

Judicial Impartiality and Social Context Education

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The issue of judicial independence has received much attention in recent years, both in litigation and other settings. Books have been written, and cases litigated on issues ranging from judges' pay scales and pension contributions to the attributes of an independent tribunal.¹ Surprisingly, less attention has been directed to another fundamental cornerstone of our constitution, judicial impartiality.² Yet the two concepts are not of equal stature. Judicial independence is not an end in itself, rather, it is a condition that exists to safeguard impartiality.

These two elements are accorded constitutional status by section 11(d) of the *Canadian Charter of Rights and Freedoms*³, which guarantees a person charged with an offense the right to be tried "in a fair and public hearing by an independent and impartial tribunal". This provision builds on the guarantees of judicial independence for federally appointed judges found in sections 96 through 100 of the *Constitution Act, 1867*⁴ that trace their origins to the *Act of Settlement, 1701*.⁵ Their contemporary meaning in Canada is captured by the often-quoted words of LeDain J. in *Valente*:

*Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" [...] connotes absence of bias, actual or perceived. The word "independent" in section 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive branch of government that rest on objective conditions or guarantees.*⁶

Both independence and impartiality serve the rule of law, since their underlying aim is to ensure that the decision in a particular case is made on the merits — on the basis of the relevant facts as presented in evidence and the applicable law, without influence from extraneous sources or biases, or preconceived notions about the value of one party's case or credibility. Both concepts are necessary to promote public confidence in the

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1. See, for example, the decisions of the Supreme Court of Canada in *Valente v. R* (1986), 24 D.L.R. (4th) 161; *Canada v. Beauguard* (1987), 30 D.L.R. (4th) 481 at 491-496; *MacKeigan v. Hickman* (1989), 61 D.L.R. (4th) 688; *R. v. Généreux* (1992), 88 D.L.R. (4th) 110; *R. v. Lippé* (1991), 64 C.C.C. (3d) 513; and the report of M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995).
 2. Two interesting Canadian articles on judicial impartiality have recently been written: Judge M. Omatsu, "The Fiction of Judicial Impartiality" (1995 - mimeo); R.F. Devlin "We Can't Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*" (1995) 18 Dalhousie L.J. 408.
 3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
 4. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.
 5. *Act of Settlement, 1701* (U.K.), 12-13 Will. III, c. 2.
 6. *Valente*, *supra* note 1 at 171-172.

administration of justice, without which, in the words of LeDain J. "the system cannot command the respect and acceptance that are essential to its effective operations".⁷

This paper addresses the issues of judicial impartiality (sometimes called "neutrality"), rather than the more well-worn ground of judicial independence. In a world where equality is a constitutional norm, members of some groups have challenged the alleged impartiality of the justice system. After outlining their concerns, this paper discusses the role of social context education for judges as one response. "Social context education" (sometimes called "judicial awareness education") deals with the social setting within which judicial decision-making occurs, with particular attention to equality concerns of groups who have suffered discrimination, including women, racial minorities, those with disabilities, and Aboriginal persons. My discussion of social context education will describe some of the models for its delivery, including their strengths and weaknesses, ending with an argument for such education as a way to pursue greater "impartiality" in the justice system.

I. JUDICIAL IMPARTIALITY: REALITY OR ASPIRATION?

Many today assert that the justice system is not impartial — the *Justitia*, our image of justice with her blindfold and scales *is*, in her human manifestation, sometimes affected by the race, gender, or some other characteristic of litigants and witnesses. Some members of the judiciary have been shown to hold stereotypical views about women, for example, that create, at a minimum, a reasonable apprehension of bias and, at worst, an apprehension of actual bias.⁸ The number of such complaints may not be large, but each draws public attention to the judiciary and calls into question the overall fairness of the system.

Numerous reports have also shown unexplained discrepancies in the treatment of racial minorities and aboriginal people within the criminal justice system, leading some to conclude that there is a degree of unconscious bias or systemic racial discrimination in the

7. *Ibid.* at 172.

8. For example, see the report of the Committee of Inquiry of the Canadian Judicial Council into the conduct of Quebec Superior Court Judge Jean Bienvenue (July 4, 1996), where a majority of four (to one) recommended his removal on the basis of his having become incapacitated or disabled from the due execution of his office due to misconduct and conduct incompatible with the due execution of the judicial office under section 65(2)(b) and (d) of the *Judges Act*, R.S.C. 1985, c. J-1. One of the grounds for removal was his comments about women, which were said to contain sexist stereotypes contrary to the principle of equality in section 15 of the *Canadian Charter of Rights and Freedoms*. The report states: "Les propos du juge sur les femmes et les conceptions profondes qui, chez lui, ses sous-tendent, mettent légitimement en doute son impartialité dans l'exercice éventuel de sa fonction judiciaire". Subsequently, the Canadian Judicial Council voted in favour of a recommendation to the Minister of Justice to set in motion procedures for the judge's removal from office, and he resigned.

system that affects decisions about pre-trial release or incarceration rates.⁹ Social science studies have also shown that women face greater obstacles than men in credibility assessments in courts.¹⁰ These and other examples generate claims for a justice system more truly impartial from those groups who feel unfairly treated — in other words, the plea seems to be for a readjusted blindfold.

Yet some will argue that despite the commitment to impartiality, this is a quest that can never fully succeed. Even if judges make every effort to decide an individual case solely on the basis of the facts and law before them, their aspiration to impartiality can only be that — an imperfect attempt to reach an ideal. The truth is that behind the blindfold, each judge brings a lifetime of experiences that play subtly upon the decision-making process. Religion, family history, relationships, region, career experiences, financial circumstances, physical or mental condition, and gender — to name but a few factors — will have some impact on the fact finding process and the interpretation of the law. Someone who has lived in a sparsely populated rural area may quickly grasp arguments about the need to draw electoral boundaries with flexibility to facilitate communication between constituents and representatives; a former criminal lawyer may well understand the dangers of reliance on lie detectors; a member of a racial minority who has experienced discrimination firsthand may understand why a victim is reluctant to speak up to stop harassment, yet nevertheless feel deeply wounded by the comments; and a judge familiar with Aboriginal spirituality and governance may readily understand an argument that individual rights claims are inconsistent with the Aboriginal conception of collective rights.¹¹ This is not to suggest that empathy and understanding are impossible without actual experience; nor is it to suggest that good judges fail to examine their own perspectives — clearly, many are well aware of the need to understand others' life

9. See, for example, the report of the Commission on Systemic Racism in the Ontario Criminal Justice System (the Cole Report), (Toronto: 1995), especially chapter 5 (systemic discrimination in pre-trial imprisonment) or the report of the Aboriginal Justice Inquiry of Manitoba, (Winnipeg: Hamilton/Sinclair, 1991), at 100-113.

10. See, for example, L.H. Schafran, "Credibility in the Courts: Why is there a Gender Gap?" (1995) 34 ABA Judges' J. 5.

11. My point is hardly startling or new. B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 12-13 stated:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos", which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

For more recent expositions, see S.J. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992) at 245-246; M. Minow "Foreword: Justice Engendered" (1987) 101 Harv. L.R. 10.

experiences. Rather, my point is to emphasize that sometimes judges may need to consider ways to expand their sensitivity to the experiences and needs of the litigants before them, whether to create a more accessible courtroom or to improve the fact finding process. Therefore, they may need to let down the blindfold to reveal who is before them in order to consider whether the litigants' experience is similar to that of the judge.¹²

But the challenge to the judicial system goes further than this. The guarantee of equality, found first in our human rights codes and now enshrined in section 15 of the *Canadian Charter of Rights and Freedoms*, requires judges to consider whether laws or practices discriminate on the basis of the listed characteristics and those analogous to them and, if so, to determine whether that discrimination is justified — an exercise that requires us to consider the possibility of accommodating the affected group.¹³ Even without a formal challenge to a law under section 15 of the Charter, the societal commitment to equality requires scrutiny of common law and statutory rules to determine whether the distinctive experiences of women and other equality seeking groups are fairly reflected in their application.¹⁴ Again, the call is not for blind justice in order to ensure impartiality; rather, the argument is that a Justice conscious of the fact that laws reflect certain values should be alert to whether those rules or practices require modification, because they were framed without due sensitivity to their impact on groups whose perspective has not always been at the forefront of decision-making — for example, women, minority groups or those with disabilities. This approach can generate challenges to prohibitions on wearing head coverings in a courtroom that exclude those who cover their heads for religious reasons,¹⁵ or to rules of evidence that allow access to the medical records of victims of sexual assault and, therefore, may give undue weight to legal rights and insufficient weight to gender equality,¹⁶ or the laws that fail to consider the burden of child care responsibilities on women.¹⁷

12. A good example of an area of the law where the importance of perspective emerges is sexual harassment, where the alleged harasser often argues that he did not know that his comments or conduct were unwelcome or ought reasonably to have been known to be unwelcome. Many cases have focused on the lack of objection by the victim to argue against liability, rather than consider whether the reasonable person here incorporated characteristics not only of men, but also women. For a case discussing this issue, see *Re Canada Post Corp. and Canadian Union of Postal Workers* (1987), 27 L.A.C. (3d) 27, Swan J.

13. The Supreme Court's jurisprudence on equality is in a confused state, with the leading cases now *Miron v. Trudel*, [1995] 2 S.C.R. 418 and *Egan v. Canada*, [1995] 2 S.C.R. 513. Nevertheless, a majority of the judges agree that the equality guarantee protects individuals against discrimination on an enumerated or analogous ground in ways that perpetuate disadvantage of groups.

14. Good examples of where this has occurred in relation to gender equality are *Norberg v. Wynrib* (1992), 92 D.L.R. (4th) 449 (S.C.C.) and *R. v. Lavallee*, [1990] 1 S.C.R. 852.

15. For example, the dispute over head coverings in the Royal Canadian Mounted Police or the wearing of kirpans in courtrooms.

16. *R. v. O'Connor*, [1995] 4 S.C.R. 411.

17. *Symes v. Canada* (1993), 110 D.L.R. (4th) 470 (S.C.C.).

Thus, the criticisms of the justice system illustrate what M. Minow has called the "dilemma of difference" — at times, the plea is for greater neutrality that ignores characteristics like race or gender; at other times, the call is for a greater sensitivity to those characteristics in order to fulfill the commitment to equality before and under the law.¹⁸ This creates a difficult challenge for a judge, both to understand the perspectives and needs of groups who have been disadvantaged by legal and societal structures, and to decide the appropriate response, given that there are valid judicial concerns about their institutional responsibilities and proper role. Some of the criticisms of the judicial system will be perceived as unfair, in that they lack a grounding in truth or they only apply to some, but not all judges. Alternatively, the challenges may invite what is seen as inappropriate judicial activism in changing the law, which would be better addressed to legislative institutions.

Not surprisingly, therefore, the response from judges to the criticisms voiced above varies. Some would like to draw their robes around them, ignore the critics and get on with their job. T.D. Marshall's recent book on judicial independence seems to stake out this position, with its rejection of virtually any concept of judicial accountability, let alone responsiveness, because of the interference with a judge's independence.¹⁹ Others respond emphasizing the unfairness of the complaints in light of the actual role of the judge, especially at the trial level, where discretion is limited and cases turn very much on the facts as presented in evidence and the relevant law, as set elsewhere. Chief Justice MacEachern of British Columbia, in a recent speech to the Canadian Bar Association, decried the practices of the media, "agendists" and academics who unfairly criticize the judiciary for failing to decide cases in certain ways, in that they ignore the evidentiary and legal constraints in a given case, and the institutional limitations facing courts when asked to act as a tool for redressing social injustice.²⁰

There is clearly some merit in what Chief Justice MacEachern says about the limits of judicial discretion, especially with respect to the lower courts. Nevertheless, there are still very good reasons to reflect on the impartiality of the justice system, as other judges have acknowledged.²¹ At a minimum, the judiciary should do so in order to maintain public confidence in the fairness of the system. Judges, like any other group wielding power in our society, ignore at their peril an examination of concerns about their performance. Even though some judges shy away from the suggestion that they should be accountable to the public, respect for the system will increase if judges are willing to consider the validity of criticisms of the justice system. However, the exercise of self-examination should be responsive not only to external stimuli, but the internal ones as well. A judge's pursuit of individual excellence should lead to a willingness to reflect on issues of impartiality, inclusiveness and equality in the justice system.

18. M. Minow, *supra* note 11 at 12.

19. T.D. Marshall, *Judicial Conduct and Accountability* (Scarborough: Carswell, 1995).

20. Speech to the Canadian Bar Association Annual Meeting, August 1996 (source: Quicklaw).

21. See, for example, speeches by Fraser J., "Judicial Awareness Training", (mimeo, September 1995); McLachlin J., "Judicial Neutrality and Equality" (mimeo, November 1995).

II. INSTITUTIONAL RESPONSES

Often, the next element in a paper on judicial impartiality is a discussion of the judicial appointments process. There are respected individuals who take the view that objectivity and neutrality are unattainable, among them former Justice B. Wilson, who relied on C. Gilligan's research to argue that women have a distinctive world view (the "ethic of care"), with the result that women judges are likely to be different from men.²² The proposition contains an element of truth, in that women's world experiences are likely to be different, to some degree, from those of men. But the points of difference should not be overstated: given the fact that women come from many races and ethnic groups, economic backgrounds, and personal experiences, there are bound to be diverse viewpoints among women, as there are among men. Women will bring a variety of perspectives to the bench, as do men and members of other groups. The same is true of those in different racial and ethnic groups, or those with disabilities. Therefore, the argument for appointing members of different groups to the bench is not to ensure that an "essential" viewpoint is represented; however, such appointments can usefully expand the perspectives brought to bear on problems and enrich the dialogue among judges about law and the justice system.

To be more precise, the argument for greater diversity in judicial appointments should not be that we must be judged by those who are like us. That has never been the goal of our legal system; moreover, "identity politics" that stresses representation as an element of judicial appointment can not feasibly be incorporated in the task of adjudication, especially at the trial level, where men and women and those of different races and other background characteristics are generally involved as parties in any individual case.²³ But more to the point, the judicial system continues to strive for impartiality — provided that term is defined with a sensitivity to the complexity of society and its commitment to equality. Therefore, diversity in appointments can be justified for a number of reasons, including increased legitimacy of the system and expanding the perspectives brought to bear both within the courts as a whole and in the adjudication of legal principles, without requiring that women or Aboriginal judges or those from other groups be "representative" of those groups.²⁴

22. B. Wilson, "Will Women Judges Really Make a Difference?" (1990), 28 Osgoode Hall L.J. 507, especially 520. C. Gilligan's most famous work is *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

23. For discussion of the rationales for appointing women judges, see I. Grant & L. Smith, "Gender Representation in the Judiciary", in *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) at 57.

24. This ongoing commitment to impartiality is the underlying perspective in the *Parks* case, in which the Ontario Court of Appeal permitted prospective jurors in Metropolitan Toronto to be challenged for their possible partiality against a Black accused in a homicide trial involving drug dealing. The goal was not to create a representative jury nor a jury of the same background as the accused; rather, the goal was to create a jury that was impartial by examining their views about race. See *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), extended in *R. v. Wilson* (1996), 29 O.R. (3d) 97 (C.A.). This approach was rejected by the British Columbia

Another important way in which these goals can be pursued is through social context education for the judiciary, the subject of the rest of this paper.

III. THE CASE FOR SOCIAL CONTEXT EDUCATION

In March 1994, the Canadian Judicial Council passed a unanimous resolution approving the concept of "comprehensive, in-depth, credible programmes on social context issues which includes race and gender [...]". Many efforts have been made to provide this kind of judicial education, with programmes offered by the Canadian Institute for the Administration of Justice, the Western Judicial Education Centre, the Canadian Association of Provincial Court Judges, and the courts of various jurisdictions. Most recently, the federal Department of Justice agreed, in the summer of 1996, to fund an ambitious effort by the National Judicial Institute in Ottawa to develop social context programmes for delivery throughout the country.²⁵ The Institute (formerly the Canadian Judicial Centre) was created in 1988 to provide educational programmes for federally and provincially appointed judges.²⁶

Social context education can perform a number of functions. At its most modest, the objective is to ensure non-discriminatory conduct by judges (and court personnel). Thus, programmes may emphasize the use of appropriate language, such as gender neutrality, forms of address for those from different cultural groups, improper references (such as the assumption that all members of visible minority groups are immigrants), and communication methods.²⁷ Other issues that might be covered relate to appropriate behaviour — for example, the use of various oaths or affirmation and the role of interpreters.

A second objective of social context education is to broaden a judge's base of knowledge. Here, the emphasis is on increased awareness of the characteristics, needs and values of a group or the magnitude of legal problems confronting them. Examples could

Court of Appeal in a case involving an Aboriginal accused in *R. v. Williams* (1996), 106 C.C.C. (3d) 215, especially at 230.

25. I acted as a consultant to the National Judicial Institute to assist in designing a blueprint for the development of social context education. The report which I prepared is available from the NJI, "Report on Social Context Education for Judges" (mimeo, February 1996). The funding decision is described by Chief Justice Antonio Lamer in a speech to the Canadian Bar Association Annual Meeting, August 1996 (Source: Quicklaw).

26. Information about the Institute is found in its annual reports, as well as in T.D. Marshall, *supra* note 19 at 56-60.

27. This kind of education is provided, for example, in the NJI videos on "Judicial Awareness: Race, Culture and the Courts" and on "Gender Equality", as well as panels at various conferences on sexist language. The Ethnic Minorities Advisory Committee of the Judicial Studies Board in England has published a document on "Body Language and Cross-Cultural Communication" and emphasizes this kind of issue in its seminars on race relations for judges (see its third annual report, 1995).

include information about Aboriginal spirituality, the incidence of domestic violence or its impact on children, the belief structures of various religions, or the problems of those with disabilities in gaining access to the legal system. The information presented can range from the empirical (for example, the incidence of female poverty, or the changing demography of Canada) to the interdisciplinary and the personal — for example, presentations from specialists in fields other than law, by individuals from these groups, and by those who work with them (for example, specialists in psychology might talk about the battered women's syndrome; Aboriginal elders may discuss spirituality and community traditions; victims of sexual assault may describe their experience with the justice system.).

This information is designed to provide background to raise judicial awareness about issues in future cases. While some judges fear that this is an inappropriate way of acquiring evidence outside the courtroom, it should not be seen in this way. Rather, this is one of many sources of education about our society and legal system that can enrich the judge's knowledge, in the same way that reading, television viewing, or personal conversations with friends and family help shape awareness.

A further objective of social context education requires judges to evaluate the meaning of equality, within the Charter and as a broader social norm. This can lead to discussions of equality in relation to a range of legal issues, in an extrapolation from the decisions of the Supreme Court of Canada.

The more ambitious social context programmes go beyond increasing awareness of social facts to ask judges to reflect on their own role and responsibilities, building on the criticisms of the lack of impartiality and fairness in the current system outlined earlier. Social context education programmes can be designed to ask judges to reflect on whether they carry unconscious stereotypes into their fact finding and decision-making, whether the alleged systemic bias in the law is, indeed there, and if so, whether judges (as opposed to some other institutions) have the power to deal with the problem.

These objectives can be pursued through a variety of educational techniques. One possible method is self-teaching, whether through reading or use of materials specially designed for judges. The National Judicial Institute, for example, provides videos on race and culture and on gender issues, along with manuals of readings and questions, to all newly appointed federal and provincial judges. One must applaud the effort, but this is far from a satisfactory method of education, in that it focuses only on new judges, rather than incumbents, and it does not provide a forum for discussion of issues that often warrant examination in light of judges' practical experience.

A second model for delivery can be called the "integration" approach, where social context issues feature as part of a larger programme of judicial education. This might take the form of one panel on equality issues in a larger conference dealing with a full range of issues — for example, a discussion of family violence as one element of a programme that included recent developments in civil procedure, criminal law or evidence. Alternatively, a conscious effort can be made to bring out equality issues in every panel where these issues are relevant — for example, in a panel on criminal law developments, there might be a discussion of the gender issues in recent cases involving

the defence of drunkenness; a discussion of evidence law might include discussion of the evidence of children or those with mental disabilities.²⁸

A third model is the "immersion" approach pioneered in this country by the Western Judicial Education Centre and emulated in a number of other jurisdictions, most recently Australia. Under the leadership of Judge Douglas Campbell, then of the British Columbia Provincial Court, the WJEC organized a series of "full immersion" courses on gender, Aboriginal, and race issues, primarily for western provincial court judges.²⁹ These programmes were different in scope and approach from other judicial education courses. They rested on an openly articulated philosophy that there is systemic discrimination in Canadian society and the legal system against women, Aboriginal people, and racial and ethnic minority groups. The clearly expressed goal was to examine equality issues in the hopes that this would increase public faith in the judicial system by creating a more empathetic judiciary.³⁰

The programmes lasted between four and six days, as they were designed to be "immersion", not conference learning. In the opinion of the organizing team of judges, academics, practising lawyers, and other resource persons, it was necessary to get judges together for a significant period of time in order to promote effective communication of and appropriate reflection on the material.

The first three courses dealt with both gender and Aboriginal issues, with the conferences building on each other to some degree. The goal of the first was described as "consciousness raising" — for example, about the status of women in Canadian society, power relationships between men and women; and Aboriginal values and beliefs. The second and third went on to emphasize practical solutions, in addition to what might be called "cultural awareness". The programmes worked with a variety of formats, including dramatizations, videos, panels, speakers, and small discussion groups. The latter were a central element of the WJEC approach. While the panels or presentations might involve judges, academics, individuals able to present facts about and concerns of the groups under study, and others offering various kinds of expertise, the small discussion groups were for the judges to have an opportunity for frank discussion in a safe setting. Led by

28. A fuller examination of these models and an inventory of some of the Canadian efforts at social context education is found in the NJI report mentioned, *supra* note 25.

29. The programmes were "Sentencing: The Social Context" (Vancouver, 1989); "Sentencing: The Social Context, Part II" (Lake Louise, 1990); "Equality and Fairness: Accepting the Challenge" (Yellowknife, 1991); "Seminar on Racial, Ethnic and Cultural Equity" (Saskatoon, 1992) and "Congress on the Role of the Judge in the New Canadian Reality" (Vancouver, 1992). Some of these programmes were described in a 1991 evaluation report prepared for the federal Department of Justice by Professor N. Wikler, *Educating Judges About Aboriginal Justice and Gender Equality: The Western Workshop Series 1989, 1990, 1991* (mimeo, Ottawa: Department of Justice, 1991). The description of them as "full immersion" is found at 5.

30. For example, the programme objectives of the 1991 Yellowknife meeting included developing the perspective that judges can and should be leaders in gender equality and that "dealing with these issues in a meaningful way requires self scrutiny and reflection on the issues of one's personal life".

specially trained members of the judiciary, the groups were often joined by a resource person to bring in the perspective of the group under discussion. While the goal was to encourage energetic discussion among judges about the material, there were mixed reactions to the way in which some discussion groups operated, with some critical of the confrontational atmosphere in some sessions.³¹

Nevertheless, the model was described by Professor N. Wikler in a 1991 evaluation report as "extraordinarily successful".³² While the WJEC has done no follow-ups post-1992, various other groups have emulated the model, most recently, the Ontario Provincial Court Judges Association in their May, 1996 annual meeting — a three day conference on "The Court in an Inclusive Society". Again, the format was a mix of panels, speakers, and discussion groups, with the latter offering a forum for judges to speak mainly to each other about issues related to judging in a racially diverse society.

IV. WHICH MODEL?

There is value in offering social context education in a variety of forms: both as an element of any judicial education programme, where equality issues are relevant, and as a larger immersion programme closer to the approach of the WJEC. The integration model emphasizes that equality issues are pervasive to the practice of law and judging today, rather than some problem detached from judging and responsive only to interest groups. However, there is a real advantage to the immersion model, because it gives judges time to discuss and reflect on what can be troubling and difficult issues affecting groups disadvantaged by the legal system.

As those involved in presenting feminist, Aboriginal or race issues to law students can testify, it is difficult to convey the problems, perspectives and the range of debate about the meaning of equality for any of these groups without a concentrated period of time for reflection. At the University of Toronto Law Faculty, for example, there are one week bridge periods for first year students when other classes are cancelled and the students are immersed in issues such as "Feminist Analysis of Law" and "Race, Culture and the Law" (as well as Law and Economics, Legal History, and Law and Philosophy). These weeks are challenging, sometimes disturbing, and an important way to broaden perspectives that will, hopefully, inform other courses when students return to the regular curriculum.

In the same way, some period of immersion is important for judges who have not confronted the equality issues arising with respect to gender, race or disability. A single panel or periodic references to equality issues will be a much less effective way to educate

31. These seminars, and the extensive planning process behind them, are described by Judge Douglas Campbell in *The Process of Developing and Delivering Social Context Education* (Western Judicial Education Centre, 1994).

32. N. Wikler, *supra* note 29 at 65.

on these issues, especially if the information is presented in a fairly passive format, with speakers and listeners provided little chance for interchange.³³

V. POINTS OF RESISTANCE, POINTS OF CAUTION

As the National Judicial Institute embarks on its ambitious plan to develop social context education programmes for judges, there are a number of design issues to address that are key to success.

Some judges remain resistant to this type of judicial education. At its extreme, the reaction is that this is indoctrination for the purpose of "political correctness", which is unwarranted at best and an interference with judicial independence at worst. Reaction against these programmes is particularly fierce when it is suggested that they be compulsory,³⁴ a point I am not prepared to argue, since little will be achieved on an educational level if the audience is fiercely resistant. One would hope, however, that judicial leadership and peer commitment to this type of education will affect the willingness of reluctant individuals to participate, even if they come with a somewhat sceptical mind. Moreover, there are practical ways to present these issues so as to encourage attendance — for example, incorporating them in the annual meetings of judges from a particular court.

The greater challenge is to make these programmes a valuable educational experience, which will eventually encourage judges to attend. This leads to a story of how *not* to do social context education. The National Judicial Institute has a film, "Judicial Awareness: Race, Culture and the Courts" available for educational programmes and distributed to all newly appointed judges. It contains a series of vignettes, with commentary of an incident. Despite repeated questions, the witness is unable to be more specific about the time of the event than that it occurred after work and before sundown. The film then cuts to a commentator who explains that the witness is from a rural agrarian society where time is not measured in the same way as in much of Canadian society.

What is the judge to make of this? There is no attempt to understand the problems of the judge in this situation, where the time of the incident may be very important to a determination of credibility or to the identity of an accused or the occurrence of an event. Moreover, there is no effort to consider what a judge should take from this film: for example, aren't there dangers to assuming, in other cases, that black witnesses have a different sense of time? Will a judge be accused of stereotyping if she or he takes this information and uses it elsewhere? Should counsel be expected to raise

33. *Ibid.* at 67-68.

34. Compulsory training for judges in both gender and racial issues was recommended by the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) at 191.

cultural issues and lead evidence of practices, or should the judge intervene to seek it? In short, what is the judge's role in an adversary system?

The fact that similar questions are raised by each of the other vignettes illustrates the importance of judicial input into the design of the programme, so that these important questions for the judiciary are front and centre in the programme. Moreover, this illustrates the importance of the discussion format described earlier. Judges are well educated and self-directed learners, who can, and should, bring important insights and experience to discussion of these issues. In sum, the educational programme must be responsive to the judicial task.

But I do not want to imply that judges have all the answers in these areas, nor that they should be isolated from academic and broader community inputs in these programmes. This is an area where a team effort between the judiciary and others with expertise and perspectives to offer can lead to a much better educational effort, as has been seen in the WJEC and other judicial education programmes.

But what of concerns such as the following voiced by Chief Justice Mason of Australia:

*We must take good care to ensure that under the guise of judicial education, judges are not subject to indoctrination or attempts by interest groups and pressure groups to influence judicial decision making in favour of such a group [...]*³⁵

One response is to point out that while past programmes have included some "language" and communication training, seen by some as "political correctness", the legitimate goal here is to convey ways of being sensitive to and respectful of the hearer. Some conduct and commentary are no longer acceptable in this society. To find discussion of these areas an intrusion on judges' independence is unacceptable in a judicial system committed to equal justice for all.

However, when programmes include discussion of the perspective of groups, delicate and difficult issues can arise with respect to who can and should speak for a group — for example, in discussing Aboriginal issues, should Aboriginal women be ensured a place in the programme? How does one convey the diversity within First Nations and across Aboriginal groups? How can one impart anything meaningful about racial and cultural groups, given the large number of groups in Canada and the differences among them? Similarly, when discussion turns to legal issues, such as the role of fault in divorce reform, the appropriate design of sexual assault laws, or the degree to which multiculturalism requires accommodation of religious difference, competing perspectives and difficult issues emerge.

For judges, these complexities raise a number of valid concerns in the design of social context education. Groups, whether defined by race, gender, disability or some other characteristic, may share some common perspectives, but they are also diverse within their own membership. Aboriginal women within their communities face different

35. Quoted in L. Armytage, "Judicial Education on Equality" (1995), 58 Mod. L. Rev. 160 at 163.

sets of problems and have different responses than middle class white women working in an urban setting. The same is true within different racial and cultural groups in Canadian society. Moreover, the meaning of equality can generate debates, both within these groups and within the broader society.

The appropriate response is not to excuse judges from engaging in social context education because there isn't a "Right answer" to the meaning of equality, or because issues of race and culture vary across groups and generations. To the contrary — judges should still be aware of the flavour and complexity of these debates, just as they need to be aware of the variety of experiences within these groups. One of the most important contributions of feminist scholarship has been to "bring the woman question in", even if this does not lead to one correct answer.³⁶ So, too, are we increasingly aware of the impact of racial and cultural diversity on our society and legal system. While there are ongoing debates about what equality requires,³⁷ decision-makers, including the judiciary, should be attuned to this debate. But it must be understood by all involved that these programmes are designed to raise awareness and to provide tools for analyzing future cases; they are not designed, for the most part, to give right answers nor to replace the need for careful consideration of the evidence in an actual case.

Therefore, in the design of social context education programmes, judicial concerns about independence must be recognized as an important consideration. This requires a shared understanding that many issues are open to debate, as outlined above. As well, it must be acknowledged that judges have to act on the evidence and law before them, for the most part, so that many changes sought by groups and individuals may have to come from either the highest level of court, legislative action, or societal change.

One safeguard for judicial independence is provided by close judicial control of such programmes as, for example, provided in the new National Judicial Institute initiative where two judges, the Honourable Mr. Justice John McGarry of the Ontario Court (General Division) and the Honourable Judge Donna Martinson of the British Columbia Provincial Court, act as co-directors of the project. Of course, this does not mean that the design and delivery of programmes should be left solely to judges, and the NJI project contemplates a structure with an advisory panel and curriculum groups that reach beyond the judiciary to bring in various forms of expertise.

Finally, the delivery of high quality social context education is a long term process, as programmes dealing with the perspective of different groups take time to develop and present on a national basis. Moreover, judicial time available for educational programmes is limited. At this point, the Canadian aspiration is ten days of education for each judge annually, but this is often not feasible, given the pressures from crowded dockets. Moreover, social context issues are not the only area in which judges perceive the need for further education. Therefore, social context programmes will have to share the time available with programmes on other important matters, such as recent

36. K.T. Bartlett, "Feminist Legal Methods" (1990), 103 Harv. L. Rev. 829.

37. See, for example, the range of feminist theories described in A.C. Daley, "Feminism's Return to Liberalism" (1993), 102 Yale L.J. 1265.

developments in criminal law. However, if these programmes are to be given the attention they deserve, relief from sitting time, rather than encroachment on judgment writing days or vacation, would demonstrate the judicial system's commitment to this enterprise.

CONCLUSION

This paper started with a discussion of challenges to judicial impartiality. While some in our society despair of the fact of true impartiality in any individual, the judiciary is one institution in which we continue to seek that quality, however imperfectly we may, as human beings, achieve the goal. Social context education, well designed and sensitive to the judicial task, is an important instrument to lessen the appearance of judicial "partiality" and move us towards an inclusive method of judging that will, in the end, make for greater impartiality in the system.