Criticizing the Court:

The Limits

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You have the right

- Canadian Charter of Rights and Freedoms s.2 (b): “… freedom of thought, belief, opinion, and expression…”
- Canadian Charter of Rights and Freedoms s. 1 : “…subject only to such reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.”

Or Do You?

- *Doré v. Barreau du Québec*, 2012 SCC 12 upheld a suspension of a Quebec lawyer who wrote a letter to a judge
- replaces a traditional Charter analysis with an arguably looser administrative law review for reasonableness test

Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326

- Alberta *Judicature Act* s. 30 placed significant restraints on reporting matrimonial cases

- SCC holds law violates s. 2 (b)

Edmonton Journal v. Alberta (Attorney General)

- Cory J.: "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression …
- …The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances."

Edmonton Journal v. Alberta (Attorney General)

- Wilson J. : “contextual approach” as opposed to absolutist approach

- LaForest J. : stresses freedom of expression not absolute

Edmonton Journal v. Alberta (Attorney General),

- Alberta advanced three justifications under 5.1 of Charter (***Oakes*** test} for s.30 – protection of public morals, privacy, and encouragement of matrimonial litigants to bring cases to court.
- Only first relates to concern that public attitudes will be adversely affected, which is a concern of Rules of Professional Conduct.
- Protection of public morals given short shrift

Slaight communications inc. v. Davidson, [1989] 1 S.C.R. 1038

- Arbitrator orders employer to provide unjustly dismissed employee with letter of reference as well as to refrain from negative comments about employee
- SCC upholds positive obligation to speak as well as prohibition
- Beetz. J. dissenting: positive obligation ”totalitarian”

“Prescribed by law”

- Law Society Act, R.S.O. 1990, c. L.8, s.33

- 33. A licensee shall not engage in professional misconduct or conduct unbecoming a licensee. 2006, c. 21, Sched. C, s. 29.

- Section 62 . 10 – empowers Convocation to promulgate Rules of Professional Conduct

4.06 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

- 4.06 (1) A lawyer shall encourage public respect for and try to improve the administration of justice.
- Commentary The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations.

Rule 4.06 cont.

- The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

Rule 4.06 cont.

- Criticizing Tribunals - Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate, or unsupported by a bona fide belief in its real merit, bearing in mind that in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism.

Rule 4.06 cont.

- Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, where a tribunal is the object of unjust criticism, a 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 in doing so the lawyer is contributing to greater public understanding of and therefore respect for the legal system.

Other rules

- 4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.
- 4.01(2)(d):(2) When acting as an advocate, a lawyer shall not …(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

Other rules

Courtesy

- 4.01(6) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.
- Commentary: Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline.

Other rules

- 6.06 PUBLIC APPEARANCES AND PUBLIC STATEMENTS
- Communication with the Public
- 6.06 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.
- Commentary:Lawyers in their public appearances and public statements should conduct themselves in the same manner as with their clients, their fellow legal practitioners, and tribunals.

Other rules- 6.06 cont.

- Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal, or the lawyer's office does not excuse conduct that would otherwise be considered improper. A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Other rules – 6.06 cont.

- A lawyer is often involved in a non-legal setting where contact is made with the media about publicizing such things as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations, or in acting as a spokesperson for organizations that, in turn, represent particular racial, religious, or other special interest groups. This is a well-established and completely proper role for the lawyer to play in view of the obvious contribution it makes to the community.

- And now for a little intemperate language…

R. v. Kopyto (1987), 62 O.R.(2d) 449 (C.A.)

- Harry Kopyto in Globe & Mail – referring to Small Claims court decision holding several claims by leader of Socialist Action against police officers were statute barred
- "This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it. Mr. Dowson and I have lost faith in the judicial system. We're wondering what Is the point of appealing and continuing this charade of the courts in this country which are warped in favorer of protecting the police. The courts and the RCMP are sticking so close together you'd think then were put together with Krazy Glue,"

Kopyto

- K. convicted of criminal contempt (not in face of cour) -"scandalizing the court"- common law crime preserved by s. 8 of CCC
- CA – reverses 5-0.
- 3 judges (Cory, Houlden, Goodman JJ.A.) hold in three separate sets of reasons that K. would have been convicted but for *Charter*
- 2 judges (Dubin and Brooke JJ.A) hold elements of offence not made out

Kopyto

- Majority holds common law offence violates s.2 (b) but cannot be justified under s. 1.
- Rational purpose – protecting administration of justice and public confidence in justice system
- but fails proportionality test
- Offence at common law did not require proof that accused actually jeopardized confidence in system – evidence held to be necessary under *Charter*
- strong themes that judiciary not “frail flower” (Cory J.) and that public would not take comments seriously

Kopyto

- Cory and Goodman JJ.A. - outline views on how modified definition might satisfy s. 1 – e.g., what if form of criticism credible but knowingly false allegation of judicial corruption? discussion of trial by media
- open question whether truth is a defence
- Houlden J.A. : offence could never satisfy s. 1 test

Kopyto

- Minority: offence not made out because public would see comment as baseless
- Dubin J.A. ends reasons with observation that acquittal does not mean LSUC cannot discipline K.

Histed v. Law Society of Manitoba, 2007 MBCA 150 (CanLII)

- H. involved in residential school litigation
- Letter to opposing counsel on selection of case management judge:
- “Justice A frankly, is a bigot. Justice B, although fair, intelligent, and a really nice guy, would not move the matter forward on a timely basis. Justice C is not familiar enough with civil proceedings and is too right wing. Justice D is too right wing.”

Histed

- Charge:… [Y]ou failed in your duties owed to other lawyers, the courts, the profession and the public by writing a letter which was offensive and otherwise inconsistent with the proper tone of a professional communication, and in which you inappropriately criticized the judiciary…

- Found guilty only with respect to comment about Justice "A" - fine of $2,500 plus costs ($7,500)
- Previous prosecutions for comments resulted in acquittals

Histed

- Appeal grounds:
- Code was vague – held: acquittal of all but one charge shows intelligible standard
- No evidence to satisfy proportionality test – held: not a case where evidence needed. Law Society not obliged to adduce social science evidence to show comment brought administration of justice into disrepute
- Rational connection: refers to *Kopyto* for important objective of protecting administration of justice but also posits general protection of public by enforcing "professional standards" - relies on *Rocket v. Ronal College of Dental Surgeons*

Histed

- obligation of lawyers to criticize judiciary
- “So, there is no question that lawyers must have the right to speak truth to power.”
- “The judiciary should be open to criticism, but to operate effectively, the legal system must operate with some degree of civility and respect. Criticism must be within certain parameters. Lawyers are required by the Code to avoid the use of abusive or offensive statements, irresponsible allegations of partiality, criticisms that are petty or intemperate and communications that are abusive, offensive or inconsistent with the proper tone of a professional communication.”

Histed

- *Panel's finding upheld by court:*

- *" the criticism of Justice A strikes at the very foundation of his role as a judge. Any person believing Justice A to be a bigot would feel justified in refusing to proceed in any proceeding for which he was appointed. Any person who believed Justice A to be a bigot would rightly believe any prior proceeding before Justice A would be tainted..."*

Histed

- Court holds that regulation of criticism is directed at form of criticism, not substance:
- "He is free to express himself in other ways while still representing his clients' interests. It was open to him to reject the names of those judges put forward by opposing counsel without the use of the offensive term that he used to attack the judge's integrity. However, his statement in a professional communication directed to other lawyers that the named judge was a bigot was offensive and unprofessional. ***Had he believed in the truth of the statement, it would have been appropriate to bring his complaint to the attention of the Judicial Council. "***

Histed

- Form of speech – gratuitous insult - did not engage core s 2 (b) values.
- Other aspects: H. unsuccessfully argued that letter was not properly evidence because his rights under *Privacy Act* violated and letter was subject to settlement privilege. Clearly bad arguments, but recipients' complaint arguably led to the public harm

Doré v. Bernard, 2012 SCC 124(CanLII)

- Boilard J. reams out Dore in open court in terms that later reprimanded by Canadian Judicial Council for disgraceful personal attack on Dore
- Shortly after leaving courtroom, Dore, writes a letter to Boilard J.:
- Sir,

  I have just left the Court. Just a few minutes ago, as you hid behind your status like a coward, you made comments about me that were both unjust and unjustified, scattering them here and there in a decision the good faith of which will most likely be argued before our Court of Appeal.

Doré v. Bernard

Because you ducked out quickly and refused to hear me, I have chosen to write a letter as an entirely personal response to the equally personal remarks you permitted yourself to make about me. This letter, therefore, is from man to man and is outside the ambit of my profession and your functions.

If no one has ever told you the following, then it is high time someone did. Your chronic inability to master any social skills (to use an expression in English, that language you love so much), which has caused you to become pedantic, aggressive, and petty in your daily life, makes no difference to me; after all, it seems to suit you well.

Doré v. Bernard

- Your deliberate expression of these character traits while exercising your judicial functions, however, and your having made them your trademark concern me a great deal, and I feel that it is appropriate to tell you.

- Your legal knowledge, which appears to have earned the approval of a certain number of your colleagues, is far from sufficient to make you the person you could or should be professionally. Your determination to obliterate any humanity from your judicial position, your essentially non-existent listening skills, and your propensity to use your court – where you lack the courage to hear opinions contrary to your own – to launch ugly, vulgar, and mean personal attacks not only confirms that you are as loathsome as suspected, but also casts shame on you as a judge, that most extraordinarily important function that was entrusted to you.

Doré v. Bernard

I would have very much liked to say this to your face, but I highly doubt that, given your arrogance, you are able to face your detractors without hiding behind your judicial position.

Worst of all, you possess the most appalling of all defects for a man in your position: You are fundamentally unjust. I doubt that that will ever change.

- Sincerely,
- Gilles Doré
- P.S. As this letter is purely personal, I see no need to distribute it.

- And as the French defender of the castle called out to King Arthur and his knights in Monty Python's Holy Grail…

Doré v. Bernard

- Found guilty of professional misconduct – 21 day suspension
- ***QCCA Decision***
- Freedom of expression infringed, so s. 1 was issue
- Evidence not necessary to establish proportionality under s. 1 – restriction can be justified without evidence if it is obviously rational

Doré v. Bernard

- Characterization of expression:
- “personal insults” – thus, on contextual approach, value of expression is not high and protection can vary accordingly
- Objective of regulation – very important

Doré v. Bernard

- CA quotes CBA rule –

- … The lawyer … must do nothing to lessen the respect and confidence of the public in the legal system of which the lawyer is a part. The lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by broad irresponsible allegations of corruption or partiality. The lawyer in public life must be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to any public statements. …

- CBA rule continues in same language as LSUC rule

Doré v. Bernard

- “ Aside from the personal insults contained in the letter, telling a judge that he is [translation] “fundamentally unjust” attacks the very foundation of the judicial role. Who wants to argue a case before a judge who is “arrogant,” “loathsome,” and especially, “fundamentally unjust”? This is the question that arises when we consider that the person who made these comments is someone who has been granted certain privileges because of his legal knowledge and his morality and whose comments on the legal system therefore enjoy a certain credibility in the eyes of the public.”

Doré v. Bernard

- Barreau argued:
- “In the eyes of the respondent, the issue is simple. The appellant’s letter lacks moderation. The letter has two effects. It discredits the judge and the judicial system in the eyes of the public. *It concocts an infallible system for disqualification, to the benefit of the appellant. “*
- CA did not discuss this functional argument.

Doré v. Bernard

- *Rational connection*

  between ruling and valid state objective: judges are lynchpins of justice system – necessity for public confidence in judiciary

- *Minimal impairment*:

  "It seems important to note that both section 2.03 of the Code of ethics and the Council's decision applying it do not absolutely prohibit the appellant's freedom of expression. What they proscribe is biased conduct and immoderate or improper comments from an officer of the court. Lawyers may, of course, criticize the legal system and all those who participate in it, but they must do so with objectivity, moderation, and dignity. This does not mean that the criticism cannot be strong or even severe."

Doré v. Bernard

- Conclusion:

- “I would add a final comment regarding the private nature of the letter. The letter was written by a lawyer to a judge, as an extension of a legal case that had just concluded a few hours earlier. Because of the status and function of the parties in this case, the author of the letter could not reasonably expect that matters would stop there and that the letter would remain confidential. As it happens, it was the Chief Justice of the Superior Court who sent the letter to the Bar of Quebec.”

Doré v. Bernard

- SCC appeal - under reserve:
- Appellant's Factum:
- Private nature of communication stressed - case had ended
- No evidence that public would lose confidence in system - *Kopyto* cited

SCC Decision

- Upholds QCC A but holds that the s. 1 Charter analysis (the Oakes Analysis) should not have been used
- Why? Because Dore was not attacking the validity of a “law” but only using the Charter to impugn a decision made pursuant to a law

SCC Decision

- Court stresses that the two lines of analysis are similar- proportionality between rights and objectives is key
- Charter values should not be infringed unnecessarily by administrative tribunals
- Courts should give tribunals a margin of appreciation-review only where unreasonable

SCC Decision

- 21 day suspension had been served and was not under appeal so only issue was whether the reprimand was reasonable
- Hard to say whether the SCC would have upheld a 21 day suspension
- Court notes that both sides recognized need for civility in judicial system
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SCC Decision

- [68] Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

- [69] A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.

SCC Decision

- Analysis ends with quoting letter, noting its vituperation, and holding that it crossed the line
- No analysis of function civility plays in justice system and proportionality in terms of a functional analysis

Bruce Clark Case- 1995/6

- Small town successful Ontario lawyer
- became obsessed with 1704 Privy Council recommendation found while researching his Ph. D. in Scotland on aboriginal land claims
- PC recommended that rights of aboriginals should be referred to new court
- Court never set up

Clark

- Created argument that Canadian courts had jurisdiction to do only one thing: refer all aboriginal cases to non-existent court.
- Canadian courts lacked jurisdiction, were committing treason, and were accomplices to genocide
- Argument led to 0-40 record in land claims cases
- Did get to bring his theory to SCC one time. Hearing ended with these comments by Lamer C. J.C. :

Clark

"I must say, Mr. Clark, that in my 26 years as a judge, I have never heard anything so preposterous and presented in an unkind way. To call the judges of the Supreme Court of Canada and the 975 High rt judges of Canada accomplices to genocide is something preposterous. I do not accept that and think you are a disgrace to the bar. The various documents filed in this court, the Supreme Court of British Columbia, and the Court of Appeal are, in large part, an utter farrago of nonsense."

Clark

- 3 days after SCC hearing, Clark performs a citizens‘ arrest of panel of BCCA in hearing on Gustafsen Lake stand-off – forcibly removed from court and charged with contempt
- Flees to Amsterdam
- LSUC discipline holds “ungovernable”- penalty: disbarment if did not resign

Clark

- Convocation (defended by Clayton Ruby):

  reprimand and suspension to continue until he returned from Amsterdam and appeared for reprimand Convocation acknowledged his seriousness and expressed admiration for him.
- Some criticism by Convocation of refusal of certain judges to listen to arguments
- Nevertheless, criticisms and conduct incompatible with functioning of system – ergo, misconduct

Clark

- Even after return to Canada, refused to appear for reprimand
- new proceeding led to disbarment in 1999
- Letter to LSUC:
- “I really don't belong with your crowd. I have nothing further to say. I am content with the matter being disposed of in absentia. I have no further desire to appear before the committee. I am asking this committee of its own motion to recommend that (the Law Society governors) commission an inquiry of the Law Society's ongoing treason and fraud and complicity in genocide.”

Clark

- Not quite the end:

  applied unsuccessfully for reinstatement in 2003 to “get off welfare” but conduct at hearing showed he continued to be ungovernable

Discussion

- Lawyers have a higher obligation to temper the form of curial criticism than members of the public because the public will give greater weight to the criticism.

  Questionable?
- Should the approach be more functional? Short of intemperate criticism that impairs the lawyer's ability to work with particular judges, are limits really required?

Discussion

Kopyto, Histed, Dore – As isolated cases, are these cases that serious?

But if everybody did it?

Histed and *Dore* – were complainants a bigger threat to public confidence?

Systemic criticism – Is there a line? Should there be? Where is it?

Discussion

- Criticism on the net - any special dangers?
- What about criticism by powerful lawyers – e.g. government ministers?
- What about obligation of lawyers to defend judges and the system?