphasize the importance of the function of the Law School for the quality of the Bar and Bench and for the role that Bar and Bench play in public and private affairs.

I turn, finally, to the most amorphous of a Judge's constituencies, the public. What are the public's expectations of the Judge, of the judicial system, of the administration of justice? Indeed, what do we mean by the public and how does the public manifest its expectations? A safe answer – perhaps the only safe answer – is to relate the public expectations to existing constitutional and statutory norms which define the status and functions of the judiciary. Foremost among these is judicial independence, supported by security of tenure but also by the acknowledged authority of the Judge, of the Court to entertain and determine justiciable disputes, unless precluded by valid legislation. Judicial independence undergirds impartial adjudication, and impartiality is certainly among the expectations

that a Judge must meet. It is synonymous with judicial office.

Impartiality demands of a Judge that he hold himself free from involvements that might give rise to a conflict of interest and duty or might reasonably be so viewed. Thus it is that the *Judges Act* forbids a Judge to engage in any business, or to be a director or manager of a company or firm, or to act on any commission or inquiry or other proceeding unless with governmental authorization, or to accept any salary or fee or other remuneration beyond his judicial salary for so acting, beyond reasonable travelling and living expenses away from home. The emphasis is on exclusive commitment to judicial duties.

Impartiality demands more, however, than the obvious limitations on extra-judicial activities expressed in the *Judges Act*, more than self-disqualification from sitting in cases where a relative is a litigant or where, soon after taking judicial office, a Judge finds a former client or former law partner is involved in a pending case. The Judge, said Lord Macmillan, "must purge his mind not only of partiality to persons but of partiality to arguments, a much subtler matter, for every legal mind is apt to have an innate susceptibility to particular classes of arguments". (*Law and Other Things* (1939), 217, 218). The striving for detachment is supported, of course, by security of tenure, by the independence which such tenure reinforces, and by training and experience. Beyond these, a Judge is on his or her own, with the only check appellate review,where it exists, and public scrutiny of his or her work.

Law, history, tradition make it easy enough to say that among the public's expectations of a Judge are his or her impartiality, integrity and responsibility. Are there other expectations that can be attributed to public demand and that should be met? If I were to be guided by some of the letters which come to me, I would be usurping the office of ombudsman, the functions of the parole board, of the Cabinet in dispensing pardons, of Parliament or a provincial legislature and even of the Better Business Bureau. But, of course, I am concerned only with judicial functions, with judicial duties; and here the voice of the public, perhaps better the voices of the public, assuming the Judge hears them and can understand them, can at best only contribute to the Judge's own determination of what expectations he should lay upon himself in the substantive area of his function. Books and scholarly journals, editorials and commentaries in and of the various media of communication are ways in which public reaction to judicial work is offered. Conference proceedings and reports of public agencies or reports commissioned by private as well as by public authorities are other means of bringing some public opinion to bear on problems that have a judicial dimension.

I must emphasize the phrase "judicial dimension" because it is important that members of the public understand that it is to the

government and legislature, federal or provincial, that they must generally look for the consideration and solution of social problems of a communal or regional or provincial or national character. Courts have habitually been concerned with individual relations, with providing reparation in disputes between individuals. Legislation when enacted may provide a basis upon which judicial intervention may be proper to enforce claims arising under the legislation but Courts in Canada cannot compel the enactment of desirable legislation or the implementation of desirable policies. Moreover, our constitutional arrangements in this country do not endow our Courts, do not endow the Supreme Court of Canada with the wide authority to intervene as directly as has the Supreme Court of the United States in the social and economic issues that arise in our respective countries. This matter is itself worthy of a long exposition but I must leave it, for present purposes, with the brief observation I have just made, adding only that apart from judicial power to determine whether exercises of legislative authority by the central or provincial legislatures are within constitutional limitations, the Courts in Canada do not control the substance of legislative policies. Of course, they may affect those policies in the course of judicial interpretation, or in the course of judicial review of the work of statutory agencies appointed to implement them. If the particular legislature finds judicial interpretation or interference objectionable, it can legislate change and, indeed, there are instances where this has been done.

Although Courts cannot, in the nature of their function, play as large a role in society as a legislature, they are not merely passive instruments playing the same tunes over and over again. My own view of the public expectation of the judicial role is in its creative possibilities, in the capacity, the ability of the Courts to keep the law in motion, to nudge it along through review and reassessment to make and keep it contemporary. A good test of this capacity, this ability can be seen in the way Judges regard the leeway which they may have in some cases more than in others to break out of an existing pattern of decision. Whether there is or is not that leeway is itself a question on which Judges may differ, and there is no certain guide to the correct answer in a particular case. I think, however, that I can safely say that Judges do not regard their function as requiring them to be indifferent to the quality of the law. Courts in Canada have given evidence by their decisions that principles stated by predecessor Judges have no eternal verity. Stability is only a factor not an invariable in the judicial process. Questions of "when" and "how" to deal with a principle whose force is spent may remain as indicators of a social lag because, as I have said elsewhere, the law's pace is generally slower than society's march. Ripeness of the occasion may come more quickly for some judges than for others. But that it comes for all is abundantly clear.