

Some Thoughts on Public Perceptions of the Role of Judges in the Administration of Justice in Canada

The Honourable Judge Donna J. MARTINSON*

- INTRODUCTION** 37
- I. THE ROLE OF A JUDGE** 37
- II. SOME PUBLIC PERCEPTIONS OF THE ROLE OF JUDGES** 38
 - A. Judges Try to Find Out What the Truth Is** 39
 - B. Judges Have Given Too Many Rights to Accused Persons** 40
 - 1. Charter sections that often arise in criminal cases 40
 - 2. Examples of situations where Charter arguments are made 41
 - 3. General Comments 42
 - C. Judges Do Not Give Tough Enough Sentences** 42
 - D. Judges Contribute to Inefficiency and Expense** 43
 - E. Judges Contribute to the Mystique Surrounding the Law** 43
 - F. Judges are not Accountable for their Actions** 44
 - G. Judges Do Not Work Hard** 44
 - H. Judges Are Aloof And Do Not Understand Or Meet the Needs of the "Community" They Serve** 45
 - 1. Constitutional Guarantees of Equality 45
 - 2. Fairness of the Adjudicative Process 46
 - 3. Social Context Education 47
 - 4. Steps That Have Already Been Taken in Social Context Education 48
- III. SOLUTIONS** 50

* Provincial Court of British Columbia, Vancouver, British Columbia.

IV. THE ADMINISTRATION OF THE COURTS	51
A. Case Management	51
B. Pre-Trial Intervention by Judges	52

EDUCATION	53
A. Education by the Judiciary	53
B. Education of the Judiciary	53
CONCLUSION	55

I have been asked to comment on my view of my role as a judge in the justice system, and my understanding of the public's perception of that role. I have also been asked to consider appropriate methods of reducing any differences. The views I express are my personal views only, based on my experience as Crown counsel, a lawyer in private practice, a law professor, and now a provincial court judge.¹

I. THE ROLE OF A JUDGE

It is worth noting at the outset that the role a judge plays is not the same in all parts of the world. In the common law system of justice in place in Canada² the role of the judge is passive. That is, judges traditionally only get involved in the case at the final stage of the court process, the trial. The lawyers handle everything up to that point. Therefore judges are not involved in investigating the case or preparing the case for court. In fact, judges usually know nothing about the case before the trial starts. The parties (litigants) or their lawyers choose what evidence will be presented to the judge at the trial. It is the parties or their lawyers, not judges, who question witnesses at the trial. Judges then make decisions based on what they saw and heard. Only one judge hears the trial.

This is very different from what is known as the civil law system in place in many parts of the world, including Continental Europe. In that system the role of the judge is a much more active one. Judges are involved in the preparation of the case, including the investigative stage. They play a major role in deciding what evidence will be called. There can be more than one judge for a particular case. Usually the judge(s) questions the witnesses at the trial, not the lawyers or the parties.³

Judges in the Provincial Court of British Columbia hear trials dealing with criminal law, family law and small claims in the traditional common law system way. They also have one non-traditional role. Civil small claims cases in British Columbia involve amounts up to \$10,000.00. In all contested cases the parties are required to meet with a judge in a Settlement Conference before a case will be set for trial. This meeting takes place in an informal, non-courtroom setting and the judge does not wear judicial robes. The judge sits down with the parties (and their lawyers if they have lawyers) and explores the possibility of settlement with them. The court rules allow the judge to mediate the dispute. If there is not a settlement the judge organizes the case for trial.⁴

-
1. I am however grateful for the helpful comments of my colleagues, and in particular Administrative Judge Ross Tweedale.
 2. The *Criminal Code* of Canada applies to Quebec. Quebec however has a distinct civil law and procedure.
 3. See the discussion in this respect by Judge Arthur Rosett, "The Changing Judicial Role" in G.H. Williams & K.M. Sampson, eds., *Handbook for Judges, An Anthology of Inspirational and Education Reading*, (Chicago : The American Judicature Society, 1984) at 112.
 4. *Small Claims Act*, S.B.C. 1989, c. 38. This small claims program is unique to British Columbia and has been successful. A study as at January, 1994 found that only 36 per cent of cases that had a settlement conference were set for trial. The program was

A provincial judge's role is governed by the *Code of Judicial Ethics* of the Provincial Court of British Columbia. The *Code* describes the role of judges as being "to render justice within the framework of the law".⁵ It requires that judges "should be impartial, diligent and courageous",⁶ and that they be objective.⁷

II. SOME PUBLIC PERCEPTIONS OF THE ROLE OF JUDGES

By and large people consider judges in Canada to be competent and fair. That seems to be the international reputation of Canadian judges as well. Concerns about the justice system relate primarily to other aspects of the system. However, there are some perceptions about judges that I will address :

- a. Judges try to find out what the truth is.
- b. Judges have given too many rights to accused persons.
- c. Judges do not give tough enough sentences.
- d. Judges contribute to delay, inefficiency and expense.
- e. Judges contribute to the mystique surrounding the law.
- f. Judges are not accountable for their actions.
- g. Judges do not work hard.

nominated for the National Association for Court Management, Justice Achievement Award. Of 38 nominations from the United States and Canada, the program received an honourable mention. See for further information : Semmens & Adams, *Evaluation of the Small Claims Program*, Ministry of the Attorney General; D. Schmidt "B.C.'s Small Claims Programme — Has It Worked?" *The Advocate* (March 1994) (vol. 52 part 2) 193; D. Schmidt "Endangered Species — The Universal Custom of the Realm" *The Trial Lawyers Association of British Columbia, The Verdict* (January 1994) (issue 61) 16; D.J. Martinson "Mandatory Settlement Conferences Achieve Fast, Fair and Simple Results From the Bench" *The Canadian Bar Association, The National* (February 1994) (vol. 3 no. 1) 13; D.J. Martinson "The Civil Jurisdiction of the Provincial Court — A Perspective of a Criminal Court Judge", *Provincial Judges Journal* (Spring 1994) (vol. 18 no. 1) 22.

5. Provincial Court of British Columbia, Revised, 1994, Rule 7.00.
6. *Ibid.* Rule 5.00.
7. *Ibid.* Rule 6.00.

- h. Judges are aloof and do not understand the "community they serve".

A. Judges Try to Find Out What the Truth Is

There is a perception that what judges are doing in making decisions is finding out the truth. This is a common misconception. As noted above, judges can only decide cases based on the evidence presented to them in court. It is the lawyers, not the judges, who decide what evidence judges will hear and see.

In addition to that, there are legal rules that govern how judges make decisions. In a system like the one used in the common law provinces in Canada, the law is developed in large part by higher courts making decisions in particular cases. The concept known as *stare decisis* (following decided cases) says that judges, in deciding particular cases, are required to follow previous decisions of higher courts, known as precedents.⁸ Judges must also consider any legislation that applies when deciding a particular case. The *Criminal Code*, the *Young Offenders Act*, and the *Canadian Charter of Rights and Freedoms* are examples of such legislation.⁹ Courts of Appeal can review decisions made by judges to see if legal mistakes have been made.

The laws judges must apply include rules of evidence. Those rules deal with what evidence judges can use in reaching a decision. These are set out both in legislation, such as the *Canada Evidence Act*,¹⁰ and in case precedents. For example, a judge, in deciding a case, may be required to not consider (exclude) evidence that has been obtained because of a breach of the *Canadian Charter of Rights and Freedoms*. The evidence is referred to as being inadmissible. This is so even if the evidence is otherwise relevant to the case. This will be discussed further in the next section. Some relevant evidence is inadmissible for public policy reasons. For example in a criminal case a husband is not considered competent to testify either for or against his wife and vice versa. This is so

8. This is a simplistic statement of the use of precedent. For a more extensive discussion of *stare decisis* see J.O. Wilson, *A Book For Judges* (Ottawa : Minister of Supply and Services Canada, 1980) Chapter III, part 4, at 92; written at the request of the Canadian Judicial Council.

9. The *Criminal Code*, R.S.C. 1985, c. C-46; the *Young Offenders Act*, R.S.C. 1985, c. Y-1; the *Canadian Charter of Rights and Freedoms*, Part I the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

10. *Canada Evidence Act*, R.S.C. 1985, c. C-5.

even if the spouse has vital evidence to give.¹¹ This has developed historically to promote harmony within marriage.

Legal rules include rules about what is known as the burden of proof. This refers to the degree that judges must be satisfied before making a decision favourable to the person making the claim in civil cases or to the Crown in criminal cases. In a civil case the person making the claim has the burden of proving the claim on a balance of probabilities. That is, the judge must be satisfied that it is more likely than not that the claimant's version is the correct one before deciding in the claimant's favour. In criminal cases the judge must be satisfied beyond a reasonable doubt that the person is guilty.

The same set of circumstances may lead one judge to find a person liable in a civil case and another to find the same person not guilty for doing the same thing in a criminal case. This happens quite often in motor vehicle accident cases. For example, a person may be found not guilty of the criminal charge of dangerous driving, but the same manner of driving may lead to a civil decision that the person is one hundred percent responsible for the accident. The criminal court judge is not satisfied beyond a reasonable doubt that the person is guilty of dangerous driving. The civil court judge is satisfied that it is more likely than not that the person is responsible for the accident.

It can be seen that the role of judges at a trial is not necessarily to find out the truth. Rather, it is to decide, based on the legally allowed (admissible) evidence presented, whether the burden of proof required for the case has been met.

B. Judges Have Given Too Many Rights to Accused Persons

There is a public perception that judges' interpretations of the *Canadian Charter of Rights and Freedoms*¹² have given unfair advantages to people accused of crimes. The Charter is designed to guarantee to Canadians rights and freedoms that are fundamental to a free and democratic society. The Charter itself says that those rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".¹³

1. Charter sections that often arise in criminal cases

-
11. This is the common law principle which has been modified by section 4 of the *Canada Evidence Act*, *ibid*. The rule does not apply to common law spouses. For a discussion of the rule and whether it is appropriate see J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto : Butterworths, 1992) at 611-617.
 12. *Supra* note 9.
 13. *Ibid*. Section I.

There are a number of sections of the Charter that judges are required to apply in criminal cases. The right to be presumed innocent is guaranteed. Section 11(d) says that "any person charged with an offence has the right to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal". If there is a reasonable doubt, the person accused is entitled to the benefit of that doubt and must be found not guilty.

Section 7 says that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 8 says that "[e]veryone has the right to be secure against unreasonable search or seizure". Section 9 says that "[e]veryone has the right not to be arbitrarily detained or imprisoned". Section 10 says "[e]veryone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; [and] (b) to retain and instruct counsel without delay and to be informed of that right [...]".

If there has been a violation (breach) of a section of the Charter the judge hearing the trial still has to decide whether relevant evidence that was obtained as a result of that violation should be allowed into evidence. Section 24(2) of the Charter sets out the test judges must apply in making that decision. That section says that the judge must exclude the evidence and not consider it if "it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute".

2. Examples of situations where Charter arguments are made

The right to retain and instruct counsel is a right that is often raised by defence lawyers. For example, if a person confesses to a murder after being denied the constitutional right to get legal advice, that confession may be inadmissible. The right to be secure against unreasonable search or seizure is another frequently raised section of the Charter. If a person is found to be in possession of drugs, but the drugs were located by the police in a way that violated this right, the evidence of the finding of the drugs may be inadmissible.

The right to life, liberty and security of the person raises issues relating to the mental element or guilty mind (*mens rea*) involved in a criminal offenses. Drunkenness has traditionally not been a defence for certain crimes known as general intent offenses, such as sexual assault. The Supreme Court of Canada changed that in the case of *Daviault v. R.*¹⁴ The Court held that extreme drunkenness "inducing a state akin to insanity or automatism" is a defence to sexual assault. The burden is on the person accused to prove the defence on a balance of probabilities and that person's testimony would have to be supported by expert evidence. The thinking behind the decision was that for all serious crimes, there should be a minimum mental element showing an intention to commit a crime present before people are criminally responsible as opposed to civilly responsible for their actions.

14. *Daviault v. R.* (1995), 93 C.C.C. (3d) 21, 33 C.R. (4th) 165.

Public concerns were expressed about the implications of the *Daviault* case. This led Parliament, after considerable public consultation, to change the *Criminal Code* to say in effect that intoxication is no longer a defence to general intent violent crimes such as assault and sexual assault.¹⁵

3. General Comments

Some legal principles have been set out by Courts of Appeal across the country and the Supreme Court of Canada to assist trial judges in knowing how to apply these sections of the Charter in individual cases. There is, though, a wide discretion given to trial judges in deciding whether or not evidence should be excluded because of a breach of the Charter. This can lead to inconsistent results in similar cases. It also makes it difficult to know in advance whether a judge will find particular evidence in a case admissible. As a result, lawyers may be reluctant to advise their clients to plead guilty. This means not only more trials, but trials that are longer because of the complex Charter arguments that are made.

There may well be legitimate differences of opinion about how the Courts have applied these provisions of the Charter in specific cases. But, it should be kept in mind that judges must follow what the Charter says in deciding cases. Nor should the role of Parliament be overlooked. As shown by the *Daviault* decision, public concerns can be addressed by legislative changes.

C. Judges Do Not Give Tough Enough Sentences

There is a public perception that judges are not "tough enough" in sentencing criminals, including young offenders. The *Criminal Code*¹⁶ and the *Young Offenders Act*¹⁷ set out what sentences are available. Usually only maximum prison sentences are referred to. For example, if a person is convicted or pleads guilty to a robbery charge for robbing a bank, the *Criminal Code* allows the judge to give any sentence ranging from a suspended sentence and probation to the maximum sentence of life imprisonment. The *Criminal Code*, the *Young Offenders Act* and precedents from appeal court cases set out the legal principles that judges must apply when sentencing. Those principles require judges to take into account the circumstances of the individual as well as the impact of the crime on the victim.

Members of the public have a right to express their views about sentences they feel do not reflect society's concerns about particular crimes. Judges should know what those concerns are. But members of the public should also be aware of all the

15. S.C. 1995, c. 32. This legislation came into effect September 15, 1995.

16. *Supra* note 9.

17. *Supra* note 9.

circumstances that are considered in choosing a particular sentence so they can make an informed decision about the appropriateness of the sentence. It should also not be forgotten that an appeal to a higher court can be taken by Crown counsel if the crown thinks a sentence a judge gives is not appropriate.

It is also open to Parliament in future to limit the discretion given to trial judges by imposing minimum or fixed sentences. This, though, does not allow judges to take into account the particular circumstances of each case. Parliament seems to be moving toward fewer, rather than more, prison sentences. It has recently passed amendments to the sentencing part of the *Criminal Code* setting out principles of sentencing for judges. One principle is that judges must consider that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". Parliament has yet to set a date for the changes to come into effect.¹⁸

D. Judges Contribute to Inefficiency and Expense

There is a public perception that the court system is inefficient, too expensive and takes too long. The public may perceive judges as being at least partly responsible for delays in cases being heard. They may also consider judges to be at least indirectly responsible for excessive costs of dispute resolution.

Delay in having cases heard and the high cost of litigation are major problems in the justice system in Canada today. Judges have a role to play in making sure that each case is heard as quickly as possible and with as little expense as possible. Judges make the final decision when one side of a case wants a postponement for one reason or another. The role of the judge also includes discouraging unnecessary court applications and encouraging the parties to agree on as much as they can so the court case can focus on the real issues in dispute.

There are however many factors over which judges do not have control. For example there may be a lack of court time. Sometimes all the judges are hearing other cases. Sometimes there is a judge available but there is no courtroom and no court staff. Lawyers may not be available due to scheduling or other difficulties. Witnesses may be unavailable for a number of reasons. All of these factors contribute to delay.

E. Judges Contribute to the Mystique Surrounding the Law

18. Bill C-41, *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*, 1st Sess., 35th Parl., 1994, which received Royal Assent on July 13, 1995 and is to come into forces by proclamation. The section referred to is section 718.2.

There is a public perception that there is a mystique surrounding the law, making it hard to understand and sometimes obscure. In my opinion, judges have a role to play in educating the public about the law, including court procedures. This can involve public lectures and other forums, attendances at schools, and the writing of books and articles. It also involves providing an explanation for certain controversial decisions so that members of the public can make informed decisions about whether or not they agree with the decision.¹⁹

Judges usually give reasons for their decision. Reasons for a decision (reasons for judgment) can be given orally by the judge in court, either when the case ends or on a later date, or by way of written reasons for judgment. They have an obligation to use language that is understandable to the parties. Making decisions easy to understand is not as easy to accomplish as it may appear. Judges, as former lawyers, are often used to speaking and writing in "legalese". Courses are made available to judges to help them write judgments. These courses encourage the use of "plain language".

F. Judges are not Accountable for their Actions

There are concerns that judges are not accountable for their actions. This is an area that is being debated extensively in the legal community and elsewhere as a result of recommendations in the Canadian Bar Report "Touchstones for Change"²⁰ and discussion of the issue in the recently released report "A Place Apart : Judicial Independence and Accountability in Canada".²¹ The questions that arise relate on the one hand to public confidence in having an appropriate disciplinary system in place and on the other to maintaining the independence of the judiciary.

G. Judges Do Not Work Hard

Some members of the community think that judges do not work very hard. An American psychologist who has considered this question stresses that judges face a

-
19. This would not be done by the judge involved in the case. A spokesperson may be designated. For example, the Supreme Court of British Columbia has now appointed a retired Supreme Court Justice to be its media liaison person. The Chief Judge of the Provincial Court of British Columbia is the spokesperson for the provincial court.
 20. The report on Gender Equality in the Legal Profession, *Touchstones for Change : Equality, Diversity and Accountability* (Ottawa : The Canadian Bar Association, 1993).
 21. *A Place Apart : Judicial Independence and Accountability in Canada*, a report prepared for the Canadian Judicial Council by Professor M.L. Friedland, 1995.

"widespread public impression ... that a judge's schedule is leisurely, punctuated by recesses and frequent postponements."²²

It is no easy task to keep up with developments in the law as they happen. A significant amount of a judge's time is spent reading other court decisions and articles written about the law. They have to do this to decide specific cases. They also want to be up to date on the law generally. It takes time to prepare written judgments. Judges also sit on various committees dealing with the administration of justice. They are involved in educational programs, both for other judges, lawyer and others.

H. Judges Are Aloof And Do Not Understand or Meet the Needs of the "Community" They Serve

There may be a perception that judges are aloof and do not understand the "community" they serve. Judges have an important role to play in making sure that the system of justice meets the needs of the community as a whole. This is particularly so when one lives in a multi-cultural society.

1. Constitutional Guarantees of Equality

Judges must make decisions that reflect the constitutional rights to equality set out in the *Charter of Rights and Freedoms*. Section 15(1) of the Charter says that [e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Section 28 says that "[n]otwithstanding anything in the Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".

Madam Justice L'Heureux Dubé of the Supreme Court of Canada feels that equality is a goal we have not yet attained. She discusses the issue in a paper called "Roads to Equality : New Challenges for the Legal System."²³ The paper's theme is that judges and lawyers have influence and thus responsibilities to achieve equality through the principles embodied in the Charter. She calls this "learning to speak the language of substantive equality". In referring to the equality rights in the Charter, she says that though "important steps have been taken, particularly over the last decade, to make the right to

22. I.M. Zimmerman, "Stress : What It Does to Judges, and How It Can be Lessened" in *Handbook for Judges*, *supra* note 3 at 117.

23. *Opening Address*, Canadian Bar Association Meeting, August, 1994 at 1.

substantive equality part of the fundamental fabric of our society, it is clear that for many people, substantive equality is still more of an ideal than a reality."²⁴

She points out that while the term equality has been part of our legal language for a long time, it is only recently that courts have looked at substantive rather than formal equality. She notes that over the last many years we have seen the obvious, clear-cut cases of inequality disappear, such as the abolition of slavery, women's emancipation through the right to vote, to hold public office and to retain their property upon marriage, to name but a few. Human rights legislation over the last forty years has helped to address incidences of overt and intentional racism, sexism or anti-Semitism. However, she is of the view that :

*[...] Inequality permeates institutions that we have held near and dear over centuries. Our renewed commitment to its eradication requires that we look deep into ourselves and into the reality experienced by those that do not "by Nature" (I use the term ironically) dominate. This is what section 15 of our Charter is all about.*²⁵

2. Fairness of the Adjudicative Process

N. Duclos of the Faculty of Law, University of British Columbia, has commented on the "Art of Judging in a Multicultural Society." Professor Duclos thinks that in Canada today, where it is increasingly likely that a judge will not share the culture of those who appear before him or her, sensitivity to other cultures is vital to the fairness of the adjudicative process :

The ability to recognize difference is learned. People from non-English linguistic backgrounds frequently cannot recognize the difference between British and American English. Some Caucasians say that all Blacks or all Orientals "look the same". Such comments may reflect racist attitudes, but they also reflect a failure of perception. If one's eyes or ears are not sensitive, one cannot perceive the world that is apparent to others. Sensitivity to this kind of difference is obviously important for judges who adjudicate controversies involving people from different cultures. Judicial impressions as to the trustworthiness and reliability of a witness, a litigant and even counsel influence outcomes. From the litigants' perspective, their impressions about the perceptions of the judge influence their views about the fairness of the judicial process. The cultural affiliation and consequent ethnocentrism of those involved in a particular legal proceeding attunes each individual to certain differences or characteristics but obscures others. This is not a very new idea. One of the original rationales for the jury system was a recognition that one's peers — members of one's own community — would be most

24. *Ibid.* at 1.

25. *Ibid.* at 8.

*closely attuned to and thus the best judge of a party's conduct. In Canada today, where it is increasingly likely that a judge will not share the culture of those who appear before him or her, sensitivity to other cultures is vital to the fairness of the adjudicative process.*²⁶

3. Social Context Education

Madam Justice Rosalie Abella of the Ontario Court of Appeal in her article "The Dynamic Nature of Equality" says that "[e]very decision-maker who walks into a court room to hear a case is armed not only with the relevant legal texts but with a set of values, experiences and assumptions that are thoroughly embedded".²⁷ In order to exercise their constitutional obligations under the equality provisions of the Charter, it is helpful to judges to examine their own values and assumptions. A well known American jurist, Jerome Frank, writing in 1949, put it this way :

*We could not, if we would, get rid of emotions in the administration of justice. The best we can hope for is that the emotions of the trial judge will be sensitive, nicely balanced, subject to his own scrutiny. The honest, well-trained trial judge, with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses, is the best guaranty of justice. The wise course is to acknowledge the necessary existence of "personal element" and to act accordingly [...]*²⁸

Social context education is useful in this respect because recognizing one's own values and assumptions and understanding other perspectives does not necessarily come intuitively. I came to this understanding in my consideration of gender equality issues. My personal experience relating to equality education in 1986 made me realize that being a female and being (hopefully) fair minded was not enough. There were many dimensions of the gender equality question of which I was unaware.

In 1986 I was the "lawyer in residence" at the Faculty of Law, University of Calgary and was asked by Professors Sheilah Martin and Kathleen Mahoney to chair a panel at a major conference at the Banff Springs Hotel on gender equality called "Equality

-
26. N. Duclos, "Justice and Cultural Difference : The Art of Judging in A Multicultural Society", *Seminar on Racial, Ethnic and Cultural Equity*, Western Judicial Education Centre, University of Saskatchewan, June 6th to 12th, 1992, at 1.2.1.
 27. R. Abella, "The Dynamic Nature of Equality" in S. Martin & K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto : Carswell, 1987) at 3, 8 and 9.
 28. J. Frank "Justice and Emotions" in *Handbook for Judges*, *supra* note 3 at 53-54. The author was a judge of the United States Court of Appeals for the Second Circuit from 1941 until his death in 1957).

and Judicial Neutrality".²⁹ I confess that I was surprised that there was to be such a conference. I did not think at that time that there was a major problem. I had practised law since 1973 both as Crown counsel and in private practice. I had seen over the years that there were some inequalities that were gender based. At the same time I thought that significant steps had been taken to address the problems. In Alberta, for example, we then had a *Matrimonial Property Act*³⁰ that provided for a presumption of equal division of property upon divorce. I could see that at the law school, one half of the students were women, more and more women were practising law and some women were being appointed to the bench. I had managed to go to law school and survive as a lawyer. Equality rights were guaranteed in the Charter.

However, I did go. I was struck by the large number of participants from various disciplines, and the wide variety of topics. For example, there were sessions on wife assault, sexual assault, economics of divorce breakdown, child custody, homemakers' contributions and civil damages and the treatment of women witnesses, lawyers and court staff in the courts. Lynn Schafran, a U.S. lawyer, spoke of the American experience relating to gender equality in the courts. She talked about task forces in the United States appointed by State Supreme Courts that found gender bias to be a significant problem.

My reaction to that was that she was talking about the United States. I doubted that the situation would be the same in Canada. It was therefore with some interest that I noted these remarks by Mr. Justice Rothman of the Quebec Court of Appeal, who attended the conference :

*But even allowing for the differences in the Canadian and American judicial systems and the significant progress in our statute law, I have little doubt that much of what Ms. Schafran says about discrimination and gender bias in the United States applies equally well to Canada. There are some institutional differences in our systems, but we must not make too much of the differences. Women in Canada face much the same kind of discrimination as they do in the United States. There is not much room for national smugness here.*³¹

Immediately after the "Equality and Judicial Neutrality" conference I had a chance to reflect on the question of gender equality while studying at Cambridge University. The focus of my studies was on comparative law and legal history. I studied comparative family law. I found that studying the extremely disadvantaged legal position of women in many other countries really helped place the question of gender equality in context. It is an international problem of major proportions.

29. See *supra* note 27.

30. *Matrimonial Property Act*, R.S.A. 1980, c. M-9.

31. M. Rothman, "Prospects of Change in Canada : Education for Judges and Lawyers", in *Equality and Judicial Neutrality*, *supra* note 27 at 423.

After leaving Cambridge I travelled for two years. That experience, especially travelling in India, China, parts of the Middle East and in South America, really brought home to me the disturbing social reality of the lives of many women throughout the world.

4. Steps That Have Already Been Taken in Social Context Education

Professor Friedland in *A Place Apart*³² discusses the question of judicial education on social context issues. He outlines a significant number of steps that have already been taken by judges at both the federal and provincial level in this respect.³³ He notes that the Canadian Judges Conference, the association of federally appointed judges, wrote to the Canadian Judicial Council in early 1994 stating :

*comprehensive judicial education, including courses on the awareness of gender, racial bias and other emerging social issues should be made available to all newly appointed judges and [...] continuing education, including the above subject, should be made available to all section 96 [federally appointed] judges.*³⁴

Professor Friedland also notes that in March, 1994 the Canadian Judicial Council passed a unanimous resolution calling for the establishment of "comprehensive and in-depth and credible education programs" relating to social issues, including gender and race.³⁵ The Council itself has created a Special Committee on Equality in the Courts which is considering how best to develop programs.³⁶

I will outline some steps that I am familiar with at the provincial court level in British Columbia. The Western Judicial Education Centre was until recently located at the Faculty of Law at the University of British Columbia and has as its mandate social context education. Dean Lynn Smith, Q.C., Dean of Law at U.B.C., was the Co-Chair of the

32. *Supra* note 21 at 167.

33. *Ibid.* at 169-170. These include courses provided by the National Judicial Institute and the Canadian Institute for the Administration of Justice.

34. *Ibid.* at 168.

35. *Ibid.*

36. The Canadian Judicial Council is sponsoring a conference in Hull, Quebec in November, 1995 entitled *Aspects of Equality : Rendering Justice*. It was organized in response to the February 1994 resolution of the Canadian Bar Association in which it called on the Council to "consider possible means of bringing women judges together to discuss matters of special interest to them [...]".

Gender Equality Committee, along with Judge Gary Cioni of the Alberta Provincial Court. Academics and other community representatives participated in the programs.³⁷

While there were large group sessions, the focus of the programs was on small group discussion sessions. However programs were judge controlled, and all the workshop sessions were led by judges. These judges received extensive training in both gender equality issues and teaching in a small group setting. Considerable time and energy went into the preparation of the conference programs and the conference material.³⁸ This included a number of advance meetings in person and by telephone conference. Experts in adult education were consulted. The faculty were required to submit well in advance of the conference date detailed outlines of plans for large group presentations and the small group workshops.³⁹

The conferences presented and materials made available by the W.J.E.C. and its then Director Judge Doug Campbell have received international acclaim. Dr. Norma Wikler, an American expert in this field, described the workshops relating to social issues as being "extraordinarily successful" in an Evaluation Study Report submitted to the Department of Justice Canada.⁴⁰ She described the program on gender equality as "the most in-depth and sophisticated treatment on this subject that I have observed in either the United States or Canada".⁴¹

In 1989 the Chief Judge of the Provincial Court created a gender equality committee. That committee of judges has met regularly to consider equality issues. In the fall of 1994 its mandate was increased to include all equality issues. Its recommendations have included integrating social context education into all education programs. Judge Doug Campbell is now the Chair of that Committee. He views judicial education as being a cooperative effort involving the community, and refers to "the community of interest in

37. Dean Sheilah Martin and Professor Kathleen Mahoney of the Faculty of Law, University of Calgary played key roles in developing the gender equality programs.

38. See *The Process of Developing and Delivering Social Context Education*, Western Judicial Education Centre, Statement of Activities (1988-1994), March 31, 1994. This is an extensive report detailing and outlining the details of its programs on gender equality, on improving the delivery of justice to Aboriginal People and in considering racial, ethnic and cultural equity.

39. In spite of its success the W.J.E.C. was unable to obtain funding and has therefore been unable to continue with the type of social context education that I have described. The Centre has in fact been moved to Saskatchewan.

40. N.J. Wikler, "Educating Judges About Aboriginal Justice and Gender Equality : The Western Workshop Series 1989, 1990, 1992", an Evaluation Study Report, submitted to the Department of Justice, Canada, December 1991 at 65.

41. *Ibid.* at 55.

fair and equal justice". He sees judges as playing a leadership role in coordinating efforts to make the justice system more responsive to the needs of the community.

III. SOLUTIONS

In some areas differences between reality and perception are based on lack of information or misinformation. There are also perceptions that reflect real problems in the justice system. I propose to set out for consideration some thoughts on the following areas :

1. The Administration of the Courts
 - A. Case Management
 - B. Alternate Dispute Resolution
2. Education
 - A. By Judges
 - B. Of Judges

IV. THE ADMINISTRATION OF THE COURTS

A. Case Management

Steps must be taken to make the system of justice in Canada more efficient in its operation. Judges in their role in the administration of the courts can make a significant contribution here. Professor Martin Friedland, in *A Place Apart*,⁴² recommends that a Board of Judicial Management with judges of all levels of courts, lawyers and lay persons become involved in coordinating efforts to make the courts more effective.⁴³ I agree with that suggestion.

Various courts across the country have been looking at pre-trial involvement of judges in efforts to prevent delay and make the courts work more effectively. The Provincial Court of British Columbia is actively reassessing its case management procedure. It has found very successful a system of disclosure in criminal cases whereby indictable offenses are referred to a disclosure court after the initial court appearance. The resulting discussion between Crown and defence has led to a number of guilty pleas and joint submissions to the Court on the appropriate sentence.⁴⁴

Any review of case management should include a reassessment of traditional procedures. There are some which have been followed for many years but may no longer

42. *Supra* note 21 at 175 and 218-19. The Report deals with who should have control over the administration of the courts, the judiciary or the Attorney General.

43. *Ibid.* at 224. Professor Friedland notes that in March 1995, the Ontario Civil Justice Review, co-chaired by Justice R.A. Blair and assistant deputy attorney general S. Lang, adopted a unified governing body approach.

44. The Disclosure Court (known as disco-court) has been operating successfully for a number of years in Vancouver and is now being extended throughout the province.

serve a useful purpose. For example, it is my opinion that the preliminary inquiry in criminal cases ought to be abolished.⁴⁵ In all criminal cases tried in the superior courts in Canada, a person charged with an offence is entitled to have a preliminary inquiry in Provincial Court. Aside from the court time taken in Provincial Court, it requires witnesses to come to court twice to testify.

45. This is not a universally held view.

B. Pre-Trial Intervention by Judges

Judges do not traditionally meet with the parties outside of the courtroom setting at all. Nor is mediation a traditional role for a judge. However, based on my experience over the past four years doing Settlement Conferences for small claims cases, I am convinced that judges have an important role to play in assisting litigants in resolving their disputes before the case gets to the trial stage. I also find it to be a professionally challenging and rewarding role and an education in itself.⁴⁶

The parties to civil small claims disputes generally react favourably to the settlement conference process. They prefer this meeting with settlement as an objective to an adversarial trial. Most litigants appreciate the chance to have the assistance of a judge in a relatively informal setting.⁴⁷ The Settlement Conference helps meet the access to justice concerns that the process be just, speedy, economical and simple.⁴⁸

The process is both more efficient and less expensive because there is a good chance of having the matter resolved at the conference. Judges can dismiss claims with no chance of success or give judgment where there is no defence.⁴⁹ Even if the dispute is not resolved at the conference, the trial becomes focused on the real issues.

46. There may be a role for Judges to play in mediation in family cases. Some courts have taken steps in this direction. I do not feel qualified to express an opinion on this issue. Not all judges agree with my view on pre-trial intervention by judges. For a contrary view see D.B. Oberend "Feedback", Provincial Judges Journal (Fall 1994) (vol. 18 no. 3) 49, written in response to my article in an earlier Journal entitled "The Civil Jurisdiction of the Provincial Court" *supra* note 4.

47. I have countless times had the parties tell me at the end of the conference how much they appreciated the chance to sit down and discuss the case with the help of a judge. (On several occasions people have commented that they have never met a lawyer before, let alone a judge.)

48. Section 2 of the *Small Claims Act*, *supra* note 4 says this :

2. (1) The purpose of this Act and the rules is to allow people who bring claims to the Provincial Court to have them resolved and to have enforcement proceedings concluded in a just, speedy, inexpensive and simple manner.

(2) [...] in conducting a hearing the Provincial Court can make any order or give any direction it thinks necessary to achieve the purpose of this Act and the rules.

49. *Ibid.* rule 7(14).

It is both simpler and less expensive because the Settlement Conference is viewed as a "one stop shopping forum". That is, pre-trial arguments that are traditionally made in court (chambers applications) can be done at the conference. It is speedy because even if there is not a settlement, efforts are being made to set the Settlement Conference two months after the defendant indicates that the matter will be disputed and the trial within four months of the Settlement Conference.

V. EDUCATION

A. Education by the Judiciary

I have indicated that judges have a role to play in educating the public. One cannot overemphasize the importance of this role. In view of the public perceptions I have referred to relating to the role of judges, and the general lack of faith some members of the public have in the judicial system as a whole, it has become critically important that judges explain what they do and why they do it. Judges have an obligation to ensure that this happens. While this may be time consuming and require the type of public presentation that many judges are not used to, judges fail to do so at their peril.⁵⁰

B. Education of the Judiciary

All would agree that the education of the judiciary generally so that judges keep up with the law is necessary. There are differences of opinion about the desirability of the education of judges on social context issues. The differences centre around whether it is

50. There is a difference of opinion as to whether or not judges should speak publicly. This issue was canvassed in August 1995 at a Canadian Judicial Conference panel discussion on "Should Silence Remain the Golden Rule of Judges?". As reported in "Conduct Code Would Inhibit Free Speech" *The Lawyers Weekly*, (September 8, 1995) (vol. 15 no. 17) 2, Sopinka, J. British Columbia Chief Justice A. McEachern, the chair of the Canadian Judicial Council's Professional Conduct Committee, is reported as encouraging judges to speak out so long as they do not cross the line by speaking out about particular partisan questions or discussing specific cases, particularly their own. He reportedly added that he did not think judges cross the line when talking positively or critically about the administration of justice or about their own institutions and what they do. He encouraged judges to speak out not via the media but directly to the public by speaking rationally to schools, service clubs, ethnic groups, learned societies and "others who will listen".

appropriate at all, and if so, who should do the educating and should the education be mandatory.⁵¹ However, given the public statements of the Canadian Judicial Council referred to above indicating that it supports social context education, I will focus on the type of education that is appropriate.⁵²

It is my opinion that an educational model, along the lines of that devised by the Western Judicial Education Centre, which is judge directed but which involves academics and other members of the community, provides an effective way of both making judges more aware of social context issues and making members of the public feel that they have a role to play in that process.

It has been my experience when participating in social context education for judges that given the particularly sensitive nature of the subject matter, traditional educational methods used in judicial education seminars are not appropriate. Many judges who expressed scepticism at the idea of small group workshops, especially with some participation by experts in the area being discussed, found, once they had tried the process and realized that all discussions were confidential, that it was effective for them.

Professor Friedland in *A Place Apart* appears to support this general way of providing social context education to judges. He describes as sound advice the following comments made by Dean Lynn Smith to the Canadian Judicial Council's Special Committee on Equality in the Courts, based primarily on her experience as the co-chair of the W.J.E.C. gender equality committee :

*Credibility among judges, to a considerable extent, turns on the extent of judicial leadership. If there are not highly credible judicial leaders of the program, it can almost become a waste of time, with academics or representatives of the community speaking on issues which may receive polite attention but little engagement. On the other hand, where there is strong and committed judicial leadership, the same presentations are likely to be seriously acknowledged. It is important for the emphasis to be on judges working with judges to enhance what is already a central goal for the judiciary in its work - a legal system characterized by fairness and equality. Academics or community representatives can be of assistance in that process not as spokespersons for "interest groups" but as persons knowledgeable about the areas which the judges have themselves identified as potentially problematic.*⁵³

There has been international interest in this approach to social context education. An Australian conference on equality issues focusing on gender equality and based on the

51. See *Touchstones for Change*, *supra* note 20 at 190 and *A Place Apart*, *supra* note 21 at 167.

52. The question of whether or not it should be mandatory is a difficult one and a discussion of it is beyond the scope of this paper.

53. *Supra* note 21 at 171-172.

W.J.E.C. model is being held in October, 1995. The conference is sponsored by the Association of Institutes for Judicial Administration and the judges attending are from all levels of court. Judge Campbell will be a keynote speaker.⁵⁴

CONCLUSION

There are some public perceptions about judges that are incorrect and based on misinformation. Whether the perceptions are right or wrong, they exist. One could apply here the principle best stated in Lord Hewart's famous remarks in *R. v. Sussex Justice* :

*[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*⁵⁵

There are also perceptions that reflect problems in the justice system. It can be seen that some steps are being taken to address these problems. While we may have come some distance in addressing them, we still have a long way to go.

54. A number of superior court and lower court judges from Australia attended a training session with the W.J.E.C. in Vancouver in the fall of 1993. Judge Campbell will also be going to Capetown in December 1995 to assist in the development of a judicial education program for judges and magistrates in South Africa on gender and racial equality issues. The effort is co-sponsored by the Project for the Group for Research and Education in Human Rights, Faculty of Law, University of Calgary, and the Law, Race and Gender Research Unit, Department of Public Law, University of Capetown. He was invited to Beijing, China on a similar project in the spring of 1995.

55. [1924] 1 K.B. 256 at 259 as cited by J.O. Wilson in *A Book For Judges*, *supra* note 8.

