

Ethical Issues in the Design and Delivery of Judicial Education: the Canadian Context

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I. Introduction

Judicial independence is the cornerstone of the administration of justice. It is the means by which the public can be assured that judges decisions are impartial, fair and balanced. The handmaiden of judicial independence is accountability.

Canadian judges are not elected, but that does not mean they are not accountable. They are bound by their oaths of office to uphold the highest standards of judicial conduct. Their decisions are subject to appellate review. They hold office during good behaviour only, and they are guided in their private and judicial lives by the *Ethical Principles of Judges*.¹

The purpose of this paper is to raise possible ethical issues that may arise with respect to the design and delivery of judicial education and explain how Canada has addressed these issues.

II. *The Ethical Principles for Judges*

The *Ethical Principles* booklet was published in 1998 by the Canadian Judicial Council to “provide ethical guidance for federally appointed judges.”² This brief statement of purpose is expanded to create these main points:

1. nothing in the *Ethical Principles* is intended to limit or restrict judicial independence in any manner;

¹*Ethical Principles for Judges*, Canadian Judicial Council, 1998.

² *Ibid.* at p. 3.

2. the *Ethical Principles* are not and shall not be used as a code or list of prohibited behaviours; and
3. the *Ethical Principles* recognize the possibility for reasonable disagreements.³

The *Ethical Principles* booklet is not a code in the sense that it is not intended to be an exhaustive document purporting to control the conduct of judges. Instead, the *Ethical Principles* set out the five main principles and provide commentary and examples intended to sustain what is already an ethical judiciary.

The five principles are: (i) judicial independence, (ii) impartiality, (iii) integrity, (iv) diligence, and (v) equality.

a. Judicial Independence

This principle states “[a]n independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.”⁴ The Commentary accompanying this statement reminds us that high standards of conduct are a part of judicial independence. It states:

Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence....⁵

b. Impartiality

The principle reads: “[j]udges must be and should appear to be impartial with respect to their decisions and decision making.”⁶ The ethical principle of impartiality is the most far-reaching of all the principles, and may encompass all the rest.

³*Ibid.* at pp. 3-4.

⁴*Ibid.* at p. 7.

⁵*Ibid.* at p. 5.

⁶*Ibid.* at p. 27.

c. Integrity

According to this principle, “[j]udges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.”⁷ The principle of integrity is extended, unlike most professional codes of conduct, to a judge’s life away from the court house. Commentary 3 states, “[t]he judge should exhibit respect for the law, integrity in his or her private dealings and generally avoid the appearance of impropriety.”⁸

d. Diligence

This principle states “[j]udges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.”⁹ Commentary 1 adds, “[d]iligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.”¹⁰

e. Equality

The principle is: “[j]udges should conduct themselves and proceedings before them so as to enhance equality according to law.”¹¹

3. **Application of the *Ethical Principles* in the Design and Delivery of Judicial Education**

When an organization sets out to provide education to judges, all five of the ethical principles of judicial independence, impartiality, equality, integrity, and diligence are engaged at some level and the first three are the most dominant.

Imagine a scenario where a government not only appoints the judges but it directly funds judicial education, it designs the content of the courses, it selects the

⁷*Ibid.* at p. 13.

⁸*Ibid.* at p. 14.

⁹*Ibid.* at p. 17.

¹⁰*Ibid.* at p. 18.

¹¹ *Ibid.* at p. 23.

speakers and it determines which courses each judge attends. The ethical problems with this scenario will be intensified if judicial education in such a system is compulsory. Another scenario might be where an organization associated with a particular cause offers funding to a judicial training organization as long as that funding is used to design courses supporting the cause. Other scenarios can raise ethical issues in more subtle forms: (a) an invitation to a judge with all expenses paid to attend a conference with a particular theme, i.e., support for victims of drinking and driving offences; (b) an invitation to a judge to speak on a judicially appropriate topic but the presentation is to be given at a conference with a particular theme, i.e., opposition to the government's stance on sentencing; or (c) the simple design of a panel that puts forward one point of view on a topic where there is another equally or more legitimate point of view.

Each of these examples runs contrary to one or more of the five ethical principles.

First, a judge attending a course in one or more of the above contexts will not appear to be independent of the government, the organization or the cause involved in the course. Independence of the judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision-making.¹² Institutional independence is associated with defining the relationships between the judiciary and others, particularly the other branches of government, so as to ensure both the reality and the appearance of independence and impartiality.¹³ When a government plays too direct a role in judicial education, it leads to the belief that the government itself controls the content of what judges learn. This can lead to the perception, in the eyes of the public, that the judge's decisions are not independent of government's influence. Governments are often the principal litigators before the Courts, either in the form of prosecuting counsel or as a plaintiff or defendant in its own right. This latter fact exacerbates the ethical issue of judicial independence associated with education.

Second, as to impartiality, the *Ethical Principles* booklet indicates, the "first

¹² S. Shetreet, *Judges on Trial*, (1976) at 17 as quoted in *Ethical Principles for Judges* at p. 8.

¹³ *Ethical Principles*, *supra* note 1 at p. 8.

qualification of a judge is the ability to make independent and impartial decisions."¹⁴ Judges are urged "to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary."¹⁵ Judges who participate in educational courses in any of the scenarios outlined above will give the perception that they are not impartial with respect to their decision making.

In addition, all educational programming must be assessed to ensure that the principle of equality is being meant. On the other hand, judges must be diligent with respect to ensuring their competence which includes the education necessary for their function, and they must act with integrity, including making appropriate decisions regarding education.

IV. How Canada has Addressed these Questions

The principal organization offering education to judges in Canada is the National Judicial Institute. It addresses the above mentioned ethical issues by: (i) its broad funding base; (ii) its corporate structure including the structure of its board of directors; (iii) its commitment to judge-led education; and (iv) its constant evaluation of programming and inclusion of social context education.

On April 18, 1988, Letters Patent were issued which incorporated the Canadian Judicial Centre (now the National Judicial Institute (the "NJI")), and established a Board of Governors consisting of five members chaired first by the Chief Justice of Canada, the Right Honourable Brian Dickson.

Like most national judicial training organizations, NJI receives its funding from governments. The perception of influence that this creates is lessened by the fact that the federal government and all of the provinces contribute to this funding either through direct

¹⁴ *Ibid.* at p. 8.

¹⁵ *Ibid.* at p. 27.

grant or by the payment of registration fees for judges. In addition, NJI is governed by a Board of governors none of whom are appointed by any government. Indeed, the positions of the chair and vice-chair are occupied by the Chief Justice of Canada and a judge from the Supreme Court of Canada. The members of the Board of Governors are nominated not only by the Canadian Judicial Council, the body which is responsible for the discipline and education of federally appointed judges, but also by the Canadian Association of Provincial Court Judges and the Canadian Superior Court Judges Association. These latter two organizations represent the judges who are their members.

Core funding is provided as is funding for particular projects by the federal and provincial governments, but this is done on the basis of proposals generated by the National Judicial Institute. The registration fee paid either for or on behalf of judges who attend the courses offered by the National Judicial Institute provides another source of funding and also assists in ensuring high quality and, therefore, presumably ethical training.

The mandate of the National Judicial Institute is:

- To foster a high standard of judicial performance through programs that stimulate continuing professional and personal growth;
- To engender a high level of social awareness, ethical sensitivity and pride of excellence, within an independent judiciary;
- Thereby improving the administration of justice.¹⁶

The objectives are:

- To update continuously the identification of the needs of the Canadian judiciary for education including skills training, professional development and personal growth.
- To maintain an inventory of and disseminate to the judiciary, information about programs throughout Canada that are related to judicial education.
- To develop and to assist courts and cooperating agencies in the development of programs to meet the needs of the judiciary for judicial

¹⁶ National Judicial Institute, Annual Report 1997-1998 at p. 3

development.

- To develop and deliver educational programs, in order to make them available to the judiciary as widely as possible.
- To provide technical and organizational services to the courts and other agencies in the delivery of their services.
- To keep the Canadian judiciary informed about new legislation and other developments of particular interest to the judiciary, and to develop programs to achieve these ends.
- To cooperate with and respond to requests for assistance from courts and agencies in Canada and elsewhere with respect to judicial education projects in other countries.¹⁷

As will be seen from the above, the mandate and objectives are consistent with ethical programming.

Programs are developed in several different ways, but the participation of judges in the development of programs is a constant. Judges form, by and large, the majority of any faculty for a national judicial institute program.

Another way to address any ethical issues in the teaching of judges is to design some courses which offer judges the opportunity to increase their knowledge of, and sensitivity to, problems of ethics. Having a judge review for other judges the core principles of judicial independence and impartiality, in a context that permits discussion about ethics, fosters an ethical culture that causes the judges to be vigilant to any infringement of judicial ethics.

Judicial independence is enhanced with respect to judicial education in Canada by the existence of other training organizations which can provide different perspectives and approaches, e.g., the Canadian Institute for the Administration of Justice (the “CIAJ”) and the Canadian Association of Provincial Court Judges (“CAPCJ”). While both the CIAJ and CAPCJ receive some government funding and work in cooperation with NJI, their structures, funding sources and constituencies are different and provide a different

¹⁷ *Ibid.*

approach to judicial education.

In Canada, Chief Justices are asked to facilitate the participation of the judges of their courts in 10 days of judicial education per year. For the most part, judges are free to select and attend those courses that interest them (limits are placed on numbers that may attend any given course). Courses are offered of high quality and sufficient frequency that most judges are able to obtain the education they need and want.

V. Judicial Ethics and Social Context Education

NJI's most recent initiative surrounds the development and delivery of programming with respect to education on social context issues and has raised for some a question of judicial ethics because of its content.

In March 1994 the Canadian Judicial Council passed a unanimous resolution calling for the establishment of "comprehensive, in-depth and credible education programmes" relating to social issues. Similarly, in October 1994, C.I.A.J. passed a resolution recognizing the importance of providing education programmes that integrate substantive law topics with social context issues raised by s. 15 of the Canadian Charter of Rights and Freedoms: namely, the anti-discrimination issues relating to race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability.

In 1996 the NJI asked Professor Katherine Swinton (now Madam Justice Swinton) to prepare a report on social context education. This Report was unanimously endorsed by the NJI's Board of Governors in March of that year and subsequently served as the basis of a funding proposal submitted to the Department of Justice in April. Although the Department did not commit itself to fund the whole amount requested, it nevertheless did commit itself to fund the initiative to an extent sufficient for it to move forward, and ultimately to complete its mandate.

Notwithstanding the commitment by the Chief Justices and many judges to this

new initiative, concerns were expressed about the need, effectiveness and propriety of social context education for judges. At this point it would seem appropriate to analyze whether social context education offends the *Ethical Principles*.

Aristotle wrote in the opening chapter of *The Rhetoric* that judges:

... have to decide present and definite issues, and in their case love, hate, or personal interest is often involved, so that they are no longer capable of discerning the truth adequately, their judgment being obscured by their own pleasure or pain.¹⁸

Despite Aristotle's fear that individual judges are creatures too vulnerable to their own personal interests to achieve a truly neutral stance, the supposed impartiality of the judge has underwritten the Western conception of justice and judicial proceedings for centuries. One of Aristotle's near contemporaries — Socrates — said that “four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.” Deuteronomy, chapter 1, verses 16-17 charges judges with an obligation of impartiality in the following words:

Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's. . . .

Lord MacMillan put the matter even more onerously when he said that a judge “must purge his mind not only of partiality to persons, but of partiality to arguments, a much more subtle matter, for every legal mind is apt to have an innate susceptibility to particular classes of arguments.”

Notwithstanding these expansive comments, prior to NJI's and CIAJ's initiatives in this area, there was a lingering concern that some groups traditionally marginalized by legal and social structures are nevertheless victimized by judges' deeply entrenched views that are different from their own. In Madam Justice Swinton's words:

While judges are committed to impartiality and objectivity in deciding an individual case, their own beliefs, attitudes, and experiences inevitably affect their actions - perhaps in the form of unconscious stereotypes affecting determinations of credibility, or choices made in the interpretation of laws,

¹⁸ Aristotle, *The Rhetoric of Aristotle*, Book 1, trans. L. Cooper (New York: D. Appleton and Company, 1932) at p. 2.

sentencing, and awarding damages.

The solution, according to Justice Swinton, is education: specifically, social context education designed to heighten judges' awareness not only of alternative lifestyles but also of their own previously held views. Again quoting from her:

Exposure to the values and experiences of others with different backgrounds may lead to greater empathy on the part of judges and result in more fair — and, therefore, better — decisions, because a judge has confronted myths or stereotypes about a particular group, or become more familiar with the extent of harm suffered in a case — for example, by victims of domestic violence or racial or sexual harassment.

Some persons, however, expressed the concern that programs of the kind envisioned by Justice Swinton are a form of indoctrination that threatens judicial independence and, as a corollary, impartiality.

The best way to respond to those who express these concerns is to demonstrate as Justice Swinton does, that independence and heightened social awareness can be reconciled in the name of a fortified impartiality if judges maintain control over educational programmes and if the proper “ultimate objective” of social context education is acknowledged:

The purpose is not to erode judicial independence by requiring pre-determined ‘right’ answers; rather, the goal is to make judges better able to exercise their judgment in a fair and objective fashion — for example, by alerting them to stereotypes about women’s behaviour in a sexual assault situation or the harm that comes from discrimination.

As has been previously noted, “diligence” is one of the five ethical principles embraced by Canadian judges. One aspect of diligence is competence. As the *Ethical Principles* booklet states, “[j]udges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.”¹⁹ It is a reasonable hypothesis to assume that a person judging in a multicultural society such as Canada must have knowledge of, and be sensitive to, the culture of the persons who come before him or her. Indeed, the principle of “equality” directs that “[j]udges should strive

¹⁹ *Ethical Principles*, *supra* note 1 at p. 17.

to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability."²⁰ Social context education for judges can be a means of ensuring the very principle of impartiality that is at the core of judicial independence.

This is not to say that there are not dangers. It is important not only to obtain the reality of a balanced, fair and impartial judiciary, but to ensure that no one could derive the perception that any one group is lobbying or teaching the judges.

Again, the means of ensuring that this perception does not arise is to do as N.J.I. has done – ask the the judges to take on the task of designing the programs with the principles of impartiality and judicial independence in mine, and then for the judges to teach the programs. As will be seen later in this conference, these objectives were achieved in Canada through engaging judicial advisors who in turn recruited and helped to teach judicial faculty.

It is hoped that the Canadian experience will be of assistance to others.

²⁰ *Ibid.* at p. 23.