

JUDICIAL INDEPENDENCE AND  
THE ADMINISTRATION OF COURTS IN CANADA

By

Carl Baar

Research Fellow

Centre for Research on Public Law and Public Policy

Osgoode Hall Law School

York University

Prepared for delivery at the National Seminar on Justice: Independence and  
Accountability, Canadian Institute for the Administration of Justice,  
Montreal, Quebec, October 15, 1987.

## JUDICIAL INDEPENDENCE AND THE ADMINISTRATION OF COURTS IN CANADA

Judicial independence is a fundamental constitutional principle in Canada, along with principles of parliamentary supremacy and ministerial responsibility. How governments define the proper exercise of that responsibility varies from one time to another, and from one place to another. In turn, the judiciary gives independence a different meaning and emphasis. This paper will spell out two ways in which the principle of judicial independence adapts to the exigencies of government and politics: a closed system model and an open system model. The terms have been chosen both because of what they convey about contrasting styles of government and administration, and because they reflect different approaches to management practices and organization theory.

The paper will proceed as follows:

- \* It will describe the two models.

- \* It will argue that the closed system continues to dominate Canadian court administration nationally, producing a debilitating inertia that is accelerating the decay of our judicial processes.

- \* It will argue that the closed system approach to judicial independence parallels the control-oriented approach taken by provincial departments of the attorney general to the issue of prosecutorial independence and impartiality. Thus the essential problem for court administration is not the desire of the judiciary to cling to its turf, but the inappropriate way provincial departments of the attorney general have chosen to operationalize principles of cabinet government.

- \* Finally, it will encourage new directions for the open system approach, by exploring new structures, new processes and new programs for the administration of our courts--provincial, territorial and federal.

## CLOSED SYSTEM MODEL

The model that will be described here is what social scientists term an ideal type (or extreme type) because it focuses on selected characteristics that have been accentuated to a high degree. It is used to understand reality, not to describe it directly. Thus the closed system model posits what court administration would look like under a particular set of assumptions about the role of government, parliament and the judiciary. The model is built on our traditional view of responsible government, in which the collective cabinet and each individual minister are answerable to parliament for the work of government. In turn, ministers control and are responsible for their ministries through a deputy minister who directs the administration of the civil servants who make up the minister's department. This framework emerged a century ago parallel to the development of the classical theory of organization and management: both approaches prescribe a chain of command linking the operating members of the department (or business) through successive levels to the top of the hierarchy, and a unity of command whereby a single individual at the top of the hierarchy takes responsibility for the department's operation. Parliament's control is seen to derive from its ability to call that single individual--who is also a fellow member--to account for his/her actions.

This system, with its focus on tight control and accountability, is in no way inconsistent with the principle of judicial independence--as long as that principle is defined in a traditional manner. In the traditional view of judicial independence, judges are not accountable to government or parliament for decisions they make in court. In turn, however, judges have no responsibility in matters of administration, including the expenditure of funds, since parliament requires some way of calling to account any office-holder who has the authority to expend public funds,

hire public servants or otherwise manage and allocate the public's resources.

These traditional views of administrative responsibility and judicial independence reinforce other views about the role of the judiciary in administration. If judges are independent as long as they adjudicate and no further, they eschew any role in ensuring that adjudication is conducted expeditiously. By this logic, the narrower their role, the greater their independence. This view of judge as courtroom referee has a number of implications. For example, lawyers not judges become responsible for the movement of cases; if cases collapse or are adjourned on consent, it is not the responsibility of the judiciary. To go still further and suggest that the court should monitor the progress of a case prior to counsel placing it on the ready list for trial is to ask the judge to practice law.<sup>1</sup> Delays that are systemic rather than the fault of counsel are also not the responsibility of the judiciary, but are almost universally attributed to government's failure to allocate sufficient resources to the administration of justice. In a closed system, judicial independence is preserved by encapsulating the judges,<sup>2</sup> placing them in a protected environment so that public criticism of the courts does not strike at them directly.

The closed system is also reflected in the way departments of the attorney general administer the courts. Since the attorney general is answerable to the legislature and not directly to the public, information about the courts is provided in answer to direct questions in the house, but not in the form of reports to the public. Basic management information--the volume of cases in a court, the amount of time it takes those cases to proceed from initiation to disposition--is either non-existent, or is withheld from public scrutiny on the grounds that an unsophisticated public would fall prey to distortion of the data by irresponsible reporting in the mass media. In exchange for their insulation from public criticism, the judiciary avoids unseemly controversy by avoiding public statements

critical of the administration of justice, thus muting a major voice that could increase public knowledge of shortcomings that are not inevitable but remediable.

The closed system model does not mean that the judiciary and the attorney general's department are isolated from one another. It means that when they establish cooperative relations, those links are hidden from public view. In practice, closed system links have emphasized benefits for the higher level judiciary, and benefits that improve the judicial lifestyle without necessarily improving the quality of service to the public. In turn, the department benefits by maintaining good relations at very little cost to the treasury, and maintaining its control over personnel, purchasing and contracting, and other areas linked to the continued success of the party in power. For example, a closed system model in provinces characterized by reliance on patronage may see a judge's relative obtain a staff position in an attorney general's department at the discretion of the minister. In other provinces, personal negotiation between a chief justice and an appropriate minister or deputy minister may result in acquisition of limousine service for selected superior court judges. In either case, benefits to the public are at best secondary or at worst sacrificed; the least prestigious courts with the greatest need for professional staff support (e.g. family courts and high-volume criminal courts) are given the least attention.

Once these attributes of the closed system model are spelled out, the researcher's next task is to measure the extent to which an actual jurisdiction (e.g. a province) approximates the model. From such research will come conclusions not that some provinces operate as completely closed systems, but that some are more closed than others. Once provinces are ranked on this basis, it is possible to assess what happens when the closed system model is used more widely and more fully.

## OPEN SYSTEM MODEL

It is more difficult to spell out the alternative to the closed system model. This is partly because it does not reflect a fully-developed and fully-implemented approach to government and to court administration. It does reflect a number of changes, primarily in the last decade, whose coherence and interrelationship are only now coming into view. Some of the pressures and conflicts that led to the emergence of an open system approach came from efforts by the judiciary to gain control over court administration--for example, in British Columbia under Chief Justice Nathan T. Nemetz and in Ontario under Chief Justice Willard Z. Estey. In practice, the changes that occurred following these conflicts did not give the judiciary control over court administration; nor did they take authority out of the hands of departments of the attorney general. What emerged have been new techniques of accountability and responsibility, and a new definition of judicial independence.

In an open system, the minister and the cabinet remain answerable to parliament, and the deputy minister accountable to the minister. But the lines of communication multiply in variety and frequency. Coordination becomes a priority and a problem. Why? Because participants are not primarily responsible to their superiors for carrying out orders--the classical model built on hierarchy. They are primarily responsible to the public for the results of what they do--the open system model that requires coordination and communication. The closed system model rewards those who follow directions and encourages employees to do their jobs rather than think about them. The open system model rewards those who achieve results and therefore encourages employees to combine thinking and doing. It assumes that policies embodied in legislation and principles enunciated by elected officials are not orders to be followed but guidelines whose implementation requires skill, energy and

imagination. Thus feedback mechanisms are essential in an open system model; to combine thinking and doing requires information about both the effects of what you do and the environmental pressures you face.

The open system model goes beyond the traditional principle of judicial independence. That principle remains inviolate: judges are not accountable to government or parliament for their decisions in court. At the same time, since those decisions could become meaningless if they take too long or cost too much to obtain, judges have an obligation to the public to increase the effectiveness of the courts. They have an obligation to coordinate their work among themselves and between themselves and those who appear before them, so that the opportunity to hear and decide cases comes in a timely fashion, as part of a process that eliminates unnecessary inconvenience and cost. Judges share with court administrators and lawyers the responsibility for the movement of cases. The judiciary participates where effective in pre-trial stages, reducing both the collapse rate and the need for adjournments. If statutory or procedural changes are needed, or redeployed or increased resources essential, forums exist for the judiciary to make its concerns known to the public and to the government. In turn, the judiciary has an obligation to report to the public, either directly or through public departmental documents, on the state of its work.

As the judiciary shifts from closed to open system assumptions about its work, so do departments of the attorney general. Public reports are more regular and more complete. Central administrators change their emphasis from reacting to individual problems and crises to developing management capabilities that reinforce local efforts to achieve results. Management information of value to operating trial courts is increased. Personnel needs are met not through political or bureaucratic patronage, but through professionalism, both in recruiting qualified new personnel and in training the dedicated and competent in-house staff. (In the

metaphor often displayed above the manager's desk, the emphasis shifts from killing the alligators to draining the swamp.) New technology is explored, not to allow expensive bad habits to be perpetuated but in order to improve performance.

At the operating level in the local courthouse, judges, lawyers and court officials share responsibility for making the system work. Management information (both quantitative and qualitative) is used to identify obstacles to the effective delivery of justice so that resources can be rapidly reallocated and problems do not linger and grow into the future crises that could have been avoided. No individual--no single actor or official--runs the court. In effect, it is "run" through a coordinating mechanism made up of the major actors. The ways the court does its work emerge from the policies developed through this mechanism, as a response by those who understand the court's operations to feedback about its effectiveness. In effect, court operations are perpetually redesigned as participants work to ensure the effectiveness of those operations.

Since the open system approach is, like its closed system counterpart, an ideal type, no particular province fits that model either. Some provinces have begun to display characteristics associated with an open system. Quebec is the one province whose court services branch issues a comprehensive public annual report containing quantitative data on case volume and (indirectly) on court delay.<sup>3</sup> The Chief Justice of the Quebec Superior Court recently released a polished public report on his court's work; the reduced delays reported in Montreal suggest the effectiveness of coordination efforts in that court.<sup>4</sup> In 1975, British Columbia's Attorney General issued his ministry's first annual report in a format similar to other major government departments. Ontario followed suit a year later, apparently even borrowing from the text of the B.C. deputy minister's letter of transmittal. Ontario's Chief Justice presides at the annual January Opening of Courts, at which time each provincial chief judge and



chief justice reports on the state of his court's business and comments on administrative issues. The press and camera crews are there to record the event, along with the Attorney General who is given an opportunity to stand before the chiefs and respond.

B.C.'s Assistant Deputy Minister for Court Services, Tony Sheridan, describes his position largely in open system terms:

By statute I report to four people. I report to the Chief Justice of British Columbia, the Chief Justice of the Supreme and County Court, the Chief Judge of the Provincial Court and the Deputy Attorney General. Organization theorists may tell you that this is an impossible situation, but I don't find it that way. I find it workable and I think that in general we have been able to distinguish between my respective accountabilities.... [T]here are times when the responsibility for some issues [is] in dispute. In those cases, I see it as my responsibility to try to work out an acceptable position to reflect the interests of all those involved.

Once major strategic policies are decided, such as where courthouses are located, there is a need for operating policy, such as how do we get a courthouse built once it is approved. Any management text will tell you that the development of good operating policy requires an understanding of the problems of implementation. In practice, this means that the policy makers have to be actively involved in understanding the dynamics of the operation. It is not a simple matter of giving orders. It is a matter of involving people in a problem solving process so they can work together to find practical solutions. Again this requires involvement with all those affected--representatives of the community, the users, the staff and technical experts, and above all it takes time.<sup>5</sup>

Sheridan's reporting relationship to three chief judges reflects the efforts of the B.C. judiciary to assert more control over court administration. The best-known of those efforts was the drive to obtain an independent budget for the judiciary. What resulted were separate budgets for "judicial administration" and "court administration," with the

judicial budget limited to personnel doing quasi-judicial functions and trial scheduling, and to the judges' personal staff. While the judiciary may have seen this as the first step in a transition from executive to judicial control of the entire court apparatus, the reality is different. The judicial budget has stabilized and the dual system has become the basis for cooperative relations between the judiciary and the ministry. At the same time, however, control over court administration has largely remained with the executive, so that significant (i.e. strategic policy) issues are handled "largely" by the attorney general and the provincial cabinet, not the judiciary.<sup>6</sup>

In 1976, Ontario's White Paper on Courts Administration proposed that court administration be largely the responsibility of a judicial council. Despite an initial flourish of interest in the proposal by the Attorney General and senior officials, that enthusiasm waned, and under a new Chief Justice, the judiciary's priorities shifted to establishing formalized consultative mechanisms: the Ontario Courts Advisory Council and the Bench and Bar Committee. While these bodies continue to function, major initiatives have been structured and defined by the ministry--the appointment of the Williston Committee to begin the process of drafting new rules of civil procedure (a committee from which judges were excluded), and the creation of the Ontario Courts Inquiry under Mr. Justice Thomas Zuber.

The ministry's court administrative apparatus has undergone some changes in the direction of an open systems model. The senior position responsible for court administration has over a fifteen-year period changed hands from a career trouble-shooter to a senior ministry lawyer, then to two successive accountants, and currently to a former Management Board official with engineering background who had implemented the province's "Management by Results" program. The change in government in 1985 saw an increase in the number of headquarters personnel in court

administration, as professionally-qualified and experienced people began to be recruited both from within the ministry and from outside. Ontario retains many elements of a closed system model: the patronage process, while abolished for policing liquor licences, has not yet been abolished for administering justice; and management information is still limited, and still not released for public consumption.

At the operating level in particular courts and courthouses, where the open system perspective focuses, evidence of a shift in the provinces is hardest for the outside observer to measure. It is likely that many senior judges and court officials spend more time trying to stay out of one another's hair than they do in coordinating and monitoring their work and seeking to improve their court's effectiveness. While the team approach that reinforces coordination may be difficult to achieve, there are signs that its importance is recognized. The Chief Justice and the Registrar of Manitoba's Court of Queen's Bench in Winnipeg recently engaged in a formalized team-building exercise, attending a workshop on the "executive component of the court". The workshop was restricted to chief judges and court administrators attending in pairs, and emphasized the development of mutual understanding of the distinct and shared tasks of each team member.<sup>7</sup> The Registrar has been enthusiastic about the value of the workshop in increasing judicial understanding of the registry's administrative work.

These brief illustrations point to piecemeal incremental changes in management style and in the conception of court administrative needs, not only among executive officials but also among the judiciary. These changes mark the beginning of a shift in court administration from the long-dominant closed system model to--in a few provinces--points further along the scale toward an open system model. For long-run benefits to accrue, these initial changes must be better understood and more fully implemented. However, before it is possible to spell out ways

to move toward an open systems approach, or press for its implementation, we must understand why this is necessary and worthwhile. To do so requires consideration of the effects of a closed system.

#### THE EFFECTS OF USING THE CLOSED SYSTEM MODEL

The greater the use of a closed system model, the less likely that challenges facing the courts will be dealt with. In a closed system setting, court officials and judges do their work without full sensitivity to their effectiveness. The judge's role is narrowly defined, limited to adjudication of cases assigned to the court in which he/she is sitting. The local court administrator traditionally emphasizes adherence to ministry procedures, not how to make those procedures work to deliver justice more effectively. Pressure for reform is not directed to these operating-level people, but to cabinet ministers and members of the legislature. Legislators press their constituents' needs and their party's policies on the minister responsible. Three things happen in the process:

- \* The courts' problems are lost amidst more pressing and dramatic economic and social problems.

- \* When the courts' problems become serious enough to be noticed, they will have reached crisis proportions, and can no longer be handled as effectively at the operating level.

- \* Court problems that are raised may be put aside as insoluble or too costly to solve--a product of ignorance about available solutions, not a reflection of the nature of the problems.

In the closed system model, these responses occur because outside pressure focuses at the top of the departmental hierarchy. While those at the top of a cabinet department may sometimes be the most active proponents of change, they can more commonly be observed buffering the department by deflecting or absorbing external pressures. The nature of the hierarchy that deals with the administration of justice raises further

difficulties, because in every jurisdiction in Canada--provincial, federal and territorial--the minister responsible for court administration is also responsible for other aspects of the administration of justice, including in every case the prosecution of criminal matters and the provision of legal advice to and legal representation of the government. In this setting, court priorities must compete for a minister's attention with other priorities ranging from law enforcement to constitutional change.

Some would argue that this "combination of roles" is beneficial since, for example, it "permits the opportunity for mounting an effective and broad effort to combat a particular category of offence." Consider a policy of "increased emphasis" on drinking and driving, as did long-time New Brunswick Deputy Attorney General Gordon F. Gregory in a recently-published address. "[F]ewer bureaucratic impediments will arise," he argued, "if the policy can be implemented by one minister responsible for policing, prosecutions, courts and corrections."<sup>8</sup>

Others might respond to Gregory's argument by noting that it suggests that courts should implement government priorities. The task of the courts is not to be part of an "effort to combat" crime. Their function is to ensure that any such effort, when it results in the prosecution of particular individuals, is subject to legal standards applied in judicial proceedings that are fair and expeditious. The court's ability to perform its function requires continuous attention to court administrative needs, not periodic attention linked to external policy goals.

While some might disagree when I assert that there is an inherent conflict when attorneys-general and deputy attorneys-general are responsible for both prosecution and court administration, there should be no disagreement with the assertion that most attorneys-general and their deputies would attempt to reduce the potential for such conflict. Unfortunately, the effort to reduce the stress associated with conflicting (or potentially conflicting) roles simply reinforces the tendency to neglect

court priorities. Put more bluntly, a minister may find inaction preferable to being accused of undermining judicial independence by intervening in particular areas of court administration. Why push for reform if the public payoff is low and the headaches great? It becomes easier to keep the peace by granting the relatively inexpensive and routine requests of superior court judges, and avoiding the more fundamental and controversial needs of all courts. A few word processors for the court of appeal will be better received and less costly in the short run than a revamped and computerized scheduling system for a high-volume trial court.

Reducing role stress in a closed system requires that expectations be kept low so that internal problems can be dealt with through top-level personal communication. Expectations can be kept low by keeping information scarce, especially outside information. There is no premium in recruiting professionally-educated court administrators if they bring in new ideas that could alter existing routines. There is no premium in giving existing officials too much management training so that they find out about new methods of doing their work. There is no premium in encouraging judges to learn more about administrative developments in other jurisdictions, or they may want to try them out at home. These actions could produce long-term benefits, but they are discouraged because they may also produce conflict and stress in the short term.

This discussion once again represents how the "pure" closed system model would operate, not necessarily how any particular province would operate. However, this apparently caricature helps explain certain nationwide manifestations of a closed system mentality that are choking off important initiatives to improve court administration. Consider first the inability of the Canadian Centre for Justice Statistics to generate data on courts. The Centre started up in 1981 as a result of a joint federal-provincial effort to improve the gathering of justice statistics in the wake of persistent tensions in the relationship between provincial justice

agencies and Statistics Canada. The result was a then-unique experiment in federal-provincial collaboration: the Centre would be a federal agency (technically a "satellite" of StatsCan), but its work would be governed by a committee of federal and provincial deputy ministers, in which the provinces would command a clear majority. The Centre takes pride in its data-gathering and publication in the fields of crime statistics and corrections, but after six years the collection of quantitative data on the courts is still in the planning stages. The Centre collects no data on the number of cases going through the courts of any province. The Centre cannot say anything about court delay, because it collects no data on the pace of litigation in Canadian courts. There are a raft of technical difficulties in developing a valid data base for the courts, but the Centre's inability to make real progress in this field is not a result of insurmountable technical difficulties. It is a result of provincial hesitance to support these efforts. One province simply withdrew from data collection efforts and Centre staff were unable to communicate with local court officials in that province. Other provinces have delayed data gathering efforts, using validity issues to retard the enterprise as long as possible. At this writing, therefore, what began as an innovative framework for encouraging the gathering and use of valid data on the administration of justice has been transformed into a way for reluctant and in some cases intransigent provincial governments to undermine the collection of court data essential for long-term efforts to understand and improve court operations.

Consider next the thusfar successful efforts of a small minority of provincial justice officials to prevent the launching of a broadly-conceived and widely-supported national study of the Canadian trial process. The trial process study was originally developed as a data gathering effort covering every section 96 court in Canada. A detailed proposal was prepared in December 1985 at the request of the newly-

organized Trial Chief Justices Committee of the Canadian Judicial Council, pursuant to the Council's mandate under the federal Judges Act. The proposed research reflected the acknowledged ignorance on the part of chief judges in one province about how their counterparts in other provinces were dealing with the problems of increasing delays and cost of litigation, and whether for example particular pre-trial procedures and caseload management techniques were more effective than others. The proposal deliberately focused on an area which most provincial attorneys-general had left largely to the judiciary, so that the study could provide a basis for cooperative problem solving rather than an assertion of judicial authority over matters previously in ministerial hands.

It became clear in early 1986 that funding from the federal Department of Justice would not be forthcoming, since it would mean a substantial percentage increase in the Canadian Judicial Council's traditionally modest budget. Nonetheless, the full Council endorsed the project at its spring meeting. The critical breakthrough occurred that summer, when the incoming president of the Canadian Bar Association made the question of court costs and delay a major priority for his term of office. He approached the federal Deputy Minister of Justice, who encouraged him to link the CBA's concern with the existing proposal of the CJC. Negotiations ensued, and despite the traditional tendency of judges to feel that lawyers lack perspective on the trial process, and the corresponding tendency of practicing lawyers to feel that judges would resist worthwhile change, an agreement was reached that the two organizations would cosponsor the study. The next major hurdle was cleared in August, when the Law Reform Commission of Canada, through its President, agreed to fund the study as the first phase of its new program of proposed research on "better dispute resolution".

What had emerged from this process was an unprecedented cooperative effort to develop an information base for future improvement in the trial



process. As soon as the study was in a position to become a reality, the support and cooperation of the provincial ministries responsible for court administration was sought. An initial memorandum went to the provinces from the federal Department of Justice in early fall asking for comments, and the matter went on the agenda at the next deputy ministers' meeting in early December in Banff. While no written criticism had been registered prior to the meeting, and most participants were either passively acquiescent or genuinely interested, a minority were hostile. The deputy attorneys-general of New Brunswick and Nova Scotia were most direct in their opposition. A working committee of five deputies was asked to examine a more detailed set of terms of reference in January 1987, prior to the federal-provincial ministers' meeting scheduled for early February.

In January, the ministers' meeting was postponed, and was finally rescheduled for the last week in May. When the working committee of deputies met, new opposition surfaced from Ontario, whose deputy had previously been supportive (but was replaced by another senior official for that meeting). Negotiations ebbed and flowed between federal officials and their provincial counterparts throughout the winter and spring. Finally, just before the ministers' meeting, federal officials proposed a framework for the study that met virtually all the objections articulated by Ontario officials. That proposal was quickly rejected by Ontario, whose position seemed to be that the provinces should do any such studies within their own departments. When the ministers met, no such position was taken; in fact, Ontario agreed to support the study. Its Attorney General set out two conditions at the time: provincial officials had to be included on the project executive committee (along with the CBA President, the Trial Chief Justices Committee Chairman and the President of the Law Reform Commission), and support would be withdrawn if any province objected in principle to the study.

With the mandate clear, federal officials sought to put the last pieces together, only to be met by continuing objections at the deputy and assistant deputy minister level from Ontario and Nova Scotia, and a brief but clear rejection of the project by the Attorney General of New Brunswick. As this is written, provincial officials appear to consider the project to be dead, even though it was never rejected by a majority of provinces (or even a substantial minority) and could go forward in any event as a joint CBA-CJC-LRCC project--itself a cooperative enterprise inconceivable even two years ago.

What lessons can be learned from the stillbirth of the national trial process study?

\* A project with important elements of an open system approach to court administration can win widespread support from governments, the judiciary and the bar. However, leverage sufficient to destroy a project still remains with authorities who prefer a closed system approach to control court administration.

\* The pattern of federal-provincial negotiations militates against federal initiatives that face even the smallest amount of provincial opposition. Once influential provinces accept a principle of comity or consensus, the most innovative and enterprising provinces are held hostage to those with the greatest stake in maintaining a closed system approach to the administration of justice. When the federal government hesitates to support an initiative without that consensus, a minority of provinces can effectively use delaying tactics to prevent action. Federal-provincial negotiations take on the character of international diplomacy, requiring direct involvement of the federal deputy minister, a time-consuming exercise since the federal deputy must devote more time to winning support for the project than any of his provincial counterparts must spend derailing it.

\* The negotiation process depends almost entirely upon senior executive officials with many competing priorities and demands on their time. Ontario officials were directly involved with their provincial Courts Inquiry (the Zuber Report).<sup>9</sup> The federal deputy minister, while supportive of the project and dedicated to its success, was unavailable for negotiations when the Meech Lake Accord (among other issues) pushed aside competing considerations.

\* Opposition to a cooperative initiative to improve court administration appears stronger at the senior official level than at the ministerial level. The willingness to let turf issues take precedence seems greater among deputy ministers than elected cabinet ministers. Ontario is the clearest case here.

\* The judiciary is dependent on the executive for research about the judiciary. Given their reliance on government funding, neither the judiciary nor the legal profession can currently establish their own research agenda. Given that provincial governments often lack enthusiasm about inter-jurisdictional comparisons in a number of policy areas, an important basis for defining and evaluating potential improvements is cut off.

\* Court administrators play a peripheral, even negligible, role in an issue of this kind despite their centrality to the trial process. Provincial court administrators were informed about the study through their national association (the Association of Canadian Court Administrators) in fall<sup>o</sup> 1986 immediately after the first memo went to provincial deputy ministers. Their advice and support were also sought. When the ACCA executive met prior to the December deputies' meeting, however, members felt they could take no position on the study without awaiting a decision by their superiors. ACCA members expressed honest skepticism about the viability and long-term impact of the project, but indicated a strong desire to be involved if the project were to go forward. The Association has continued to monitor the status of the project, but has yet to express

any formal views on it. Thus while ACCA has made impressive progress since its first meeting of eight delegates in 1975, and has become an increasingly aware and professional organization, it has yet to separate itself from the provincial attorney-general's departments out of which most of its leaders come, and articulate the needs of court administration as they compete for departmental recognition against the needs of law enforcement, prosecution and governmental civil litigation.

Taken together, the experience of the Canadian Centre for Justice Statistics and the joint CBA-Canadian Judicial Council trial process study illustrates the effects of continued dominance of a closed system mentality on Canadian court administration. The resistance even to the gathering of information about court processes and the sharing of that information across provinces seriously hinders the ability of the courts to deal with their operational problems. This is particularly tragic at a time when research and action have shown that delays in the trial process can be reduced by the more effective use of existing court resources.

The CCJS experience and the trial process study also suggest that the most important current source of resistance to an open system approach in court administration appears to be centred at the senior levels of provincial ministries of the attorney general. How can this resistance be accounted for or understood? Is it directed specifically at the courts in an effort to maintain sufficient control to allow ministerial responsibility and parliamentary supremacy to coexist with the principle of judicial independence? Or is it part of a pattern of tight control by those ministries that is visible in other areas as well?

#### INDEPENDENCE OF THE PROSECUTORIAL FUNCTION IN CANADA

One way to test these two competing explanations is to examine how the prosecutorial function is organized and administered in Canadian provinces. Prosecution of criminal offences is conducted by crown

attorneys and their assistants, law-trained and predominantly full-time officials employed by provincial governments and organized into a unit of the province's department/ministry of the attorney general. While they are part of a province-wide cadre, they are usually organized into regional and local units serving particular courts. In practice, the discretion to proceed with a prosecution or not to proceed is delegated to the senior crown attorney in the region or locality, but some Code requirements or administrative guidelines may centralize the discretionary decision in particular matters at the ministerial level. There is evidence at the federal level that the decision on whether or not to prosecute in certain sensitive cases has been made at the cabinet level.<sup>10</sup>

The way prosecution is organized in Canada contrasts sharply with prosecution in the United States. There, violations of state criminal statutes are prosecuted primarily by local district attorneys who are in most cases elected by voters in their home counties. The staffs of state-level attorneys general handle prosecutions of a growing number of commercial and environmental matters, but the large volume of traditional crimes against the person and property (as well as victimless crimes) remain within the discretion of locally-elected D.A.s. In contrast, federal prosecutions (under the separate U.S. federal criminal code) are conducted by full-time staff lawyers working for over 90 United States Attorneys --one in every federal district court--all of whom are appointed by the Attorney General of the United States and are part of the U.S. Department of Justice. Thus, ironically, Canadian provincial prosecution is organized along lines that most closely parallel U.S. federal prosecution, while federal prosecution in Canada is done by a combination of full-time subject-matter specialists who parallel American state prosecutors, and private lawyers on contract whose American counterparts would most likely be found at the county and municipal level.

The Canadian theory of or approach to prosecution is rooted in English law and practice. John Edwards of the University of Toronto has written the major works in this area: two books (The Law Officer of the Crown<sup>11</sup> and The Attorney General, Politics and the Public Interest<sup>12</sup>) and a study titled Ministerial Responsibility for National Security for the McDonald Commission on the RCMP.<sup>13</sup> His arguments and conclusions have found their way into commission reports going back to Ontario's McRuer Report of the late 1960's,<sup>14</sup> and into parliamentary statements by attorneys general spelling out the grounds on which prosecutorial discretion has been exercised.<sup>15</sup> Edwards stresses that attorneys general in Canada, as law officers of the crown, are independent legal officers bound by an obligation to the public interest and not to the government of the day. Like their counterparts in England and the British Commonwealth, they must exercise their discretion to prosecute or not to prosecute based on requirements of the public interest apart from political considerations (including the views of the majority of his/her cabinet colleagues).

In practice, local crown attorneys are less directly involved in criminal investigation than prosecutors in the United States. On the other hand, however, it is equally clear that the prosecution function is not organized as independently in Canada as it is in England and elsewhere in the Commonwealth. The attorney general in England has ministerial status, is a member of parliament, but does not sit in the cabinet. His ministry has no responsibility for police, courts or corrections. Day-to-day prosecutorial activity is in the hands of the century-old office of the Director of Public Prosecutions, and not in a main line government department.

Recent developments in Australia offer the most closely comparable setting to Canada and the most strikingly different approach to organizing the prosecutorial function. The state of Victoria created an Office of the Director of Public Prosecutions in 1982 legislation. The Director's tenure

is "unlimited"; the "incumbent can only be removed by a vote of both Houses of [the Victorian] Parliament."<sup>16</sup> The DPP thus has the status of a superior court judge. The first Director inherited the Criminal Law Branch of the Crown Solicitor's Office:

... [M]orale in the Branch at that time was low - a 'circumstance brought about by a combination of poor working conditions, lack of incentives and opportunities for promotion within the Branch, and a well developed perception of being neglected - of being in effect a back-water of the Law Department.' [The Director] also found clear evidence of insufficient staff numbers

By the end of the Director's first year in office, the state Public Service Board had approved the creation of "a new career structure providing ample promotional opportunities."<sup>17</sup>

The creation of the Office of the DPP was apparently also a response to the increased sensitivity and politicization of criminal law enforcement issues. In the words of the Victorian Attorney General: "Just as the impartiality and independence of the judiciary is the cornerstone of a free community, impartiality and independence of important prosecutorial decisions are also essential to a sound system of justice"<sup>18</sup>

By the end of 1985, an Office of the DPP had been created in two other Australian jurisdictions: the state of Queensland and the central Commonwealth Government. The three governments are diverse politically. Queensland is considered the home of Australia's most conservative government, the other two jurisdictions have Labor Party governments. Except for the recent creation of DPP offices, Australian administration of justice is organized quite similarly to Canada's. Courts in every state and nationally are administered by departments headed by an attorney general who is elected to parliament and sits as a powerful senior member of the cabinet.

In light of the Australian developments, it is interesting that no provincial government has yet introduced or apparently even considered

legislation to create a prosecutorial office independent of government. This could not be simply a result of the superior performance of existing prosecutorial arrangements. The Ontario Courts Inquiry vigorously criticized inadequate prosecutorial salaries and resources in that province. Nationally, the occasions when media criticism and public controversy have focused on the provincial administration of justice over the past five years have tended to focus on accusations of political interference in law enforcement and prosecutorial matters. In the late 1970s, British Columbia's Seaton Report, which criticized the actions of the provincial Deputy Attorney General in trying to have a judge removed from a case involving the validity of provincial legislation, did not get as much publicity as accusations that the same senior official had interfered with the exercise of discretion by certain provincial crown attorneys. Alberta's Deputy Attorney General left his post in the early 1980's amidst controversy over whether high-level political considerations were compromising law enforcement. The commission now holding hearings in Nova Scotia has generated national media interest in how justice has been administered in that province. This litany of public controversies certainly suggests that the time may be upon us for a public debate around the adoption of a framework for organizing prosecutions, modelled on the DPP, that is more consistent with the legal and constitutional obligations carried by law officers of the crown when they exercise prosecutorial discretion.

There is one province in which the use of an independent prosecutorial office has been debated: New Brunswick. That province has also had its share of controversy over the administration of justice, and within the past year the New Brunswick Branch of the Canadian Bar Association issued the report of a committee headed by a former Chief Justice of the province calling for a DPP. In 1986, the provincial opposition leader



(Frank McKenna) told a law school audience that New Brunswick should "seriously consider [building in the] institutional safeguard of separating the Minister of Justice in some way from the role of the Attorney General."<sup>19</sup> In fact, John Edwards revealed in an address a year ago that he was approached in the late 1970's by the New Brunswick Attorney General to be a one-person royal commission on "the role and functions of Minister of Justice and those that derive from the Office of Attorney-General."<sup>20</sup> "The Minister," explained Edwards, "was anxious to discover what alternative legislation or administrative solutions should be explored to restore public respect for the justice system." While the proposed study "would have represented the first such governmental study of the subject in the entire Commonwealth," the opportunity "was lost when, in 1980, the Government of New Brunswick failed to execute the final instrument" establishing the inquiry. "It is not for me," concluded Edwards, "to hazard an opinion as to the reasons behind the last-minute withdrawal of the government from its commitment to undertake this extraordinarily courageous examination of the Justice Department."<sup>21</sup>

Can this brief review of the issue of independent prosecution in Canada help us understand the competing approaches to Canadian court administration? It does seem clear that provincial attorneys general have been as successful at maintaining departmental control over prosecution as they have been in maintaining departmental control over court administration. When alleged abuses of prosecutorial discretion come to public attention, they seem to be treated as exceptions requiring a search for malefactors--the bad apple approach--rather than requiring public consideration of structural alternatives. Thus a closed system mentality pervades this area as well: an inclination by governments and attorneys general to deal internally with sensitive issues, while maintaining control through traditional hierarchical departmental organizations.

This analysis suggests that opposition of provincial attorneys general to the Deschenes Report's recommendations for independent judicial administration of the courts cannot be interpreted simply as an attempt to shield our parliamentary traditions from American-style separation of powers. If it were, then why has there been no serious consideration of adopting a more institutionally independent prosecutorial system in Canadian provinces? Such a system is in the best British parliamentary and common law tradition, has won new support in Australia, and is decidedly "un-American". The explanation is obvious. What both proposals have in common is the desire to shift critical justice functions away from the control of government departments linked directly to a political minister and his cabinet colleagues.

I am not advocating here the creation of provincial DPPs. The costs and benefits of that proposal require separate examination. The proposal also requires analysis that an outsider cannot provide of why prosecutorial discretion has been subject to allegations of abuse. For example, Edwards' argument assumes that political interference with prosecution is the most important source of potential abuse. New Brunswick's Deputy Attorney General seems sympathetic to this perspective in the concluding paragraph of his recent article:

Can we reasonably expect an acceptance of the apolitical motivation of the Attorney-General when we require that the same person exercise political judgment and be subject to cabinet solidarity in his other functions as Minister of Justice ...? My own view, and probably that of most employees of the Department of Justice, is to favour any step that would reduce suspicion. The opinions of bureaucrats, of course, do not prevail. In some instances those views are self-serving, to the extent that each seeks to carry out his own particular function, unencumbered by the problems accompanying the other branches of the department.<sup>22</sup>

On the other hand, it is also worth considering whether allegations of abuse are more likely to arise when an attorney general is not as attentive

to his portfolio and exercises less day-to-day oversight of the work of his deputy. In Alberta, for example, public allegations in the 1980's that were followed by the shifting of the incumbent deputy attorney general were made during the term of office of a minister who simultaneously held the position of government house leader and could give less time to his attorney generalship than his much more active predecessor. That predecessor had the same incumbent as deputy and the two developed a more open and active approach to the ministry. When allegations arose during their era about a particular criminal investigation, a royal commission was set up under then Justice Laycraft. The more recent allegations were investigated without a public inquiry, and no report on them was ever issued. Thus it may be that in a more closed system, deputy ministers with more autonomy, by reason either of long experience or of having a less attentive political superior, acquire less information and/or pass on less information than deputies with less autonomy. As a result, the potential for accountability is reduced not increased. Both effective political supervision and an effective independent office may therefore need more elements of an open system approach in order to promote accountability.

Regardless of the merits of a particular structure for the effective and responsible exercise of the prosecutorial function in a particular province, the issue of how to organize prosecution in an independent and impartial manner has been almost entirely ignored in Canada. Here as in the field of court administration, the closed system approach of provincial attorneys general and their departments has not served the public well.

#### NEW DIRECTIONS FOR THE OPEN SYSTEM MODEL

The argument of this paper has been that the outlook for the administration of courts (and of justice generally) is bleak as long as a closed system model tends to dominate. The alternative open system

approach, with its emphasis on coordination rather than encapsulation and collegiality rather than hierarchy, is clearly preferable. It would require changes in the way governments often operate, and the way judges often operate. What are some of its implications?

Let us begin with the question of the conflicting roles of the attorney general as chief prosecutor and as minister responsible for court administration. A closed system response to role conflict would be to avoid those issues where conflict could surface, a response that discourages exchange of information and efforts to deal with problems. What is needed is a framework to reduce role conflict and still deal with pressing issues. One option, control of court administration by the judiciary as recommended in the Deschênes Report, has been roundly criticized. However, its critics offer no alternative other than the present arrangement by which the courts are administered within the same government department that is the largest single litigant before those courts. Those critics would argue that the academic preoccupation with this conflict of roles hides a reality in which the system works to the satisfaction of the public. This begs the question of what the public would feel were it as knowledgeable as those familiar with the current system. I believe the public would be disillusioned if it understood the implications of this conflict of roles, and would look for alternatives that would ensure an accountable and effective system of justice free from that conflict. Do the courts require sensational coverage of allegations of abuse, similar to coverage about allegations concerning criminal investigation and prosecution, before steps are taken to reduce role conflict without discouraging problem solving and reform?

The Report of the Ontario Courts Inquiry (the Zuber Report) falls into the critics' trap. Having rejected judicial control of court administration, the report then concludes that the judiciary should have "the final say" in a narrow range of matters directly affecting who hears cases, while

"administration of all other aspects of the court system would be left in the hands of the Ministry of the Attorney General with the provincial government having final authority on certain matters."<sup>23</sup> The report supports its conclusion by quoting at length from a 1976 paper by Garry Watson, but apparently missed one of that paper's key conclusions.

However, it is to be noted that the quite different experiences in the United States and the United Kingdom do make one common point. It is extremely difficult to reconcile the concept of an independent judiciary with the placing of court administration within the control of an executive department of government which is itself involved as a litigant before the courts. . . . Yet in Canada, the current trend is for provincial departments which are heavily involved in litigation before the courts to assume increasing and broad roles in court administration. This would appear to be an unsatisfactory state of affairs.<sup>24</sup>

This was likely to have been one of the concerns that led Watson and Peter Russell to write a year later in support of Ontario's White Paper on Courts Administration,<sup>25</sup> whose recommendations are rejected in the Zuber Report. More important for our present discussion, Watson went on to suggest a variety of "structural alternatives" for avoiding the conflict of roles. He mentioned putting court administration and government litigation under two different cabinet ministers, dividing court administration between executive and judiciary, or assigning court administration to an independent body.<sup>26</sup> The Zuber Report itself goes on to recommend an innovative "partnership approach" through a province-wide Courts Management Committee and a network of seven regional committees. There is a clear though implicit expectation that over time these joint executive-judicial committees will become the real policymaking bodies and perhaps even the coordinating mechanisms at the centre of an open system approach. But the report's hesitancy to take on the minister whose support is necessary for its implementation has meant

that a majority of the members of the proposed management committees would serve at the pleasure of the provincial cabinet.

Ironically, one of the advantages of placing court administration within a more autonomous structure than a government department is that accountability could be promoted through applying open system principles. This is because the accountability of a more independent, nondepartmental structure is so problematic under traditional hierarchical theories of ministerial responsibility that steps are usually taken to ensure that new accountability mechanisms are developed; these are often more accessible to the public. Thus under certain conditions it may be easier for the public to learn about the activities of a crown corporation, a tribunal, an ombudsman's office or an auditor general's office than about the activities of a traditional government department.

The courts have always been accountable in a more open way. While their deliberations are in secret, the decisions and the reasons for those decisions are public. A researcher examining the history of Judge Learned Hand's court, the U.S. Court of Appeals for the Second Circuit, found an instance where two members of the court who disagreed strongly about a point of law in a certain case suggested that the matter be taken to the ultimate court of appeal, the Board of Editors of the Yale Law Journal.<sup>27</sup> What question period could equal that for sustained criticism?

At the same time, an open system approach is likely to change the way judges perform some of their existing administrative responsibilities. For example, the Chief Justice of Canada, as Chairman of the Canadian Judicial Council, sends a lengthy annual letter to all federally-appointed judges outlining the previous year's work of the Council. However, that letter is not considered public, and no annual report of the Council is available to the public. Since the complaints handled by the Council come almost entirely from the public, an obligation exists to provide an accounting of Council actions. Individual's names are not necessary, but an inventory of

the kinds of complaints and the reasons for treating them in particular ways would be valuable public information. It not only meets the Council's obligation to the public for the discharge of a sensitive and important function; but is also likely to reduce public cynicism about the value of judges judging themselves.

The need for management information is also critical to an open system approach. Consider the position of the Supreme Court of Canada. Delays in that court have grown considerably in the past five years, and the Canadian Bar Association released a report this summer calling for substantial changes in the court's operation, as well as creating an entirely new tribunal for handling criminal appeals. In appended commentary, justices of the Supreme Court reject a number of the key assumptions and recommendations of the CBA study.<sup>28</sup> Unfortunately, neither the justices nor the CBA committee collected any quantitative data on the pace of litigation in the Supreme Court of Canada, beyond an examination of the front page of the court's judgments that indicates the elapsed time between oral argument and judgment. No data were collected on the elapsed time between application for leave to appeal and granting of leave, or between granting of leave and oral argument (easily the source of the court's longest delays). The data would be relatively easy to collect; their use would provide the basis for more informed prescriptions, pinpoint more effective responses, and possibly even produce more creative approaches to management of that court's important work.

The most critical area in which the judiciary affects court administration is in managing the flow of cases through the courts. The field of caseload management is at the centre of court administration, but too often the judiciary approaches its responsibilities at two extremes: either assuming it has no responsibility, or using its authority in a tough but still ineffective way (what I have referred to elsewhere as the

Justice Rambo approach to caseload management).<sup>29</sup> What is needed is the development of a collegial approach in which the judiciary plays a central role, the trial coordinator is treated as a colleague, and the practicing bar is involved in developing workable standards and procedures for scheduling and moving cases from initiation to disposition.<sup>30</sup>

An open system approach, by monitoring changes in the court's environment and inviting outsiders to reflect on the court's functions and operation, allows court administration to respond to new issues that would otherwise be missed. The Ontario Courts Inquiry understood this when it asked for briefs not only from groups of judges, lawyers and court officials, but also from advocacy groups, women's shelters, and public service unions. Those organizations were not always able to define adequate solutions to the problems they experienced, but were often able to point out basic difficulties and injustices unnoticed by courthouse professionals. By recognizing new issues, we may be reminded that even the basic aspects of judicial independence must be considered within new contexts.

Thus our generation must reestablish and maintain the principle of judicial independence that was established almost three centuries ago. As society changes and as governments change, so too does the operating definition of judicial independence and the scope of activities to which it should apply. The contribution of our time should be to show that the tension between the independence of justice and accountability posited by the organizers of this conference may be a false tension. Justice would be most effective and most independent when accountability mechanisms based on an open system model are put into practice. In an open system approach to court administration, judiciary, government and society alike have a vehicle through which the goals of independence, accountability and justice can be sought and mutually reinforced.



## FOOTNOTES

1. For a contrary view, see Perry S. Millar and Carl Baar, Judicial Administration in Canada (Montreal: McGill-Queens University Press, 1981), ch. 8.
2. See Carl Baar, "Patterns and Strategies of Court Administration in Canada and the United States," 20 Canadian Public Administration 242 (Summer 1977), 11 Law Society Gazette 79 (June 1977) at 94-99.
- 3.
4. The Honourable Alan B. Gold, 1986-87 Report of the Activities of the Superior Court of Montreal and Its Surrounding and Outlying Districts
5. A. K. B. Sheridan, "The Future of Court Administration" (remarks prepared for delivery at Workshop on Court Reform for the Nineties, Queens University Faculty of Law, Kingston, Ont., March 1, 1987, pp. 1, 2, 6-7)
6. Ibid., p. 5
7. "Strengthening the Executive Component of the Court--A Program for Teams of Chief Judges and Court Managers," Institute for Court Management, Denver, Colorado.
8. Gordon F. Gregory, "The Attorney General in Government," 36 UNB LJ 59 (1987) at 67
9. There was some feeling that, given the Zuber Report, the national trial process study would be redundant in Ontario. However, the Ontario Inquiry was able to collect only a small amount of quantitative data on litigation costs and no data on delay, partly because the ministry did not authorize employment of a staff person to gather such data.

10. J. L. J. Edwards, The Attorney General, Politics and the Public Interest (London: Sweet and Maxwell, 1984) at 361-65
11. J. L. J. Edwards, The Law Officers of the Crown (London: Sweet and Maxwell, 1964).
12. Cf. note 10 above.
13. J. L. J. Edwards, Ministerial Responsibility for National Security, study prepared for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (Ottawa, 1980).
14. J. C. McRuer, Royal Commission on Civil Rights (Toronto: Queens Printer, 1968), v. 2, pp. 931-50.
15. See Attorney General of Canada Ron Basford, House of Commons Debates, Vol. 121, pp. 3881-83, March 17, 1978; and Attorney General of Ontario Roy McMurtry, Legislature of Ontario Debates, pp. 50-52, Feb. 23, 1978.
16. Victoria [Australia], Office of the Director of Public Prosecutions Annual Report 1984/85, p. 3.
17. Ibid., p. 2.
18. Quoted in ibid.
19. Quoted in John L. J. Edwards, "The Charter, Government and the Machinery of Justice," 36 UNB LJ 41 (1987) at 46.
20. Ibid., pp. 41, 43. the commissioner's proposed terms of reference may be found at p. 45
21. Ibid., pp. 42, 43 and 44
22. Gregory, note 8 above at 69-70.
23. The Honourable T. G. Zuber, Report of the Ontario Courts Inquiry (Toronto: Ontario Ministry of the Attorney General, 1987), pp. 157-58.

24. Garry D. Watson, "The Judge and Court Administration," in The Canadian Judiciary, A. M. Linden, ed. (Toronto: Osgoode Hall Law School, York University, 1976) at 182.
25. Peter H. Russell and Garry D. Watson, "A Quiet Revolution in the Administration of Justice," 11 Law Society Gazette 111 (July 1977)
26. Watson, note 24 above at 185-88.
27. Marvin Schick, Learned Hand's Court (Westport, Conn.: Greenwood, 1978 [orig. pub. 1970]) at 224.
28. See Appendix 1, "Memorandum by Supreme Court of Canada," in Report of the Canadian Bar Association Committee on The Supreme Court of Canada (Ottawa: Canadian Bar Association, 1987).
29. Carl Baar, "Theme Address" for Workshop on Court Reform in the Nineties: From Laissez Faire to Responsive Court Management," Queens University Faculty of Law, Kingston, Ont., Feb. 28, 1987. The Faculty of Law is preparing the proceedings for distribution.
30. See Carl Baar, Caseflow Management Policy Options for Victorian Courts (report submitted to the Courts Advisory Council, Law Department, State of Victoria, Melbourne, Sept. 1987), especially ch. 1.