

**Address to Judiciary by the Honourable Madam Justice  
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**Judges and the Public:  
Ivory Tower recluses or Engaged Actors?**

Judges are different, set apart, aloof from the world. They live in ivory towers, remote from the bustle and controversy of the real world far below. They do not go to community meetings. They do not talk to the press. When people criticize them, they do not respond, bearing their frustration in silence. What I have just described is the classic view of how judges should conduct themselves.

The classic view of judges as remote from the ordinary *hoi poloi* has come under question in recent

decades, however. More and more, modern judges are climbing down from their ivory tower and mingling in the world. They are going to community meetings to talk about their work. They are giving public speeches and lectures. Judges responsible for the administration of justice, like Chief Judges, give state of the union addresses, issue press releases, submit to media interviews and brave the assaults of press conferences.

What is going on? Why are things changing? Is the new openness practiced by many judges good or bad? How, in particular situations, should a judge respond to demands for openness?

I do not claim to have definitive answers to questions such as these. My goal tonight is more modest. I want to share with you my experiences in moving from the classic model of the isolated judge, to a more open model. I hope the challenges I faced will resonate with you, and generate a conversation about the difficult issues judges face given the emerging demand for more judicial transparency and openness.

I joined the bar in 1969, over fifty years ago, when the classic ivory-tower model for judicial conduct still ruled supreme. Judges were seldom seen outside the courthouse. On rare occasions they sallied forth for bar or professional events, on condition that

the organizers provided a separate VIP reception room and an elevated head table, designed to distance them from the mass of ordinary lawyers teeming below. Judges, it was said, spoke only through their judgments. Rarely if ever did they give speeches. They seldom conversed with lawyers and never with the public.

The classic model served, or was thought to serve, two purposes. The first was to perpetuate public respect for judges and the courts. Like robes and high benches, the remoteness of judges accentuated the specialness of their calling. Judges were high priests, a cut above ordinary mortals. Their remoteness served as a symbol of their independence

and impartiality. Ordinary mortal concerns could not sway them. They issued their rulings from on high on the evidence and legal submissions vented in the courtroom, and those alone. The second and related purpose of the classic model was to minimize the possibility that an unfortunate comment or demonstration of human fallibility would diminish public respect for the judge and thus the court as a whole. Don't let the judges out; they cannot be trusted to behave.

When I was asked to go on the bench at the tender age of thirty-seven, I drew up a list of pros and cons to help me make my decision. High on the con side of the list was the isolated position of judges. I

was too young, I thought, to withdraw from the world. Yet if I said yes to judging, I would have to accept that. In the end I did say yes, resigning myself to life in the judicial equivalent of a convent, except for private time with my husband, son and a few close family members and friends.

So it came as a surprise when shortly after being sworn in, I encountered my first lesson in openness. When I was sworn in the Supreme Court of British Columbia in 1981, I was only the second woman on the Court. The appointment of a woman was understandably newsworthy. I received an interview request from a reporter with the Vancouver Sun.

My first reaction was to decline; judges don't give interviews. But before I did, I mentioned it to my Chief Justice, a legendary judicial icon named Allan McEachern. He cocked his head and said, much to my surprise, "Do it, the people of B.C. are entitled to know who their judges are."

So, quaking with fear that I would destroy my judicial credentials before I had sat on a case, I granted the interview. The interviewer was kindly, and drew out details of my life and legal career. The appointment of a woman, it turned out, was a popular story, and the public response was positive. Still, it wasn't something I planned to repeat any time soon.

But my Chief Justice's words stayed with me: "The people are entitled to know who their judges are." I realized that judges are human beings, performing a public function that had the potential to profoundly affect the lives of men, women and children. The public was indeed entitled to know something about the people who had been entrusted with this formidable responsibility. It was a matter of transparency and preserving confidence in the judiciary. The world was beginning to change. Secrecy and withdrawal might stoke concerns about whether a young female judge could do the job; bringing my experience out into the open had the opposite effect.



My appreciation of the people's right to know who their judges are took another a leap forward when I was appointed to the Supreme Court of Canada eight years later. With the adoption of the *Charter of Rights and Freedoms* in 1982, the Supreme Court was confronted with the task of interpreting the new constitutional guarantees of rights. The Court from its earliest cases took a broad generous approach to the rights. As a result of its declarations of incompatibility with the guarantees of the *Charter*, laws began to fall. Many Canadians voiced alarm. The phrase "judicial activism" punctuated op-ed opinion pieces and letters to the editor. Who were these nine people who were

changing the legal landscape and striking down laws Parliament had duly enacted?

The Chief Justice of the Supreme Court, Brian Dickson, could have reacted by pulling his judges firmly up the steps of the ivory tower and locking the door behind them. Instead, he adopted a policy of openness. It had a number of facets.

The Chief Justice invited a national news magazine to do an in-depth story on the court, and encouraged the judges to give lengthy interviews to the reporter in charge. The result showed the Justices of the Courts not just in their formal role as judges, but in their private lives. The public learned that the Justices of the Supreme Court were not occult

recluses, but real people who skied on the weekend and sometimes went to the movies. They also got a glimpse of the huge workload of the Justices, and learned about how heavily their judicial responsibilities weighed upon them. Whether they agreed with a particular decision or not, people understood that the process was independent and impartial, and that the Justices worked indefatigably to get to the right answer in the cases they heard.

The Chief Justice didn't stop there. In the early 90's, he opened the way for televising of the Court's hearings. We were careful to ensure that this did not impact on the proceedings. After a few days, I and my colleagues forgot that the tiny stationary cameras

perched near the ceiling were even there. I am not convinced trial proceedings should be televised, because of the impact cameras might have on witnesses and parties. But at the appellate level, Canadian experience with televising hearings has been positive. I believe it has increased Canadians' confidence in the Supreme Court and indeed, the entire justice system. People say, "I'm not sure I understood everything that was said, but it was impressive to see lawyers debating differences in such a civil way, and to see how engaged the Justices were".

Chief Justice Dickson encouraged the Justices of the Court to give speeches to community groups

and participate in legal education programs. The Justices did not talk about particular decisions, to be sure. But they were able to enlighten people as to how the Court worked in general terms, and participate in discussion on general legal topics.

Finally, the Chief Justice established a press officer (the Court's Executive Legal Officer) to liaise with members of the press. This was followed by a judge-led Media Committee to work with the media and vet their concerns and proposals.

While other factors doubtless played a role, steps such as these helped bolster public confidence in the judiciary in general and the Supreme Court in particular, in the years that followed. Year after year,

the Court scored high – well above Parliament and other institutions of governance - on polls that ranked public confidence in institutions.

When I assumed the role of Chief Justice of the Supreme Court in 2000, I resolved to continue – and indeed enhance – the policies of openness my predecessors had put in place. I gave a press conference at the outset of my tenure and thereafter each year at the meeting of the Canadian Bar Association. We introduced measures to enhance reporting, including lock-ups which allowed instant reporting on release of opinions. We introduced plain-language summaries of the cases. From time to time, I and other justices gave press interviews. All of

us made speeches to legal groups. We took the Court on “retreat” to different parts of the country to allow the Justices to meet people there and allow them to interact with us. We commenced live-streaming of important cases, so that people who could not come to the courthouse could view the proceedings in real time. In all these ways and more, we tried to help the public understand who its judges were, how the Court functioned, and how the cases brought before the Court were unfolding.

Two particular areas raised challenges as we moved forward: (1) attacks against judges; and (2) speeches to the profession and the public. Let me say a few words about each.

First, how should a judge respond to an unfair attack? Over time, I moved from the position that judges should never – or almost never – respond to public criticisms against them, to the position that in some circumstances a short, factual rejoinder may be necessary. It is wrong and usually counter-productive to get into an argument or exchange of opinion with the press, a politician or a critical member of the public. It lowers the judge into the arena of public opinion and all who scrabble there, and the judge usually emerges with a draw or worse. For this reason, I believed, judges should not respond to allegations that they had said something politically incorrect or erred in some other way. In Canada, the



Judicial Council exists to judge these things; writing an irate letter to the editor defending oneself is only likely to stoke the flames already making the judge uncomfortably hot.

However, in exceptional circumstances it may be necessary to issue a brief factual statement when a judge is attacked. The public is entitled to know the facts before it judges a judge, and sometimes the judge or her Chief Justice is the only person who can supply critical facts.

This was how I approached one of the most difficult incidents of my time as Chief Justice. The government of Conservative Prime Minister Stephen Harper had suffered a number of losses in the

Supreme Court, culminating in a six to one decision that his most recent appointment to the Court did not fulfill the requirement in the *Supreme Court Act* that judges from Quebec to the Court must be members of the Quebec Bar for ten years, or a s. 96 judge in Quebec. We ruled that the candidate in question, a Federal Court of Appeal judge named Marc Nadon, did not qualify because he was neither a Quebec lawyer or judge, as the Act required. It was a painful decision, given we had already sworn in and welcomed Justice Nadon to the Court.

Shortly after the release of this decision, I awoke to a newspaper headline proclaiming that the Prime Minister was saying I had acted unethically by

interfering with the appointment of Justice Nadon to the Supreme Court. In fact, I had never discussed Justice Nadon with either the Justice Minister or the Prime Minister. My only involvement, apart from sitting on the case to remove him, had been a call to the Justice Minister to discuss with him my concern that any candidates for the pending Quebec vacancy would need to fulfill the requirements of the Supreme Court Act – a call that took place months before Marc Nadon was named as a possible candidate.

Confronted with the Prime Minister's indictment – one which if proved would probably have sounded the death knell of my judicial career – I pondered how to respond. A senior Justice advised me not to

respond, and I could see his point. But on the other hand, I knew I had done nothing wrong and that the allegation that I had interfered with the Nadon appointment was patently false. The public, I decided, was entitled to know the facts. Then they could make up their mind.

The same morning that the Prime Minister made his allegation, my office put out a brief, factual statement, stating that I had done nothing wrong and going on to state “These are the facts”. The statement briefly catalogued the relevant events chronologically. It was clear that my only contact with the Justice Minister was months before Justice Nadon’s name had circulated, making it patently obvious that the

Prime Minister's accusation was groundless. The press and legal commenters all agreed. Although the government continued to bluster and the Prime Minister never apologized, the matter was over. My greatest fear throughout was that the Prime Minister's comments would damage the reputation not only of me, but of the Court. In the end, the reputation of the Court emerged enhanced. This would not have happened had I not decided that the public was entitled to know the basic facts of what had transpired.

I add this. At one time in England and in Canada, the minister responsible for the administration of justice regarded it as his duty to defend judges who

were wrongly accused of wrongdoing. This was done on the understanding that a judge could not speak out to defend himself or herself. Unfortunately, this tradition is no longer honoured in Canada. The Minister of Justice, far from defending me from the Prime Minister's accusations in the Nadon affair, supported the Prime Minister. And when the popular press in the U.K. labelled three Divisional Court judges "Enemies of the People" for ruling that Parliament had a say in Brexit negotiations, no member of government came to the judges' defense. Bar associations often rise to the defense of the judge, but they may not know all the facts and their intervention may be late. In these circumstances, it

becomes important for someone to put forth the facts pertaining to the matter. Sometimes that task necessarily falls to the Chief Justice of the Court.

This brings me to judges making speeches. During my time on the Supreme Court of Canada, I, like other judges of the Court, made many speeches, usually to legal audiences, but sometimes beyond. This confronted us with the question of what judges should talk about and what they should steer clear of. Two kinds of speeches need to be distinguished for this purpose – talks to the legal community on legal issues, and speeches to the general public.

At legal conferences discussing a particular area of the law, we contributed on points of general

application, but steered clear of discussing the merits of particular judgments, whether in lower courts or our own. On such matters, the judgment speaks for itself and extra-judicial comments may muddy what the case actually stands for. The Court learned from the experience of one of the judges, who suggested at a legal conference covered by the press that lower courts had applied a decision he had written on a controversial matter too broadly. The matter was reported, provoking an editorial in a leading newspaper which asked: “What is the state of the law on this question? What the judge said in his judgment? Or what he is now telling assembled



lawyers and judges?” This is a situation no judge and no court wants to find itself in.

Outside the professional realm, the judges of the court often gave public addresses. In this arena, our rule of thumb was to steer away from pronouncements on the state of the law. My personal rule was that I would not discuss cases decided in the previous decade or so, and I would not comment on issues that might come before the Court in the future. I would usually make this clear at the outset if the speech was followed by a question period.

While this rule placed a broad range of topics outside the realm of what I could talk about, it left other important areas open for exploration, like the

role of the Supreme Court, the importance of the rule of law, and the state of the justice system. I expanded my early Chief Justice's comment that the people are entitled to know who their judges are to a broader proposition: The people are entitled to know who their judges are and how the justice system operates. This led me to talk about the need for better access to justice, which in turn led to improvements in how justice in Canada is delivered to ordinary women, men and children. The public, I realized, saw the Chief Justice as the spokesperson for the judiciary and the justice system. With no one else speaking up on justice matters, it sometimes became important to address them directly.

While I came to believe that on occasion judges should speak up on justice issues, I approached this responsibility with great caution and circumspection. Before making a speech or commenting on a particular matter, I always asked myself a series of questions. Did the proposed intervention fall within the range of what judges can or should talk about? Was it necessary, in order to provide facts or information that might otherwise not be put before the public? When tempted to comment on a matter of current interest, I learned to ask myself a simple question: “Will good come of this?” If I could not answer the question with an affirmative yes, I kept silent.

Let me offer a few rules of thumb I developed over the years. Perhaps you will not agree with some, perhaps you would add others. But here is my list.

1. Never discuss the internal process of how a particular decision was made.
2. Never discuss judicial colleagues or internal relations at the court.
3. Never discuss recent decisions of your court in detail or matters that may come before the court in the future.
4. Steer away from political issues and matters of social controversy.

5. Before speaking publically on a matter, ask whether your intervention is necessary or helpful. Ask yourself: “Will good come of this?”
6. On matters of alleged judicial misconduct, clarifying the facts may be helpful on serious matters in the public arena, but statements of opinion and argumentative ripostes should be avoided.
7. Know your personal strengths and weaknesses as a communicator. Use a press officer or ask another judge to respond to an issue if you feel you are not the right person to speak on a matter.

8. Review what you are going to say with a trusted advisor before saying it.
9. Don't use social media. Twitter and Facebook, for me at least, are out.

Allow me to conclude. We live in a time when courts and judges are closely watched. That is good, it shows that people are concerned about justice and the justice system. Judges no longer live in remote ivory towers; they live in the real world. Judges still speak mainly through their judgments, and hold themselves aloof from political controversy and social opinion. But from time to time it is appropriate that they venture into the public forum – at professional gatherings on legal

issues; to inform the public on who its judges are and how its legal system functions; and rarely but importantly, to clarify facts when judges or courts are attacked.

Thank you for allowing me to share my thoughts on this important subject with you.