CJC
Canadian
Judicial Council

ALTERNATIVE MODELS OF COURT ADMINISTRATION

September 2006

Catalogue Number: JU14-3/2006E-PDF
ISBN: 0-662-44278-4

Canadian Judicial Council
Ottawa, Ontario
Canada K1A 0N8

Telephone: (613) 288-1566
Fax: (613) 288-1575
Email: info@cjc-ccm.gc.ca

Also available on the Council's Web site at www.cjc-ccm.gc.ca

TABLE OF CONTENTS

FOREWORD

On behalf of members of the Subcommittee on Models of Court Administration, I am pleased to present the final report *Alternative Models of Court Administration*. The report was prepared by the consultants employed by the Subcommittee to assist it in carrying out its work.

The Canadian Judicial Council has long been aware of the inefficiencies of the executive model of Court administration as well as the challenge it presents to the independence of the judiciary. Prior to 2003, Council had already sponsored 2 major studies and dedicated a Chiefs' seminar to issues and concerns surrounding court administration.

In a 2003 Judge's Day speech in Montreal, the Council's chair, Chief Justice McLachlin, pointed out that through these, and other, previous studies dealing with administrative efficiency and judicial independence, a great deal of wisdom had been amassed. She then went on to say: "It is now time to build on this wisdom and seek to formulate concrete suggestions to this lingering challenge to judicial independence."

The Chief Justice was referring to the fact that earlier that year the Subcommittee on Alternative Models of Court Administration had been established and tasked by the Administration of Justice Committee and the Executive Committee of the Council to: (1) identify the standards of administrative control Courts should exercise in order to ensure the required standard of judicial independence; and to (2) come up with alternatives to the executive model of Court administration designed to better preserve judicial independence; better preserve the judiciary as a separate branch of government; enhance public confidence in the judicial system; and improve the quality and delivery of judicial services.

I am satisfied that this Report fulfils the mandate contained in the terms of reference and formulates the concrete suggestions referred to by Chief Justice McLachlin. The Subcommittee believes the alternative the Report calls the "Limited Autonomy and Commission Model" will best achieve the goals set out in the terms of reference and what the Supreme Court of Canada refers to in the *Remuneration Reference* as the constitutional imperative of depoliticizing, to the extent possible, relations between the judiciary and other branches of government. However, realizing that, for a variety of reasons, one size may not fit all, the Report also identifies several other alternatives. Any of these would be more appropriate for the administration of the Courts of a modern constitutional democracy like Canada than the existing executive model that presently prevails in all the provinces and territories of the country.

As Chair, I thank my colleagues on the Subcommittee Chief Justice Catherine Fraser, Chief Justice David Smith, Chief Justice Michel Robert, Associate Chief Justice Robert Pidgeon, Associate Chief Justice Douglas Cunningham, Mr. Justice Kenneth Hanssen and Mr. Justice Robert Edwards for their dedication, hard work, cooperation and support these past two years. I also wish to thank our Provincial Court advisors, Chief Justice Brian Lennox and Madam Justice Kathleen McGowan, for their participation and advice. Thanks to Chief Justice Beverley McLachlin and her executive advisor Nancy Brooks for their help and support. Thanks to all who contributed to the success of this Report by participating in interviews and seminars, including all the members of the Council and numerous Deputy Ministers and other administrative officers of Courts across Canada.

Additionally, for courts to rely on the concept of inherent powers, appellate courts require "a showing of 'reasonable necessity', or powers 'reasonably necessary', to achieve the specific purpose for which the exercise is sought".[99] Appellate courts may also place a very heavy burden on trial courts seeking to use their inherent powers. One test that has been used requires "clear, cogent and convincing evidence".[100]

It may be seen from this review of the United States concept of inherent powers that they are used for well-defined purposes which have some connection with the holding of a trial (questions of procedure and judicial governance) or with administrative questions that have a direct and immediate impact on the functioning of the judicial process.

In the final analysis, the scope of this concept with regard to administrative matters seems to be limited to isolated actions, which may represent large sums of money but which clearly do not cast doubt on the constitutional division of functions. This concept cannot be relied on as a means of divesting the executive of all administrative duties which have judicial ramifications and drawing up a budget for judicial affairs in its place, replacing the executive and exercising complete control over the administrative staff assigned to the courts. Rather, "the doctrine . . . is of modest practical consequence, capable of dealing effectively with some small problems but unable to solve the big ones".[101] Given the significant limitations placed by the courts on use of the doctrine of inherent powers, the concept seems very useful in resolving limited and defined administrative problems. But it appears to have limited potential for wider use.

What is the situation in Canada? In a now classic article, the English writer I.H. Jacob defined the concept of inherent jurisdiction as follows:

> In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.[102]

As in the United States, inherent jurisdiction has to do with questions of procedure and judicial administration. Thus, inherent jurisdiction assumes that the court has the power to control access to courthouses and give individuals access to them;[103] that the court can control its procedure by ensuring that its hearings are public or by excluding certain persons, dismissing frivolous and vexatious applications, correcting procedural inequities, suspending proceedings regarded as

---

99 *Ibid.*, at p. 70.

100 *Ibid.*, at p. 74. On the limitations imposed on the use of inherent powers see also Howard B. GLASER, "Wachtler v. Cuomo: the Limits of Inherent Powers", (1994) 78 *Judicature*, at pp. 20-21.

101 HAZARD, MCNAMARA & SENTILLES, at p. 114.

102 I.H. JACOB, "The Inherent Jurisdiction of the Court", *Current Legal Problems* (1970) 23, [JACOB] at p. 51. Luc Huppé suggests the following definition: [TRANSLATION] "An inherent power may be defined as a power the origin of which is not to be found in any formal rule of law and only the extent of which can be circumscribed by rules of law. The existence of inherent powers in the courts results from the need to effectively perform the duties assigned to them, to make such performance possible. It has to do with the very nature of the judicial function, so much so that an ordinary court of law would lose its identity if it was deprived of such an essential attribute": Luc HUPPÉ, *Le régime juridique du pouvoir judiciaire,* (Montreal: Wilson & Lafleur, 2000), [HUPPÉ] at pp. 19-20.

103 *British Columbia Government Employees' Union v. Attorney General of British Columbia*, [1988] 2 S.C.R. 214.

wrongful, adopting rules of practice,[104] or determining in a case of two conflicting decisions of administrative courts involving the same two parties which shall take priority, and so on.[105]

Inherent jurisdiction, associated with the status of a court of record, also gives the court the power to punish for contempt of court.[106] The origins of inherent jurisdiction confirm the two areas of application just identified:

> It will, I think, be found that the superior courts of common law have exercised the power which has come to be called "inherent jurisdiction" from the earliest times, and that the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.[107]

Inherent jurisdiction in Canada has not typically been considered as including the power to resolve purely administrative questions that have a direct and immediate impact on the functioning of the judicial process. Nonetheless, there is a line of authority in Quebec in which the courts have used their power to require of the executive the presence of an usher in courtrooms,[108] to maintain judges' secretaries in their positions[109] or to keep judges' parking places at the Montreal Courthouse at a set price.[110] These cases contain no analysis relating to inherent jurisdiction, or indeed the slightest mention of the concept. This is undoubtedly explained by the presence in Quebec of art. 46 of the *Code of Civil Procedure*, which appears partly to codify the concept. It reads as follows:

> The courts and the judges have all the powers necessary for the exercise of their jurisdiction. They may, in the cases brought before them, even of their own motion, pronounce orders or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to cover cases where no specific remedy is provided by law.

These judgments were rendered on the basis of this provision. Some cases have also referred to *Valente*, and in particular to the administrative independence described by Le Dain J. Although inherent jurisdiction is not the basis of these judgments, the definition of administrative independence in *Valente*, though limiting, seems broad enough to cover these particular cases.

It is crucial to bear in mind that inherent powers, by definition, inhere in courts and their jurisdiction and so cannot be analysed independently of the role the judiciary is expected to play in the constitutional structure. The codification of the doctrine, noted above, is a good reminder of its rationale: *The courts and the judges have all the powers necessary for the exercise of their jurisdiction*. Given the very significant evolution of the past 25 years in this respect, this means that inherent powers are now inherent in a judiciary with a significantly increased role. The fact that the Quebec

[104] HUPPÉ, at pp. 21-23.

[105] *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739.

[106] Karim BENYEKHLEF, "La notion de cour d'archives et les tribunaux administratifs" *R.J.T.* (1988), 22, 61, at p. 71. See also JACOB, at p. 27.

[107] JACOB, at p. 25. It will be seen that the lower courts also have inherent jurisdiction: see Shalin M. SUGUNASIRI, "The Inherent Jurisdiction of Inferior Courts" *The Advocates' Quarterly*, (1990-91), 12, 215.

[108] *Shatilla v. Shatilla*, [1982] C.A. 511 and *Gold v. Attorney General of Quebec*, [1986] R.J.Q. 2924 (S.C.) [*Gold*].

[109] *Poirier v. Québec*, [1994] R.J.Q. 2299 (S.C.) and *Gold*.

[110] *Bisson v. Québec*, [1993] R.J.Q. 2581 (S.C.).

decisions can be explained as an application of *Valente* can be taken as an indication that the general constitutional principle of judicial independence is tied to the very same evolution in the role and functions played by the judiciary, including the attendant evolution in public perceptions and expectations. In other words, as long as constitutional principles are in tune with this evolution, inherent powers cannot add much to the equation. They remain a valuable safeguard, but one which should not be expected to form the basis of fundamental changes in institutional arrangements.

4.3 ADMINISTRATIVE INDEPENDENCE AND THE IMPERATIVE OF DEPOLITICIZATION

The third essential characteristic of the principle of judicial independence, administrative independence, as identified by Le Dain J. in *Valente*, has not been the subject of further decisions by the courts as in the case of financial security or security of tenure.[111] In *Valente*, Le Dain J. referred to the growing demands for administrative autonomy of the courts, as expressed, for example, in the Deschênes report, *Masters in Their Own House*. He noted that "Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it, may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(*d*) of the *Charter*".[112] Le Dain J. also indicated that the case before him concerned the judge's independence in making decisions (adjudicative independence) as opposed to independence in matters of administration.[113]

Consequently, the scope of Le Dain J.'s opinion may be circumscribed with regard to this third characteristic of judicial independence, especially as that opinion dealt only with the interpretation of s. 11(*d*). Indeed, Le Dain J. wrote in this regard that "The essentials of institutional independence which may be reasonably perceived as sufficient *for purposes of s. 11(d)* must, I think, be . . . judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function".[114]

The principle of judicial independence derives from several sources, including the preamble to the *Constitution Act, 1867,* which gives it a much wider scope. It would thus appear that the question of administrative independence has not yet been closely studied by Canadian courts. Pronouncements by the Supreme Court at the level of general principle, however, may well have a direct bearing on the issue, as would appear to be the case with the imperative of depoliticization put forward by the Court in the *Remuneration Reference*. In other words, it remains to be seen what essential elements are included within the scope of administrative independence. Before the *Reference*, the then Chief Justice, Brian Dickson, had this to say about the requirements of administrative independence for the courts:

> Independence of the judicial power must be based on a solid foundation of judicial control over the various components facilitative and supportive of its exercise . . . Effectively, the financial and administrative requirements of the judiciary for the

[111] See *Lippé*.

[112] *Valente* at para. 52.

[113] *Ibid.*, at para. 47.

[114] *Ibid.*, at para 52 (emphasis added).