REFLECTIONS ON *A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA*

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I believe that the judiciary can be both independent and accountable. In the preface to my study, *A Place Apart: Judicial Independence and Accountability in Canada*, I stated:

> This Report suggests a number of ways in which the judiciary and those responsible for appointing members of the judiciary can develop techniques of accountability that are consistent with judicial independence. Accountability can, in fact, enhance the public's respect for independence. The relatively modest renovations in the structure suggested in this document will help keep the judiciary a strong, respected, and independent institution.[1]

I will discuss the three areas that were the subjects of the three panels: judicial selection, judicial conduct, and institutional independence. Let me start with judicial selection. I will concentrate on the federal system because most of the panel discussion related to that area. The present provincial committee system used for federal appointments is working reasonably well, but in my view it can be improved. There are problems with the present selection process. One is that the number of names that come forward to the Minister of Justice constitutes a very large pool from which the Minister may select judges. At any one time there might be 400 eligible candidates from which the Minister may draw for the approximately 50 federal judicial appointments each year. It is not surprising, then, that the political considerations mentioned in the panel this morning may find their way into the selection process.

We have *good* judges in Canada. Yet, why shouldn't we devise a system that produces the *very best* judges? The committees now categorize candidates as "qualified," "highly qualified," and "not qualified." It is good that the Minister is not selecting judges from the last category but why shouldn't the Minister be required – or at least encouraged – to select candidates from the "highly qualified" category? The ground rules could be that if the Minister went outside of that category some explanation would have to be given to the appropriate provincial committee and some statistics on the extent of the failure to select from that category would be given in an annual public report.

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[1](Ottawa: Canadian Judicial Council, 1995) at xiii [hereinafter *A Place Apart*]. The phrase "A Place Apart" comes from a remark made by Senator Arthur Meighan in 1932: "a judge is in no sense under the direction of the government ... The judge is in a place apart.", *Senate Debates*, 24 May 1932 at 457.

Another approach would be to require the committees to put forward four to six names for any specific vacancy. This is now the practice for the appointment of provincial court judges in Manitoba.[2] (The Ontario practice for appointing provincial court judges is to produce only one or two names.) If this were done, it is likely that the committee would put forward persons who they thought were the most highly qualified to be judges. These would not necessarily be the persons who were the most experienced litigators.

Another defect in the system is the absence of interviews. It is odd that selections are made for one of the most important positions in society, with virtually lifetime security of tenure, without interviews. Interviews are conducted in the United States for federally appointed judges – and, like the Canadian federally appointed judiciary, there are about 1,000 federal judges in the U.S. Similarly, interviews are conducted in England for all positions below that of a High Court judge. (Candidates for the High Court tend to be leading barristers and are therefore fairly well-known.) Ontario, which has about as many provincially appointed as federally appointed judges, also conducts interviews. So it is odd that the practice has not been adopted at the federal level in Canada. I hope that it will be in the future.

Another concern is that there is no external review system for promotions. Is this consistent with judicial independence? Judges may, consciously or unconsciously, decide cases in favour of the government, hoping to get an appointment to a higher court or to become a chief justice. In my report, I suggest various different techniques for assessing persons for elevations.[3] For appointments from the trial division of a superior court to the court of appeal, I suggested a seven-person committee consisting of representatives of the federal and provincial governments, the trial and appeal benches, and the bar. A different system was suggested for elevations from the provincial court to the superior court. (Not all provincial court judges consider this to be an elevation, it should be pointed out.) I would have the resumes of all provincial court judges on file with the Commissioner for Federal Judicial Affairs. A small committee would select names that it thought should be considered by the appropriate regular provincial committee.

With respect to the Supreme Court of Canada, it was suggested in the report that special nominating committees be established for each appointment to the Supreme Court. A representative committee of about nine persons (with four chosen by the federal government) would present a short ranked list of names to the government. If the government went outside the list, a public confirmation

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[2] *Ibid.* at 243 *et seq.*

[3] *Ibid.* at 255 *et seq.*

hearing (with the exception that there would be no public hearing for personal matters) would be held by a joint House and Senate Committee. This would put pressure on the government, but not force it to choose from the list.

Let me now turn to judicial conduct. Both Chief Justices Lamer and Scott referred to the tension between judicial accountability and judicial independence. In my report I stated:

> There is a tension between judicial accountability and judicial independence. Judges should be accountable for their judicial and extra-judicial conduct. The public has to have confidence in the judicial system and to feel satisfied, as Justice Minister Allan Rock stated in a speech to the judges in August, 1994 'that complaints of misconduct are evaluated objectively and disposed of fairly.' At the same time, accountability could have an inhibiting or, as some would say, chilling effect on their actions. When we are talking about judicial decisions being scrutinized by appeal courts, we are generally not worried about curtailing a judge's freedom of action. That is the purpose of an appeal court: to correct errors by trial judges or in the case of the Supreme Court of Canada to correct errors by appeal courts. Similarly, if actions of a judicial council deter rude, insensitive, sexist, or racist comments, that is obviously desirable. The danger is, however, that a statement in court that is relevant to fact-finding or sentencing or other decisions will be the subject of a complaint and will cause judges to tailor their rulings to avoid the consequences of a complaint. It is therefore necessary to devise systems that provide for accountability, yet at the same time are fair to the judiciary and do not curtail judges' obligation to rule honestly and according to the law.[4]

Investigations of allegations of improper judicial conduct at the federal level are conducted by the Canadian Judicial Council. The system works reasonably well, as I outline in my report, but there are techniques that could make the process more visible than it now is. One wants greater visibility so that, as Chief Justice Scott said, the public will have continuing high confidence in the judiciary. Chief Justice Lamer, in his speech last night, accepts that certain techniques for further visibility should be adopted. Sanitized copies of complaints and responses could be made available to the public, by the judiciary, as they now are in the U.S. federal system. Moreover, one could have periodic reviews of the complaint process by respected persons from outside the judiciary. These techniques are discussed in my report.[5] I went further, however, and suggested that the non-public panels should include someone from outside the judiciary. There are only about nine or ten such panels each year that decide whether a case should go on to a formal hearing. I did not recommend that there be non-judicial participation in the initial screening of complaints. The other techniques previously mentioned would help make sure that they were being dealt with properly. The non-judge

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[4] *Ibid.* at 129.

[5] *Ibid.* at 134 *et seq.*

on the panel could be a lawyer or lay person. It would provide the public with the assurance that this crucial stage was being dealt with properly. In his speech last night, Chief Justice Lamer called this "window dressing." I'm not sure what is wrong with "window dressing." It often tells us what is going on inside the shop.

On the issue of intermediate sanctions, I agree with Chief Justice Lamer that certain intermediate sanctions, such as suspension with or without pay, would not be desirable, but it seems to me that reprimands – either public or private reprimands – should be part of the arsenal of the Canadian Judicial Council. It would not be used very frequently, just as in the U.S. federal system where there is the power to reprimand, it is rarely used. I do not see very much difference between the power to reprimand and the power to express disapproval, which the Canadian Judicial Council now exercises. I think that there should be a range of things the Council should be able to say to a judge whose conduct has been held to be inappropriate.

Moreover, to take another example, I suggest that the Canadian Judicial Council should be able to say to a judge who has a problem with alcohol that the judge take alcohol treatment. The Council or a chief judge cannot *force* the person to take alcohol treatment, but if the person says "mind your own business," then the next step may well be a recommendation for dismissal. Similarly, if a judge uses inappropriate sexist or racist comments, shouldn't the Canadian Judicial Council be able to say: "we can't force you to do this, but we would like you to take some of the sensitivity training programmes" that Chief Justice Lamer described in his speech last night? Again, they cannot force a person to do it, but surely there is some institutional memory at the Canadian Judicial Council, so that repetition of undesirable conduct can be treated more seriously than the first time it occurred. My analysis of the intention of those responsible for setting up the Canadian Judicial Council shows that the Council now has these powers. If it does not, they should be given to the Council by amendments to the *Judges Act*.

One issue that I discussed in some detail in my report, which was not mentioned by Chief Justice Scott, is whether we should adopt the U.S. federal scheme whereby the judge's own chief justice is given an opportunity to resolve a complaint before it goes on to a further stage.[6] This is a very valuable feature of the U.S. federal system. It gives the chief judge significant influence with the judge because the judge knows that the issue can be taken to a further stage. Except in extreme cases, the real purpose of the legislation is to change undesirable conduct, not to discipline the judge. As one U.S. chief judge stated: "You get the right result without unnecessarily humiliating or degrading anyone."[7]

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[6] *Ibid.* at 132-133.

[7] *Ibid.* at 133.

A number of provinces adopt this process for provincial court judges. It is one that should be carefully considered by the Canadian Judicial Council.

Chief Justice Scott has described the work that is now going on with respect to the drafting of a code of conduct or, as it may be called, principles of judicial conduct. This is a very significant and important venture in which the Canadian Judicial Council is engaged. I am pleased that the Council is involving the Bar and the provincial judges. It is crucial to have the provincial judges involved. It would be a mistake to have one code for the federally appointed judges and another for the provincially appointed ones. The public does not understand the difference between the different levels of the judiciary. We have one judicial system; we happen to have – almost by accident[8] – different appointing powers. So it is crucial that in the end we have – to the extent possible – one code for the judiciary across the country.

I like the approach that is being taken, that is, that the code avoid a list of prohibited conduct, but instead consist of principles, commentaries, and examples. The U.S. federal code is, in my opinion, a very well designed code, which, I am sure, is being carefully looked at for ideas. It does not directly link the code to the discipline process, although understandably one cannot completely divorce them.

The questions that Chief Justice Scott raised in his talk are very good questions. They are, I concede, difficult ones to agree on the answers. I hope that in the process of struggling with the questions the committee and the Canadian Judicial Council do not throw up their hands in despair or throw in the judicial towel. Perhaps they can't solve all the issues in the detail that some would like, but there are many issues that they can solve. The code can state, for example, as many U.S. codes now provide, the circumstances under which a judge should not hear a case. What degree of relationship should require the judge to step down when there is a family relationship with a lawyer or litigant? When should a judge be able to act as an executor of an estate? When can a judge contribute money to a political party? These are questions that judges are asking and there is not a uniform answer across the country. These are the type of matters which will give the code a significant degree of usefulness for judges.

A code is not going to solve all the issues relating to judges speaking publicly outside the courtroom, but it can give useful guidance. The U.S. federal code gives such guidance and makes sense to me. One of the canons of the U.S. code makes it clear that the judge should avoid public comments on the merits of pending cases saying:

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[8] *Ibid.* at 234-235.

> A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.[9]

The commentary to the section states that "the admonition against public comment about the merits ... continues until completion of the appellate process." This all sounds sensible to me.

The code therefore makes a distinction between commenting on pending cases and other types of comments. With respect to the latter, it encourages the judges to speak out on certain matters, stating that:

> [A] judge may speak, write, lecture, teach, and participate in other activities ... As a judicial officer and person learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.[10]

Again, this makes sense to me. Thus, the example given this morning by Chief Justice Scott of the three chief judges in Ontario publicly commenting on the problems that will arise with budget cuts would certainly be acceptable conduct.

The final area that I will deal with is institutional independence. The *Valenté*[11] case does not go too far in requiring changes for constitutional reasons. An "essential condition of judicial independence for purposes of s. 11(d)", stated Le Dain J. for the Supreme Court of Canada in *Valenté*, is "the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function."[12] It is true that the *Beauregard* case appears to go somewhat further by stating: "The role of the court as resolver of disputes, interpreter of the law and defender of the constitution requires that they be completely separate in authority and function from *all* other participants in the justice system."[13] Justice Thomas Zuber in his 1987 report on Ontario courts, however, interpreted *Valenté* in a narrow manner stating, in an oft-cited quote, that the independence included "the assignment of the totality of a judge's

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[9]*Ibid.* at 153, citing Canon 3A(6).

[10]*Ibid.* at 153, citing Canon 4A.

[11]*R.* v. *Valenté* [1985], 2 S.C.R. 673; (1985) 23 C.C.C. (3d) 193.

[12]*Ibid.* at 219 C.C.C.

[13]*Beauregard* v. *Canada* (1986) 30 D.L.R. (4th) at 491; [1986] 2 S.C.R. 56.

workload, the setting up of particular forms of sittings in order to discharge the court's business, but nothing else."[14] So what we are talking about is not the constitution, but effective judicial administration.

I have a very long chapter in *A Place Apart* on institutional independence.[15] To me, it was the most interesting and perhaps the most important issue that I dealt with. How should we structure the running of the courts to achieve both independence and accountability? I made a number of points in my study. One is that there should be some separation or buffer between the judiciary and the Attorney General, the chief litigator before the courts. Another important consideration is that people tend to work more effectively if they have control over their work environment. I think it is desirable for the judges – and I include, of course, the puisne judges – to have more control over how the courts operate. They should have some of the same power that members of law firms or the academic world have to make the trade-offs between, say, secretaries and personal word processors.

A point was made in the last session about the desirability of the three levels of courts (court of appeal, trial division, and provincial court) working together. To me, this is a crucial consideration. Right now, the three courts operate more or less separately in almost all provinces because there is a certain amount of suspicion between the provincial court and the superior courts and even between the superior trial court and the court of appeal. Yet it is one legal system. There is an interrelationship between the various level of courts in both civil and criminal matters. The use of resources for preliminary hearings at the provincial court level uses resources that could perhaps be better used in other areas. I would like to see a system where the three levels of courts work together and collectively try to make the best use of the available resources.

It isn't necessary for the judges to be administrators. They would choose the senior administrator. No doubt, the courts administration branch in the provincial Attorney General's department would simply move under the wing of the judiciary. The judiciary would act as a board of governors. They would make decisions on a range of issues, such as the use of alternate dispute resolution, which it is now very difficult for the government to make because the judiciary says that it is a threat to judicial independence. If the judiciary had the responsibility I think they could perhaps do better than the government in the effective use of resources.

As for the funding process, I think that the estimates prepared by the judiciary should continue to go through the Attorney General's department. If they were

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[14]*Report of the Ontario Court Inquiry*, (Toronto: Queen's Printer, 1987) at 149.

[15]*Supra* note 1, Chapter 9.

to go straight to the Treasury Board or the Legislature, then the judiciary would be losing the assistance of the Attorney General who is often a good friend of the judiciary in the government.

In my opinion, there should be substantial outside involvement in the judicial board in order to ensure a measure of accountability for the expenditure of public funds. The model that I put forward in my report was to have about 12 or 13 persons on the board to whom the administrator would report.[16] (The administrator would continue to report to individual chief judges on true *Valenté* matters, which would not necessarily come before the board.) In my scheme, there would be two justices from each court, probably the chief judge and either an associate chief or a puisne judge. There would also be lawyers selected by such groups as the provincial law society, the Canadian Bar Association, and the law teachers. The rest of the members of the board would be selected by the Attorney General, possibly from distinguished lay persons with business experience. Civil servants would have the right to attend most sessions as observers. Ontario is now giving some thought to such a scheme.

At the end of the chapter on "Administering the Courts" I state:

> The scheme suggested here - or some variation of it - has the potential for providing better, more accountable court administration in one place. Further, it creates a mechanism for the three levels of courts to work together and brings together in one body representatives of the public and those most knowledgeable about the courts, the judges themselves. In my view, the scheme should be carefully examined by the provinces.[17]

Let me end these brief remarks by reading the final paragraph of my Report:

> This study has analysed a great number of issues relating to the independence and accountability of the judiciary. The judiciary, as the title to this volume suggests, is properly 'a place apart.' That place has a solid historical foundation and a fine edifice. This study suggests some relatively modest renovations in its structure to keep it a strong, respected, and independent institution.[18]

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[16] *Ibid.* at 222.

[17] *Ibid.* at 224.

[18] *Ibid.* at 268.