

**ALLOCUTION DE BIENVENUE AUX  
NOUVEAUX/NOUVELLES JUGES  
FEBRUARY 8, 2015, MONT-TREMBLANT**

Nicole Duval Hesler, J.C.Q., C.J.Q.

Cher/es nouveaux et nouvelles collègues,

Cher/es amies,

Dear colleagues,

Dear friends.

Les cerveaux sont comme les parachutes. Ils ne fonctionnent que s'ils sont ouverts.

Minds are like parachutes, they don't really work unless they are open. Judges, in particular, should not be in a free fall.

Ce que j'ai apprécié le plus pendant mes presque quinze ans à la Cour supérieure, c'est justement l'ouverture d'esprit de mes collègues, même les plus conservateurs, ainsi que leur compétence et leur professionnalisme.

Similarly, what struck me the most about my weeks of training as a new federally appointed judge, was how much I enjoyed the company of my new colleagues. I found them knowledgeable, certainly erudite about the law, smart overall, even brainy, pleasant, without a trace of arrogance, open minded and oh so collegial!

That first impression has never changed.

Superior courts are wonderful institutions, who do the bulk of judicial work, and I am honoured to have served on one for close to 15 years before transiting to the Court of Appeal.

Que dire maintenant du passage du Barreau au banc. Let me now turn my attention to the transition from Bar to Bench.

Remember that your training is in law. If you want to make your job as a decider easier, make it a habit to check the applicable legal standard before you set foot in the courtroom, unless you know it already. This will allow you to

sort out what is relevant and what is determinant among the myriad of bits of information that will be placed before you.

Writing a judgment is hard work. The earlier you can enlist in a judgment writing course, and the CIAJ organizes an outstanding one every summer, the better.

This being said, remember that the best quality of a judgment is its being actually rendered. A great many of you who are former litigators well know the paralyzing effect that an uncertain outcome exerts on the parties. Render judgment as soon as you can. And if you really want to be in a position to do so, write the portion of the judgment dealing with facts and evidence straight away, before other cases chase the particulars of a given case from your mind.

Certainement, vous aurez à trancher des cas problème, difficiles à cerner, difficiles à entendre, difficiles à juger. Souvent les difficultés inhérentes à de pareils dossiers font en sorte qu'ils progressent à pas de tortue dans l'appareil judiciaire. Le problème ne peut qu'en être amplifié. Je me permets de vous rappeler que la qualité première d'une décision, c'est d'être rendue. Une partie qui connaît le sort

de sa procédure n'est plus dans l'incertitude. Elle peut agir, elle peut passer à autre chose, elle peut tourner la page, ou non. Tant que la décision n'est rendue, c'est l'attente, souvent la paralysie.

When I became a judge of the Superior Court, my then Chief, the late Allan Gold, fondly remembered, told me that he would only give me one piece of advice.

"Nicole, he said, if at the end of the trial you know what to do, and you are certain that you won't change your mind, do the parties a favour, do the system a favour, do yourself a favour: render judgment from the bench."

It is advice I have followed as much as I could, and still follow whenever I can on the Court of Appeal. I consider that it has made my life as a judge much more agreeable than it would otherwise have been, and I pass it along in the same spirit.

Before I get on with sundry advice about how to manage the bench, let me make two very serious points.

First, judicial independence is a fundamental value for the Canadian judicial system. Each and every judge is free to decide an issue according to his/her understanding of the law and the dictates of his/her own judicial conscience, without interference from any sort, and most definitely not from the Chief Justice. As a matter of fact, since becoming Chief, I comment only rarely on opinions which I do not share. In my view, that is the most important manifestation of the rule of law in any system. Judges must be entirely free to decide a matter according to their conscience. There are not that many societies that can boast the level of judicial independence which we enjoy in Canada and it seems to me that it is an achievement well worth boasting about, for it benefits all members of society and it greatly enhances transparency, without which cynicism thrives.

On dit souvent, d'ailleurs, que les dissidences d'aujourd'hui sont le droit de demain. Rappelez-vous surtout que le plus grand courage pour un/e juge, c'est de penser pour soi-même.

Secondly, I would be remiss if I did not bring to the fore the essential role of lawyers in maintaining the rule of law in

our country. Sometimes, judges get frustrated with lawyers and forget that they once were lawyers. Allow me to emphasize that lawyers are the carriers of the brief. It is a unique and most influential role. They know things you don't about the case. In addition, one should bear in mind that many, if not most, of the initiatives which have ensured due process before the courts have been fostered by lawyers. We might take it for granted today, but something as fundamental as the right to cross-examine was instigated by a barrister, Sir William Garrow, in the late 1700s.

Nos institutions judiciaires, si chères à notre démocratie, ne sauraient évoluer, ni même subsister, sans l'apport journalier des avocats et avocates. Nous comptons sur elles et sur eux pour continuer d'insuffler au droit vigueur et créativité. N'oubliez donc pas que vous avez été avocat/e.

Une longue tradition veut que les allocutions que nous donnons pendant ces semaines de formation des nouveaux juges comportent une note humoristique et collégiale, et je n'ai pas l'intention d'y déroger. Je vais donc maintenant tenter de vous faire rire en vous confiant quelques recettes

qui sauront je l'espère vous être utiles comme juge tout autant que vous amuser.

Ma première recette, c'est de vous rappeler la définition que donnait René Descartes du bon sens :

« Le bon sens est la chose du monde la mieux partagée, car chacun pense en être si bien pourvu que ceux mêmes qui sont les plus difficiles à contenter en toute autre chose n'ont point coutume d'en désirer plus qu'ils en ont. En quoi il n'est pas vraisemblable que tous se trompent, mais plutôt cela témoigne que la puissance de bien juger, et distinguer le vrai d'avec le faux, qui est proprement ce que l'on nomme le bon sens, ou la raison, est naturellement égale en tous ».

Rappelez-vous cette définition lorsque vous aurez devant vous une personne qui se représente elle-même et dites-vous que les choses pourraient être pires, cette personne possédant au moins autant de bon sens que vous, bien qu'il soit fort probable qu'elle soit moins impartiale que vous ne l'êtes.

My first recipe for you to enjoy life as a judge is to remind you of the definition of common sense given by none other than René Descartes, the « Je pense donc je suis » - "I think therefore I am" philosopher. Loosely translated, he said that common sense was the best shared characteristic in the world, to the point that no one thinks they should possess more. As he thought it unlikely that everyone is mistaken in this respect, he concluded that all human beings must possess equal amounts of it. This might encourage you to have a better opinion of appellate judges than otherwise would be the case. Or to view vexatious litigants in a kinder light.

As writers of judgments, you may wish to remember the congratulatory note that Carol Huddard received upon her appointment to the B.C. Court of Appeal several years ago. A colleague from her former Court wrote: "I applaud your rise to the Court of Appeal in the fervent hope that I may henceforth understand my reversals." Don't write for yourself, write for the reader.

You could also think about Robert Schumann, the composer. Schumann had two imaginary alter egos. One



was quite the comedian. Schumann called him Floristan. The other was quite the opposite, and Schumann named him Eusebius. Schumann always made it a point to tell his interlocutors who they were dealing with on a given day, so that they could strategize accordingly. I would not encourage you to go quite that far, but you may try to figure out, when dealing with lawyers and parties, whether you are facing Floristan or Eusebius on that particular occasion. Il pourrait vous être utile d'apprendre à reconnaître facilement les Floristan des Eusèbe qui se présentent devant vous. Et peut-être pourriez-vous-même décider d'être plus souvent Floristan qu'Eusèbe!

Il ne nuit pas non plus de se dire à l'occasion, comme St-Exupéry, qu'on est riche aussi de ses misères.

Si une affaire vous laisse perplexe, consolez-vous puisque la perplexité est le début du savoir.

Si la patience vous manque, songez qu'il y a des gens qui préfèrent prier pour se faire pardonner plutôt que de résister à la tentation.

Loosely translated, St-Exépurry meant, not that misery loves company, but that misery can be enriching – in experience I suppose. I have just also reminded your French speaking colleagues that perplexity is the starting point of understanding and that some individuals prefer begging for forgiveness rather than resisting temptation. That sort of notion always comes in handy for judges, such is the richness of human experience you will now encounter daily!

If you're unsure as to what to do, remember that the trouble with the world is that the stupid are cocksure and the intelligent are full of doubt.

Reminding yourself that a paranoid is a person in possession of all the facts may also alleviate some of your own symptoms on a bad day.

And when writing, tell yourself that there is a mighty big difference between good, sound reasons and reasons that sound good.

Develop a sense of humour. You will need it.

To prove my point, I will now tell you an anecdote which I heard at the retirement dinner of a prince of a judge, Dan Tingley, until very recently a member of the Quebec Superior Court. I have his express authorization to do so.

Dan was hearing a family case pitting one parent against the other over a skiing holiday for the 13 yr old son. The father is immensely rich, but I am not asserting that that is truly relevant to the tale. It just makes it easier to understand.

Be that as it may, the 21 yr old daughter came to testify rather unkindly about the father's parenting capacities. She described him as a control freak, an irascible tyrant, a father whose company was difficult to bear at best of times. She retold how, the previous summer, on the father's yacht, in the middle of the ocean, she found herself without toothpaste and took it upon herself to go brush her teeth in the father's bathroom. 10 minutes later, he appeared on deck vociferously castigating the deed. "Who is the asshole, he screamed at the top of his lungs, who squeezed the tube from the middle?"

In an effort to lighten the atmosphere in the courtroom, Dan put both hands to his head and said: "Oh My God. I squeeze the toothpaste tube in the middle too!" To which the witness promptly responded: "I guess that makes you an asshole too!"

In situations like that, tell yourself: it's not about me!

The time has come for me to toast the class of 2015! May all your cases be interesting, if not downright fascinating, may all your witnesses be truthful, and may all your judgments be appeal proof.

C'est avec enthousiasme que je vous lève mon verre, en vous souhaitant à tous et à toutes mes meilleurs vœux de succès et de bonheur pour une longue et fructueuse carrière de décideur/es.