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A LAWYER'S FREEDOM OF EXPRESSION: THERE IS A LIMIT TO WHAT ONE CAN SAY

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WITH REGARD TO THE PROFESSIONAL OBLIGATIONS OF A LAWYER, IS IT POSSIBLE OUTSIDE THE PHYSICAL CONFINES OF THE TRIBUNAL TO LET A JUDGE KNOW EXACTLY WHAT HE THINKS OF HIM? SHOULD THE RESPONSE BE NEGATIVE, DOES IT NOT UNDULY RESTRAIN HIS RIGHT TO FREEDOM OF EXPRESSION OTHERWISE GUARANTEED TO ALL BY VIRTUE OF THE CHARTERS OF RIGHTS AND FREEDOMS? THIS IS THE QUESTION TO WHICH THE COURT OF APPEAL HAD TO RESPOND RECENTLY BY RENDERING JUDGMENT IN THE CASE OF *DORÉ V. BERNARD*[1], WHICH HAS INCITED VARIOUS REACTIONS IN THE LEGAL COMMUNITY.

The issue arose in the context of the motorcycle gang mega-trial held in 2001. Judge Jean-Guy Boilard, who was presiding at the trial, made certain disagreeable remarks aimed at Me Gilles Doré, defence counsel. Judge Boilard referred to the lawyer in these terms: [TRANSLATION] "boring rhetoric", "presumptuous", "an insolent lawyer is rarely of use to his client", "I have a feeling this is going to be awful", "quite ridiculous". The same evening, Me Doré replied to the Honourable Judge Boilard by means of a letter couched in the most unequivocal terms as to the opinion he held of the said judge. For example, the letter contained the following reproaches addressed to Judge Boilard: [TRANSLATION] "chronic inability to master the social graces", "pedantic, cantankerous and petty behaviour", "execrable individual", "arrogant", "fundamentally unjust". On two occasions in this letter, Me Doré pointed out that it was to be considered as having been sent in his capacity as a private person and was in no way connected with his functions as a lawyer.

The syndic of the Bar, alerted to the fact of this correspondence by the Chief Justice of the Superior Court, lodged a disciplinary complaint against Me Doré, accusing him of having contravened Section 2.03 of the *Code of ethics of advocates*[2] and Sections 59.2 and 152 of the *Professional Code*[3]. The first provision establishes a lawyer's obligation to behave in an objective, moderate and dignified manner, while the second two forbid the commission of acts that are derogatory to the honour and dignity of the profession. It must be noted however that Section 2.03 of the *Code of ethics of advocates* has, since the disciplinary complaint was lodged, been abridged. Section 2.00.01 of the same Code, differing very little from the former provision, has now replaced it.

1 2010 QCCA 24.

2 R.R.Q. c. B-1, r. 1.

3 R.S.Q. c. C-26.

DECISIONS OF THE LOWER COURTS

Appearing before the Québec Bar's Disciplinary Committee [4], Me Doré argued that it was up to the syndic to prove that the remarks contained in his letter were false or exaggerated, since otherwise he could not be reproached for having uttered them, the more so because, according to him, a lawyer has the right to respond to a judge who addresses personal criticism to him. Me Doré also raised the point that a lawyer, as is the case for any citizen, benefits from the freedom of expression enshrined in the *Canadian Charter of Rights and Freedoms* [5] and that, in consequence, the legal provisions under which he was being prosecuted could not be interpreted in such a way as to deny him this right.

The Disciplinary Committee did not accept these arguments and sentenced Me Doré to a striking of 21 days [6]. In doing so, the Committee noted that the defendant should have known that the insults contained in his letter, whether or not he wanted them to be private and made in his own name, were highly likely to become public considering the function occupied by the addressee. Besides, Me Doré could not seek to evade the obligations regulating the profession that he has freely chosen to pursue. The Committee considered that, should this incident go unpunished, it might signify that a lawyer may, by addressing reproaches and disagreeable comments to a judge, create a situation in which a judge might be obliged to recuse himself, which would almost be tantamount to "choosing one's judge".

This said, the Committee recognized the right of a lawyer to reply to unjustified criticism from a judge. However, in his capacity as an officer of the court, a lawyer is nevertheless obliged to remain respectful even in such circumstances. The Disciplinary Committee judged that these limits to freedom of expression are reasonable and can be justified with respect to the *Canadian Charter of Rights and Freedoms*.

One after another, the Professions Tribunal [7] and the Superior Court [8] have confirmed the decisions on conviction and penalty rendered by the Disciplinary Committee. Me Doré has carried out his sentence, but received authorization to appeal his case, where only one question remains in litigation: did the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms* protect Me Doré when he sent his letter to Judge Boilard?

THE JUDGMENT OF THE COURT OF APPEAL

The Honourable Judge Rochon, speaking for the Court of Appeal, first considered that the lower courts were correct in determining that the decision of the Disciplinary Committee finding Me Doré at fault did infringe on his right to freedom of expression because it failed to recognize his right to send a letter to Judge Boilard containing the remarks mentioned above. Secondly, the Court was nevertheless unanimous in judging that the restriction on Me Doré's freedom of expression was justified by virtue of the first section of the Canadian Charter.

The first section of the Canadian Charter is a provision that allows a constitutional right to be restrained "by a rule of law subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." According to the test developed by the Supreme Court, it must first be verified that the objective served by the measures restraining a freedom is sufficiently important. The means employed to attain this objective must then be reasonable and demonstrably justified using a proportionality test.

With respect to the importance of the objective, the Court explained that the decision of the Committee being challenged by Me Doré is based on considerations pertinent to disciplinary law, which is to say the protection of the public, the promotion of justice and the preservation of the integrity of the justice system. The Court confirmed that the objectives being pursued were indeed important.

With respect to the proportionality of the means involved, the Court had to examine three elements: firstly, a rational connection must exist between the objective being targeted and the measure taken; secondly, this measure must be such that it impairs the right in question as little as possible; and thirdly, the effects of this measure must be proportional to the objective being pursued.

4 Now known as the *Bar's Disciplinary Council*.

5 Part I of the *Constitution Act 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

6 *Bernard v. Doré* (January 18, 2006), 06-02-01652 (C.D.B.Q.) [decision on conviction]; *Bernard v. Doré* (July 24, 2006), 06-02-01652 (C.D.B.Q.) [decision on penalty].

7 2007 QCTP 152.

8 2008 QCCS 2450.

With respect to the rational connection, the Court rapidly established that this test had been satisfied:

> " [TRANSLATION] Placed in its actual judicial context, the Committee's decision is directly aligned with the fundamental objective of maintaining a justice system that is honest and credible and that benefits from the public's confidence. The exclusive privilege conferred upon lawyers and their role as auxiliaries to the justice system is directly aligned with the objective being targeted. Sanctioning the misplaced conduct of a lawyer or his unfortunate remarks, and in this case it is a euphemism, can only be seen as having a rational connection with the importance of promoting both the justice system and justice itself." [9]

The Court also judged that the breach of Me Doré's right to freedom of expression was in this case minimal. In effect, neither Section 2.03 of the *Code of ethics of advocates* nor the decision of the Disciplinary Committee totally forbids Me Doré to exercise his freedom of expression. It is only that Me Doré, as a lawyer, may not do so by means of remarks such as those which appeared in his letter. The Court noted that Me Doré has in fact demonstrated an appropriate example of his freedom of expression when he lodged a complaint against Judge Boilard with the Canadian Judicial Council which, in fact, blamed the Honourable Judge for his conduct. The Court added:

> " [TRANSLATION] A lawyer may certainly formulate criticism with respect to the justice system and to all those who take part in it, but he must do so with objectivity, moderation and dignity. This does not mean that such criticism may not be strongly expressed, or even severe." [10]

As for the proportionality between the effects of the Committee's decision on Me Doré's freedom of expression and the objective of maintaining the integrity of the justice system, the Court also considered that it was satisfied, since the lawyer preserved his right to freedom of expression without, however, having the right to adopt injurious conduct.

Finally, the Court made the following remark with respect to the supposedly private nature of the letter:

> " [TRANSLATION] The letter was written by a lawyer to a judge in an extension of a court case which had ended some hours earlier. Due to the status and functions of the parties involved, the author of the missive could not reasonably expect that the affair would end there and that the letter would remain confidential. [...]
>
> This last recourse of the appellant (the private nature of the letter) may perhaps justify a lesser penalty, but in my opinion, it has no effect on the decision on conviction as rendered." [11]

[9] *Supra* note 1 at para. 44.

[10] *Ibid.* at para. 48.

[11] *Ibid.* at para. 52-53.

CONCLUSION

Even outside the confines of the tribunal, a lawyer who believes he has been wronged by the manner in which a judge conducted himself toward him should opt to respond by lodging a complaint against this judge with the Judicial Council, and therefore the sanctioning of the judge by his peers.

A lawyer does have, as much as any other person, the right of exercising his freedom of expression. However, as with any other freedom, it is not an absolute right. A lawyer may not, therefore, in the name of freedom of expression, allow himself to proffer immoderate or caustic remarks to a magistrate.

Although the judgment of the Court of Appeal as well as the decisions of the lower courts in this case made no mention of it, it can be foreseen that a similar attitude on the part of a lawyer toward a judge will equally be sanctioned, even outside the context of a trial in which lawyers and judges interact. For example, if a lawyer composed an insulting letter to a judge to the effect that, in a given recent case, he had rendered a questionable judgment, it would equally constitute criticism lacking in moderation and dignity, directed against the justice system and one of its authority figures. In addition, the dreaded effect of the remarks addressed to the magistrate would no doubt remain, since the judge concerned would probably feel obliged to recuse himself should it happen that he was eventually called upon to preside before the lawyer who had thus criticized him.

FINAL REMARKS

It may seem surprising that a debate related to freedom of expression should be engaged solely on the basis of the *Canadian Charter of Rights and Freedoms* and not by virtue of the Québec *Charter of Human Rights and Freedoms*[12]. In fact, apart from the Professions Tribunal, which mentioned, but only in passing, that freedom of expression was recognized by both the Québec Charter and the Canadian Charter, the other tribunals which rendered decisions in this case seem not to have considered this Québec fundamental law in their reasons and Me Doré did not, apparently, include this Act in his argumentation.

However, the Québec Charter is no less complete that the Canadian Charter and applies in the province to issues that are purely private in nature and to affairs concerning the State. Additionally, the Québec Charter is the quasi-constitutional governing statute in Québec.

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[12] R.S.Q. c. C-12.

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