Openness and Independence in Judicial Discipline

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Before commenting on some of the ideas raised by my colleagues on the panel, I would like to draw on my personal experience in conducting enquiries in relation to the conduct of judges on behalf of the Canadian Judicial Council. I fully concur with Chief Justice McEachern that examples of gross misconduct are highly unusual. What emerges more frequently are cases which fall into certain patterns such as the following:

1. Drinking or other health problems that can lead to delay or "cranky" behaviour;

2. Judges who have been on the bench for a long period of time, who have allowed themselves to become isolated and who have trouble dealing with changing views as to acceptable conduct in relation to gender and race. While the majority of judges are increasingly sensitive to these issues, occasionally attitudes are expressed which appear to have been "frozen in time" some decades ago;

3. Some judges are unable to avoid succumbing to the arrogance which can flow from the deference and independence afforded to the judicial office. As Mr. Justice Sopinka has observed, when you are referred to as "M'Lord" often enough, there is a danger that you will start to believe it. Occasionally, this attitude manifests itself in rude treatment of counsel, witnesses or parties or in failing to treat the claims or positions of the parties with respect;

4. Another category of problems arises when judges are forced to balance the efficient disposition of lists with the time necessary to provide the parties with a full and fair hearing. For example, the over-booked motions judge may have five hours to deal with a ten-hour list. Should the judge simply conduct business in a calm and measured manner or should the judge urge counsel to shorten their arguments so that parties will not face further delays? This is often a dilemma which may create adverse impressions of the courts but over which judges may have no control;

5. Another category is simple "burnout" and this seems to affect different personalities in very different ways. Some legal professionals adapt very

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> well to the particular stresses of the judicial role while a few seem to have difficulty in coping and this difficulty may increase with time. Problems in this area are often manifested in delay in rendering decisions and may, in some cases, be compounded by the effects of age or illness.

It is obvious that many of these are human problems which can arise in other professions as well. However, public disappointment may be greatest in relation to judges because of the acute consequences which judicial decision-making may have for the parties and because of the very high expectations which the public has for judges. There is an expectation that the courtroom will reflect a paragon of wisdom, sensitivity and fairness. In view of the power which judges exercise, such an expectation is understandable, if not always realistic.

Chief Justice McEachern has described the process at the federal level and has indicated that the Canadian Judicial Council takes seriously and responds conscientiously to complaints from the public. I agree. However, one problem with the system is that some critics simply are not aware of how the existing process works. Detailed information in this respect is available in the annual reports of the Council. Each year the number of complaints, their disposition and even summaries of the facts in the more serious cases are presented. However, these reports are not widely read. I wonder how many of even those present in this audience, some of the most knowledgeable people of all in relation to Canada's judicial system, actually have read these annual reports.

One very real issue then is, how can the public become better informed about the existing process for dealing with complaints about the conduct of superior court judges? This must be the first step towards greater openness and access. Perhaps there are more proactive steps that can be taken beyond publishing the annual report.

Professor Friedland and Chief Justice McEachern both would welcome an independent "audit" of the complaints process. Periodic audits to monitor the operation of institutions and process can often provide valuable information and suggestions for improvement. However, if the basic objective is to attempt to satisfy the various interests which constitute the public, that the process is functioning very well, I have some reservations. Unless such an audit is actually successful in rooting out problems and exposing them to public scrutiny, I suspect that the public reaction will tend to be sceptical. Indeed, the very motive for putting in place such a mechanism might well, in itself, generate scepticism. Another potential problem is that the "auditor" may be tempted to exaggerate problems for public consumption in order to justify this role.

Perhaps more serious is the concern that the "auditor" may isolate the Council from communicating directly with the public. Instead of reporting directly, the Council could find it necessary to report by reacting to the "auditor's" report. While the annual report is an important source of information, perhaps it should be supplemented by other forms of communication with the public. In recent years, the Chief Justice of Canada increasingly has made public speeches about aspects of the operation of the courts and the administration of justice. Perhaps there should be an annual speech devoted to the subject of judicial conduct, which could also be printed and widely distributed.

Another approach enhancing public confidence, which has found increasing favour in relation to professional disciplinary bodies, has been the addition of lay persons as members of those bodies. Some provincial judicial councils also have non-judges and non-lawyers to decide judicial conduct matters. Are they effective? One concern is that lay persons will become "co-opted" because of their lack of legal knowledge and training. However, that does not appear to have been the experience of the provincial councils. Such appointments, at the very least, provide a perception that reduces the suspicion that the judges might be trying to shield their own colleagues. At best, they can provide insights and information which can enhance the decision-making process and which might not otherwise be available. Such input may be particularly helpful in dealing with issues of race and gender, which have become increasingly prevalent in recent years.

In dealing with specific complaints about judicial conduct, there is a fundamental issue that must be addressed. Is the judicial role so unique that formal public criticism of a judge would render that judge ineffective in carrying out his judicial function? It has been suggested, that a "wounded" judge cannot function. The judge must either be removed from office or left alone.

This issue has direct implications for the imposition of any form of "intermediate" discipline such as a public reprimand or suspension from duties. Certainly federally appointed judges have a unique tenure of office and an extremely complex process for removal. No other form of discipline is referred to either in our Constitution or in the Judges Act for superior court judges. Nevertheless, the Canadian Judicial Council has adopted a practice of sending judges a letter with an "expression of disapproval" where the conduct is viewed as improper but not serious enough to warrant removal. In such a situation, the complainant is informed and there is nothing to prevent the complainant from making such information public. On occasion, where a complaint has a high public profile, the Canadian Judicial Council may take the initiative to release information as to the disposition of the complaint. One example involved a judge who had removed doorknobs from one courthouse with a view to installing them in his own office in another courthouse. The report of the special inquiries which were conducted indicated that the judge had characterized his conduct as being "stupid" and he had also apologized. In view of the high public interest and attention given to this incident, the report was made available to the public.

My own view is that, on occasion, for a judge to acknowledge improper conduct and express regret for it will enhance rather than diminish public confidence in the judiciary.

I agree with the panel members who suggested that peer pressure or "collegial persuasion" can be effective in curbing improper conduct. Nevertheless, there are limitations. One problem is that colleagues, especially on trial courts, may often be the last to know about the manner in which a judge is behaving in the courtroom. Another difficulty is that colleagues are often torn by emotions of loyalty. For example, a recent high profile sexual harassment complaint involving an Ontario judge seems to have split his colleagues into one camp who considered his behaviour to be disgraceful and another which felt that he had been badly treated and should fight the allegations to the bitter end. In one case, a superior court judge mounted an aggressive defence on behalf of a colleague

against whom a complaint had been made. The matter escalated and could well have resulted in a formal investigation. However, the judge subsequently decided that he should respond personally. He acknowledged that he had acted improperly and advised the Council of the steps that he had taken to resolve the problem. As a result, the file was closed with an expression of disapproval together with an acknowledgment of the judge's apology and his efforts to avoid problems in the future.

Professor Friedland appears to favour an increased role for Chief Justices in screening complaints against judges on their courts. I believe that the prestige and respect that most chief justices have within their courts does allow them to be effective in providing informal counselling. However, it is far from clear that superior court chief justices have any legal authority in relation to the conduct of judges on their courts. Even if such legal authority does exist, my preference would be to allow chief justices to exercise this role informally and to "pick their spots". Indeed, such intervention might involve asking another puisne judge to undertake this role because of the relationship of two judges or for other reasons. Concerns about "collegiality" on the court in question may inhabit chief justices in carrying out this role in a formal way. There is also the concern that the public will view the chief justice as simply wanting to avoid any possible embarrassment in relation to his or her court.

Ongoing judicial education is obviously an important avenue for avoiding problems related to the conduct of judges. However, it is crucial that such programs be properly created and delivered if they are to be effective. Such programs are most effective when the students really have the desire to be educated. Unfortunately, some judges do not have gender and cultural sensitivity issues high on their list of priorities and those who do are often the ones who least need help. Creating and delivering effective programs in these areas may be one of the most important challenges for the judiciary today.

This relates to a problem which I have with the Ontario legislation described by Chief Judge Linden. The power to require a judge to issue an apology does not carry with it any assurance that such an apology will be sincere. Case law in human rights tribunal hearings has tended to abandon apologies as a part of remedial orders for that very reason. The same difficulty exists in relation to order which would require a judge to take educational courses, treatment or counselling. I do not suggest that these avenues should be abandoned but merely that they should be invoked selectively and only in circumstances where they are likely to be effective.

In conclusion, I certainly share the view that complaints about judicial conduct must be kept in perspective in relation to the stressful atmosphere of an adversary process in which there are always "winners" and "losers". In that context, perhaps the number and seriousness of complaints is surprisingly low. However, another context must also be kept in mind. That is the very high standard expected of the judiciary because of the unique privilege that judges are given in our society — the privilege of passing judgment on other human beings. Openness of the judicial discipline process is particularly important to ensure public confidence that allegations of misconduct are taken seriously and dealt with properly.