

# Modernizing Models of Court Administration: A Time for Change

---

Catherine FRASER\*

## I. Setting the Scene

In recent years, a number of critical issues affecting court facilities and support services for the judiciary have arisen across Canada between the judicial and executive branches of government. These concerns cross provincial and territorial boundaries, affect all court levels and raise serious issues about the constitutional dividing line amongst all branches of government.

Earlier this year the Canadian Judicial Council initiated a research project on Models of Court Administration. The purpose of this project? Simply this — to identify alternative models of court administration to the existing executive model.

This issue — what is an appropriate model of court administration — is a very important one in a constitutional democracy.

Over the past quarter century, there have been innumerable reports here and around the world weighing in on the subject of court administration. It is hard to know where to begin. I will first explain the executive model, what it has meant in practice and why reform is required. Next, I will place this issue in its historical and international context; and then move on to what a proper governance model should accomplish. Then, I will briefly outline what models of court administration are viable in a constitutional democracy. Finally, I will

---

\* Chief Justice of Alberta.

touch on a number of lessons learned from a review of other innovative courts and management principles.<sup>1</sup> Given the time constraints, I cannot possibly develop these points in detail. I would however be happy to elaborate on any that catch your attention during question period.

## **II. What is the Executive Model and What has It Meant in Practice?**

What is the executive model? It is the one we have. Although there are different variations, this model is one in which the executive, as represented by the Minister of Justice, controls policy and operational decision-making for the courts — in other words court administration. The Chief Justice of each court controls those areas of court administration directly bearing on adjudication. Where one ends and the other begins is one issue. But it is not the only one.

What has the executive model meant in practice? Several things.

1. Limited long-term planning for the courts; limited consultation with the judiciary on budgetary needs and budget for change management; and in turn limited ability on the courts' part to respond effectively to new challenges and public expectations. Judges are typically not consulted about needs, or at least not in any organized fashion. And in any event, if one could find someone to turn to, the answer is invariably the same. "Sorry, we have no budget for that."
2. And then there are the obvious operational problems, starting with divided loyalties amongst administrative staff, a significant bar to structural and operational reforms in its own right.

---

<sup>1</sup> I wish to acknowledge the excellent assistance I received in preparing these remarks from a publication by R. Hann, C. Baar and L. Sossin, contributed to by K. Benyekhlef and F. Gelinas, "*Canadian Judicial Council Project on Alternative Models of Court Administration — Revised Draft Discussion Paper*" (*Canadian Judicial Council Discussion Paper*) [Unpublished, archived at Canadian Judicial Council, Ottawa, Canada].

3. The model depends on government's commitment to meet the courts' legitimate needs. But in these days of competing demands for public funding, the executive model presents a serious problem. The judiciary cannot compete for public funding and yet competition is inevitable when courts are denied needed resources. The problem is that too often, the judiciary is viewed as the "department" of least resistance, unable or unwilling to defend itself.
4. The model is inherently vulnerable. It discourages interaction and militates against reform. Where there is no agreement on common goals and objectives, the model quickly founders since there are no effective dispute resolution mechanisms available. And since neither branch of government has the authority to impose its will on the other in matters of court administration, this can lead to a stalemate.

### **III. What is the Purpose of Developing Alternative Models of Court Administration?**

There are several: to avoid unnecessary conflict between the judiciary and other branches of government; facilitate coordination, cooperation and respect amongst all branches; ensure within the courts a culture of continuous improvement and reform; modernize court administration and court governance; enhance accountability and public confidence; improve the quality and delivery of judicial services; and preserve the separation of powers.

### **IV. Situating This Issue in its Historical and International Context**

When one examines the history of the evolution of court administration in Canada and then compares where we are to other democracies with shared values, certain points become clear. Let me make three.

First, a new cycle of positive change is not only possible but very much needed today. And lest anyone think that change in the justice system is easy, let me mention the experience of Professor Ernie Friesen, an internationally recognized American expert in case management. He began his ground-breaking work in this area decades ago. As part of his

efforts to determine what to do about delay, he asked a friend with an expertise in management, Len Sales, who wrote the book on Complex Organizations, to spend a couple of weeks studying the courts. After doing so, Sales came back and told Friesen that he had concluded that the courts were the most complex organization in the world. “How could that be” asked Friesen “especially since you have studied some of the most complex organizations including NASA?” “Very simple” said Sales. “Two reasons. Number 1: No one is in charge; and Number 2: ½ the people in the system at any time are trying to keep it from working.”<sup>2</sup>

Second, and I will develop this point more fully, the executive model in place today was never designed to run the courts as they are now. Nor has this model been as typical or as long-established as some might think. For much of our history, court administration has been a relatively undeveloped task that involved providing clerical and courtroom support for judges presiding at trials and hearing appeals. We are not that far away from the days when some magistrates were paid on a piece-work basis. For example, in the first half of the twentieth century in British Columbia, magistrates were paid per conviction. Defence counsel had to assure the magistrate if their client was acquitted, they would match the amount that would have been received from the public purse.<sup>3</sup>

That has all changed. As case volumes grew, so did the complexity of the cases themselves. And issues that might previously have been thought to reflect effective management control are now recognized as matters that strike directly at the heart of impartial adjudication. Now that court administrative functions have been consolidated under provincial ministers of justice, issues of principle have become more clearly defined. Management of the courts is the direct responsibility of the same minister responsible for prosecuting criminal cases in those courts. This also means that administrative changes are

---

<sup>2</sup> As related by Ernie Friesen at the Chief Justices Training Program sponsored by the National Judicial Institute held at Aylmer, Quebec, October 21-26, 2001.

<sup>3</sup> *Canadian Judicial Council Discussion Paper, supra*, at p. 19-20, citing Alfred Watt's history of the British Columbia Provincial Court, Magistrate-Judge (Victoria: Queen's Printer, 1986) at pp. 79-84.

driven by the province — a recipe for conflict between central administration and local adjudication.

In the meantime, provincial and federal civil services have grown in size, scope and professionalism in a wide range of policy areas. However, unfortunately, much of that growth has passed the courts by.

And then we have the Charter — and a new relationship between the judiciary on the one hand, and the legislative and executive branches of government on the other. As courts have assumed the role conferred on them as defender of constitutional rights, that has led in turn to increased criticism of the courts, even to the point where some today challenge the legitimacy of the courts' role.

All this has arguably translated into less concern/priority/willingness by government — or some governments — to meet courts' legitimate needs. It is a credit to those involved in court administration that the anomalous model of court administration that still exists in every province today has been able to operate at all.

Third, having regard to what is happening in other democracies and internationally, Canada is falling behind its peers and is arguably out of line with emerging international standards on judicial independence. Put simply, other courts are slowly but surely moving away from the anomalous models of the past. For example, both the Federal Court and the Family Court of Australia have moved to an autonomous court model. The federal courts in the U.S. did so in 1939 and state courts thereafter. And for a recent example, the Republic of Ireland has within the past decade established an Irish Courts Service to handle all court support functions independent of government.

This more active and autonomous role by the courts in court administration is consistent with emerging international trends in judicial independence. The one — judicial independence — both drives and reflects the other — that is the more autonomous role. Looking at international declarations and other soft law instruments beginning, for example, with the 1981 Syracuse Principles on Independence of the Judiciary, the Montreal Universal Declaration on Independence of the Judiciary, the United Nations Basic Principles on Independence of the Judiciary, and the American Bar Association Judicial Reform Index, the general trend is clear. All recognize the importance of administrative autonomy.

Let me close this subject with these words by the former Chief Justice of Canada, The Honourable Brian Dickson:

“Independence of the judicial power must be based on a solid foundation of judicial control over the various components facilitative and supportive of its exercise... Preparation of judicial budgets and distribution of allocated resources should be under the control of the chief justices of the various courts, not the ministers of justice.”<sup>4</sup>

## V. What Makes for an Efficient and Effective Court Administration?

I now turn to what makes for an effective and efficient court administration. There are six essential requirements:<sup>5</sup>

1. strong leadership;
2. a shared vision and set of objectives;
3. a proper organizational and management structure;
4. effective strategies, tactics and procedures, including an operational plan;
5. adequate resources, including sufficient ones for the change process; and
6. appropriate support systems, including for instance, management information systems, caseload systems, etc.

## VI. Alternative Models of Court Administration

What then are alternative models of court administration?<sup>6</sup> First a language problem. I concede there is no common understanding of what a

---

<sup>4</sup> As cited in Martin L. Friedland, A Place Apart: Judicial Independence and Accountability in Canada, at p. 179.

<sup>5</sup> See *Canadian Judicial Council Discussion Paper, supra*, at pp. 9-12.

specific model might mean or even what it might be called. With that caution in mind, let me list five other possible models apart from the Executive Model which I shall then briefly explain. All assume that the courts will be administered as a separate department or organization and not as part of a government department:

Joint Partner Model

Executive Administration/Guardian Model

Limited Autonomy Model

Autonomous Governance/Dispute Resolution Model

Judicial Model

But first, a few comments on the Executive Model are in order.

### **1. Executive Model**

A number of governments have recognized the significant shortcomings of the executive model and have modified it in recent years by way of informal understandings, formal rules, or more elaborately drafted Memoranda of Understanding. In theory, other changes could perhaps breathe new life into it. For example, the executive could formally delegate to the chief justice authority over the court administration budget or part of it. B.C. has done this as has Alberta and Ontario for certain courts.

But in the end, it remains an inherently flawed model, one that is conducive neither to good governance nor to judicial independence.

### **2. Joint Partner Model**

---

<sup>6</sup> These are discussed at some length in the *Canadian Judicial Council Discussion Paper, supra*.

Under this model, the courts and executive would exercise joint control over court administration. That would be accomplished through the use of a board responsible for appointing the court executive officer and administering all aspects of the courts. Typically, legislation would spell out the board's composition and its authority. But under this model, government would still set the budget.

Membership on the board would include representatives of the courts. Of course, whether the judiciary were a true partner would depend on the composition of the board. If the judiciary's representatives were on a board dominated by government appointees, this would be a partnership in name only. Or the chief justice or designates could serve on a board where 50% of the membership of the board is drawn from the judiciary. That is the case with the Irish Courts Services Agency. Indeed, in Ireland, only two of its 16 members are appointed at the discretion of the government.<sup>7</sup> If the courts were a controlling partner, the courts would have a voting majority of the seats at the partnership table.

### **3. Executive Administration/Guardian Model**

This model, which is rooted in management theory, leaves the primary responsibility for day-to-day planning and operations of the courts to the executive. But it also recognizes the important role — and responsibilities — the judiciary has in ensuring the existence of an effective judicial system. Under this model, the judiciary would have the authority to intervene in court administrative planning and operations when those activities adversely affected the judicial system. This authority would be exercised at the discretion of the courts and not be subject to prior approval of the legislature or the executive.

The court would therefore have the right to order the chief court administrator to perform certain tasks or activities — or to cease performing certain activities — in order to maintain an acceptable level of court performance. You will immediately see one obvious flaw with this model. There is no point in ordering that something be done if there is no

---

<sup>7</sup> Others represent the bar, court staff, and segments of the national economy (business, labor and consumers).



money to fund it. Thus, special protocols would need to be developed for those situations in which resources were not immediately available to allow court administration to comply with the court's order.

#### **4. Limited Autonomy Model**

Under this model, authority for court administration (including budgeting) is transferred by statute to the judiciary. Day-to-day operational management of courts is then typically delegated to a chief registrar or chief executive officer. That officer is appointed by the chief justice or council of judges. In other words, all the court staff who now report to the executive would be accountable to, and report to, the courts.

This model is not new to court administration. Indeed, it has found considerable support and success in a number of jurisdictions around the world: Australia; the U.S., both federally and at the state level; Singapore. This model represents an emerging trend in democracies around the world — that is to confer on the judiciary increasing authority, responsibility and accountability for court administration. This trend is also consistent with international instruments on the independence of the judiciary increasingly accepted by established and aspiring democracies.

The reason this is called a “limited” autonomy model is that the legislature remains responsible for setting the courts' budget. However, the courts would have the authority to reallocate funds within that budget as they see fit, in the other words to set their own priorities. The chief justices/or council of judges would report to the legislature annually on the administration of the courts. Where this model is in use, as in the Federal Court of Australia, that reporting is typically done by the court registrar. Funding representations are handled this way too.

Clearly defined court administration goals and objectives play an important role in this model. Through the provision of timely, accurate and comprehensive information to the legislature and the public at large, the courts ensure real transparency and accountability for administrative decisions and actions. It is important to understand that under this model, it is the court itself that defines these administrative goals and objectives. Measurement, in this context, is a problem. Too many fail to understand the value of the justice system — or what judges do. But as Albert Einstein once said, “Not everything that can be counted, counts. And not everything that counts can be counted.” The Chief Justice of Australia put

it best when he stated, “[Court managers] know how to measure the use that judicial officers make of their seats, but not of their heads.”<sup>8</sup>

## **5. Autonomous Governance/Dispute Resolution Model**

This model combines a dispute resolution process with the Limited Autonomy Model. As in the Limited Autonomy Model, court administration is the responsibility of the judiciary. However, this model differs from the Limited Autonomy Model in that an independent commission, functionally independent of both the judiciary and the other branches of government, would be used to resolve any disputes that might arise over the level of funding for the Courts. This is the system currently in place to resolve disputes on judges salaries and benefits.

An independent commission avoids the kind of negotiations between the executive and the judiciary which have been found to be impermissible in the context of judicial salaries and benefits. It also avoids the conflicts — and confrontations — that have led in the U.S. to some courts issuing orders under the inherent powers doctrine requiring governments to build courthouses or other needed court facilities.

## **6. Judicial Model**

This is the mirror image of the Executive Model. Under the Executive Model, the executive retains complete control over court administration. Under the Judicial Model, the judiciary does. The judiciary would not only run the courts; it would also have the authority and ability to set the budget for the courts.

## **VII. Lessons Learned**

What are some of the lessons to be learned from management principles and innovative courts and court models around the world? I see nine.<sup>9</sup>

---

<sup>8</sup> The Hon. A.M. Gleeson, Chief Justice of Australia, “Valuing Courts” (Family Law Conference, Sydney, 27 July 2001) (2001) 13(7) *Judicial Officers’ Bulletin* 49.

First, separating court administration from the executive minimizes conflicts between the judiciary and the executive, strengthens judicial independence, and avoids all the fallout that comes from unresolved disputes.

Second, increased court autonomy forces courts and governments to agree on common goals and objectives. This is an extremely important and useful step in its own right for the justice system and the public.

Third, increased court autonomy promotes greater accountability by the courts, and I suggest, the other branches of government too, for the justice system. It disarms the “it’s not my responsibility” defence.

Fourth, the chance for real reform in the justice system increases when courts are administratively autonomous. After all, it is the judiciary which is most familiar with every roadblock in the way of change.

Fifth, allowing the courts to take control and responsibility for administration also encourages a culture of change. This is arguably as important as change itself because change will never come if an institution’s operational model is based on a “business as usual” approach. Good governance principles dictate that approximately 20% of an organization’s budget should be directed to the change effort. In the court system, if you are not moving ahead, you are falling behind.

Sixth, one of the most important benefits of a separate and independent court administration is the courts’ ability to set their own priorities. Flexibility in fiscal administration within court systems (transfers among line items, carry-over across fiscal years) can reduce the impact of budgetary constraints.

Seventh, to be successful, any model must address not only the issues between the courts and external bodies, but also the organizational and management issues within the courts themselves.

Eighth, innovative governments allow innovative court administration. Why? Because innovation requires a degree of managerial autonomy within which modern management ideas can be applied. And innovative governments understand that.

---

<sup>9</sup> These are based in part on Principles to Consider in Making Any Model Successful contained in *Canadian Judicial Council Discussion Paper, supra*, at p.49.

Ninth, governments that understand the important role that courts play in economic development are more open to administrative innovations developed within the courts, and more willing to finance reforms that enhance court competencies.

### **VIII. Conclusion**

This too must be said. While innovations to the executive model are to be encouraged and can mitigate tensions with particular courts on particular issues, the model itself has inherent flaws. These give rise to the need for alternative models premised on greater judicial control, and not just innovative practices within the executive model.

One final point about models of court administration. We must never forget that improved models of court administration are not an end in themselves but merely a means to an end — and that end is the delivery of better judicial services to the public. Part of that objective involves implementing the courts' vision. Therefore, quite apart from constitutional concerns on the judicial independence front, the need for good governance institutionally militates strongly in favour of reform. Put simply, what is required is a modern model of court administration that minimizes conflicts, facilitates long term planning, promotes cooperation and coordination amongst the branches of government, fosters change and systemic reforms and improves responsiveness and accountability to the public.