

Canadian Institute for the Administration of Justice

Comments on Papers on
Ethics and Discipline, Quality Control
and Judicial Education

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Mister Chairman, Distinguished Guests, Members of the Judiciary, Ladies and Gentlemen

We are examining here some of the fundamental freedoms of a civilized society - freedoms which we who enjoy democracy tend to take for granted. We owe Professor Shetreet a vote of thanks for providing a comparative framework, against which to test our Canadian institutional mechanisms which protect the independence of justice and which exact accountability from those who participate in the Canadian justice system. That accountability obliges each of us to contribute according to our own responsibility to the quality of civilization in our country.

I was struck last evening by a parallel, as I listened to Shostakovitch's tenth symphony, which has the theme of Stalin's repression of artistic freedom. Professor Shetreet's exposé reveals much more constrained justice systems elsewhere than those we enjoy here.

I speak today as a citizen, concerned for control of the quality of justice in Canada. But my point of view focuses not only on control mechanisms, since I believe that quality will result from conditions which prompt the best of people to meet and exceed the demands of their roles in the administration of justice. In particular, I will suggest important support for judges and for members of administrative tribunals.

Let me declare myself on the question of the independence of administrative tribunals. By way of introduction, the tribunal which I chaired, the British Columbia Securities Commission, had four roles:

- adjudication of appeals, as a substitute for the lower court
- development of policy within the legislation, and recommendation of legislative changes

- executive direction for the operation of staff engaged in securities regulatory functions
- bringing actions, both civil and criminal, into the courts.

You can imagine the schizophrenia between quasi-judicial and executive functions - indeed, there is an issue regarding such tribunals' extension into quasi-legislative functions, but that is a debate for another day. In my view, it is only in the adjudicative function of such tribunals that there is a direct relationship to the independence and the accountability of the judiciary. My comments, therefore, insofar as they relate to the quality of decision making of members of administrative tribunals, are related to their adjudicative responsibilities.

In this room are men and women who have chosen to devote your life's work to the cause of justice. It is the quality of your work which inspires the respect of Canadian society for our judicial system. At one point, each member of the judiciary was invited to condemn yourself to a life of relentless intellectual attention and rigour, of solitary decision making, of loneliness from the professional vigour of the legal community, of the frightful awe and fortunately rare unwarranted criticism of judges on the part of members of society, of frustration at sometimes parsimonious provision of resources to do your job, and frustration at delayed justice resulting from backlogs. You have condemned yourself to half the income you could earn elsewhere, to an obligation to be above moral reproach whatever the pressures of your life, to a denial of the average citizen's normal right and responsibility to directly influence public policy, and to nowhere to go if you choose to end prematurely your career as a judge.

Fortunately, you chose to accept, and, each day, to make decisions which shape the social fabric of our community, and the lives of those who come before you.

I share Professor Dusseault's concern for the quality of decisions. Rather than focus on control and discipline, I will suggest conditions which should foster the highest quality of decisions being made. The tests which judicial decisions need to meet include fairness, care for the statutes made in our parliaments as well as the traditions of our legal systems, sensitivity in interpretation of social evolution, consistency in treatment of those who break or act within the law, inspiration for that respect for the law which derived from the feeling that justice has been done, boldness to make decisions which break new ground, and clarity of reasons for the decision.

The most important determinant of quality decisions is the selection as judges of people whose legal experience is broad, spanning a range of issues. Their experience should demonstrate an impeccable mastery of the law. They must possess both energy and maturity of judgment. It is, of course, important to recognize, as Dean Bender points out, that judges will change over the years of their lives following their appointments to the bench.

Once selected, what support do judges need? First, they must be equipped, at the outset, through training in the basic operational requirements like decision writing. I commend Judge Bordeleau and his colleagues for the continuing judicial education proposals. It is to be hoped that those responsible will adopt these proposals immediately, to add to the quality of training already available.

There must also be intellectual opportunities to grapple with fundamental principles, such as this very conference. I congratulate the Canadian

Institute for the Administration of Justice on these annual conferences. I had the honour of serving as your rapporteur at last year's conference, and it was equally stimulating.

There must be a recognition of the need for intellectual renewal over the course of a judge's career. Although it is always difficult to ration financial resources, investment in sabbaticals, exchanges with academic centres, or judicial systems in other countries could have an important benefit for Canadian judges.

Second, there must be the practical operational support available to enable the courts to do their job. We must recognize the limits on the public purse and insist upon prudent management. However, governments must make choices which attach a priority to the justice system. We cannot sacrifice the loss of moral authority which would result from society's feeling of a denial of justice. This translates into such needs as the required dollars and cents, staff, courtrooms which inspire simple respect, and simplifying court procedures.

Third, judges need support in maintaining their standard of performance. The judiciary must define their concept of competence. The subject must not remain a taboo, as Professor Dusseault reports it is today. However, judges deserve sympathetic support in their efforts to achieve the standard. This does not suggest tolerance of less than the highest quality of judicial decision making. Rather, processes are needed to assist judges in improving their performance, in a remedial sense. If removal from the bench is the only available remedy, however carefully handled, there will be an understandable reluctance to acknowledge situations of deteriorating performance. Other than in cases of misconduct, judges need the sense that their efforts to improve

their own performance will be encouraged in ways which preserve their dignity and reputation.

Fourth, judges need avenues which bring them in contact with the vital evolution of community issues. It is important that a judge's first exposure to the forefront of social change be earlier than the case before his or her court which pushes the frontier. Society must find ways to welcome judges into the debate on critical issues, in ways which do not compromise their impartiality. Indeed, it may be useful to see greater flow in and out of the judiciary, between the bench and other productive enterprise.

Above all, we must recognize that judges are human beings, serving their community from a somewhat hybrid vantage point. It is in our Canadian society's interest to ensure that judges have available every support in their desire to deliver the best of justice.

Much of this consideration holds for members of administrative tribunals, with variations on the theme of support for the best of adjudicative decision making on their part. The test of decision making is in a narrower field, but the very nature of a specialized tribunal exacts a requirement for deep knowledge of the particular field as a basis for decisions. Also, in cases where the tribunal decision is final, the consequence of a decision is even greater than in the case of judicial decisions subject to appeal.

This requires selection of tribunal members who enjoy high regard in their professional fields, as well as in the particular community affected by the tribunal's work. I agree with Judge Abella and this morning's speakers that there is a greater risk of governments' using tribunal appointments as patent political rewards, not accompanied by as rigorous a consideration of their professional competence as is normal in the appointment of judges.

The support needed to improve the standard of adjudicative performance of administrative tribunals is similar to the support judges need.

First, members must be equipped through professional development. This is particularly important in the case of new members who may not have the benefit of legal experience as a basis for their quasi-judicial function. It is to be hoped that administrative tribunals will be able to avail themselves of the technical training proposed by the Canadian Judicial Council. It is also encouraging to note the high proportion of participants here from administrative tribunals. Occasions like conferences of the Canadian Institute for the Administration of Justice offer the opportunity to deal with questions such as the appeal from tribunal decisions and the roles of counsel and staff, the importance of which Professor Dusseault underlines.

Second, as with the courts, administrative tribunals must be equipped with the necessary practical support, no matter who argues their requirements with Treasury Boards. On this count, I am a great believer in assuming the responsibility for your tribunal's own fate in developing the arguments for adequate resources.

Third, there must be standards of performance, and support for their achievement. To the degree that independence of administrative tribunal's decision making is important, as I believe it is, appointment of members should be on the basis of good behaviour rather than at pleasure. Good behaviour would then encompass achievement of that standard of performance.

Fourth, it is equally important that tribunal members have exposure to their community of interest. These opportunities are, however, normally present due to the term nature of tribunal appointments.

In closing, then, I would urge members of the judiciary, administrative tribunals, and executive branches of governments to understand the pressures on those who administer justice. We need to remember the stakes which society has is the quality of people who render judicial decisions. Public confidence in the justice system depends on the support which will enable the highest performance on the part of those who serve on the bench and tribunals.