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# A Quiet Revolution in the Administration of Justice

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# A Quiet Revolution in the Administration of Justice

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On the 28th of October, 1976, the Attorney General of Ontario, Honourable Roy McMurty, released a White Paper on Courts Administration. Compared with his Family Law proposals, the Courts Administration proposals have received but scant attention in the press (a press which in the past few years has written extensively on the inadequacies of court administration in the province). While proposals concerning family law perhaps touch more immediate public interests, the new system of court administration set out in the White Paper could be at least as important in the long-run as it portends a significant reform in our system of government.

The nub of the Courts Administration proposals is to transfer formal responsibility for running the entire Ontario court system from the Attorney General's Department to a judicial council—a committee composed entirely of judges with the Chief Justice of Ontario, the chairman. If and when the proposal becomes law, the staff in the Ministry of the Attorney General currently engaged in court administration will be transferred to a newly established Office of Courts Administration headed by the Judicial Council.

This proposal is an innovative solution to the Canadian version of a difficulty in the working of liberal-democratic government which in modern times has become apparent throughout the English-speaking world. The problem is how to arrange for the provision of an efficient adjudicative service which is accountable for its efficiency to the public it serves—without fatally undermining the independence of the judges who must deliver that service.

The problem has become apparent in recent years because the proliferation of laws and growth of litigation have produced much larger and more complex judicial machinery. As a result, the high price of inefficient

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court administration—incessant delays and increasing costs of litigation to individuals, corporations and government—has come to be felt much more acutely. Witness the enormous spate of newspaper articles on delays and backlogs in the courts.

In the late 1960's, the Ontario Government began to move on the problem by centralizing financial responsibility for courts at the provincial level, relieving local authorities of this fiscal burden. But the Provincial Government soon found that its responsibility for the judicial system was more nominal than real. The Government paid for the staff and the courtrooms but the judges remained in charge of the flow—or lack of flow—of cases through each court. The Government had the responsibility but not the control. The challenge was how to discharge this responsibility more effectively without destroying judicial independence, a cherished and essential feature of liberal government.

Ontario, of course, was not alone in facing this challenge. The other Canadian provinces, especially the larger and more urbanized ones—Quebec and British Columbia—began in the 1970's to grapple with the same problem. The Canadian situation requires an innovative response as constitutional differences preclude the simple importation of American or British solutions to the problem.

The clear principle of the separation of power in the constitution of the United States has led to the judicial branch assuming basic responsibility for court administration—at both the state and federal levels. Compared with the American, the Canadian constitution is more oriented to parliamentary sovereignty and responsible government with all governmental activities responsible to the people through the legislature. In Britain in the early 1970's, reform was achieved by placing a centralized system of court administration under the Lord Chancellor. But the Lord Chancellor's position is unique to Great Britain and defies constitutional theory. The Lord Chancellor, while a member of the Cabinet and the Legislature (The House of Lords), is also a judge and, indeed, head of the British Judiciary. As such, he is a figure who traditionally is seen as insulated from partisan politics. The same aura of independence does not attach to the position of Attorney-General or Justice Minister in Canadian governments.

In 1973, Ontario's Law Reform Commission came forward with a solution. Essentially this was a proposal for dual responsibility. A modern, thoroughly professional system of court administration would be installed under a Provincial director ultimately responsible to the Attorney-General but working closely with the judges on a day-to-day basis. But excluded from his decision-making authority would be those administrative matters which are inextricably bound up with the adjudicative responsibilities of judges. These would be left to the judges—and they included the crucial functions of assigning cases to judges and judges to courtrooms. There was

a reasonable basis for excluding these functions from control by the Executive. The Government, after all, is the most frequent litigant to appear as a party before the courts. If its officials could decide which judges should hear the cases in which the government is involved, judicial independence in both appearance and reality could be seriously compromised.

The Ontario Government's first reaction, through the then Attorney General, Dalton Bales, was to support the concept of an extensive new system of efficient court management but to insist that it must be an integral part of the day to day operations of the Attorney General's Department. This emphasis seemed to leave little room for judicial participation in court administration. The reaction of the Province's bar and bench was predictably hostile. There were signs of a serious constitutional conflict in the making. Ontario's senior judges, backed by the legal profession, felt that judicial independence was imperilled. The Government seemed up against a stone wall in its attempt to discharge its responsibility for providing a more efficient judicial service.

Mr. McMurtry's proposal is a bold and imaginative attempt to break this deadlock. It is based, in part, on the shortcomings identified in a recent experiment with split responsibilities for court administration in the Hamilton (Central West) area. This experiment demonstrated that so long as judges retain control over the assignment of cases, an executive-based court administrative office, no matter how well versed in using all the instruments of modern management, cannot direct the most critical aspect of court business—the flow of cases through the courts. So the lesson was learned: a dual approach to court management doesn't work; a unified system was required. But under the scheme set out in the White Paper, unified control is to be exercised not through Mr. McMurtry's Ministry, nor indeed through any other government department, but by a committee of six judges—four of whom are appointed by the Federal Government. Government policy seems to have turned 180 degrees!

The transfer of responsibility from the Executive to the Judiciary is not complete—as, indeed, it could not be in our system of government. Most important, the chief administrative officer under the proposed system—the Director of Court Administration—is to be appointed by the Cabinet on the advice of the Attorney General, although he would report to the Judicial Council and could be removed only upon a Judicial Council recommendation. The Government also retains control of an important group of appointments to minor court offices which are perceived to have considerable patronage value (a dubious part of the proposal in view of the important administrative roles played by many such officers). The provincial auditor will inspect the court's accounts. The cabinet and legislature will be kept informed by Council reports and an advisory committee established to monitor the work of the Judicial Council. And, of course, legislative con-

trol, including the power to dismantle the Judicial Council, remains with the Legislative Assembly.

A key aspect of the new system is financial control. The annual budget for court expenditures will have to be approved by the legislature. But for the first time judges, through the Judicial Council, will supervice the preparation of estimates. These will be presented separately to the legislature, and (although the White Paper does not specify this) might be presented by the Chief Justice himself. If such a practice of judicial accountability to the legislature were to emerge, it would give the public a knowledgeable account of the judiciary's resources and needs and yet not jeopardize the public's right to an independent judiciary.

At first glance, it may seem strange for any government to be supporting proposals which appear to transfer responsibility to a body over which it has little control. But actually, it may be very shrewd. For what the government has now is nominal responsibility without real power. What the White Paper entails is a clear ascription of responsibility. The basic responsibility for running the courts, from the highest court in the Province to the lowest, is to be *ascribed* to the judiciary.

If the proposal goes through, the ball will clearly be in the judiciary's court. The critical question which then arises is will the six senior judges who are to constitute the Judicial Council be able any better than the Attorney General to manage the work of Ontario's judges? Assuming that a more efficient system of managing the flow of court business and deploying court resources can be designed, will the Judicial Council be able to ensure that there is reasonable compliance by the judges with these plans? The answer to this question depends on the extent to which the judges are willing to put a sense of corporate responsibility ahead of their own desire to run their own court in their own way. If each judge remains more or less a master in his own house retaining not only the independence to decide the cases which come before him as he sees fit (an independence which, of course, he must retain) but also the independence to design his own administrative practices, his own adjournment policy, and his own standards for dispatching business, the new system may end up forcing us to pay too high a price for protecting judicial independence.

The opposite danger is also a possibility. The new system might impose too rigorous a system of central control so that judges are forced to sacrifice their professional integrity in order to meet the rigid standards of bureaucrats operating only nominally under judicial direction. However, so long as judges are in charge, there is perhaps more danger of the system's being too insensitive to the needs of the public than to it being insufficiently sensitive to the concerns of judges.

There are grounds for being reasonably optimistic about the prospects of this new approach to the reform of court administration. By placing the

prime responsibility on the judges themselves it removes the threat of executive interference with the administration of justice and gives supervisory control to those who should be best able to define reasonable standards of performance in the delivery of adjudicative services. At the same time, it leaves open channels of communication and final control, through which the public can receive an accounting of judicial performance, and can, in the end, insist on changes if that performance, despite increased resources, continues to inflict unacceptable hardships on those who use the courts.

It is to be hoped that the new system, perhaps with some adjustments and refinements, will be given a chance. If it is, the rest of Canada and much of the common law world will watch closely this path-braking attempt to avoid a collision between the principle of judicial independence and the public's need for a reasonably efficient judicial service.