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The Judge and Court Administration: The Respective Roles of the Judiciary and the Executive in Court Administration in Canada, England and U.S.A.

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The Judge & Court Administration : The Respective Roles of the Judiciary and the Executive in Court Administration in Canada, England & U.S.A.

A paper delivered to the Stockholm 1976 meeting of Committee 15—Court Administration by Garry D. Watson, *Professor of Law, Osgoode Hall Law School, York University, Toronto* and Research Director, Canadian Institute for the Administration of Justice

Introduction

This paper deals from a comparative perspective, with a very basic aspect of court administration which is at present of major concern in Canada, namely, who should carry out and be responsible for court administration — the Judiciary or the Executive. The comparative analysis is somewhat narrow since it is limited to the examination of the experience to date in three common law jurisdictions but I hope it will be of some interest to those from civil law jurisdictions.

In one sense my subject is as much in the realm of political science of constitutional law as court administration. It is concerned with how to reconcile the basic concepts of parliamentary responsible government and the independence of the judiciary in such a way as to produce an effective system of court administration while maintaining a constitutional government.

Court Administration: A Brief History

Obviously court administration in common law jurisdictions is not something new. For as long as there have been courts they have been administered by someone, either by judges themselves or by officials attached to the court. While rarely, if ever, has the administration of the courts been held up as a model to be emulated by other government departments or by private industry, the present *sustained level* of public and professional interest in improving the management of the courts in common law jurisdictions is a recent phenomenon.

That is not to suggest that the administration of the courts has not at earlier times come under intense fire. For example, in England in the nineteenth century there had existed a sad state of affairs resulting from a long history of corruption and inefficiency in the officials of the court: corruption and inefficiency which was closely related to patronage rights of the judiciary. But legislation towards the end of the nineteenth century abolished the patronage and converted court officials into salaried officials appointed by the executive along civil service lines.

While administration of the courts has perhaps never been without its critics

(nor perfect) the present sustained concern with court administration in common law jurisdictions really dates back to about 1950. Since that time the administration of the courts has become a major concern in the United States, England, Canada and Australia.

The factor precipitating this concern — the inability of the courts to cope with their ever increasing caseloads — has repeated itself, not only across the United States but in other common law countries. The “crisis in the courts” (as it has been described in the United States) is a direct result of increased criminal and civil caseloads which are themselves a function of a variety of factors including population growth, increased urbanization, legislative changes (for example, the liberalizing of divorce) and increasing crime rates. It has generally been accepted that the “crisis in the courts” has been exacerbated by the lack of adequate court administration and in various countries steps have been taken to remedy this.

In the United States sustained efforts to improve court administration got underway in the 1950's. The major leaders of the movement in that country have been the judiciary, aided by professional court administrators and, to a lesser extent, by educators. (Educational programs aimed at training professional court administrators have been developed at various institutions in the United States, e.g. the Institute for Court Management at Denver, the University of Denver College of Law and the University of Southern California).

In England the crisis in the courts — or at least governmental response thereto — came later, in the form of the Royal Commission on Assizes and Quarter Sessions, chaired by the distinguished industrialist Lord Beeching and which reported in 1969. The implementation of the broad and sweeping recommendations made by Lord Beeching took place in the next succeeding few years and centred around the passage of the Courts Act 1971.

In Canada, the problem emerged still later — or at least the governmental response was later in coming. The response that has received most attention nation-wide was that of the government of the province of Ontario which, in 1970, requested the Ontario Law Reform Commission to undertake a study and review of the administration of Ontario courts. Three years later, in 1973, the Ontario Law Reform Commission produced a lengthy report which directed itself, among other things, to the question of who should be primarily responsible for court administration. While affirming that the principle of an independent judiciary must be preserved, the report concluded that court administration should primarily be the responsibility of the government rather than the preserve of the judiciary. (The Law Reform Commission had proposed a rather delicately balanced system of court administration under which the court administrators would not be part of the executive branch of government but would enjoy somewhat independent status and be jointly responsible to both the judiciary and the executive. Soon after the release of the report the Attorney General made it clear that he intended to make these court administrators a part of his Ministry and directly responsible to him on matters primarily touching upon court administration).

There is presently, in Canada, a considerable amount of activity in the area of court administration. Departments of the Attorney General across the country are taking an increased interest in the problems of court administration and are busy developing systems design to improve the administration of the courts. In addition the judiciary have been far from deaf to public criticisms that are being voiced and have been taking active steps to improve the administration of the courts. However, despite the fact that both the executive and the judiciary are making genuine efforts to make our courts operate better in the interest of the public a major problem remains: pervading all of this activity as to what should be the relative roles of the executive and the judiciary in the area of court administration.

The position taken by the Ontario government as to who should administer the courts is shared by other provincial governments. The judiciary, on the other hand, has generally tended to take exception to the idea of executive control over the administration of the courts. In general the judiciary have been more vocal in expressing their concern over this issue than have the Attorneys General. The Attorneys General tend to take the position that the problem is really a non-problem since, they have assumed (rightly or wrongly) that constitutionally court administration is their responsibility. In making this assertion they have pointed to the fact that the Canadian constitution (the British North America Act) expressly assigns legislative responsibility or the administration of justice to the provincial legislatures. Judges, on the other hand, question this conclusion, contending that too extensive a role for the Attorney General in the running of the courts is a threat to the existence of an independent judiciary in Canada.

While the Attorneys General express less concern with the problem than do the judiciary it still remains a problem for them. Establishing a mutually acceptable definition of the respective roles of the executive and the judiciary in court administration has not yet been achieved in Canada. Consequently the executive (i.e. the Attorneys General) feel constrained in implementing comprehensive plans for reorganizing court administration. In short, this jurisdictional question is impeding the speedy development of solutions to the problem of administering courts in Canada.

At present this jurisdictional question remains unresolved in Canada. In an attempt to develop a solution to the problem it is useful to look at the experience in other jurisdictions. I would like to draw for you a picture of what appear, at least on the surface, to be two very different models of court administration that are developed on the one hand in the United States, and on the other hand in the United Kingdom. Such a comparative analysis can, I believe, give a much better perspective on the Canadian problem.

Two Models of Court Administration

A. The U.S. "Third Branch Model": Separate but Subservient?

Let me introduce my brief description of court administration in the United

States with a quotation that typifies the prevailing attitude in that country on the question of responsibility for court administration:

"Judges are ultimately responsible for the management of the courts. Any theory of the separation of powers or the independence of the judicial process is tenable only under this condition. The judicial branch of government must be given and must accept full responsibility for judicial procedures and operations. Executive branch management or legislative branch control are a prelude to improper pressures that interfere with the exercise of independent judgement on individual cases. [Judges are the instruments through which the goals of courts are reached. The courts must be made to function totally for the purposes of individual justice.]"¹

"The power to prescribe administrative policy is essentially a matter of internal concern to the court system, and is therefore unqualifiedly an inherent judicial power." . . .

"Court administrative policy concerns such matters as court calendars, assignment of judges, responsibilities of court auxiliary personnel, internal administrative procedures, and financial administration. The power of the courts to make administrative policy governing their operations is an element of their constitutional status as an "equal branch of government". The agency that formulates administrative policy for the courts should be based within and be accountable to the courts system itself. It should, therefore, consist exclusively of judges. It should not include in its membership persons who, while having legitimate interests in the courts, are nevertheless in positions where they may from time to time have interests that conflict with those of the court's system."²

As I am sure you are all aware the Federal Constitution of the United States establishes a separation of powers. The general powers of government are divided into three separate departments: the legislative, the executive and judicial. The generally accepted doctrine is that no person charged with the exercise of powers properly belonging to one of these departments can exercise any functions pertaining to any of the others, except where the constitution expressly directs or permits it. The objective was to set up each branch so that it would function as a check on an improper and arrogant use of power by another branch.

In this context, and particularly with regard to the Federal Constitution, it should not be forgotten that the pre-occupation of the American people with the independence of the judiciary goes back to the time of the American revolution.³ One charge that was made against King George III in the Declaration of Independence

¹ Friesen, Gallas & Gallas, *Managing the Courts* (1971), p. 133.

² American Bar Association, *Standards Relating to Court Organization* (Tentative Draft, 1974), pp. 73, 77, 78.

³ See generally Friesen, Gallas & Gallas, *supra*, note 24, at pp. 83-84 and Lederman, *supra*, note 4, at pp. 1144 *et seq.*

was that "He has made judges dependent upon his will alone, for the tenure of their offices, and the amount and payment of their salaries." This complaint undoubtedly loomed large in the minds of the framers of the United States Constitution.

But while the United States Federal Constitution provides (in explicit terms) for an independent judiciary with the traditional safeguards, the prevailing system today in many state courts is the election of judges for a relatively short fixed term. This development — the election of judges — was not a result of the late 18th century American revolution: it was a consequence of the later surge of Jacksonian democracy in the mid 19th century. The state judiciaries were thus, for the most part, converted into an elected branch of government. However, the federal judiciary escaped the onslaught of Jacksonian democracy. This was largely due to the relative unimportance of the federal trial courts at that time and the difficulty of amending the Federal Constitution.⁴

In the United States today the role of the judiciary in court administration is a major one. But there is a dichotomy between the situation at the federal and the state level, a reflection of the influence of Jacksonian democracy. In addition, the virtual omnipotence of the judiciary in matters of federal court administration is a relatively recent development.

Prior to 1939 the management of the federal judicial system lay within the jurisdiction of the executive, through the Department of Justice. But in that year the Administrative Office of the United States Court was created by legislation and the business management of the courts was transferred from the Department of Justice to the judiciary. Interestingly enough the man who played the major role in bringing about this transfer of power was the then Attorney General, Homer S. Cummings. On a number of public occasions the Attorney General made it clear that he thought it was improper for the chief litigant before the federal courts to have jurisdiction over the budget and expenditures of the court. The major purpose of the legislation was to free the courts of executive control by the Department which was a major litigant before the courts. The result of the legislation was to make the entire federal judicial system an integrated whole, responsible only to itself. Pursuant to the legislation, the expenditure estimates of the courts are now included in the federal budget without revision by the Bureau of the Budget (the executive body which usually controls budget estimates).

The "third branch model" involving virtually complete control by the judiciary over all aspects of court administration is most highly developed in the United States at the federal level and often much less at the state level. While the general consensus, particularly among state judges and court administrators, is that the courts rather than the legislature or the executive should control court administration the actual extent to which this is achieved varies considerably from state to state. For example, frequently local government rather than the court has control over the hiring and firing of court staff.

⁴ *Ibid.*

But the state judiciary, even where it has effective control over court administration, is frequently subject to severe budgetary control from the other branches of government. This problem has at time become an acute one for trial courts, which are often locally financed, and has given rise to the much publicized "inherent powers lawsuits". These are actions brought by courts to mandate court financing. They assert the inherent power of courts (arising from the need to maintain judicial independence in a system of separated powers) and are designed to limit the discretion of other branches of government to define how much money the judicial branch may have from the public purse.⁵ The extent of the difficulty faced by some state courts is illustrated by the type of questionable judicial activity it can engender. It is reported that one judge, in a confidential conversation, described his methods for obtaining court financing. He had no trouble, he said, in getting money from the country to fulfill the needs of his court. If his county board was reluctant, he simply set down all of the tax assessment appeals before himself for the next week and suggested the board reconsider its reluctance.⁶

The biggest problem faced by the independent judiciary in the United States, particularly at the state level, is the obtaining of the requisite financing to carry out the judicial function. While the federal judiciary has generally had less difficulty in obtaining adequate budgetary appropriations, the Chief Justice Berger has of late complained of the increasing financial neglect by Congress of the plight of the federal courts. In his most recent, year-end report⁷ he called again for an increase in the number of judges. In so doing he pointed out that at the trial level there had been no increase in judgeships since 1970, yet since that time the caseload had increased 42 per cent: at the appellate level there had been no increase in judgeship since 1968 yet the caseload had increased 113 per cent.

In the United States the other two branches of government have generally conceded to the judiciary jurisdiction over court administration. Yet the judiciary have experienced considerable problems because of their lack of any "power over the purse". They remain dependent upon the other co-ordinate branches of government for financing. (Hence the title of Professor Carl Baar's recent book on court financing: "Separate but Subservient"). In Canada the dispute between the executive and the judiciary at present revolves around defining their respective roles in court administration. In the United States that question has been resolved in favour of the judiciary, but a major battle continues at the level of financing.

Many Canadian judges advocate the adoption of the U.S. "third branch model" as the appropriate solution to the problem of responsibility over court administration in Canada. They are attracted to the model because it gives to the judiciary

⁵ Friesen, Gallas & Gallas, *supra*, note 24, p. 88. At the time the legislation was being considered, others made the same point, e.g. Judge William Dinsmore: "True, the Attorney-General is a public officer, but he is a litigating officer" (1939), 28 Georgetown L. J. 383, 387.

⁶ Friesen, Gallas & Gallas, *supra*, note 29, p. 79.

⁷ "The Third Branch" (Bulletin of the Federal Courts) Vol. 8, No. 1 (January, 1976).

virtually complete control over court administration and champions the principle of judicial independence. Even leaving aside the issue of the compatibility of this solution with Canadian constitutional norm of parliamentary responsible government, one may question the wisdom of this solution from the viewpoint of the long term interests of the judiciary and the administration of justice generally.

One might speculate that the problem facing the United States courts today is, at least in part, structural in nature. The legislature and the executive have permitted the judiciary to run the courts. Consequently they view the task of running the courts to be, not their responsibility, but that of the judiciary. Having taken that position in respect of the running of the courts, the government is less than responsive to requests for court financing. When the question of the annual budget arises or new judgeships are needed, the judiciary finds that it lacks friends *within* the executive who feel a real responsibility for the plight of the courts. The result is that court financing is a much greater problem today in the United States than it is in either the United Kingdom or Canada, where the assumption by the executive of a role in court administration has led to a degree of executive involvement in, and commitment to, the proper financing of the courts.

*B. The United Kingdom – Beeching's Report and the Aftermath
"Responsible Government and Court Administration"*

I have already mentioned that in 1969 in England Lord Beeching chaired a Royal Commission which suggested a wide range of reforms in the administration of justice in England. In his report Beeching made radical recommendations on the subject of court administration. The position he took on the question of who should be responsible for court administration is in sharp contrast to the American position we have just examined. The Commission's basic position was stated clearly and unequivocally in the following language:

"It is clear that many of the present inadequacies of the higher courts are attributable to the lack of any overall court service . . . In our view, the first step must be the assumption of responsibility by one minister, answerable to Parliament for the running of all the courts above the level of Magistrates' Courts and for the establishment of a single court service."⁸

The wide range of reforms recommended by Beeching as to both court structure and court administration called for a great deal of coordination where there had formerly been a great lack of coordination. Hence Beeching considered a radical improvement in court administration a prerequisite to successful implementation of his major proposals.

"We regard control by a single Minister, coupled with the creation and maintenance of an efficient administrative service responsible for all aspects of court administration as essential for our proposed reorganization . . ."⁹

⁸ *Supra*, note 15, at p. 103.

⁹ *Ibid.*, at p. 67.

Thus in one stroke the Commission recommended the establishment of a professional court administrative staff, organized on a unified basis, and directly responsible to and under the direction of, one Minister, answerable to Parliament.

At least on the surface, the contrast with the American model of court administration could hardly be more dramatic. The first assumption by Beeching — *in England remember, the home of judicial independence* — was that court administration must be in the hands of a Minister responsible to, and answerable to, Parliament. Only after stating that premise did the Commission turn to consider the question of who was the most appropriate Minister.¹⁰

While referring to other Ministers who had responsibility with regard to court operations and the administration of justice generally, the Commission had little difficulty in concluding that the Lord Chancellor was the most appropriate Minister to take on this new overall responsibility for a number of reasons — he enjoyed a special position as head of the judiciary, he appointed most of the judges and he already had responsibility for running the county courts.

Immediately below the Lord Chancellor in the hierarchy of this new court service would be six Circuit Administrators, responsible for all aspects of the court service within their respective circuits. It would be their duty, Beeching said, to ensure that all criminal and civil business is promptly disposed of and they would be answerable to the Lord Chancellor should delay occur.¹¹

While viewing an efficient administrative organization as essential to combating delays, Beeching was not unmindful of problems of judicial independence. (However, it is fair to say that very little of the Report was devoted to this problem). Beeching said, "It is our intention that the circuit administrators shall exercise firm managerial control over all matters affecting the smooth running of the courts *other* than those which have a *direct* bearing upon the discharge of judicial functions".¹² This being so, he continued, "we consider it very necessary, on constitutional grounds, to provide a visible and effective safeguarding of the position of the judges serving the circuits by assigning to each circuit a senior member of the judiciary who will have the general responsibility for that circuit and a particular responsibility for all matters affecting the judiciary serving there".¹³ Thus to ensure the continuance of an independent judiciary Beeching recommended the appointment of Presiding Judges to each of the proposed circuits. The essential idea was that each presiding judge should be a mini-Lord Chief Justice and their major responsibility would be for the allocation of judge power throughout the circuit. Decisions on the deployment of judicial manpower were decisions that Beeching felt must be made at the circuit level, but he was "convinced that such decisions should not be made by even a senior administrator, but should be made

¹⁰ *Ibid.*, at pp. 103–4.

¹¹ *Ibid.*, at p. 105.

¹² *Ibid.*, at p. 86.

¹³ *Ibid.*

by a senior judge".¹⁴ The Commission also saw the need for a senior member of the judiciary to have a general responsibility for the orderly running of the lists in the circuit. However, it stressed that it did not want the presiding judge to assume any greater part of the burden of administration than would be necessary to ensure the well-being of the circuit and, in particular, of the judiciary within the circuit.¹⁵

Notwithstanding the sweeping and radical nature of the reforms proposed, the Beeching Commission's Report received overwhelming support from all quarters: from the government, the judiciary, and the profession and the press. And a similar response was forthcoming to the *Courts Act* 1971 which was the legislative vehicle for the implementation of Beeching's proposals.

In the parliamentary debates on the legislation there was little, if any, suggestion that Beeching's proposals involved any threat to the independence of the judiciary. For the most part, the debates placed most emphasis where Beeching had placed it — the need for parliamentary responsibility with regard to court administration. [For example, in the House of Commons some labour members opposed some of the reforms because they placed so much authority in the hands of an official (the Lord Chancellor) who was not directly responsible to the House of Commons. They felt that his independence, in another chamber (i.e. the House of Lords) where the pace of parliamentary battle is more sedate, would insulate him in his political role and permit him to give too much weight to the demands of his special constituency, the Bar and the judiciary.¹⁶]

In the debate in the House of Lords a number of judges spoke (it is to be noted that in England the judges of the highest Appellate Court in the land sit as members of the upper house of Parliament) from the viewpoint of the likely impact of Beeching's recommendations on judicial independence the comments of these judges are of particular interest.

Lord Parker of Waddington, the then Lord Chief Justice, referred to Beeching's work as a "truly admirable report" and expressed his delight at "being relieved of the day to day, if not the hour to hour, impossibilities of endeavouring to see that a hundred judge days of work are somehow done in fifty days." Lord Denning in his speech pointed out that the Bill would give great powers to the Lord Chancellor and his Department and would lead to a great deal more centralization in the administration of justice. It would convert the Lord Chancellor's Department, whatever its name, into a Ministry of Justice. He then went on to point out the Bill did raise questions relating to independence of the judiciary, but his concerns were of a rather traditional nature, having to do with the salary and tenure of judges rather than the control of court administration in the hands of a Minister was itself a threat to the independence of the judiciary.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at p. 87.

¹⁶ Morrison, *Courts and the Political Process in England* (1973), p. 209.

At the close of the House of Lords debate on the Courts Bill, the Lord Chancellor, Lord Hailsham, responded to Lord Denning's remarks in terms which are of particular interest with regard to evaluating, from a Canadian perspective, the English response to the Beeching Reforms. The Lord Chancellor said:¹⁷

"I was grateful to the noble and learned Lord, Lord Denning, for his intervention. He quite rightly stressed the importance of the independence of judges, and I feel sure that anyone who held my office would be wholeheartedly with him in that respect. I rather shy, if I may say so, at the description of the Lord Chancellor's Office as a Ministry of Justice. No Minister of Justice sits on the Woolsack as Speaker of any Legislative Assembly of which I am aware, except the Lord Chancellor of Great Britain. Many Ministers of Justice not merely appoint judges, but also look after prisons, and start prosecutions. To my mind, this would be something altogether dreadful in the British system and I would fight that in the last ditch."

Beeching's recommendations and the Courts Bill 1971 were enthusiastically received in all quarters in England. But what of the implementation of the recommendations? How successful has this been? Ernest Friesen, perhaps the foremost American commentator on court administration, has made a study of this subject and has written as follows:¹⁸

"Students of court reform might well decide to study the speed with which the Beeching Report was adopted. It has no parallel in modern times. It recommended substantial changes in the judicial structure of the oldest system of court administration in the modern world and was almost universally successful. Measures which in the United States were adopted only after conflict and compromise were passed through Parliament almost without dispute.

"In one broad sweep the Courts Act . . . wiped out centuries of local control over courts, established a new class of judges, set up an administrative hierarchy across the country and made court personnel a part of the national civil service . . .

"The basic concepts of the Beeching Report were adopted within a year of their publication and were being implemented within two years. They could have gone wrong. Hierarchy could have centralized authority and destroyed the effectiveness of local machinery. The wrong administrators could have been selected. Judges could have resisted the concentration of power in administrators. None of these things happened. The implementation of Beeching must be recorded as one of the most successful of modern governmental experiments."

¹⁷ 313 H. L. 1316.

¹⁸ Friesen, *English Criminal Justice* (Institute for Court Management, Denver), (1975), pp. 81-83.

C. A Comparison of the United States and the United Kingdom Experience with the Canadian Situation

What light, if any, does this comparative analysis shed on the Canadian situation?

A helpful starting point is to ask the question: why should the response of the English judiciary and legal profession to the recommendations of the Beeching report have been so very different to the Canadian responses to the somewhat similar proposals made by provincial Attorneys General in Canada? Given the common heritage of the English and Canadian legal systems, and the common form of responsible parliamentary government enjoyed in both countries, this question is a most appropriate one.

Two important distinctions can be drawn between Beeching's recommendations and those that have been put forward by the executive in Canada.

The first, and most obvious distinction, is that the Minister who is to have responsibility for court administration under the Canadian proposal is one whose department is heavily involved in both criminal and civil litigation: throughout Canada generally the Department of the Attorney General directs the operation of Crown Attorneys (who conduct criminal prosecutions) and is the civil litigating arm of the government. By way of contrast, in England the Lord Chancellor's office has no responsibility for, or involvement in, litigation conducted on behalf of the government.

The second, and perhaps the major point, accounting for the different reaction in England and Canada to the proposals for a radical change in court administration is the unique role of the Lord Chancellor. Much has been written on this remarkable office.¹⁹ Here it will suffice to quote Ernest Friesen's brief description of the position.

"The Lord Chancellor is a member of the Cabinet. The office is political and changes with the government. There is, however, a long tradition of filling the post with an able member of the Bar or a judge. The role may well be thought of as intermediary between two important English institutions, the government and the legal profession. Quite often, the Lord Chancellor must exercise considerable power to maintain the judiciary as an independent arm of the governmental system as distinct from the 'Government'. Tradition has created a role for the Lord Chancellor which defies political theory but works effectively to make the needs of the judiciary known without interfering with the independence of the judges. The office is not exclusively the seat of judicial administration but has many non-judicial duties to perform."²⁰

¹⁹ See Lord Schuster, "The Office of the Lord Chancellor" (1949), 10 *Camb. L. J.* 175; Lord Gardiner, *The Trials of a Lord Chancellor*, The Holdsworth Lecture, Friday, March 8, 1968 (mimeograph); Viscount Kilmuir, "The Office of Lord Chancellor" (1956), 9 *Parliamentary Affairs* 132.

²⁰ *Supra*, note 48, at p. 81.

To these observations we should add the fact that by virtue of his office he is a judge, indeed the head of the judiciary, and after the defeat of his government or his own dismissal from Cabinet he is entitled for the rest of his life to the position of a law Lord. Also important, in the context of analysing the response of the English judiciary to the Beeching Report, is the long standing mutual co-operation that has always existed between the Lord Chancellor's Department and the judiciary. I do not think, from a Canadian perspective, that one can under-state the importance of this feeling of mutual trust that has always existed, and which continues to exist, in England between the judiciary and the Lord Chancellor's office.

Indeed, because of the extraordinary nature of the Lord Chancellor's office, and contrary to the picture of sharp contrast that I have drawn between the U.S. and English models of court administration, one might well argue that they are very similar in one basic respect — each is headed by the senior judge in the country: in England by the Lord Chancellor and in the United States (at the federal level) by the Chief Justice of the United States.

However, despite the unique role of the Lord Chancellor, from the Canadian context one cannot lose sight of the fact that Beeching recommended for England — which has a constitutional structure very similar to that of Canada in this regard — a solution to the problem of control over court administration which came down heavily in favour of parliamentary responsibility.

Turning now to the U.S. model. What parallels and distinctions can be drawn between the U.S. and the Canadian positions?

The first point to be noted is that the U.S. model is founded upon a constitutional framework which embodies a very strong doctrine of the separation of powers by which the judiciary is viewed as a co-equal branch with the legislature and the executive: a system which assumes and recognizes the need for checks and balances between the various branches of government.

Secondly, of course, the concept of parliamentary responsible government is quite foreign to the American political system.

By way of contrast, in Canada there is no real constitutional doctrine of the separation of powers. Certainly this is true in so far as it relates to the legislature and the executive, since the executive is headed by the Cabinet which is formed by the party having a majority of seats in the legislature. However, our written constitution does provide for, and our political theory and practice recognize the need for, an independent judiciary. But there is little in our constitution to support a position similar to that which exists at the federal level in the United States. Certain specific provisions of the British North America Act coupled with the basic concept of parliamentary responsible government enshrined therein certainly suggests a large role for the executive in the area of court administration in Canada. This still leaves open, of course, the question of how large a role for the executive in view of the fact that no one, to my knowledge in Canada, including the executive, has suggested we should adopt a court administration structure that represents a real threat to the right of all Canadians to independent judiciary.

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. This point was made in the United States by Attorney-General Cumming and in the United Kingdom by the Lord Chancellor in the debate in the House of Lords on the *Courts Act 1971* which I have already referred to.²¹ 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.

D. A Canadian Solution

Several alternative structures for court administration — none of which is necessarily perfect — present themselves as possible solutions to the Canadian problem. Before turning to analysis of these structural alternatives it may be useful to make some general observations with regard to several matters that underlie the development of a sound system of court administration in Canada.

(a) Some General Observations

As I see it one of the major difficulties underlying a solution to the question of responsibility for court administration in Canada is the lack of mutual trust and respect between the judiciary and the executive with regard to court administration. Instead there is a degree of mistrust between the judiciary and the executive.

To date the executive has failed to convince the judiciary that its intentions are bona fide and that its sole desire is to develop a sound and efficient court administration system in the public interest. There has been a lack of openness in government in the area of court administration by the executive and they have often not shown themselves to be genuinely responsive to input from all quarters, including the judiciary. The executive has also not gone as far as it might have to convince people that it recognizes that the judicial process enjoys a very particular role in our Canadian society.

The judiciary, on the other hand, has failed to gain fully the trust and respect of the executive in matters of court administration. To a certain extent at least this revolves around the way in which the judiciary defines and uses the concept of judicial independence. Judges usually refer to the concept of "the independence of the judiciary" rather than the term "an independent judiciary". Personally, I much prefer the latter phrase. It has the advantage that it is more clearly indicative of the concept. In the final analysis we value and stress judicial independence but what it assures to the public, not for what it grants to judges themselves. Ultimately,

²¹ See *supra*, text at notes 30 and 47.

the sole purpose of the concept is to ensure that every citizen who comes before the court will have his case heard by a judge who is free of governmental or private pressures that may impinge upon the ability of that judge to render a fair and unbiased decision in accordance with the law.

In analysing the problem of who should be responsible for court administration we must be careful not to confuse the goal of an independent judiciary with the institution itself. (A confusion which I find is often present in judicial discussions). Our constitutional doctrine demands a solution to the problem which safeguards the public right to an independent judiciary, but this does not mean, *ex hypothesi*, that the judiciary must control court administration. The judiciary must be prepared to concede, for example, that if ten totally incorruptible saints were to come down to earth and take over court administration the public's right to an independent judiciary would not be threatened.

I believe that in the debate over the respective roles of the judiciary and the executive in court administration, the judiciary is really expressing two concerns and has made an error in framing both of them as constitutional arguments. The *first* is a concern that the executive may use its power over court administration to manipulate the case assignment process to its own advantage or to otherwise influence judicial decision making. This is clearly a problem of constitutional proportions. The *second* is a broader and different concern: that the executive department is attempting to construct an administrative system under which judges will be reduced to a role of simple "case deciders" and denied any meaningful input into, or responsibility for, the courts overall performance administratively. I suggest that this is an understandable and human concern of the judges but one that does not have constitutional implications. Further, I would suggest that it weakens the argument to put it forward as one of constitutional dimension. Yet I believe the argument has validity and should be listened to despite its lack of the constitutional dimension. Modern management theory and practice recognizes that normally you cannot employ highly qualified professionals and give them roles that are devoid of any say in setting and meeting the goals of the job, and expect them to be satisfied in their work. I believe that this is one of the real reasons why judges are asking for a greater role in court administration than the executive, at times, seems prepared to accord the judiciary.

In this context it is interesting to contrast the attitude of the judiciary in England with that of the judiciary in Canada and the United States. In the two North American jurisdictions judges generally have a strong desire to play a major role in court administration: to have active control and responsibility for the running of at least much of the courts operations. By contrast, the English judiciary seems little interested in being actively involved in court administration and seems quite happy, generally, to leave this to others i.e. the executive. Underlying this difference in attitude is, I believe, a sociological explanation. North American lawyers who are appointed to the judiciary have typically been involved in the practice of law in firms where they themselves had responsibility for the running of their law practice.

Whether or not they bring with them great administrative skills is a matter of some debate. The important point, however, is that they have grown up professionally in a situation where they control their own work environment. By way of contrast, in England appointments to the upper courts are made exclusively from the Bar: from amongst those who have practiced in group chambers as barristers. As one English lawyer pointed out to me recently the English barrister, since the very first day he joined the profession, has been used to having his life more or less run for him (so far as administrative matters are concerned) by that remarkable English institution the barristers clerk. The barristers clerk accepts briefs on behalf of his principal, negotiates the fees that will be charged and makes all the arrangements as to when and where his principal will appear in court. As my English friend pointed out this type of professional upbringing breeds in the English judiciary, in general, a distaste for administrative matters.

(b) *Structural Alternatives*

In closing let me return again to the question of the possible structural alternatives that might be adopted in Canada to resolve the problem of authority over court administration.

The starting point must obviously be a point that has already been made: that 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 which is itself involved as a litigant before the courts.

One structural technique would be to place executive responsibility for court administration in the hands of a minister who has nothing to do with the conduct of litigation before the courts. The most logical step in this direction would be to create a new Ministry of Justice by transferring from the Department of the Attorney General a variety of responsibilities (e.g. judicial appointments, law reform and court administration) that are unrelated to the government's role as a party in litigation. This solution has the advantage that it would maintain parliamentary responsibility for court administration in a traditional form, through Ministerial responsibility. But it is not without risks and drawbacks. If a new Ministry is a politically weak one, difficulties may arise in the future in obtaining adequate financing for the courts. Moreover, some may argue that the separating of the functions of government litigation and court administration into different departments is not a sufficient safeguard: since the responsible Ministers would still be members of the same cabinet, the risk of politically motivated interference remains too high.

Despite its possible drawbacks there is some contemporary indication that this is the likely future Canadian solution to the problem.

A *second* possible structure is to retain executive responsibility for court administration in the hands of the Attorney-General, but to carve out a broad area of court administration — namely, that which has to do with the processing of the court's caseload — and make this the sole responsibility of the judiciary. This would

appear to be the general direction of current Canadian attempts to resolve the problem. Controversy, however, exists as to what should be the area of court administration assigned exclusively to the judiciary. No disagreement exists as to who should be responsible for the actual assignment of judges to particular cases or courtrooms. Both the judiciary and the executive are in agreement that this is solely a question for the judiciary. Serious controversy continues to exist, however, as to what functions, if any, beyond this need be assigned to the judiciary. Typically the executive takes the position that if the judiciary has complete control over the assignment of judges the needs of judicial independence are met. The judiciary, on the other hand, takes the view that mere control over the assignment of judges is insufficient to safeguard the public's interest in judicial independence, since control over the preparation of trial lists and the running of those lists is to control, *de facto*, which cases will be heard by which judges. Consequently, they contend, that to safeguard the public interest these functions also must be controlled by the judiciary.

Attempts to resolve the problem along these lines is also attended with difficulties. On the one hand, the executive argues, not without some merit, that the line sought to be drawn by the judiciary makes little or no sense in managerial terms. Control over caseload management, it is argued, is integral to the development of a sound and efficient system of court management, and to assign responsibilities in the way suggested by the judiciary will be harmful to the development of a sound overall management system in the courts. The contention is that caseload management is at the very heart of court administration and the authority that manages the courts must control caseload management. In this context it is worth noting that under both the U.K. and the U.S. models of court administration this is, indeed, the case.

On the other hand, certainly so long as the executive department in charge of court administration is also the litigating arm of the government, the assumption by it of control over caseload management and the scheduling of cases, appears to remain unacceptable to the Canadian judiciary and will not satisfactorily resolve the problem of court administration in Canada.

I suggest it is incumbent upon the judiciary to carefully consider its position on this question and to articulate more clearly just how placing control over caseload management in the hands of the executive represents an actual threat to the public's right to an independent judiciary. I suggest that what Beeching described as a "unified court service" — the placing of responsibility for all of the salient aspects of court administration including caseload management (but excluding the assignment of judges) to one authority — *is* the *ideal* solution in managerial terms. But how, if at all, can this ideal be adapted to the Canadian context. In the United States that authority is assigned to the judiciary. I suggest that under our constitutional system such a broad grant of authority would be inappropriate. Under our system the authority in charge of court administration should be responsible to the legislature, but in addition any proposed system of court administration must

be one that truly safeguards our desire for, and the public's right to, an independent judiciary.

A third possibility might be to assign total responsibility for court administration to some independent body directly responsible to, and only responsible to, the legislature — along the lines of the Ombudsman or the Auditor General. Such a body might be headed by a joint committee representative of both the executive and the judiciary. To assure parliamentary accountability it could be provided that all members of this committee should be subject to dismissal (from their position on the committee) by the legislature for failure to perform the job adequately. (Of course, in the case of a judge he would still retain his position as a member of the judiciary). Without going into the matter in any detail this type of solution could involve new problems, not the least of which is the obtaining of adequate financing for the courts in the future.

One further structural variant is to consider the feasibility and desirability of building a judge into any new executive based court administrative service in order to safeguard the public's interest in the maintenance of an independent judiciary.

Conclusion

In Canada today it is generally recognized that the ever increasing volume and complexity of litigation has created a crisis in the administration of the courts and that our existing systems of court administration are not equal to the task confronting the courts. But while the problem is perceived the development of an appropriate solution is being held up by a conflict between the judiciary and the executive over the issue of who should be responsible for court administration.

The issue is reasonably clear: how *does* one deal with the problem of authority over court administration in a political system that has as twin pillars responsible government and an independent judiciary? The solution is less clear and is still being worked out, with assistance from the experience of the U.S. and England.