7 Judicial Administration

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Judicial administration refers to the organization, management, and operation of courts and court systems. Judicial administration as a field of study is quite recent in Canada. Perhaps the first comprehensive examination of the area was the three-volume *Report on the Administration of Ontario Courts* published in 1973 by the Ontario Law Reform Commission, and the first scholarly book in the field was *Judicial Administration in Canada* by Judge Perry Millar and Professor Carl Baar, published in 1981 as part of the Canadian Public Administration Series.

Judicial administration was already established as a field of study in the United States, but even there its origins have usually been traced only as far back as 1906, when Roscoe Pound, later to become Dean of Harvard Law School and the most prolific writer in sociological jurisprudence, gave his famous and controversial address to an American Bar Association meeting in St Paul, Minnesota: 'The Causes of Popular Dissatisfaction with the Administration of Justice'. By mid-century, a text (W.P. Willoughby's *Judicial Administration*) and a law school casebook (Maynard Pirsig's *Judicial Administration*) had been published, along with major reports by the American Bar Association (e.g., Vanderbilt, 1949) and articles by Pound and other law reformers. The American Judicature Society had been founded in 1913, and its journal, originally the *Journal of the American Judicature Society* and for many years simply *Judicature*, had provided a forum for scholarly and professional writing on the reform of judicial selection, bar governance and discipline, and court organization and procedure. New Jersey Chief Justice (and former ABA president) Arthur Vanderbilt had just completed constitutional reform of his state's court system, and in 1951 would found the Institute of Judicial Administration at New York University Law School.

A new surge of interest in the field would begin in the mid-1960s with the growing American concern about crime, marked by the 1967 publication of the report of the presidential crime commission, *The Challenge of Crime in a Free Society*. By 1973, when the Ontario Law Reform Commission's report was completed, the flagship American text in the field, *Managing the Courts*, by Ernest C. Friesen, Jr, Edward C. Gallas, and Nesta M. Gallas, was in widespread use. New centres of research and education—the National Judicial College, founded in 1960; the Institute for Court Management (ICM), founded in 1969; and the National Center for State Courts, founded in 1971—had been established. Three specialized master's degree programs in judicial administration were in operation, at the University of Denver Law School, the School of Public Administration at the University of Southern California, and American University in Washington, DC. And a new refereed journal, the *Justice System Journal*, sponsored by ICM, was about to begin its first volume.

In fact, the practice and problems of judicial administration could be traced back well before the twentieth century. While references to the eternal verity of the law's delay are often

sprinkled through the orations of judges and lawyers, efforts to address these and other central concerns of the administration of justice go back thousands of years. Chapter 18 of the Book of Exodus describes how Jethro, concerned that his son-in-law Moses has kept the people of Israel waiting 'from the morning unto the evening' to ask him how to resolve their disputes in accordance with God's law, advises Moses to appoint a number of 'able men' to decide the large number of routine cases, leaving only the most difficult matters for Moses himself (Exodus 18: 13–27).

Furthermore, while court administration as a profession has only begun to emerge over the past 30 to 40 years, administrative officials have always played key roles in the support of judicial power. When Michel Foucault introduces his classic *Discipline and Punish* with an account of a public execution in 1759 in France, he describes how the clerk of court is called when the executioner is unable to carry out the sentence; the clerk returns to the courthouse and confers with the judges about how to draw and quarter the man before he is hanged (Foucault, 1979: 3–5). When former Ontario Premier E.C. Drury is rewarded at the close of his political career with a patronage post as Local Registrar of the Supreme Court, Sheriff of Simcoe County, and Clerk of the Simcoe County Court in Barrie, he still must arrange in the late 1940s for construction of a gallows to execute a person convicted of a capital offence in the county (Drury, 1970).

While these local court officials played important roles, they were not part of a larger coherent administrative system. Thus when two neophyte senior court administrators in Manitoba decided to assemble their provincial counterparts at a small conference in September 1975, the two did not even know whom to contact in the other provinces. There were clearly identified senior officials (though varying in title, rank, and legal qualifications) in British Columbia, Saskatchewan, Ontario, Quebec, New Brunswick, and Nova Scotia, but Alberta, Newfoundland, and Prince Edward Island still divided responsibility for court support services among diverse officials (as BC, Ontario, and Nova Scotia had done until only a few years earlier). Following some early stops and restarts, these officials have become the core of a growing national organization that meets annually in locations across Canada.

As late as 1980, when Brock University initiated Canada's first graduate-level course of study in court administration, there wasn't even general agreement on an appropriate label for the field. The Brock program was referred to as an MA degree specializing in Judicial Administration, while the national organization's members settled on court administration, naming their group the Association of Canadian Court Administrators. One ACCA leader felt that the term 'judicial administration' was confined to those matters within the responsibility of the judges themselves, and excluded a variety of court support services in the hands of court administrators. Judge Perry Millar, who had attended the inaugural meeting in Winnipeg of what was to become ACCA, felt that the term 'court administration' was too close to the earlier term 'court services', and that many officials who held the title 'Director of Court Services' needed to bring a broader managerial perspective to their work. He felt the term 'judicial administration' did in fact encompass both the traditional court support functions and the new managerial requirements (Millar and Baar, 1981: 17–18). Today, in fact, both terms—'judicial administration' and 'court administration'—are used widely and interchangeably, reflecting the emergence of a coherent field of study and practice. In 2000, when York University created its Graduate Diploma in Justice System Administration, it was thought that the name of the new program would signal both 'judicial administration' and 'court administration', and would also empower the program to examine administrative issues in parts of the justice system beyond courts.

The purpose of this chapter is to introduce some of the major terms, topics, and preoccupations of the field of judicial administration. At the same time, the chapter will also argue that the field, although non-existent less than 40 years ago in Canada, and seen as backward and marginal in the United States, has emerged today as a model for other areas of public administration

in an era when the ability to manage professionals, to manage flexibly, to manage contextually, and to deliver specific programs effectively is critical to success in managing a wide range of public sector initiatives.

Provincial Responsibility

In Canada, authority over judicial administration lies largely with the provinces and is therefore affected by the managerial and fiscal environment of provincial and territorial governments. This differentiates judicial administration from many of the larger, older, and more established areas of public administration, and reinforces its distinctive character.

Provincial authority is easily understood and explained, because the administration of justice has been a provincial responsibility since Confederation in 1867, as specified in section 92(14) of the British North America Act (today known as the Constitution Act, 1867). Prior to that time, courts had been organized within each province from the time of the earliest permanent civilian settlements. Upper Canada (now Ontario) gets its own special footnote in North American history, for in 1795, within a few years of the establishment of its first courts, a group of lawyers met in Niagara-on-the-Lake, the province's first capital, and set up the Law Society of Upper Canada as the governing body of the legal profession; the Law Society is now the oldest group of self-governing lawyers on the continent, and was the model for integrated bar reforms in the United States in the first half of the twentieth century (McKean, 1963: 33).

Four caveats are necessary to modify the general statement that court administration is a provincial responsibility. First, the judges of the superior courts of each province (the judicial hierarchy is discussed below) are appointed, and their salaries and expenses paid, by the federal government. Thus, an important aspect of the responsibility for and administration of the courts is divided between federal and provincial authorities. No similar system would be conceivable in either the American or Australian federations. In fact, the Canadian approach would be unique had not the Indian Constitution of 1949 borrowed and entrenched it in their fundamental law. No principled reason for this division can be gleaned from Canadian Confederation debates of the 1860s, and the general view is that federal appointment power reflected the patronage preferences of key political allies Macdonald and Cartier. In retrospect, federal appointment may re-enforce the separation of the judges from a key source of potential dependence on governments responsible for day-to-day administration of the courts, but there is no sign that the Constitution's framers had Locke or Montesquieu in mind when the judicature provisions (sections 96–101 of the Constitution Act, 1867) were drafted.

Second, criminal law and procedure are federal responsibilities under section 91(27), so that provincial efforts to address issues of court delay, for example, must either stay away from changes in the federal Criminal Code or await support and co-operation from Ottawa, speaking through the Department of Justice Canada, before being able to act. For example, grand juries have long been seen as antiquated; once provinces had replaced citizen-initiated prosecution with professional prosecutors, the citizen grand jury no longer provided real protection for persons accused of crime or meaningful participation of the public in the law enforcement process. But provinces that sought to eliminate the grand jury often had to wait many years for federal parliamentary concurrence (Nova Scotia was the last, in 1992). Today, provincial attorneys general often call for an end to preliminary inquiries that take up many hours of Provincial Court time, arguing that the Supreme Court of Canada's post-Charter decision requiring pretrial disclosure of evidence by Crown prosecutors (*R. v. Stinchcombe*, 1991) makes the preliminary hearing redundant. Criminal defence lawyers, however, disagree, and Justice Canada has refused to act on recommendations that go back over 25 years.

Third, the federal government is responsible for the administration of certain specialized courts set up by federal statute under the authority of

section 101: 'for the better Administration of the Laws of Canada'. Earliest among these were the Supreme Court of Canada and the Exchequer Court of Canada. (It is interesting to realize that the Supreme Court itself was not created until 1875, a full eight years after Confederation. Presumably there was no rush, since a final appeal could still go to five members of the House of Lords in England, sitting as the Judicial Committee of the Privy Council.) While the Supreme Court has become the jurisprudential leader in reality as well as formality, the Exchequer Court, with its specialized jurisdiction over federal tax matters, was abolished and replaced in 1971 by the Federal Court of Canada, with broader authority to handle appeals from federal administrative agencies and other matters under federal law (see, generally, Russell, 1987). Later in the 1970s, the existing Tax Review Board was transformed into the Tax Court of Canada. Each of these three courts has had its own administrative apparatus, including professional administrators charged with overall responsibility for managing the records, the staff, and the courthouse space; and registrars and trial coordinators who deal with the day-to-day movement of cases and courtroom proceedings. In 2002, federal legislation created the Courts Administration Service (CAS) by merging the administrative staffs of the Federal Court, Tax Court, and Court Martial Appeals Court, and placing the CAS at arm's length from the Ministry of Justice; the innovation has been noticed and praised as far away as Australia (Alford et al., 2004: Ch. 7). The Supreme Court remains a separately administered body.

Finally, federal institutions have developed in recent decades to support the common efforts of provincial judiciaries. Thus the Canadian Judicial Council, founded in 1971, includes all federally appointed chief justices and associate chief justices, even though the vast majority of them sit on provincially administered superior courts. The Council has statutory responsibility for discipline of section 96 judges, and has also supervised important research on issues and policies of direct concern to the administration of justice. The Canadian Centre for Justice Statistics was established in 1981 as a satellite of (or section within) Statistics Canada and operates today under the guidance of liaison committees of provincial justice officials. And the National Judicial Institute was established in 1988 to provide judicial education programs for all judges, regardless of whether they are appointed by the federal or provincial government.

The Judicial Hierarchy

Courts throughout the world are organized in hierarchies that reflect the process of litigating cases and making authoritative decisions. Cases proceed from trial to appeal; since appellate courts have the last word in a case, they are referred to as 'higher courts'. Trial courts are typically categorized into superior and inferior courts; the former are often given the statutory name of Superior Court (*cour superieure* in Quebec). The two types of courts, properly identified by more neutral terminology as courts of general jurisdiction and courts of limited jurisdiction, are often distinguished by the seriousness of the cases they handle, but there are numerous and growing exceptions.

The hierarchical distinction remains important in legal terms, especially in common-law countries where past decisions establish precedents binding in future cases. Thus, whether a judgment constitutes a binding precedent depends first on the hierarchical relationship of the court that set the precedent and the court that is asked to follow the precedent. A decision of a provincial court of appeal is binding on all the trial courts of that province. A decision of the Supreme Court of Canada is binding on all other Canadian trial and appellate courts. In turn, the decision of a provincial superior court is binding on all other trial courts within that province. (For the names of the various provincial trial courts, see Dunn, 2006: 287.)

The decisions of common-law courts that are not legally superior to one another are not binding, but may be persuasive. Thus, the judgment of a court of appeal in one province is often cited

in the courts of appeal of other provinces as a rule that ought to be followed, but it does not govern. Similarly, a superior court judge need not follow the precedent set by another judge on the same superior court.

Constitutionally, superior courts also have what is legally termed 'inherent jurisdiction', which is derived from their link to superior courts in England and their constitutional entrenchment in section 96 of the Constitution Act of 1867. Thus superior courts, unlike trial courts whose jurisdiction is limited to powers conferred by statute, have inherent authority to enforce their own orders (e.g., through use of the contempt power).

Historically, appeals in Canadian provinces were not handled by a separate court, but by superior court judges assembled to review the original judgment of one of their fellow judges. As provinces grew in size, courts of appeal became differentiated entities with judges appointed specifically to those tribunals. Newfoundland's superior court had only three judges from its inception in 1825 until 1963; as a result it was not unusual for a trial judge to sit on a three-judge panel reviewing one of his own decisions (Goodridge, 1991). In Alberta, the historic link between its current Court of Appeal and Court of Queen's Bench is such that trial judges often sit by special appointment to hear appeals (but never from their own judgments).

The superior courts were supplemented by a set of county courts and district courts in the nine English-Canadian provinces. These courts, also staffed by federally appointed judges, did the bulk of the civil and criminal trials in county towns throughout the country. Over time, the work of the county and district courts came to overlap the work of the superior trial courts, and beginning in 1973, the two courts were merged to form a single section 96 trial court in each of the provinces.

At the lowest level of the judicial hierarchy stood the **Magistrate's Courts**. In the first half of the twentieth century, it would have been appropriate to apply the term 'inferior courts' to them in more than a formal legal fashion. Magistrates themselves were sometimes called police magistrates, reflecting their role in criminal cases—and typically their location in local police stations (where their successors were found until much later in the century). Magistrates were usually non-lawyers (the first women judges in Canada were non-lawyer magistrates, including Emily Murphy of the 'Persons Case', whose criminal sentences could be notoriously harsh), serving on a part-time basis, often paid on a piecework basis (the more warrants signed, the higher the pay), and serving at the pleasure of the government. In pioneer Alberta, the local magistrate could be the commander of the local RCMP detachment. Until 1939 in British Columbia, magistrates were paid only when they entered a conviction; the practice continued for some matters until 1960 (Watts, 1986: 79–81).

Beginning in Quebec and Ontario in the 1960s, these courts were transformed over two decades in every province into modern, professional **Provincial Courts**. Their work today is primarily in criminal matters, but some have been given expanded jurisdiction in civil matters (originally small claims, but now extending to claims currently as high as $25,000 in British Columbia, Alberta, and Nova Scotia, and $25,000 in Ontario as of 1 January 2010) and in family law. All of these courts have exclusive jurisdiction over young offenders under the federal Young Offenders Act. The criminal jurisdiction of Provincial Courts has expanded to the point where a large majority of serious offences (termed 'indictable offences' in Canada, generally parallel to 'felonies' in the United States) are tried in these courts. Thus, in practice, superior courts have tended to specialize in civil litigation, and Provincial Courts in criminal matters, limiting the salience of the superior–inferior legal relationship between the two levels of trial courts.

These changes, coupled with the desire of Provincial Court judges to erase the difference in status between the two levels, have led to proposals for a **unified criminal court** at the superior court level. The unified criminal court would replace the current division, whereby only superior courts can hold jury trials and

Provincial Court judges cannot preside at murder trials. In the 1980s, the proposal received the unanimous support of provincial attorneys general, but opposition by superior court judges and the Canadian Bar Association stopped the proposals. (For a detailed analysis of the issues, see Baar, 1991.) Renewed interest surfaced again early in this century, and a major national conference was held on the topic in 2002 (see Russell, 2007).

A more successful innovation has been the **unified family court**, designed so that litigation on family issues (divorce, separation, custody and access, division of property) would no longer be divided between superior courts and Provincial Courts. Specialized family courts with unified jurisdiction now operate in seven provinces.

The existence of a legal hierarchy has had important administrative consequences. In a sense, judicial administration is inherently non-hierarchical in character. The most difficult administrative work is often at the front end of the system. Visualize the paperwork (or computer capacity) necessary to support the activities in a criminal intake court that hears first appearances, deals with applications for pretrial release, takes guilty pleas, metes out sentences, and schedules dates for trials and preliminary hearings. Or picture the support work at the counter in a civil court, where many claims are filed and judgments issued without a case ever going before a judge. The pressure and complexity of this work reflect the fact that court administrators must manage processes and smooth the flow of incoming work. Yet the existence of a judicial hierarchy, in which the courts with the greatest legal authority handle fewer cases than courts in a legally subordinate position, could distort administrative priorities.

In the United States, critics have noted that because judicial salaries increase as judges move up the legal hierarchy, so do the salaries of court administrators, meaning that courts with the largest volume of cases, as well as the largest amount of fee and fine collection, are managed by administrators with the lowest salaries and status (Stott, 1982). The chief justices of state supreme courts can often dictate administrative policy in high-volume courts of limited jurisdiction. As court administration has evolved as a distinct field and the professional requirements for court managers are increasingly recognized, processes for court governance are likely to evolve that separate the requirements for a hierarchy of legal judgments from the requirements for effectively administering justice.

Judicial Independence

Judicial independence is the central concept in understanding how courts are administered. This independence reflects the fundamental values of the judiciary as a distinct public institution. It is seen as a necessary condition for any court system to perform its functions (in current terminology, achieve its mission). It is also a constraint on the management of courts and a challenge to court administrators everywhere.

Judicial independence refers to the ability of the individual judge to perform his or her adjudicative function, whether sitting in court hearing cases or sitting in chambers writing judgments and hearing motions, free from external interference. Historically, that interference took the form of pressure from government on the judiciary to hand down decisions consistent with governmental preferences, and that pressure is still visible today in many countries throughout the world (including Canada and the United States). Judicial independence can also be undermined by interference from outside pressure groups, or even from 'inside' interference, for example, if the chief judge of a court criticizes the work of one of that court's judges and perhaps threatens to take that work away (see *Chandler v. Judicial Council of the Tenth Circuit*, 1970, in the US, and *Reilly v. Wachowich*, 2000, in Canada; for related commentary, see Bouck [2006]).

This is not to say that judges do or should operate free from external influences when they hear and decide cases. Governments are the most frequent litigators (parties) in court. Every criminal case is prosecuted by a Crown attorney (a full-time government official) or a person that the Crown attorney designates. Federal and provincial governments are parties or intervenors in every case arising under the Canadian Charter of Rights and Freedoms. Numerous interest groups participate in litigation as well. But these roles are clearly defined and public. Parties argue for their positions, both orally and in writing, through formal processes that are either public, or conducted with all contending parties present (e.g., proceedings under the Young Offenders Act), or subject to review and appeal (e.g., *ex parte* proceedings brought by one party alone on an emergency basis). Thus, if a government lawyer meets privately with a judge to discuss a pending case, as occurred during a war crimes proceeding in the Federal Court of Canada, that meeting is seen as a violation of judicial independence (*Canada [Minister of Citizenship and Immigration] v. Tobiass*, 1997; and see Baar, 1998).

Judicial independence is closely linked to the concept of **judicial impartiality**: that a judge is bound to decide only on the relevant law and facts presented in court. Interference by any individual or official not playing a formal role in the proceeding (that is, someone who is not a witness, advocate, or adjudicator in that case) could prevent the judge from coming to an impartial judgment. Thus judicial independence is seen as a necessary condition for an impartial tribunal. However, it is not a sufficient condition, since an independent adjudicator might still not act impartially. If that occurs, judicial independence requires that it be remedied through appropriate formal procedures (e.g., an appeal to a higher court, or a motion by a party that the judge recuse him- or herself from the case, or a complaint to a judicial disciplinary body), not by a personal attack from a government official or members of the public.

Similarly, judicial independence and impartiality do not prevent politicians, academics, or citizens from criticizing the judgments of a court on the grounds that the court misread the law or misconstrued facts, or made policy best left to others (or declined to make policy when a legitimate opportunity arose to do so). Judges are not accountable in the sense that employees in a government department are; they are not required to follow orders that restrict their exercise of judicial discretion. But judges are accountable in the sense that their discretion is subject to review, whether by a higher court or by those who follow their work and question its quality.

In a liberal democratic theory of society and politics, judicial independence is critical to the ability of courts to do justice by the impartial application of the law to parties in individual cases. It is also a legitimate and important constraint on governments that is often missing in non-democratic regimes, where judges sit and apply the law but may be sanctioned when their judgments are seen to undermine the government in power.

In the Charter era, the constitutional guarantees surrounding judicial independence have been given additional meaning, particularly in the context of disputes over the salaries of provincial court judges in the 1990s. As a result of disputes in four provinces, the Supreme Court of Canada imposed constitutionally required salary commissions in each province, to limit negotiation between elected officials and judges. (See McCormick's excellent article [2004] on these developments.) Following criticism of the breadth of the holding in the Remuneration Reference, the Court subsequently modified its judgment (*Provincial Court Judges' Assn. of New Brunswick v. New Brunswick*, 2005).

But how does the fundamental concept of judicial independence fit into the study and practice of judicial administration? First, the preservation and enhancement of judicial independence becomes one of the purposes of court administration (see Friedland, 1995). At an operating level, clerical employees must know what documents need to go in a case file for the judge to review before going into court, and court administrative staff often become a buffer between the judiciary and the public. Those who design courthouses have to ensure that jury rooms are private and that judges can move in and out of court without passing through public hallways where parties to a case could make statements not properly in evidence. Those who prepare the court's budget must ensure that officials with fiscal authority do not act to undermine judicial independence.

Second, the management of an organization whose core activities are performed by autonomous professionals becomes a challenge for court administration. Unlike most parts of the public sector, in which civil servants deliver services to the organization's clients in the community, the justice services of the court are not provided by public servants but by independent judges not subject to direct supervision by any manager. In many provinces, court administration defines its clients as the judges themselves rather than the public, only to find that many judges react unkindly to that label.

Third, court administration is made even more challenging in Canada because administrators in every province are part of executive branch ministries responsible to the government of the day. Thus, court administrators must serve two masters—judiciary and government—and two potentially conflicting principles: judicial independence and responsible government. This conflict has been addressed differently in various judicial systems. Courts in the United States are conceived as a third branch of government, so that court administrators are responsible to the judges of their courts—either to a Chief Justice, the court as a whole, or a judicial council. Courts in England and Wales have been administered by an executive department, the Lord Chancellor's Department, but the Lord Chancellor is both a judge and a cabinet minister. (Recent legislation replacing the Lord Chancellor's Department with a Department of Constitutional Affairs was very controversial and created difficulties for court administration; see Lord Justice Phillips [2008].) In Australia, a number of courts have evolved arm's-length relationships to the government of the day, so that their administration resembles that of independent agencies in Canada. In Ireland, an innovative Irish Courts Service has shifted responsibility for court administration from the government to an independent board of judges, lawyers, court administrators, and public representatives. Elsewhere in Europe, and in Asia and Latin America, where government has traditionally played a central role in court administration, a diverse array of countries—including Sweden, Singapore, India, and Cuba—have developed administrative forms separate from the executive.

Canada has traditionally separated adjudication from court administration, so that judges and administrators can define distinct spheres of activity. Judges expect government to provide them with the necessary staff and material resources to conduct legal proceedings, but they have no authority to hire or fire administrative staff or to supervise the purchase of necessary equipment. However, procedural and technological changes urged by judges to reduce delay and increase efficiency are often delayed or denied by government ministries responsible for court administration—usually provincial ministries of the attorney general that are also responsible for prosecuting criminal cases in those courts.

Beginning in 1981, when the late Chief Justice Jules Deschenes of the Quebec Superior Court wrote a 198-recommendation report, *Masters in Their Own House*, many students of the courts have called for some form of **judicial administrative independence** that reflects the unique role of the courts within a traditional cabinet system. But no major change has been accomplished. British Columbia began in 1976 to shift parts of the court administrative staff to a separate judicial administration budget controlled by the judges, but no further shifting of responsibility has taken place in over two decades. In the late 1980s, the Quebec government offered to adopt the principles in the Deschenes Report. The province's three chief justices (from the Court of Appeal, the Superior Court, and the *Cour du Québec*) were supportive, but the rest of the judiciary resisted, fearing that administrative autonomy would be accompanied by substantial budget cuts that the government would leave the judiciary to implement. More recently, Ontario judges and ministry officials attempted to negotiate a 'court services agency' model similar to that in Ireland, but no consensus was ever reached, and current section 96 chief justices prefer the status quo.

While a new set of practical issues has led to increased collaboration between judiciary and government in a number of provinces, the issue of administrative autonomy remains a lightning rod for executive-judicial conflict. A major report of the Canadian Judicial Council, *Alternative Models of Court Administration*, was released in Fall 2006. It tried to reopen the issue by showcasing a wider variety of alternative approaches, but any breakthrough is still pending.

Caseflow Management

Court administration has often been associated with court reform, the periodic efforts of legal and political elites to change the way court cases proceed from initiation to resolution. Roscoe Pound's 1906 address to the American Bar Association, recognized as the beginning of the study of judicial administration, was primarily a comprehensive agenda for procedural and organizational reform of common-law courts.

In the 1990s, court reform has moved from a focus on changes in the jurisdiction and organization of courts to the revamping of court processes to reduce cost and delay and to increase access to justice, particularly in civil cases brought by private parties. At the heart of court administrative reforms is the concept of '**caseflow management**', which refers to 'the continuum of processes and resources necessary to move a case from filing to disposition, whether that disposition is by settlement, guilty plea, dismissal, trial or other method' (Solomon and Somerlot, 1987; see also Church et al., 1978; Mahoney, 1988; Steelman, 1997, 2006). The term was coined in the United States 40 years ago to convey a new conception of the court's role in the monitoring and supervision of all matters before it.

Caseflow management rests on a set of principles that derive from the notion that courts and judges are responsible for how cases proceed. This may sound trite to those unfamiliar with the internal workings of the judicial system, but it represents a challenge to one of the underlying assumptions of common-law procedure and the **adversary system**: party—and hence lawyer—control of the process (Jacob, 1987). In the traditional common-law proceeding, cases are initiated when one party (the plaintiff in a civil proceeding, the Crown in a criminal proceeding) files an appropriate document with the court. This may be a statement of claim or an application (in civil proceedings), or an information or indictment (in criminal proceedings). Once the defendant has responded (by filing a statement of defence in a civil proceeding or appearing in court to enter a plea in a criminal proceeding), the case then proceeds through preliminary steps taken by the parties (e.g., exchange of documents in civil cases or Crown disclosure in criminal cases). Only when the parties are ready to proceed to a trial, or perhaps earlier to a pretrial conference or a preliminary hearing, do they approach court staff and ask for a trial date (or have the matter placed on a list for trial). Only when a case moves to this stage is the court responsible for expediting its disposition. Thus a case may have been filed in court months or even years earlier, as, for example, the parties await medical evaluations in a personal injury case, additional investigation in a criminal case, or the availability of busy counsel. In this paradigm, lawyer delay is separate from court delay (the number of weeks or months the parties must wait for a trial once they have requested a trial date from the court).

The theory of caseflow management is that the court is responsible for the case from the time it is initiated. Caseflow management rules and procedures typically include a set of time standards for all stages of litigation and a procedure for monitoring those cases that exceed the time standards (Civil Justice Review, 1995). In criminal cases, the Supreme Court of Canada has constitutionalized some of these time standards through use of section 11(b) of the Charter of Rights (*R. v. Askov*, 1990; *R. v. Morin*, 1992). As a result, courts may dismiss cases if the parties do not proceed, or they may force parties on when they believe the litigants are unnecessarily delaying the litigation. By monitoring the flow of cases, courts hope to speed up the pace of litigation, avoid having parties use delay for strategic purposes, and increase the predictability of trial or last-minute settlement in cases that are set down for trial.

Caseflow management may encompass a variety of different techniques and elements. Some courts set general guidelines and standards, for example, by using a 'fast track' for cases that need to proceed more expeditiously. Other courts may establish 'directions hearings' or 'case conferences' at the early stage of a larger or more complex case, so that a customized set of time standards may be established by a judicial officer in consultation with the parties and their lawyers; these procedures are often labelled 'case management' or 'individual case management'. Some courts encourage the use of settlement processes as part of a caseflow management program (e.g., settlement conferences conducted by a judge, or mediation conducted by a professional mediator).

While caseflow management projects and procedures have been used in a number of jurisdictions in the United States, and more recently in Canada, parties themselves still typically control the civil litigation process, at least in its preliminary stages. In Canada, criminal case processing is now typically controlled by the courts, although the Crown—and even the police—still play major and perhaps determining roles in setting trial dates.

The concept of caseflow management came later to England, but after a wide-ranging inquiry by Lord Woolf (1995), who later became the Master of the Rolls and then Lord Chief Justice, a comprehensive system of civil caseflow management was initiated in April 1999 throughout England and Wales. The Woolf reforms, as they are known, make up the most important changes in English civil procedure in over a century, and suggest that the changes begun in the United States 40 years ago are likely to continue there and in Canada.

Caseflow management reforms have also shifted the field of judicial administration from its traditional concern with jurisdictional divisions and judicial independence to a focus on operational processes and effective teamwork (both among teams of judges and between judges and lawyers and court staff). In fact, concepts of case management are increasingly used in other fields (e.g., medicine and social services). The field of court administration has thus been in the forefront of widespread public administration efforts to redirect attention away from formal structures and functions over to core processes and purposes.

Courts and the Public

Judicial administration has not only embraced the analysis of operational processes, but has also given increased attention to the relationship of courts and their clientele. A pioneering set of Trial Court Performance Standards developed over a decade ago by the National Center for State Courts in the United States focused not only on delay reduction and judicial independence, but also on access to justice and on maintaining public trust and confidence in the courts. Court administration has always been premised on efforts to improve the quality of justice (on court effectiveness rather than more narrowly defined issues of court efficiency). What has emerged in the 1990s is a change in the issues courts define as central to achieving and maintaining the quality of justice. Court reform has shifted its orientation from internal professional issues to external public service issues, and from a focus on adjudication in courtrooms and chambers to litigation within and outside the courthouse itself.

One important manifestation has been the recognition that diversity has never been adequately understood or its effects on justice acknowledged. The rule of law is based on principles of universality—rejecting in theory the favouritism and bias that arose when individuals could use their power and influence to exempt themselves from laws that applied to others. But those general laws could have different effects on the population, reflecting historical differences in the treatment of men and women, Aboriginal people and settlers, and people of different races and social conditions. The judiciary, made up primarily of men from dominant ethnic groups and economic classes, would be particularly vulnerable to critics of the gap between the theory and practices of legal institutions.

In the United States, a number of state court systems responded to these concerns by creating internal judicial task forces, to consider, first, gender bias and then racial bias (Baar, 1994). The Canadian judiciary lacked the administrative authority to initiate similar inquiries, but provincial law societies initially filled the gap (Law Society of British Columbia, 1992), and the Canadian Bar Association set up a gender bias task force, chaired by retired Supreme Court Justice Bertha Wilson, that produced an important and controversial report that spurred the development of judicial education programs on this and related topics (Canadian Bar Association Task Force, 1993: ch. 10). A broader commitment to ensuring access to justice is still new to the field of court administration, but this is increasingly defining the reform agenda (see Hughes, 1988; Zuber, 1987).

Near the beginning of the new century, Ian Greene was invited to join the team of the Canadian Democratic Audit to write a book about the strengths and weaknesses of Canadian courts. His book, *Courts*, reviews the successes and failures of various reforms in the justice system, and concludes that 'Canadian courts are doing very well in some areas, such as their contribution to independence and impartiality. But there is a great deal of room for improvement in other areas, such as public participation in court administration and judicial selection, responsiveness to problems of unnecessary delay, support for self-represented litigants, and the respectful treatment of juries, witnesses and litigants' (Greene, 2006: 163). There are signs, however, that the civil justice system in Canada is addressing the need to respond to public criticism of its inefficiencies. For example, since 2003 the Canadian Forum on Civil Justice, a non-profit independent agency located at the University of Alberta, established to promote improvements to Canada's civil justice system, has spearheaded a collaborative research program entitled 'The Civil Justice System and the Public'. Among other things, the project supports research that provides the civil justice system with more complete and accurate information about public concerns, so that the system can respond appropriately.

Alternative Dispute Resolution (ADR)

The earliest, most visible evidence of this reorientation of court administration was the development of **alternative dispute resolution** (ADR) mechanisms. These were already well known in other fields: arbitration had been a staple of labour relations for decades, and mediation had roots as diverse as religious communities, family counselling processes, and commercial and workplace committees. ADR received added visibility among court reformers in the 1976 Pound Conference in St Paul, Minnesota, convened on the seventieth anniversary of Roscoe Pound's pioneering ABA address. Pilot projects followed under the impetus of the Carter administration's Justice Department, both as free-standing alternatives to the court itself, and as alternatives to adjudication within the court (the beginning of the concept of the multi-door courthouse).

Mediation and settlement conferences have become an option—and occasionally a requirement—in Canadian and American trial courts, in civil cases, and in family law matters. What began as a movement proposing a new paradigm for dispute resolution, energized by a culture of peace and a theory of a facilitative interest-based transformative process, has been seen by some as an increasingly professionalized and mainstream option, often rights-based in character and sometimes even staffed by retired judges.

The role of ADR is still evolving. But as the concept of alternative dispute resolution has threatened to go mainstream, it has also been supplemented by a more radical conception of **restorative justice**. Australian criminologist John Braithwaite, its best-known theoretician, went far enough to identify it as a replacement for a system of criminal justice that he considers one of the worst institutional failures since the Industrial Revolution. For Braithwaite, all disputes require a restoration of the balance of relationships within

a community, and thus the participation of members of the larger community in individual cases.

In Canada, the most visible moves towards restorative justice have come in recommendations for separate Aboriginal justice systems (Law Reform Commission of Canada, 1991) and the adaptation of traditional sentencing circles for use in Provincial Courts to advise judges on the length and terms of criminal sentences. Other examples are less well known. Victim–offender rehabilitation programs have been undertaken by Mennonites and Quakers, and courts handling cases under the Young Offenders Act have used panels of young people to advise the judge on terms of sentences.

Court Technology and Integrated Justice

Judicial administration, like other elements of the public sector, has also responded to the technological changes associated with computerization. Beginning with the advent of automated management information systems in the 1970s (Millar and Baar, 1981: ch. 10), judges and court administrators have worked to adapt a wide range of electronic technology to the justice environment.

Quebec was the early leader in court technology. By the 1970s, the province had replaced traditional court reporters with recording technology—so centralized in the massive *Palais de Justice* in Montreal that 90 courtrooms were served by a single recording centre. Since then, court reporters in English Canada have upgraded their transcript preparation technology through CAT (computer-assisted transcription) systems, staving off elimination in several provinces and creating the anomalous situation that a province with recording technology may not be able to prepare a transcript necessary for an appeal as effectively as a province with a traditional court reporter.

Today, advocates of technology talk of a paperless courthouse, with parties and their lawyers filing documents electronically, and judges reviewing court records on a computer screen instead of a paper file. E-filing and similar developments are still in the pilot stage, and have taken longer to develop than experienced systems engineers expected. But even now, one can walk into an appellate court in British Columbia or Ontario and observe judges listening to oral argument while taking notes on their laptop computers. And the monitoring and scheduling of cases are automated in every trial centre of any size throughout the country.

The most ambitious concept in the field today is labelled **'integrated justice'**. It is based on the notion of seamless automated processes with a single point of entry. For criminal cases, integrated justice means that data on criminal charges would move electronically from police to prosecution to courts to corrections, without personnel at each stage having to re-enter the names, charges, and other information about every person accused of an offence. Electronic filing by private parties in civil and family cases is the counterpart of integrated justice in criminal proceedings.

So far, provincial aspirations for integrated justice have run ahead of achievements, as pioneering efforts in British Columbia and New Brunswick were scaled down and large-scale private partnerships were abandoned. Ontario tried to build on these experiences, but its integrated justice project faced added costs necessary to bring courts up to the level needed to begin to move information electronically into and out of the adjudicative process (Baar, 1999), and was finally abandoned.

New Professionalism

As this account is written, courts face resource constraints common throughout the public sector. And in some respects, the pressures and constraints on court administration are even greater. While other government departments can downsize by reducing their complement of senior staff, judges cannot be laid off, and they serve until retirement ages generally well beyond any others (age 75 for superior court judges, Federal Court judges, justices of the Supreme Court of Canada, and some Provincial Court judges). And judges are continually replaced, usually by cabinets and governments with no direct interest in or understanding of the courts' financial needs or of the reality that justice in individual cases cannot easily be repackaged in bulk or turned over to the private sector for delivery.

Yet court administrators in recent years have approached their work with renewed engagement and a level of professional skill unknown in the past. Previously, experienced clerks, familiar with arcane rules of procedure but limited in professional training, supervised court services at the local level, while civil servants drawn from other government departments or other fields (with little or no operational experience in the courts or understanding of how management principles must be modified to be effective in a court environment) directed court services provincially. Today, court administrators have developed distinctive skills increasingly important throughout the public sector: how to manage work processes rather than simply directing people (when key people cannot be subject to formal lines of bureaucratic accountability); how to deal with clientele under stress and often in conflict with the system (in the words of a senior management scholar who had studied the US space agency, courts are more complex because on any given day, half the participants don't want them to work); and how to maintain a commitment to broader institutional purposes (to see that justice is done, and is seen to be done).

In 2000, the ACCA (the Association of Canadian Court Administrators) held its 25th anniversary conference, as it reached a larger membership and expanded its educational and communication activities. As a further sign of the field's professional development, York University's Business School and Arts Faculty established a Graduate Diploma in Justice System Administration, building on the original Brock University program in judicial administration. The core course for the diploma is now built into the Administrative Law stream of York's part-time LLM program. The reform agenda for court administration is as challenging as ever, but enhanced skills and a renewed commitment to advance the agenda provide cause for optimism.

Important Terms and Concepts

adversary system
alternative dispute resolution (ADR)
case management
caseflow management
integrated justice
judicial administration
judicial administrative independence
judicial impartiality
judicial independence
Magistrates Court
mediation
Provincial Courts
restorative justice
superior and inferior courts
unified criminal court
unified family court

Study Questions

1. [illegible] for judicial administration in Canada: s. 96, s. 92(14), and s. 101.
2. Why does Baar think that the superior/inferior [illegible] higher and lower trial courts in the provinces is misleading? [illegible] the difference in status between the two levels? What are the *administrative* consequences of the [illegible]?
3. What is the relationship of judicial independence and judicial administration?

4. Spell out in detail the differences in processes under the traditional and caseflow management supervision of court administration.
5. What has been the effect of the Charter on the administration of justice?
6. What seem to be some skills, orientations, approaches, and reforms that the larger public administration community could import, to its advantage, from the judicial administration field?

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