

Reform in Administration of the Courts

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Courts administration in Ontario is governed by the *Courts of Justice Act*, RSO 1990, C 43, as amended. Section 71 of the Act requires that the administration of the courts be carried on as follows:

1. so as to maintain the independence of the judiciary as a separate branch of government;
2. recognize the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice;
3. encourage public access to the courts and public confidence in the administration of justice;
4. further the provision of high quality services to the public; and
5. promote the efficient use of public resources.

The question I would pose is whether we have too much attention being paid to items numbered one and two and not enough emphasis on items three, four and five.

Public confidence in the administration of justice must obviously include confidence in the independence of the judiciary. However, without the ability of the public to first access the courts and the justice system in an affordable and timely way the whole exercise is pointless. Much has been written, many speeches given, committees struck, task forces tasked, and initiatives launched in an effort to improve access, affordability and timeliness—but progress, if any, has been absolutely glacial. And this is not a new issue! While the concerns have been very much heightened in recent years, the concerns, particularly about timeliness and affordability, have been voiced since my call to the bar in 1976. Having litigated in the courts as a young lawyer, having managed large and complex litigation in jurisdictions all over the world and having

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run a number of different businesses in both the private and public sector, I think that my observations about court administration bear some consideration. Interestingly, they are not even particularly novel.

It is not as though the issue of court administration has not already been studied. The Canadian Judicial Council in 2006 issued an excellent discussion paper on the administration of courts. It studied the various alternatives in administration and reached the following conclusions:

1. Canada has fallen behind peer jurisdictions such as Australia in innovations in court administration. Although the trend in most Canadian provinces is toward an enhanced judicial role within the executive model, the deficiencies of the executive model continue to impair the ability of courts to fulfill court administration goals and objectives.
2. The analysis of the evidence indicates that there is a compelling constitutional rationale for changing the executive model of court administration in Canada to a model or models which feature a greater degree of judicial autonomy.
3. This change ensures judicial independence.
4. This change also enhances the accountability of the judiciary in court administration, as well as achieving improved effectiveness and efficiency in court administration.
5. Although there are legitimate variations in viewpoints about the strengths of those positions on the issue, concerns about the shortcomings of the executive model of court administration are widely held among the judiciary and this view is shared by some executive officials.
6. There is significant support for a model of court administration based on limited autonomy for the judiciary within an overall budget for court administration set by the appropriate legislative authority. Support extends further to linking this limited autonomy to the use of an independent commission for the prevention and resolution of disputes related to the overall size of the budget allocated to the judiciary.
7. There is also a need for a professional court administration with a chief executive officer responsible to the Chief Justice. The existence of a CEO to handle day-to-day operations will be important in ensuring that the judiciary is not preoccupied with

those matters and can focus on the overall strategic direction of court administration.

8. This report concludes that an optimal model of court administration would be one which provides the judiciary with autonomy to manage the core areas of court administration while ensuring (by the carefully considered use of an independent commission) that the authority of the political branches over resource allocation is not used arbitrarily.¹

While we have seen movement in Canada away from what the CJC termed the 'executive model' the shift has been relatively minor, if any at all. My read of the report and recommendations is that the approach taken in Ireland, where court administration is the responsibility of a corporation created by legislation to administer the courts, would meet the findings of the Canadian Judicial Council. Frankly, I do not see it as likely that in Canada we would see court administration devolving to the direct responsibility of the judiciary. I think the executive arm of government and the judiciary itself would be too nervous to contemplate this degree of restructuring. However, charging an agency with responsibility for court administration and management, when that agency is comprised of the judiciary, the legal profession, the executive, the public and professional management would be entirely within the scope of Canadian experience in public administration. In addition there is a successful example of this model of court administration in Ireland.

My fellow speaker Mr. Justice David D Smith has set out in his paper the experience in Ireland under the Court Services Act, 1998. It appears to have been a most successful approach to administration. Courts Service is a corporation with a CEO and Board of Directors. The composition of the board is such that the judiciary have a majority of the board placements. The board composition is the Chief Justice; the Presidents of the High Court, District Court and Circuit Court; a judge nominated by the Chief Justice; a judge from each of the courts elected by the judges; the Chief Executive; a practising barrister nominated by the Bar Council; a practising solicitor nominated by the Law Society; an officer of the Ministry of Justice nominated by the Minister; a person nominated by the Minister to represent consumers of services provided by the courts; a person nominated by the Irish congress of Trade Unions; and

¹ Canadian Judicial Council, *Alternative Models of Court Administration*, (Ottawa: Canadian Judicial Council, 2006) at 3.

a person nominated by the Minister who has relevant knowledge in commerce and finance.

Courts Service under the direction of its CEO and Board is charged with management of the Irish courts. Section 5 of the *Courts Services Act, 1998* outlines the corporation's functions as to manage the courts; provide support services for the judges; provide information to the public about the courts; provide, manage and maintain court buildings; and provide facilities for the users of the courts. In relation to its responsibilities it is able to purchase, sell and own land; enter into contracts; make proposals to the Minister of Justice for reform, justice policy, court procedure, and distribution of jurisdiction as between the courts; and designate court venues. In short, the Corporation has been delegated for all practical purposes the authority to manage a significant portion of the administration of justice. Political accountability is through the Minister of Justice who reports to the legislature and secures the Corporation's finances through the budget process overseen by the legislature.

Like any corporation, Courts Service must produce a strategic plan with objectives, outputs and related strategies, which incorporate any directives from the Minister of Justice and has regard to the effective use of resources. However, the legislation is clear that the authority vested in Courts Service is not to impugn the independence of the judiciary in the performance of their judicial functions or those functions which are required by law to be transacted by or before one or more judges. This important point is of course largely assured in a practical way by reason of the fact that the majority of the Board members are from the judiciary.

I have set out in some detail the Irish model because it is instructive in pointing to a way in which significant reform in the administration of the courts could be achieved. It is a model that makes clear where accountability lies for management of the courts and therefore provides an effective, timely and cost efficient mechanism for the public and the state to access the courts and obtain disposition of their legal issues. This model recognizes that there must be accountability for there to be effective management and meaningful reform. My own experience would indicate that without someone clearly being in charge it would be rare for there to be a very effective initiative, process or organization. Unfortunately when you ask the question with respect to the administration of the courts and therefore by extension much of the justice system the answer is usually 'no one is in charge.' Maybe this is just a

cynical quip, but unfortunately it is much closer to the truth than we would really like to admit.

According to the Ontario Auditor General's 2010 Report, the Courts Services Division of Ontario spent \$403 million for the 2009/10 year. In addition it spent \$70 million on capital projects and received \$140 million from fines and court fees. These numbers don't include the Government of Canada's costs for the 242 federally appointed judges of the Superior Court of Justice or the 22 Court of Appeal members. I suspect that these costs would be in the range of \$100 million per annum. Despite these not insubstantial expenditures, Ontario's Auditor General's report indicated in 2010 that little progress had been made with respect to the Auditor General's 2008 observations. For the sake of illustration, they were:

- Between 2004 and 2008 pending criminal charges had grown by 17% and charges pending for more than 8 months had increased by 16%. Backlogs for family cases including child protection matters were also growing.
- The Ontario Court of Justice had insufficient judicial resources.
- The Ministry had no explanation for the 50% increase from 1997 to 2007 in the number of defendant court appearances before a case went to trial.
- Qualifying low-income defendants experienced difficulties in obtaining legal aid funding contributing to delays and more frequent court appearances.
- Little progress in the implementation of new technologies.
- Court operating costs were significantly different across the province.
- There was no minimum security standard.²

The most interesting aspect of the 2010 report it is what is said with respect to Recommendation 2 of the 2008 report:

Recommendation 2

To help ensure that the courts function effectively and to improve the stewardship of funds provided to the courts, the ministry of the Attorney General and the Judiciary should maximize the benefits

² Office of the Auditor General of Ontario, *2010 Annual Report*. Online: <http://www.auditor.on.ca/en/reports_2010_en.htm>.

from their improved relationship to enhance their administration and management procedures by establishing:

- a process whereby they regularly assess the administrative structure of the courts and Ministry/Judicial relationship against desired outcomes; and
- realistic goals, plans and timetables for the timely and effective resolution of issues related to court operations such as the reduction of case backlogs and improvements to technology, information systems, and security in courts.³

The report goes on to provide:

The Ministry informed us that it continues to work with the Judiciary to maximize co-operation in court administration while respecting the independence of the Judiciary. The 2006 amendments to the *Courts of Justice Act* specify goals for the administration of the courts, clarify ministry and judiciary roles and responsibilities, legally recognize the memoranda of understanding established between the Ministry and the Judiciary, and require the Ministry to publish an annual report on court administration. Separate memoranda of understanding have been established between the Attorney General and the Chief Justices of the Ontario Court of Justice and Superior Court of Justice that further set out their roles, responsibilities, undertakings, and expectations, as well as a process for regularly assessing and discussing their collaborative relationship. We were informed that the Chief Justice of the Court of Appeal will soon sign that court's first memorandum of understanding with the Attorney General.

Ministry staff meets regularly and participate on several committees with representatives of the offices of the Chief Justices and local levels of the Judiciary to identify and address needs and priorities, and to participate in initiatives such as JOT, and others, to improve information and video technology and court security. The Court Services Division Five-year Plan, contained in its published annual report, sets out goals, plans, and timetables to address priority needs identified by the Ministry and the Judiciary. As discussed elsewhere in this follow-up report, we also noted progress in establishing plans and, in some cases, targets, with

³ Office of the Auditor General of Ontario, *2008 Annual Report*, Online: <http://www.auditor.on.ca/en/reports_en/en08/ar_en08.pdf>.

judicial involvement, for addressing longstanding issues in court administration and security.⁴

Like other provinces, Ontario's court administration is gravitating towards greater participation by Judges. The Ontario Court of Justice's memorandum of understanding was struck in the early 1990s and gives the judiciary significant participation in administration and budget management. However, the memorandum of understanding with the Superior Court is little more than a cooperation agreement. No agreement has yet been made with the Court of Appeal. The problem with this type of an approach is that responsibility is split within different reporting structures. In spite of considerable goodwill and significant effort on the part of all concerned, it is not a model of administration that is going to be particularly efficient.

Simply compare the authority vested in the Irish Courts Service as compared to the limited delegated responsibility—even under the Ontario Court of Justice Memorandum of understanding. All aspects of court administration need to be housed under one authority. Procedural rules, jurisdiction, allocation of resources (judicial and non-judicial), technology, and public information all must be managed by the same entity if there is truly to be effective administration. All of these aspects of administration are interdependent. Without coordinated and strategic management by one body, change will not come very quickly and will be difficult to effect successfully. An oversight body such as the Irish Courts Service board contains within it the necessary competencies to decide how best to decide as between competing interests and priorities. Day to day management and decision making would be the responsibility of the CEO.

Can we really afford to continue with the glacial improvements that we are currently achieving? Without what some would label as radical reform, we are not likely to see enough change in courts management to really affect the timeliness and accessibility issues that are driving the public either away from the courts in the first place, or draining the resources of those who have resorted to the courts to the point that they have to end up representing themselves. My perspective would be that change in the present context is not really radical at all, but simply a wise decision in the face of what most would call a crisis in access. Frankly I don't see how we can effect real change without

⁴ *Supra* note 2.

charging a new body to effect the necessary changes to court administration and management. Without clear accountability there cannot be effective management. The state of affairs that we currently witness in our courts and their administration is simply evidence of this truism.