

The Problem of Judicial Arrogance

By: Alice Woolley

In her remarkable new book *Life Sentence* (Doubleday Canada, 2016), Christie Blatchford describes the Canadian judiciary as “unelected, unaccountable, entitled, expensive to maintain and remarkably smug” (at pp. 33-34). She argues that the process for judicial appointments and judicial discipline, along with the structure and conduct of an ordinary trial, create judicial arrogance. And that arrogance, even if not universal, is both systemic and common enough to corrode and undermine the pursuit of justice. She also suggests that actors in the legal system are complicit in judicial arrogance while simultaneously having considerable arrogance of their own: lawyers and judges alike deny the rationality and dignity of the “non-lawyer,” refuse to admit their own faults, and tend both to aggrandize official power and to subdue public criticism.

I wish I could disagree with Ms. Blatchford. But I can't. I have to reluctantly concede the uncomfortable truth of her fundamental allegation: we undermine our legal system through our own arrogance, and particularly in how we create, encourage and reinforce judicial power, unaccountability and – at the end of the day – judicial conduct that can be fairly described as arrogant.

I'll begin with the expected caveat. I don't think all judges are arrogant. I don't even think most judges are arrogant. Indeed, for the purposes of my argument it can be true – and may be true – that no Canadian judge is an arrogant person.

But I do think three things. I think some judges act arrogantly. I think our system both encourages and does not discourage acts of judicial arrogance. And I think acts that demonstrate judicial arrogance create injustice.

Three recent examples support my point.

The first arises from the decision of Judge Denny Thomas to convict Travis Vader of second degree murder under s. 230 of the [Criminal Code](#), a statutory provision that has been unconstitutional for 26 years. As cogently [argued](#) by Peter Sankoff, Judge Thomas's decision reflects poorly on Parliament for its failure to amend the *Criminal Code*. It may also reflect poorly on Judge Thomas's criminal law competency.

There is, though, another way to look at it – at least potentially, depending on what emerges about how the s. 230 error came to be. Not surprisingly, the Crown did not rely on s. 230 in its written argument. Even less surprisingly, nor did the defence. The question is, then, how did s. 230 come to be so central to the decision? At least one possibility is that Judge Thomas on his own volition, without asking for further submissions from the Crown or defence on its applicability, decided to apply a different provision of the *Criminal Code* than those that were argued. I do not know if this is what happened. But if it did, it raises a concern beyond the error itself. It would take a particular and troubling kind of confidence for a judge in an adversarial

system of justice, which relies on the evidence and argument of the parties, to think that he knew enough of the law and the facts to decide what law properly applies without either.

Judge Thomas did not need Parliament to amend the *Criminal Code* (although it should have). He did not need to know that s. 230 was unconstitutional. All he needed to do was consult with the parties on the key legal issue he thought arose in the case before releasing his decision. If he did not, that failure – the failure to consider the possibility that the parties may know more than you do or that they may have something useful to contribute to your decision-making process – at minimum suggests a lack of humility, and might even be described as an example of judicial arrogance. And as a lack of humility that led to injustice – the injustice of a person being convicted pursuant to an unconstitutional provision.

The second example arises from the hearing into the conduct of Justice Robin Camp. At his hearing, a significant part of Justice Camp's [explanation](#) for his conduct was that he did not know the law on sexual assault; that he had received inadequate training; that he had conducted only one sexual assault trial prior to the *Wagar* case which gave rise to the complaint against him; and that, in general, "I didn't know what I didn't know". Yet recall for a moment what Justice Camp has [conceded](#) was inappropriate in his conduct of the trial, and for which he has apologized: that he asked inappropriate questions of the complainant about her conduct while she was testifying, he made inappropriate personal comments to the prosecutor in response to her argument, and he fell prey to myths about sexual assault.

Given his defence and his acknowledged misconduct, consider this: Justice Camp knew that he had never studied criminal law or constitutional law at a Canadian law school. He knew that he had never practiced in those areas as a lawyer in Canada. He knew this was only his second sexual assault trial. He claimed that he had not received extensive training in the area. He also knew – he must have known – that as a judge in an adversarial trial one option open to him was to sit silently and quietly and listen to the witnesses and the lawyers, making such rulings as he was asked or required to make, and issuing a decision at the end. But Justice Camp didn't do that. Instead he was actively interventionist, asking questions of the complainant, giving personal advice to the accused on his dealings with women in the future, and aggressively questioning the prosecutor.

This suggests that the problem is not just that Justice Camp didn't know what he didn't know. *It was that he assumed that he knew a great deal.* He assumed he knew enough to be interventionist in an adversarial proceeding – to not just be a judge, but to be an active and interventionist judge. Despite every reason to know that he was ignorant, he assumed he was one of, if not the, most knowledgeable person in the room. Justice Camp needed to know what he didn't know. But, even more, he needed not to assume that he knew a lot. Making that kind of assumption is, I would suggest, a pretty good example of judicial arrogance. And, again, one that obviously led to injustice as evidenced by the Court of Appeal's reversal of Mr. Wagar's acquittal and the need for a new trial.

The third example is less extreme than the first two and is not directly linked to injustice. But it's a problem I've written about [before](#) and in my view it is both troubling, and suggests the more systemic problem of a culture where conduct that looks like arrogance is permitted, and even celebrated. In the recent decision of the Supreme Court in *Canada (Attorney General) v. Igloo Vikski Inc.* [2016 SCC 38](#), the majority, in a judgment written by Justice Brown, invoked the spirit of Lord Denning to begin its decision like this:

In wintertime ice hockey is the delight of everyone. Across the country, countless players of all ages take to ice rinks and frozen ponds daily to shoot pucks at the net. Often the puck is stopped or turned aside by a goaltender blocking it with a blocker or catching it with a catcher. This is notoriously difficult business. The goaltender's attention must remain fixed on the play, and not on off-ice matters. His or her focus must not drift to thoughts of the crowd, missed shots or taunts from opponents. And, certainly, the goaltender should strain to avoid being distracted by the question before the Court in this appeal — being whether, for customs tariff classification purposes, he or she blocks and catches the puck with a “glove, mitten or mitt”, or with an “article of plastics” (para. 1).

The argument in favour of decisions like this is they make the Court's ruling accessible. Some have described this judgment as [awesome](#). I'm sure it would lighten the dullness of life for law students required to read it. In my view, however, judgments like this also do something much less appealing and much more troubling – they turn a decision about the rights and interests of parties before the court into an opportunity to show off the cleverness and erudition of the judge.

Don't get me wrong. I don't think injustice arose from this example of judicial wit and rhetorical sprightliness. I too liked reading Lord Denning's decisions in law school. My guess is the judge's intentions here were well-meaning and light-hearted. But I nonetheless think it is a bad example to set. It reinforces the systemic judicial arrogance that Ms. Blatchford so vigorously skewers.

When a decision gets to the Supreme Court so much is at stake for the parties. Tens if not hundreds of thousands of dollars in legal fees. The substantive issue in the case. Sometimes their liberty. And the judge who uses that moment – where everything is at stake for the parties and nothing is at stake for him – to be clever and witty for a purpose extraneous to the decision itself has acted improperly. A judge can be clever and erudite. He can even be [funny](#). But he should do so only where necessary to achieve justice in the matter at hand, not to entertain himself or bolster his reputation. Otherwise he has put himself and his interests in the decision and, by doing so, has contributed to a culture where arrogance, rather than humility, becomes the norm.

What follows from all of this? As I acknowledged earlier, I am not labeling all judges as arrogant. In two of the examples here the behaviour could perhaps be better described as indicating a lack of humility than as an example of arrogance. And even where a judgment or decision looks arrogant, that doesn't mean that the judge who made it is an arrogant person. We are more than the things that we do from time to time, and our behaviour is conditioned by the expectations and culture of the roles that we play.

But I do want to say unequivocally that judicial arrogance is wrong. It is a wrong that gets committed too often and called out too little. Judges need to strive for humility – to recognize it as a virtue. Judges may be independent, but their independence exists to deliver justice to the public, not to give judges a public forum to say what they want, when they want, to whom they want. It requires, in short, humility. And in humility's absence I cannot blame life-long observers like Ms. Blatchford from “falling out of love with the Canadian justice system (especially judges”).

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