# The Role of the Judge in the 20th Century

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The role of the judge in the 20th century. The topic is vast and given that there are only 6 years left in the 20th century, it is surely not premature! The subject has the merit of getting us to reflect on the fundamentals. I know how easy it is for us to focus so tightly on doing our day to day work that we do not, as often as we should, step back and think at the most basic level about our role — our function in society. I welcome the opportunity to do just that today.

I propose to look at some of the ways in which the role of the judge has evolved during this century. My approach will not simply be from an historical perspective but will also look ahead to see how the role of the judge is influenced by the need to adapt to the likely conditions of the future.

In the time available, I can only give you a fairly bare outline of some of my reflections on this huge subject. I know, however, that you will be examining in much more detail over the next few days some of the themes that I will touch on today.

I believe there are three basic relationships between the judiciary and society which we need to consider in discussing the role of the judge. First, the judge is a central actor in the administration of justice, but only one of many. Second, the judge acts within the institution of the judiciary and therefore the role of the judge within that institution needs to be examined. Third, the judge is increasingly a public figure and so the role of the judge as it relates to the broader public also must be considered. Let me develop each very briefly.

## I. THE JUDGE AND THE ADMINISTRATION OF JUSTICE

First, the judge and the administration of justice.

According to the traditional view, the role of the judge was like that of an umpire. The judge simply came into court, listened to the case and decided it. The umpire is not responsible for the scheduling of the games, for how much the players are paid or whether the fans are satisfied with the players' performance. In a similar way, the judge, according to the traditional view, was not concerned with the comparable aspects of the justice system.

Those days are long gone. Of course, the first job of the judge is to render a just decision in the cases properly before that judge. But I believe the approach to the discharge of that role has evolved considerably. Moreover, beyond the work of the judge in the courtroom, I believe today people look to the judges for leadership in addressing the problems — indeed the inadequacies within the courts and the whole system of justice. When delays are long and the cost of obtaining justice is high, people look to their judges as being well-placed to make the needed changes or at least to propose solutions.

First, consider the role of the judge in the courtroom. I have referred to the traditional view of the judge as umpire; another analogy might be to the sphinx. Judges in an earlier period tended to say little or nothing until it was necessary to make a ruling or give judgment. I believe this approach has gradually given way to a more active involvement of the judge in the hearing as, for example, in the posing of questions to witnesses and counsel. While of course it is the role of the judge not to let the adversary process get in the way of substantial justice, I believe we judges must be careful not to

allow our interventions in a case to distort the rather finely balanced procedural protections that are present in that adversary system.

I think, too, that the dynamics among the judge, the counsel and the public have evolved considerably. For example, there has been a considerable development of the law relating to contempt of court, rendering it considerably more permissive of comments on the judicial process than it was 25 years ago. We have seen the evolution in other areas as well. Consider the question of whether judges and lawyers should gown. In the 1970's, in certain quarters, mostly the junior bar, gowns were in disfavour as symbols of prestige and hierarchy. The pendulum has swung back. More recently, there has been a call in some quarters for gowns in proceedings in which they were not previously worn so as to underline the solemnity, dignity and importance of the proceedings. There is also the question of whether all judges should be addressed as Your Honour or whether the traditional My Lord or My Lady should continue in the superior courts. In these sorts of questions, it is really just a matter of finding the right balance that will preserve the dignity of the proceedings while not giving the impression that the judge and lawyers were just recently released from a museum exhibit. At the present time, I think there is renewed understanding of the importance of the dignity and solemnity of Court proceedings. I would simply add that we must remember that it is not tradition for its own sake that governs, but rather whether we think we have achieved the right balance which will preserve the dignity so important to judicial proceedings.

I move to the judge as part of the justice system outside the courtroom. As I said, I believe there are quite legitimate expectations that judges will provide leadership in addressing problems in the law and the way it is administered. This new and quite legitimate expectation of the judiciary raises some delicate issues about the appropriate role of the judge. Consider some of the issues facing a judge who wishes to respond to this relatively new public expectation.

Any would-be reformer must question the existing regime and often that involves criticising the way the government is running the country or the province. However, this is not an appropriate activity for a judge under most circumstances. Reforms usually also have resource implications. But judges are not appointed to make decisions about spending priorities. Finally, judges must be careful that what they say or do as reformers does not interfere with their first duty — to fairly and impartially administer justice in the cases coming before them. If the judge is perceived as a lobbyist for a certain position, this may make it impossible or at least unwise for the judge to hear cases in that area. So the reformer judge faces many limitations in attempting to meet the public expectation for leadership. This does not detract from the importance of the contributions judges can make to the improvement of the administration of justice. It does point out, however, the challenges facing the judge in doing so and the delicacy of the balancing involved in defining the judge's role in this area. I would also note the unfairness of the situation in which a judge may find him or herself when the judge is held responsible in the public mind for situations not of the judge's making and in which the judge would be criticized if he or she were to speak out about the problem.

Judges, individually and collectively, are finding ways to contribute to the improvement of the administration of justice in addition to the faithful exercise of their judicial duties. Let me give only two of many possible examples. The Canadian Judicial

Council has assisted the organization of consultation and study groups to give reactions and opinions on proposed legislation. Very recently, a national committee of experienced criminal law judges carried out a detailed study of proposed reforms to the Criminal Code. The Council itself, through its Trial and Appeal Court Committees has been devoting considerable energy over the past three years to the problem of delays. Just last month, the Trial Courts Committee recommended targeted time standards for adoption by each of the section 96 trial courts and assembled an inventory of the various techniques and devices that have been tried across the country to reduce delay.

These are examples of judges responding to their role in relation to the administration of justice while at the same time doing so in ways that are consistent with and appropriate to the judge's other roles and responsibilities.

There is another important aspect of the judge's role within the broader administration of justice. That issue is the proper division of authority and responsibility as between the judiciary and the executive. This issue has many dimensions — all of them difficult.

For example, who should run the courts? Should judges take on more management responsibilities? The answer in many jurisdictions is yes and I expect this is the trend for the future. But it must be recognized that this is a significant change of role for judges and one that is by no means uncontroversial. The more active involvement of judges in the management of the courts brings with it the need to make sure that judges are properly trained to carry out these new duties. Management experience is not a requirement for judicial appointment. One approach to balance the need for judicial direction with management skill is to make the Chief administrators of the Court responsible to the judiciary as well as to the relevant authority in the civil service. For example, the *Supreme Court Act* indicates that the Registrar of the Court, who is its chief civil servant, shall carry out his or her functions "subject to the direction of the Chief Justice". I have found that this arrangement is a good one and goes a long way towards assuring both judicial independence and management effectiveness.

Consider also the issue of who should set the terms of employment for judges. I am speaking under great constraints here for reasons that are familiar to all of you. The role of the judge as an independent authority must be preserved and enhanced. However, we are clearly in need of better mechanisms to accommodate the legitimate requirement of independence with the executive's responsibility to administer public funds.

Finally, there is the question of the best way to deal with complaints about judicial conduct. Once again there are important issues of independence at stake here, but there are also other issues. Public confidence in the judiciary is vital and even isolated instances of perceived judicial misconduct undermine that confidence. The judicial role requires both independence and public confidence. Balancing those two requirements is not always an easy matter and we have work to do to ensure that we have achieved the best balance possible.

This issue is receiving a great deal of attention. The Canadian Judicial Council has commissioned a detailed study of judicial independence and accountability which

should be ready in the autumn of 1995. We hope that this will provide a firm basis for careful discussion and consideration of the multitude of difficult issues involved. The Council is working with representatives of the Canadian Judge's Conference to set the wheels in motion for the preparation for discussion of a draft Code of Judicial Conduct. While there are a number of problems and limitations inherent in the exercise, it may also be most valuable. Judges are appointed from a wide variety of backgrounds and come to the bench with varied experience. A Code holds some promise of collecting in one place a common starting point on these issues. A Code also has the advantage of making more publicly accessible a statement of the legitimate public expectations in the area of judicial conduct. The Council is also examining ways to enhance public knowledge about and confidence in the existing statutory scheme for dealing with complaints against federally appointed judges. Specifically, we are examining ways in which, within our existing statutory scheme, it may be possible to have some lay input into the complaints process.

There has also been a remarkable evolution in the role of the judge with respect to the progress of cases through the court. Of course, I am speaking here about caseflow management and the use of pre-trial conferences. Caseflow management arises from the sense that the courts have a responsibility for the progress of a matter and leaving this to the lawyers and the parties is not sufficient. To put it simply, if judges are going to be blamed for the delays of others, they will take a more active role in trying to avoid them. The short answer is for the legal profession to make the timely progress of the case a higher priority. But my sense is, and I say this with some reluctance, that we will, as a necessity, see more judicial management of cases.

The pre-trial conference has demonstrated the important role judges can play in narrowing and settling disputes. It also requires a range of different judicial skills than those needed for adjudication. I expect this role of the judge will also continue to expand and that we will build upon the work already done to provide specialized training in the necessary skills. The National Judicial Institute has recently developed a course responding to this need which has been very well received by the judges attending.

I would also add that if the formal legal process can be made quicker and always ready to explore and support settlement by agreement rather than by litigation, the present growth of Alternative Dispute Resolution (ADR) mechanisms outside the courts will likely slow considerably. I fear that too often ADR is chosen because the existing formal system is thought to be seriously deficient.

I simply note these as examples of how the role of the judge as an important actor in the justice system is evolving and how judges are inevitably involved in a range of issues and activities far beyond their core responsibility to decide the cases before them.

In short, the role of the judge as an actor in the broader administration of justice requires a difficult balance to be struck involving the judge as impartial decision maker, the judge as reformer, the judge as manager and the judge as one sharing a collective responsibility for maintaining the highest standards of judicial conduct. The balancing of these roles requires due weight to be given to judicial independence, effective administration of public funds and the administration of justice in the public interest.

## II. THE JUDGE WITHIN THE JUDICIARY

Let me now touch on the second area, the judge within the judiciary.

Judges are not only independent of the executive but of each other. If you doubt this, try being a chief justice! But this basic fact of individual independence is an important aspect of the judge's role. The core work of the judge is individual work. It is, of course, the job of deciding the cases according to the best efforts of the individual judge. The arrangements within the judiciary must promote and never inhibit this individual responsibility. While efforts to streamline and make more efficient are necessary and important, the individual independence of the judge to perform the central work of the judiciary must be respected and supported. This, of course, has important implications as judges are expected to assume more management responsibilities and as the administration of the courts is viewed increasingly through the prism of management principles. The judiciary is necessarily a choir of soloists and not, I would add, without some artistic temperament at times. As we consider the various roles of the judge and the many demands placed on judges, we must not lose sight of the importance of this individual nature of the judge's core functions.

## III. THE JUDICIARY AS REGARDS THE BROADER PUBLIC

I turn finally to the role of the judiciary as regards the broader public.

Judges are more than ever public figures. The decisions of judges are the subject of considerable public attention, sometimes well informed and sometimes not. From the public perspective, the courts do not just decide cases. The case itself often serves another public purpose. It provides a platform to draw attention to important questions of public policy. It is not uncommon for a factum in our Court to be faxed to the media before it is filed with us. This led one person at the Court to dub these documents "faxtums"! It is not uncommon to have a so-called demonstration in connection with a court case at which the media contingent considerably outnumbers the demonstrators. It seems that many people are quite ready to comment on court decisions without either reading or understanding them. In other words, the case becomes a vehicle for publicity as much as a dispute about the law.

All of this has a very positive side. It is a healthy thing that the public takes an interest in their courts. The courts exist for the public and their ultimate purpose is to protect and vindicate everyone's rights and freedoms. Public interest is a sign that the rule of law is a vibrant force in the community; that the desire for justice according to law is a strong public aspiration as it must be in a healthy democracy.

There are problems requiring attention, however. We have a long way to go to provide the public with accurate information about what the courts are doing. Judges are under some obvious constraints in this area given their main responsibility to decide individual cases fairly. But judges are making more public appearances and are helping the public, through their remarks, to understand some of the issues better. We have made

progress in the area of coverage of the courts, with courts providing help to journalists who want to get it right and journalists becoming better educated about the institution and processes that they are covering. The Supreme Court of Canada inaugurated some 10 years ago the making available to the media of informal assistance in understanding quickly the judgments of the court and in facilitating ready access to information about the Court. This approach is now being followed in a number of other courts across the country. I think it has helped the timeliness and accuracy of reporting about matters before the courts. But too often still there is a failure to get the basic facts straight. There is the ongoing problem that the process itself is not treated with sufficient understanding or respect.

News gathering and judging have some serious cultural differences. The process of judging is deliberative. Although the pressure for expedition is always there, the main object of the exercise is to consider the competing arguments, make a decision according to law and then offer reasons for the result. News gathering of course is concerned with getting the story, often under incredibly short deadlines. A court's reasoned elaboration that has taken weeks to prepare is reduced to a few lines by someone who may well not have had time to read the judgment. Sometimes, the case as platform is a much easier story than the case as decision. There are always lots of people willing to comment on judgments having not read them, let alone thought carefully about the issues. There is inevitably some clash of cultures here, but it is important that we find ways to bridge it to the greatest extent possible.

I am sure there is much more we judges can do. One initiative that the Judicial Council is taking is to retain professional communications advice to help us communicate effectively to the public. This is not a subject in which judges have much expertise or experience and I hope that this will help us do a better job of speaking to the broader public.

We are obviously not going to change, fundamentally, the roles of judges or the roles of reporters. But perhaps we can find ways to help the public get a better view of the court process as well as a better informed appreciation of individual decisions.

Several ideas come to mind. Could the media find space and public interest for follow-up reporting which would allow more time for careful study of decisions? Does the televising of actual Court proceedings contribute to public understanding? We have been experimenting with this at the Supreme Court of Canada, but I think it is too early to assess the impact. Moreover, televising proceedings of other courts raises many problems. Can Courts do a better job of making accurate information more readily available?

In this regard, I want to mention to you a pilot project between the Supreme Court of Canada and Centre de recherche en droit public of the University of Montreal. This project involves the distribution of Supreme Court of Canada judgments through Internet.

During the course of the pilot project, the Court's decisions will be transmitted electronically from Ottawa to the University of Montreal, and will be instantly, and relatively inexpensively, accessible to anyone worldwide who has a personal computer, modem and means of access to the University of Montreal through the Internet. The

judgments are indexed, which means that the database can be searched in much the same way as other computer databases. The service is available in French and English.

The University of Montreal will keep track of the number of times the Supreme Court of Canada data is accessed, which will assist us in determining the extent of public interest in this service. To date, the database is composed of all Supreme Court of Canada judgments rendered in 1993 and 1994, and is the most frequently accessed database provided by the *Centre de recherche en droit public*.

This is one step allowing much more ready access to information about the decisions of the Court. I would encourage you to think of others, because it is crucial to the judge's public role that public interest in the Courts be accommodated with readily available and accurate information.

There is another aspect of the judge's public role. While the judge is a public figure and indeed a public servant, the judge's interaction with the public is unavoidably different than some other public figures.

I have spoken before about the importance of a judge doing everything humanly possible to be impartial. Of course, there are many instances in which a judge must take the public interest into account. But judges must not allow a high level of public scrutiny of their work or even deliberate pressure tactics to distract them from their most important duty. There is a difference — an important difference — between having public confidence and being popular. Some judicial decisions are unpopular; that does not mean they are wrong. While public interest in the courts' debate about what is just and how well courts do their job are all important in a democracy, we must also remember that the role of the judge is to decide, not to please, to give judgment not propaganda and to be faithful to the rule of law, not to the rule of external pressure, whatever the source.

In this respect, the role of the judge remains largely unchanged, although the context in which that role must be discharged has been transformed remarkably in this century. The challenge for the judiciary and for all who care about the rule of law is to preserve that role, while adapting it to the changing circumstances of the present and the future.