The Judicial Role in Court Administration in Canada:

Striking the Balance Between Judicial Independence and Effective Court Management

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It is a great pleasure to be asked to speak at this Conference which is being held in recognition of the fifteenth anniversary of the State Court Administration of Ukraine. Congratulations on achieving this milestone. Despite all the uncertainty and turmoil that have occurred over the past decade, the State Court Administration of Ukraine has been one institution that has persevered in its efforts to provide efficient court services to the Ukrainian public. That is no small achievement.

Canada and Ukraine have a long history of partnership in various judicial reform efforts, stretching back to at least 1996. Over the years we have participated in open and frank dialogue, exchanges and training programs. Canada has benefitted and learned from these frank exchanges of views and I hope the feeling has been mutual.

I have been asked to speak on the subject of models of court administration in Canada and how a balance has been maintained between preserving judicial independence while at the same time ensuring efficient and effective court administration.

Before speaking about the specifics of court administration in Canada, however, let me first say what is perhaps obvious. Courts today are complex institutions that depend, for their proper functioning, on the effective coordination of diverse functions and people so that various parts of court operation work together in a harmonious whole. This requires collaboration and respect among the various functionaries in carrying out their individual duties. In other words, courts do not simply consist of judges trying cases; they consist of an interdependent web of many people performing different functions.

Another preliminary observation I would make is that increasing distrust in formal governmental institutions seems to be a worldwide phenomenon. The recent events in Ukraine certainly seem to fit that trend. Courts depend on public trust for their moral legitimacy and effectiveness. For trust to exist, however, the institutions must be regarded as *trustworthy*. To be regarded as trustworthy, they must at the very least be, and be seen to be, competent, reliable, honest and fair. These requirements underscore the importance of the work that court administrators do, both from a practical point of view in

ensuring that the court system functions and also in the broader context of promoting public trust and, therefore, confidence, in the administration of justice which leads to the maintenance of public order.

Achieving this is the challenge faced by judicial administration institutions, including those in Canada and Ukraine. They must attempt to achieve it within the constitutional, political and social structures with which they work. At the same time, they must be mindful of not compromising fundamental principles, such as the separation of powers and judicial independence, upon which the court system is based.

The first thing to note about the Canadian system as it relates to court administration is that, unlike Ukraine, Canada is a federal state with legislative and executive power divided between a national government and ten provincial governments. (Canada also has three territories which have separate governmental institutions but so as not to complicate matters I will set them aside for the purposes of the remaining discussion).

Under the Canadian constitution, the power to legislate with respect to the administration of justice within a province is vested in that province.[1] This includes the constitution and administrative support of the court system within the province. However, the national (or federal) government also has the

[1] *Constitution Act, 1867*, s. 92(4). See also s. 91(27).

power to create additional courts for the better administration of laws falling within federal legislative jurisdiction.[2] Furthermore (and just to complicate things), although provinces have the power to create courts of all levels within a province, the Constitution vests power in the federal level of government to appoint, remove and pay the judges of the superior courts created and maintained by the province.[3] Appointment, removal and payment of judges of other (i.e. non-superior) courts in a province are vested in the province, not the federal government.[4]

The result of this split jurisdiction is that each of the ten provinces has its own court system which is funded and managed under legislation passed by each provincial legislature.[5] In addition, the federal government has authority to operate and administer, and does operate and administer[6], a court system for federal purposes.

There is therefore no national court administration system that uniformly provides administrative court services to all courts in Canada. There are in fact ten such separate provincial systems and a federal system.[7] Even within a province, there

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[2] S. 101.
[3] Ss. 96, 99, 100.
[4] By virtue of the combined operation of ss. 92(14), 96, 99 and 100.
[5] Each provincial system essentially consists of three levels of court: a provincial court (created, appointed and funded by the provincial level of government); a superior trial court (created and funded by the provincial level of government, except with respect to the judges themselves, who are appointed and paid by the federal level of government); and a court of appeal (with the same administrative, appointment and payment structure as the superior trial court).
[6] Consisting essentially of the Supreme Court of Canada, a Federal Court of Appeal, a Federal (trial) Court, a Tax Court and the Court Martial Appeal Court.
[7] The Supreme Court of Canada has been provided with its own administrative system, separate and apart from the Courts Administration Service which administers all other federal courts.

may not be one administration serving all courts in the province; each court may have its own separate administrative structure.

It will be quickly appreciated that this fragmented system has the potential for inefficiency and duplication. It does, however, allow for the tailoring of administrative services to the peculiar needs of local courts and, perhaps, provides the potential for easier and closer communication between the courts and the local government with respect to funding needs.

Because, under the present constitutional structure, there can never be a single court administration system in Canada, other means have had to be sought to achieve uniformity and develop best practices. I will mention three approaches.

First, the Canadian Judicial Council, a statutory body consisting of all of the 39 Chief Justices and Associate Chief Justices of the provincial superior courts in Canada and of the federally-appointed courts, chaired by the Chief Justice of Canada, is mandated to "promote efficiency and uniformity, and to improve the quality of judicial service in superior courts"[8]. In accordance with that mandate, the Council has undertaken studies and produced reports on optimal models of court administration in Canada, with a view to the recommendations being used as a basis for further discussions between individual courts and the provincial and federal governments as to how to improve existing administrative structures.

[8] *Judges Act*, RSC 1985, c. J-1, s. 60(1).

A second approach to the issue of promoting uniformity and efficiency involves the holding of periodic national meetings of the heads of court administration in Canada. The Heads of Court Administration meetings involve the sharing of best practices and working collaboratively to achieve innovation and improvements in court administration.

A third approach I will mention is the process of periodic meetings of ministers of justice and senior justice officials in government, known as Federal/Provincial/Territorial Justice meetings to discuss matters of mutual concern relating to the Canadian justice system. While the focus is not limited to matters of court administration, the meetings provide a forum for discussion of these issues and for the sharing of information as to different administrative practices in different regions. For example, when the Canadian Judicial Council produced one of its reports recommending changes in the traditional model of court administration, it was the subject of discussion and debate at a Federal/Provincial/Territorial Justice meeting.

While there are many other organizations and methodologies which address the issue of improvement of court administration in Canada, I have mentioned these three because they represent the three most important groups – the judiciary, the court administrative staff and government – which have to be involved in constant attempts at keeping the operation of the court system up-to-date and responsive to the changing needs of society.

Traditionally, the administration of courts in Canada has been conducted using what is known as the “executive model” of administration. Under this model, the government, through the ministry of justice, has the responsibility for financing the operation of the courts and, accordingly, should have, so the argument goes, the authority to hire and fire appropriate staff and determine the structure and operational policies of the court. Carried to the extreme, this would leave little role for the chief justice and the judges with respect to court organization and administration. They essentially would be limited to receiving case files delivered to them by the court staff, going into court and hearing the case and then making a decision. All else, including the physical conditions in which the court operated and the extent and accessibility of court operations to the public, would be performed and controlled by staff who were an extension of the arm of government known as the ministry of justice.

One of the main concerns about this model is the perception of the impact on judicial independence that it creates. By not maintaining a clear and visible separation between the judicial branch of government on the one hand and the executive branch on the other, the model risks giving the impression that the courts are simply a division of the ministry of justice and subject to its control and direction. When the government is the biggest litigator in the courts, either by way of prosecution of criminal offences or having the legality of its actions challenged

by way of judicial review, this is problematic for the perception by the public of judicial impartiality.

The Chief Justice of Canada, the Honourable Beverley McLachlin, writing extra-judicially, expressed the conundrum facing the court system this way:

> "Courts must be independent. Yet they must also have courthouses, staff, and resources to perform the tasks essential to effective justice. The question is how to ensure judicial independence free from actual or perceived government influence, in the face of the need to look to the government for resources and support… We need to look to ways to ensure the proper funding and staffing of courts, while preserving judicial independence and ensuring public accountability for moneys spent."[9]

When the Supreme Court of Canada has had an opportunity to address such issues, it has taken the time to assert that the notion of judicial independence, as the primary means of maintaining judicial impartiality, is a fundamental unwritten principle of our constitution that must be respected.[10] One of the aspects of judicial independence is administrative independence. The Court has also asserted that "an essential condition of judicial independence" was control by the courts "over the administrative decisions that bear directly and immediately on

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[9] "Canada's Legal Systems at 150: Democracy and the Judiciary" online: http://www.scc-csc.ca/judges-juges/spe-dis/bm-2016-06-03-eng.aspx

[10] *Reference Re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3at para 83.

the exercise of the judicial function." [11] Those types of decisions were described as including judicial control over:

- Assignment of judges to cases
- Determination of the sittings of the court
- Court lists
- Allocation of courtrooms
- Direction of the administrative staff engaged in carrying out those functions[12]

Rulings such as these have formed the dividing line in Canada between those administrative functions which should be performed by the chief justice of a particular court and the administrative chief of staff of the court.

That still leaves, of course, many things that technically can be performed by the administrative side of the court and in theory still subject to direction by the executive branch of government. In particular, while the budget for the courts is developed by the courts using administrative staff, it in theory is submitted to the ministry of justice for approval before being forwarded on to the finance department, as part of the justice budget, for final analysis and inclusion in the global budget submitted by the executive to the legislature for approval. Furthermore, in principle, it is claimed by government that the court is subject to government-wide policies on financial policy, human resources and technological regulation.

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[11] *R. v. Valente*, [1985] 2 S.C.R. 673 at 712.
[12] *Ibid* at 709.

The reality, however, is that a court cannot function and deliver adjudication in an independent fashion without operating as an integrated whole and without recognizing that many of the functions of a court are unique and cannot be effectively regulated in accordance with general government policies designed for government operations in other areas. Administrative functions are very much an adjunct of the judicial privilege. To the extent, therefore, that the functions of court staff are necessary to enable the judiciary to perform their functions, the right to direct and control the administrative support provided by court staff of necessity must fall under the protective umbrella of judicial independence.[13]

In practice, therefore, those jurisdictions that are still nominally operating under the executive model do not operate as if there were two independent silos (i.e. judicial administration and court administration) that do not work together. There is much interaction and collaboration between the chief of staff and the chief justice on just about all aspects of court operations. Few if any decisions are made without the chief justice being regarded as having a right to be consulted and without obtaining his or her concurrence. Furthermore, informal protocols often exist whereby the executive (the minister or deputy minister or other senior official) will consult with and ensure that the chief justice is in agreement with proposed decisions that are not

[13] See, *NLAPPE v. Newfoundland and Labrador (Minister of Justice) et al* (2004), 2004 NLTD 54, 237 Nfld. & P.E.I.R. 94 at paras 126 & 127.

technically matters of strict judicial administration and which do not directly impact judicial independence.

Various techniques have been adopted to recognize the practical need for decision-making by the court outside of what has been regarded as the area of judicial administration as identified by the Supreme Court.

First, informal *ad hoc* arrangements have been made between the chief justice and the minister of justice about how decisions are made in particular areas. For example, in some jurisdictions, ministers have agreed not to assess (and perhaps modify) the court's budget in the context of other competing departmental demands but to send it on without changes to finance officials for final assessment and justification. These sorts of arrangements have the weakness that they depend in large measure on the level of personal trust that exists between the persons actually occupying the offices and may be easily changed.

Second, ministers have sometimes agreed, and confirmed by ministerial direction, to delegate formal decision-making authority regarding certain court administrative functions to the court without any need for further involvement by the justice ministry officials, thereby giving greater autonomy to the court even under the executive model.[14]

[14] An example would be the delegation of certain human resources functions to the court relative to filling vacancies and transfers without having to obtain final concurrence from the Ministry office before proceeding.

Third, in some jurisdictions, courts have entered into formal memoranda of understanding with the minister of justice regulating governmental decision-making generally as it pertains to the court, providing that such things as decisions as to construction of new court infrastructure and budget reductions would not be made without consultation with and participation by the chief justice in the decision-making process. The subject-matter of these memoranda of understanding varies from jurisdiction to jurisdiction but in all cases, the memorandum effectively enhances the ability of the court in question to manage and operate more effectively on a day to day basis and to have greater influence on longer-term planning issues.

Finally, some jurisdictions have moved away from the executive model by enacting specific court-service legislation that provides for a new administrative relationship. The best example is the Courts Administration Service which was created for the administration of all of the federally-created courts, except for the Supreme Court of Canada.[15] The objects of the legislation as stated in the Act are as follows:

1. To facilitate coordination and cooperation among the four courts for the purpose of ensuring the effective and efficient provision of administrative services;
2. To enhance judicial independence by placing administrative services at arm's length from the Government of Canada and by affirming the roles of the

[15] *Courts Administration Service Act*, SC 2002, c. 8.

chief justices and judges in the management of the courts; and

3. To enhance accountability for the use of public money in support of court administration while safeguarding the independence of the judiciary.[16]

This legislative regime provides a limited degree of administrative autonomy for the four courts involved[17] by providing a single administrative service for all courts administered by one Court Administrator who reports directly to the four chief justices of the courts. The law permits the chief justices to issue binding directions in writing to the Administrator and he or she is required to follow them. Furthermore, the powers of the Administrator expressly exclude any decision-making authority respecting any matter assigned by general law to the judiciary. The Administrator is responsible for meeting the courts' requirements and for ensuring public access to the courts and their records. To facilitate accessibility, the Courts Administration Service has offices in eight of the country's ten provinces and agreements with courts in other provinces for the provision of agency services.[18]

It will be seen from this necessarily-generalized description that different approaches have been taken in different jurisdictions as to how to modify the executive model of court

[16] This is a summary. The actual language is contained in section 2.
[17] The Federal Court of Appeal, the Federal Court of Canada, the Tax Court of Canada and the Court Martial Appeal Court.
[18] For a more detailed description of the Courts Administration Service, see www.cas-satj.gc.ca.

administration to ensure that judicial independence is maintained while at the same time ensuring that the country's courts are managed and administered efficiently and effectively in the interests of providing the citizenry access to a fair and independent system of adjudication.

About fifteen years ago, the Canadian Judicial Council, one of the bodies I referred to earlier, became concerned about the effect of existing models of court administration on judicial independence. It engaged in a study of the issue and issued several reports[19] outlining various options[20] ranging at one end of the spectrum (the executive model) to the other end (judicial model) where there would be judicial control over virtually all court administration decisions, including the setting of a global budget for the court. Following its study, the Council recommended in its 2006 Report a limited autonomy model (general judicial control over most areas of administrative decision-making with self-government within the court's global budget) together with an independent commission to make decisions resolving differences between the court and the executive relating to the size and composition of the court's global budget. In its subsequent Report in 2007, it modified this slightly by suggesting a limited autonomy model without a dispute-resolution commission as a first step, with further

[19] *Alternative Models of Court Administration* (2006); *Administering Justice for the Public* (2007); and *Comparative Analysis of Key Characteristics of Court Administrative Systems* (2013). Accessible at https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news.pub_all_en.asp.

[20] Called and described in the 2006 Report as: Executive Model; Independent Commission Model; Partnership Model; Executive/Guardian Model; Limited Autonomy Model; Limited Autonomy and Commission Model; and Judicial Model.

discussions to be had on how to break deadlocks on budgetary matters once experience was gained. The Council called this the "judicial responsibility" model which, it said, was based on five principles:

1. The judiciary should be responsible for court administration.
2. Courts should receive appropriate resources to meet the needs of the public.
3. Courts should be consulted in a meaningful way in the process which determines the budget for their administration.
4. Courts should have their own staff and other resources, including information technology systems, needed to properly discharge their responsibilities.
5. Courts should have meaningful input into the planning and design of courthouses to ensure that the public's needs are met.[21]

The initially-proposed system, with an independent commission to resolve funding deadlocks, has not been achieved anywhere in Canada nor in other jurisdictions based on the Westminister model of parliamentary government.[22] However, the limited autonomy model with authority to manage the court *within* the court's global budget (but with ultimate authority for setting the size of the budget remaining in the executive branch

[21] *Administering Justice for the Public* (2007) at 1-2.
[22] See *Comparative Analysis of Key Characteristics of Court Administrative Systems* (2013) for detailed descriptions of the systems in Australia, Canada, England and Wales, New Zealand, Northern Ireland, Republic of Ireland and Scotland.

of government) has been implemented in a number of jurisdictions both within and outside of Canada.

In the last analysis, for courts to operate in Canada, they must depend, as do all government functions, on money voted by the legislature.[23] To that extent, the courts can never be totally divorced from and separate from the other branches of government. There will still be a need for commitments, protocols and memoranda of understanding between the court and its administration, on the one side, and the executive branch of government on the other. This involves an ongoing dialogue about the needs of the court and about the mechanisms that can be implemented to best ensure that those needs are met by a recognized and understood process that places the court, as far as practically possible, at arm's length from influence by the executive branch.

In Canada, we have seen that for courts to function efficiently, effectively and fairly there are two sets of relationships that have to be managed carefully and sensitively in a manner that does not compromise the fundamental principles, such as judicial independence, upon which courts are based. The first is the relationship between the court as an institution and the executive branch of government. The second is the relationship between the chief justice and the chief administrator of the administrative service attached to the court.

[23] And under s. 54 of the *Constitution Act, 1867* the executive branch of government has control over what money-appropriation bills are introduced into the legislature.

With respect to this second relationship, whether the court operates on the traditional executive model of court administration (with authority divided between the chief justice, who is responsible for administration directly related to the judicial function, and the chief of staff who has responsibility for other aspects of court administration), or a more autonomous model (where the chief justice has overall ultimate authority and to whom the chief of staff would be answerable), one of the most important aspects of court administration is the need for respect and collaboration between the judicial and administrative sides of the court. One cannot function without the other. The reality is that even if a chief justice has full ultimate authority over general administration of the court, he or she cannot immerse him- or herself in the minutiae of day to day administration and effectively perform judicial functions. There must, at the least, be a delegation to senior administrative staff of authority to perform most regular administrative functions. That requires a close, respectful, well-defined and reliable working relationship between the chief justice and the chief of staff of the court. It, in effect, must be an "executive partnership"[24] with respect to the administrative functions of the court.

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[24] See Pamela Ryder Lahey and Peter H. Solomon "The Development and Role of the Court Administrator in Canada", International Journal for Court Administration (January, 2008) at 35:

> "The predominant approach to managing courts in Canada in the new millennium emphasizes cooperation and teamwork, especially among the chairman of the court and the trial court administrator. While officially court administrators may only assist the chief judge in performing his administrative responsibilities, in fact the two figures often form an executive partnership. Of course, the personal chemistry among the two figures matters, and may influence what the partnership means in practice. But it

Without such good working relationships, that are respectful of the functions, skills and abilities of each and of the values that animate the court system, the court will not be able to perform its fundamental function of providing accessible and impartial justice for all citizens in a way that inspires the confidence of the public in the system of administration of justice as a whole.

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is normal, not exceptional, for the court administrator to take charge of some of the functions that are deemed to be essential to adjudication, such as allocation and scheduling of cases, albeit under the supervision of the chief judge. In such matters as managing of court staff and the preparation and implementation of court budgets, the court administrators are likely to be the dominant actors. In many of their activities they need to coordinate with provincial (and sometimes regional) court administrators, but their main relationship is to the chiefs of their own courts. Whereas consultations with colleagues beyond the court may happen a few times a month (and mostly by telephone), interaction with the chief judges of their courts takes place a few times each day. In short, court administrators typically have a good deal of discretion. They are able to make many decisions on their own or in consultation with their chief judges; only occasionally must they consult their superiors above the court. While court administrators are technically in a position of dual subordination, they have one real master, and with that master they often achieve a position of functional equality."