

Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

Making Law Responsibly

10:45-12:30, Friday May 20, New Chancellor Day Hall, Maxwell Cohen Moot Court
Chair: Mr. Louis Masson, Vice President of the Quebec Bar, Montreal

Introduction

Before introducing the presenters, Chairman Louis-Masson affirmed that the values of fraternity, equality, and sustainable development were not only at the heart of Justice Gonthier's judicial philosophy, but were also at the core of the Quebec Bar's mandate. Each of the presentations in this session aimed to illuminate some aspect of this philosophy. Professor Belleau posited a link between a statistical analysis of Justice Gonthier's judicial opinions and his deep regard for fraternity. Mr. Caron argued that Justice Gonthier was deeply concerned about protecting vulnerable groups, but simultaneously insisted that parties take responsibility for their actions. Finally, Ms. Mason-Case showed that the notion of responsibility could provide a framework for consumer led sustainable development initiatives.

L'honorable Charles Gonthier : Une analyse quantitative comparée de ses motifs

Professor Marie-Claire Belleau, Faculty of Law, Laval University, Quebec City

Professor Rebecca Johnson, Faculty of Law, University of Victoria, Victoria

Ms. Anik Lamontagne, Faculty of Law, Laval University

Note: Professor Johnson and Ms. Lamontagne were not able to attend the conference.

This presentation showcased part of a larger project funded by the SSHRC that involved both a qualitative and quantitative evaluation of the Supreme Court of Canada's dissents between 1982 and 2010. The 1982 docket not only included the first Charter of Rights and Freedoms cases, but also coincided with the appointment of Bertha Wilson, the first woman to sit on the Supreme Court bench. Only "pertinent" decisions were evaluated: oral judgements and petitions were excluded. In total, 2081 decisions were analysed. The dissenting opinions were categorized as full dissents, dissents on the result, or dissents on the reasoning (i.e., a concurring opinion). Due to time restrictions, only the quantitative aspects of this research were presented at this conference.

With respect to Justice Gonthier's judgements, 46.6% were unanimous, 33.4% were majority reasons, and 18.8% were dissents of some kind. Statistically, Justice Gonthier wrote fewer opinions than his colleagues; Justice Iacobucci has suggested that this is because Justice Gonthier was habitually asked to write the most difficult opinions, which required more time to draft. But when Justice Gonthier did decide to side with the dissent, he would—in comparative terms—write the opinion more often than his colleagues. Roughly 35% of the dissenting opinions signed by Gonthier were written by him—most of these were concurring opinions (i.e., dissent on the reasons only). Only three judges wrote an equal or greater number of their dissenting opinions: Justices Major and

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Abella both wrote 35%, and Justice Estey, 37%. Finally, the presenter noted that when Justice Gonthier wrote a dissenting opinion, it was often related to matters of public law.

When writing in the majority, Justice Gonthier's usual signing partners were Justices Cory, McLachlin, and Iacobucci. When dissenting, Justices L'Heureux-Dubé, LaForest, and McLachlin sided most often with Justice Gonthier. In conclusion, Justice Gonthier wrote little while sitting on the Supreme Court. When he did write, it was even rarer that the opinion would be a dissenting one. The researchers posited that Justice Gonthier's avoidance of dissent could have been a manifestation of his fraternal attitude.

In the question period following the presentation, Justice L'Heureux-Dubé—who has the highest dissent rate of any judge examined (63%)—stressed the importance of qualitative questions when interpreting this research (which were not discussed due to time constraints). The former judge wondered aloud how much Justice Gonthier influenced his colleagues during deliberations. Furthermore, she stressed the importance of following the life of the dissents; “after all,” she said, “all of my dissents are now law!”

L'obligation de renseigner et de se renseigner en droit des assurances

Mr. Vincent Caron, Faculty of Law, University of Montreal, Montreal

This presentation examined Justice Gonthier's notion of responsibility in *Canadian Indemnity v Canadian Johns-Manville*, [1990] 2 SCR 549. The case assessed an insuree's duty to disclose the risks associated with asbestos mining. The litigants framed the disclosure standard in two ways: 1) the standard was high and applied to everything that was not common knowledge; or, 2) the standard was minimal and only applied to facts that were not accessible to the general public. Justice Gonthier took neither extreme and decided that the standard was that of a reasonably competent insurer who understood the market that was being insured. His logic was that this standard would protect an insuree from an insurer who entered a “new market without the most basic, publicly available, and generally known information about the risks covered by the policy.”¹

The impact of *Canadian Indemnity* was substantial. The principles it espoused paved the way for a duty to inform,² a duty to question,³ a duty to inspect the site of an insured area,⁴ and forced the insurer to bear the burden of proof for due diligence.⁵ Perhaps most importantly, *Canadian Indemnity* clarified the insurer's contractual duties: the insurer could no longer abandon a claim for frivolous

¹ *Canadian Indemnity v Canadian Johns-Manville*, [1990] 2 SCR 549 at 589 para e [*Canadian Indemnity*].

² See *Régie des installations olympiques v Kansa General Insurance Co*, [1994] RJQ 1397 (CS).

³ See *Bergeron v Lloyd's Non-Marine underwriters*, 2005 QCCA 194; *Compagnie mutuelle d'assurances Wawanessa v GMAC Location Ltée*, 2005 QCCA 197.

⁴ See *Villa Ste-Geneviève (1986) v Le Groupe Commerce*, [2003] RRA 198 (CS).

⁵ See *Lafrance v Axa Assurances*, 2010 QCCQ 7141 at para 67.

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reasons. The provider now has a duty to investigate a claim and may be forced to pay punitive damages if this duty is not carried out in good faith.⁶

The presenter argued that this decision showed both innovation and wisdom on the part of Justice Gonthier. Innovation was shown by the fact that the judge did not simply supply a list of allowances and restrictions, but instead gave a set of principles to follow. These principles allowed Justice Gonthier to protect vulnerable groups while simultaneously insisting on personal responsibility.⁷ Wisdom was found in the judge's flexible approach. Justice Gonthier did not attempt to micro-manage the industry but instead suggested business practices that left room for the decision's principles to evolve and adapt.⁸

When the Rules Don't Apply: Consumer Social Responsibility

Ms. Sarah A. Mason-Case, IDLO, CISDL & Faculty of Law, McGill University, Montreal

This presentation looked at Consumer Social Responsibility—the “other” CSR—through the lens of climate change and environmental issues. Large multi-lateral frameworks like the UNFCCC are proving to be inadequate at finding solutions for today's environmental problems. Because of this insufficiency, the presenter advocated a polycentric approach that includes consumer action and initiatives. Inspired by Justice Gonthier's principles of responsibility, fraternity, and sustainability, consumer social responsibility can empower citizens to have a positive impact on environmental issues.

The presenter argued that law can be integral to consumption choices and is needed to facilitate and support decentralized consumer initiatives. Organic food trade was used as an example of a market driven initiative that benefits the environment. During the ten-year period between 1999 and 2009, the organic trade industry grew from 15.2 to 50.9 billion USD. Furthermore, the presenter submitted that demand still outstrips supply. But further growth is often checked by regulatory deficiencies. Most labelling initiatives are private; this can invite fragmentation and conflict in certification standards. The presenter argued that state intervention in organic labelling and multi-national equivalency agreements, overseen by the WTO or through bilateral frameworks like those currently held between Canada and the US or Taiwan and New Zealand, could serve as guideposts for future facilitative laws and regulations.

Conclusions

Bringing together both the rule and the spirit of law, Justice Gonthier viewed the juridical process as a moral force. Influenced by the three pillars of the French Revolution, he described fraternity as

⁶ See *Bergeron v Promutuelle Lac St-Pierre-Les Forges*, 2010 QCCQ 5595; *Richard v Wawanesa*, 2004 CanLII 18471 (QCCQ); *Whiten v Pilot Insurance*, [2002] 1 SCR 595.

⁷ See Fabien Gélinas, “Une Justice Fraternelle: Éléments de la pensée de Charles Doherty Gonthier», (2010) 55 McGill LJ 357, at para 1.

⁸ See *Canadian Indemnity*, *supra* note 1 at 608 para i.

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putting the values of liberty and equality in the context of community.⁹ Professor Belleau posited that Justice Gonthier's work at the Supreme Court was greatly influenced by his ideals of fostering community. An example of this fraternal outlook can be found in many of his opinions, including *Canadian Indemnity*. This decision did not overly interfere in the affairs of insurance providers, but instead provided an innovative set of business practices that not only guided the industry, but also future judges. Furthermore, Justice Gonthier took care to protect vulnerable groups. After *Canadian Indemnity*, insurees covered by a negligent insurer would not be victimized. Instead, the insurers would be held responsible for their actions. The concept of personal responsibility was further considered as a result of Ms. Mason-Case's examination of sustainability through consumer initiatives. Inspired by Justice Gonthier's philosophy, she argued that although consumer social responsibility does not derive its life force from laws, it needs a legal framework to be successful in today's global reality. This view is supported by Justice Gonthier's claim that rights and laws themselves are not an end. He stated that "[w]e cannot simply assume legal rights will solve everything; we must put greater emphasis on the duties and responsibilities individuals have to one another and their community."¹⁰ In sum, although sustainable law is concerned with governance, it must be complemented by the values of fraternity and responsibility that Justice Gonthier espoused.

⁹ See The Honourable Charles D Gonthier, "Law and Morality" (2003) 29 Queen's LJ 408 at para 14.

¹⁰ *Ibid* at para 18.

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