

Models of Court Administration: Administering Courts in the Interests of Justice

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I. INTRODUCTION: FOCUSING THE DEBATE

In recent years, in Canada and abroad, there has been much debate on models of court administration. When the Canadian Judicial Council (CJC) launched its project on models of court administration in 2003, the project was given a mandate to identify alternative models of court administration in order to best achieve three goals: first, judicial independence and separation of the judiciary from other branches of government; second, public confidence in the judicial system; and third, quality delivery of judicial services. In 2006 the CJC provided an overview of these issues in a report entitled *Alternative Models of Court Administration* ('*Alternatives*').¹

In a letter to Chief Justice Beverley McLachlin in response to the CJC's interim report on *Alternatives*, which is substantially the same as its final *Alternatives* publication, Allan Seckel, QC, former Deputy Attorney General of British Columbia, wrote:

In his poem 'Mending Wall,' the poet Robert Frost repeats the time worn expression 'good fences make good neighbours,' but teaches us that they do so because neighbours build them together.... My comments are offered in that spirit. I respect the fences that must exist in the justice system to ensure that we preserve the democratic society governed by the rule of law which we enjoy. Judicial independence is paramount amongst those fences, but the fence is better and the rule of law is enhanced if we ... determine the boundaries and build it together.²

Whatever the ambiguities associated with Frost's poem, this paper adopts the sentiment drawn from it as expressed in Allan Seckel's application of the 'good fences make good neighbours' proverb and is also written in that spirit. The goals originally outlined for the models of court administration project will best be obtained through a recognition that the judicial arm of government and the executive arm of government

¹ Canadian Judicial Council, *Alternative Models of Court Administration* (Ottawa: Canadian Judicial Council, 2006).

² Letter from Allan Seckel, QC to Chief Justice McLachlin (3 March 2005).

inevitably share responsibility for the administration of the courts within the larger realm of responsibilities underlying our collective support for the administration of justice and the rule of law. Wherever we build the fence that defines and separates our responsibilities, we must build it together.

Discussions around models of court administration often focus on the first two goals established for the CJC project. This paper focuses on the third goal—‘the quality delivery of judicial services’ (which we choose to refer to simply in terms of what model or system works best).

The first two goals, while important, are not primary issues at this stage of this debate. First, judicial independence is not at stake. Administrative independence, as described by the Supreme Court of Canada in *R v Valente*³ and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*,⁴ is maintained under the current executive model operating in Canadian jurisdictions. As described in *Valente* and reaffirmed in *Provincial Judges Reference*, only administrative matters “that bear directly and immediately on the exercise of the judicial function” need be exercised by the judiciary.⁵ The ‘essential minimum’ delineated in *Valente* has also been met. Matters such as “the assignment of judges, sittings of the court, and court lists—as well as the related matters of allocation of court rooms and directives of the administrative staff engaged in carrying out these functions”⁶ have been left to the judiciary. In *Provincial Judges Reference*, Chief Justice Lamer rejected the judges’ argument that, by not having control over various aspects of financial administration such as budget preparation and the allocation of expenditures, judicial independence as guaranteed by section 11(d) of the *Canadian Charter of Rights and Freedoms* was impaired. He concluded that “these matters do not fall within the scope of administrative independence, because they do not bear directly and immediately on the exercise of the judicial function.”⁷ Judicial control

³ *Valente v The Queen*, [1985] 2 SCR 673, 24 DLR 161.

⁴ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 150 DLR (4th) 577.

⁵ *Supra* note 3 at 712; *supra* note 4 at 143.

⁶ *Supra* note 3 at 709.

⁷ *Supra* note 4 at 143.

over all matters of court administration is by no means a constitutional imperative.⁸

Judicial independence should not be confused with greater autonomy for judges. It is understandable that judges, particularly chief judges, might want greater autonomy with respect to matters of court administration. That desire is not dependent on principles of judicial independence in the constitutional sense.

Second, there is little if any indication that public confidence in the judicial system is adversely affected by the current executive administration model. What the public expects, and what litigants expect, is that each individual judge hearing a case will be impartial in carrying out that responsibility. The public does not focus on institutional independence so much as the independence of individual judges. This independence is assured by the provision of security of tenure, financial security, and administrative independence as set out above. Is there any reason to believe that a judicially administered model or a commission model will improve public confidence in this regard?

Thus, the question of which model best delivers court services is the appropriate focal point for the debate. This paper advances the position that the executive model is preferable in the Canadian context.

Before considering some of the specific reasons an executive model leads to a better system of court administration, two general points are worthy of mention. First, it must be acknowledged that a judicial model or a commission model can be effective. There are examples elsewhere in the world where these models are proven to work. They can be made to work in Canada. However, the question is, would they be as effective as the executive model as it exists in the Canadian experience? Second, it should go without saying that whatever model of court administration is in place, it exists not for the benefit of the individuals or institutions whose interests are connected to the court system. Whether one model is preferred over another by justice ministers or deputy ministers, or the executive government more generally, should not determine our choice. Similarly, a preference by individual judges, including chief judges, or the judiciary generally should not be

⁸ Also see Graeme Mitchell, QC, “‘Be Careful What You Wish For’: Administrative Independence and Alternative Models of Court Administration – The New Frontier” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010).

determinative. The choice of model should depend on what works best for the persons whose interests are determined by the courts and what best supports the public interest, perhaps more appropriately described in this context as the interests of the administration of justice.

II. REASONS TO FAVOUR THE EXECUTIVE MODEL

We don't live in a perfect world. So, too, the public institutions that support our liberal democracy are not perfect. The executive court administration models supporting Canadian courts do not always function as well as we want them to. This can be a product of our less than perfect management of the systems. It can also be due to the realities of a complex system that necessarily require the participation of all three arms of government. However, this paper now presents several reasons why the executive model, with all of its imperfections and limitations, should not be discarded in favour of one of the other models commonly advanced as alternatives.

A. WITH CHANGE COMES UNCERTAINTY AND A MEASURE OF RISK

We think we understand the alternative models that have been examined throughout the various stages of the models of court administration project. We think we understand how they would work in a Canadian context. However, our understanding of them comes from an examination from the outside looking in. We will not fully comprehend their effectiveness, or their problems, without abandoning the current executive model in favour of one of the other systems.

We cannot, for example, know whether a judicial model or a commission model will lead to greater harmony among the three courts in each jurisdiction, or whether we might see more tension among the courts as they exercise expanded authority with respect to, among other things, the allocation of resources among the three courts. Court resources, like resources for all public institutions and programs, will always be finite and may indeed shrink over time.

It is similarly difficult to predict how the place of puisne judges might be altered by greater authority in the hands of chief judges. From time to time we hear concerns from puisne judges about limitations and shortcomings within the current system. However, often those concerns

arise from matters that are already within the control of the judges themselves.

Heads of court administration, deputy ministers and ministers can be and commonly are replaced if they are not good at their jobs. A court administration model that places chief judges in expanded roles of governance by virtue of their office could create circumstances where courts cannot function well because the chief judge lacks the capacity to support high performance. While this is also a risk now, the potential negative impact is significantly increased in a judicial model and, perhaps to a somewhat lesser extent, in a commission model.

In sum, it would seem imprudent, even bad public policy, to change to an alternative model on the basis that it *might* work as well as or better than the current model.

B. INTEGRATION WITH THE EXECUTIVE GOVERNMENT BRINGS EFFICIENCIES

The delivery of court services is presently integrated to some degree with other executive government programming in all jurisdictions. Rather than a concern, this should be seen as a distinct benefit. The specific resources dedicated to supporting the courts are supported in turn by the many other resources in the provincial or territorial bureaucracy that are in place for programming of all kinds. This includes additional resources dedicated to policy and program development and implementation, program review, information technology, budget development and management, risk management, building construction, renovation and maintenance, human resources issues, labour relations and legal services. In the smaller provinces this is particularly important, since the replication of all of these services inside the court administration work units is impractical and uneconomical.

The quality of court services profits from this integration. Admittedly, we could construct arrangements that would develop and support relationships that presently occur naturally under the executive model. That would create something artificial that already exists quite naturally.

Critics of the executive model tend to focus on limitations and failures. Surely it must be acknowledged that much has been achieved under the current models functioning in Canada. Is it not possible that

some of those success stories are due in part to the leadership of the executive government?

C. WITH RESPONSIBILITY COMES ACCOUNTABILITY

It often seems to be assumed that the creation of a professional manager reporting to the chief judge or chief judges in a judicial model or to the commission in a commission model would insulate the judges involved in governance from the nastier realities of managing a large, complex organization. We doubt that this would be so. Given the strong desire so often expressed by judges to have an active role in matters of administration, it appears likely that no matter what alternative model were chosen, removing the executive government from the role it plays in buffering the judiciary from many matters of day-to-day administration would see judges touched by sometimes less than appealing operational aspects of managing the court systems.

Human resource management is fraught with problems. Hiring processes themselves are complex. Discipline, including dismissal, is more difficult. In between there are issues related to the determination of salaries, classification of employees, promotions, grievances and human rights and sexual harassment complaints. The judiciary should want to be as far away from these matters as possible. The alternative models take them closer to the risks associated with such operational details.

Much of the court services workforce is and will continue to be unionized. Collective bargaining and the management of a collective agreement present significant challenges for employers. Furthermore, as our colleague Graeme Mitchell, QC notes, judges may also be placing themselves in conflict situations in the event that judicial review of decisions pertaining to labour relations is sought.⁹

Depending on the details of the alternative model of choice, the judiciary may also be tasked with additional responsibilities regarding the construction, renovation and maintenance of court facilities. While judges already play important roles in relation to these matters, bearing the ultimate responsibility for what are sometimes large and complex projects will at the very least be a significant distraction from mainstream judicial duties.

⁹ *Ibid* at 124–25.

Someone who hasn't worked at a senior level in a large public institution might find the level of complexity, not to mention frustration, associated with the preparation and management of a budget in these organizations difficult to believe. Judges might look forward to greater input into and control over court budgets. The reality may be something different. Managers of public budgets have relatively little control over day-to-day spending. Simply put, there is very little discretionary spending left in the budgets of public institutions. There's no large pot of cash being hidden from judges. The managers of government budgets spend considerably more time fretting about them and accounting for them than they do enjoying the fruits of those budgets.

D. ARE ACCOUNTABILITY AND INDEPENDENCE TRULY COMPATIBLE?

We advance this next point more as a question than an assertion. The requirement of judicial independence, both in the institutional and individual senses, is of great importance when considering anything involving the activities of judges or those who interact with judges. As judges become more involved in matters of administration, do they risk becoming less able to maintain their status as independent, impartial decision makers? Put another way, while alternative models of court administration are advanced in the name of judicial independence, those models may actually generate a decline in that independence, or at least a perception of independence.

A complete examination of this issue would require an in-depth consideration of the role of judges, as well as society's perceptions and expectations of judges, which is beyond the scope of this short paper. Simply stated, however, it should be a matter of concern for us that the confidence placed in judges to remain detached and above the fray may be adversely affected by involving them in the day-to-day business of court operations and in the consequential requirement that they be held accountable for these responsibilities.

Any contest between support for the primary responsibility judges have, which is to hear and decide cases, and what must be considered secondary, their role in court administration, must be resolved in favour of supporting judges in their primary role as decision makers.

E. SHOULD WE FURTHER DISTRACT JUDGES FROM THEIR ADJUDICATIVE FUNCTION?

As mentioned above, the primary function of judges must be to hear and decide cases. Many judges, not just those who fill the roles of chief judges or associate chief judges, already carry many administrative responsibilities over and above their central judicial duties. Even now, concerns exist that judges are too occupied with these administrative responsibilities, to the detriment of efficient operations inside the courtroom.

Will courts function better if judges spend more time on administrative matters and less time hearing and deciding cases? Of course, one possible response is to appoint more judges. Given the increasing focus on controlling public expenditures, that seems highly unlikely no matter what the model of court administration.

We might also ask whether judges collectively possess the attributes appropriate to an expanded role in court administration. Clearly, some individual judges do have the requisite skills. Equally clearly, many do not. It might also be added here that an interest in administrative matters does not equate with a capacity to contribute at an appropriately high level. Many intelligent and engaged individuals lack the skills and experience necessary to guide the development of policy or the formation and management of administrative systems.

This should lead ultimately to a reconsideration of the basis on which lawyers are appointed as judges. If judges are to have greater responsibility for court administration, correspondingly greater consideration should be given to lawyers who have experience and attributes that lend themselves to these tasks. This logically suggests that in-house counsel and government lawyers with management experience should be given more favourable consideration in relation to appointments within an alternative court administration system.

Perhaps more important, the appointment of chief judges under alternative models should attract a new set of considerations. Although the basis on which they are presently selected remains something of a mystery, an enhanced role as contemplated in either the judicial model or the commission model should be cause for executive governments to ensure that the lawyers or judges appointed to these positions possess the attributes appropriate to the exercise of their many additional powers. This is particularly significant given the potential for a chief judge to be in

office for several decades without any meaningful way of addressing a lack of capacity to carry out their administrative responsibilities at an acceptable level.

III. CONCLUSION: POSITIONING AND MAINTAINING THE FENCE

Advocates of an alternative model seek, among other things, a clearer delineation of powers between the judiciary and the executive government in matters of court administration. There are certainly advantages to a clearer understanding of the respective roles of these two branches of government. However, the notion that alternative models of court administration support this clarity seems flawed. We can shift the boundaries—the location of the fence in the metaphor offered at the outset of this paper—but executive governments cannot abandon their responsibilities related to the administration of justice, which responsibilities necessarily require them to take an interest in the administration of the courts.

One senses as well that there are those who seek a purity in the system that, simply stated, will not be found. Again, no matter where we locate the fence, our shared responsibilities related to the administration of justice make us close neighbours.

We can find several examples to demonstrate the connectedness of our responsibilities, but we might start with the executive government's responsibility to appoint judges, including chief judges. Given that judicial appointments are made by the executive branch, the judiciary can never be seen as entirely separate from the executive. We create the separation in how we conduct our business; not simply through the structures themselves. For observers from other systems, in Europe for example, this is sometimes difficult to accept. For those of us who have grown up in the Anglo-American tradition, it seems quite natural. While we should never take these things for granted, we accept that individuals can and do conduct themselves with integrity and in support of the proper functioning of our complex legal systems.

Having said that, no matter where we draw the line and build the fence, we must remain vigilant. It's easy to slide into complacency. Notwithstanding that we are friends within our small community, we must be constantly mindful of the respective different roles we play in the administration of justice.

Similarly, no matter where we build the fence, relationship building and communication between the judiciary and the executive government will remain key features of any court administration model. While critics have suggested one of the flaws of the executive model is it relies too heavily upon communication and strong relationships between individuals in the executive and the judiciary, this shouldn't be considered a bad thing.¹⁰ Anywhere shared responsibilities exist, tension will be present. Moreover, as mentioned, strong relationships between the executive and judiciary will be important regardless of the court administration model, because neither the executive nor the judiciary can rightfully be fully removed from court administration.

So, is there a need to move the fence? Proponents of alternative models say yes. Our position remains that the primary consideration in making that decision must be which model best serves the persons whose interests are determined by the courts and the overall interests of the administration of justice. While there are challenges within the current executive model, it has not been demonstrated that an alternative model will be better. Furthermore, alternative models bring with them new challenges.

Whether or not the CJC's project on models of court administration ultimately leads to the adoption of an alternative model in any Canadian jurisdiction, it has served the important additional purpose of focusing debate on many issues of court administration, demonstrating at times ways in which we can improve court administration systems. Perhaps it has also demonstrated that we need to talk more.

Furthermore, given that many judges, including chief judges, are seeking greater autonomy, perhaps we need to re-examine the various aspects of court administration within the executive model to see where that would be desirable. For example, some jurisdictions might want to consider greater rule-making powers for judges.

However, whatever changes we make within the existing model or through the adoption of an alternative model, the judiciary and the executive government will remain jointly responsible for matters related to the administration of justice, including matters related to court administration. As in the past, this partnership will be its most effective when we work together as neighbours while maintaining our good fence.

¹⁰ See, e.g., *Alternatives*, *supra* note 1 at 15.