

REVIEW

The Independence of Provincial Judges

Manitoba Law Reform Commission
Winnipeg: Queen's Printer, 1989.

Peter H. Russell*

THE TITLE OF THIS REPORT is somewhat misleading. Its main concern is not judicial independence. The Report accepts the minimum requirements of judicial independence as set out by LeDain J. in *Valente*¹ and finds that existing arrangements pertaining to Manitoba's provincially appointed judiciary do not transgress these minimum standards.² The central problem that the Report addresses is how to improve the quality of Manitoba's provincial court judiciary without violating these basic norms of judicial independence.³

The Independence of Provincial Judges essentially is a study of personnel policies relating to the judiciary. No previous Canadian study has looked so comprehensively at judicial personnel issues nor researched them so well. The only major gap in its coverage is the office of Justice of the Peace. It is more difficult to obtain information on J.P.'s than on any other component of the judiciary. For a comparable inquiry into the position of J.P.'s, we must await publication of the in-depth study Professor Anthony Doob and his colleagues are carrying out for the Canadian Institute for the Administration of Justice.

In developing recommendations for Manitoba's provincial judges, the Commission, on each topic, has canvassed widely alternative approaches in other Canadian jurisdictions as well as in the United States and Great Britain. Thus, it is a mine of comparative information. Quite aside from the Report's practical value to those concerned with judicial reform, it is a major contribution to Canadian scholarship on the judicial branch of government.

Although the title's focus on independence may be misleading, the Commission has been wise to fly this flag over its reform proposals. "Judicial independence" is for judges what "academic

* Professor, Department of Political Science in the University of Toronto.

1 *Valente v. R.*, [1985] 2 S.C.R. 673 at 693-694 and 698-714.

2 Manitoba Law Reform Commission, *The Independence of Provincial Judges* (Report No. 72) (Winnipeg: Queen's Printer, 1989) at 19.

3 *Ibid.*, at 1.

freedom" is for professors: it is the touchstone of virtue. To pass muster with the judiciary, any programme of reform will be measured in terms of its compatibility with "judicial independence". Like professors, judges are not exactly shrinking violets when it comes to defending their virtue.

The Commission sees a causal link between improving the quality of the judiciary and judicial independence. That link is public confidence. The Commission argues that recruiting better qualified lawyers, improving their terms of office, and providing a measure of accountability, will increase public confidence in the judiciary and thus strengthen judicial independence.⁴ This may be a pleasing rationale for the Commission's proposals. However, I very much doubt that the Canadian public's confidence in the judiciary does in fact turn very much on the quality of judges, even if this confidence ought to depend upon their qualifications. It is much more the product of deep social conditioning. We have not yet fully fathomed how incompetent judges can be and still enjoy the public's confidence, nor the willingness of citizens to use the courts and abide by the decisions of judges in whom they lack confidence.

The Commission's recommendations for improving the provincially appointed judiciary focus on four main issues: appointments, remuneration, discipline and evaluation. On each issue, the Commission recommends major reforms to be implemented by additional machinery for the administration of justice in the province.

For improving the appointing process, the Commission adopts the nominating committee approach⁵ favoured by the Canadian Bar Association's Committee on Judicial Appointments⁶ and the Canadian Association of Law Teachers.⁷ Unlike the passive and ineffectual committees set up in each province by the Mulroney government to render advice on federal judicial appointments, the nominating committees proposed here would be proactive, seeking out the best available talent and providing the provincial government with short lists of the best candidates for each vacancy.

In designing a system of nominating committees for Manitoba, the Commission has combined features of systems used in other Canadian provinces and territories and thrown in a few new wrinkles of its own.

4 *Supra*, note 2 at 17.

5 *Ibid.*, at 32.

6 Committee on the Appointment of Judges, Canadian Bar Association, *The Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985) at 66-67.

7 Special Committee on the Appointment of Judges, Canadian Association of Law Teachers, "Judicial Selection in Canada: Discussion Papers and Reports", (1987) at 203 [unpublished].

Like the judicial councils which play a proactive role in judicial appointments in British Columbia and the Northern territories and the advisory committees used in Québec and Ontario, the proposed nominating committees would include representatives of the bar, the bench and the general public.⁸ Reflecting, perhaps, its academic orientation, the Commission would also have the province's Law School appoint a member to each committee.⁹ As in Québec, a new nominating committee would be struck for each vacancy, although the Manitoban committees would be larger than the three-person Québec committees and province-wide rather than locally based.¹⁰ In the latter respect, they would resemble Ontario's Judicial Appointments Advisory Committee, except that, whereas six of its nine members are lay persons, the laity would have only two of the five positions on the Manitoban committees¹¹.

Under the Commission's scheme, the Lieutenant-Governor-in-Council would be legally bound to choose from short lists of three to six names submitted by the committees.¹² In this respect, the proposed committees would resemble the judicial councils of British Columbia and the Yukon. The responsible appointing authority would retain some freedom of manoeuvre in that the lists of names would not be ranked.¹³ The Commission wrongly attributes this feature of its recommendation to the proposals of the Canadian Bar Association's Committee on Judicial Appointments.¹⁴ The CBA Committee was content to put its faith in the evolution of a constitutional convention that would constrain the government to select from the advisory committees' lists.¹⁵ The Canadian Association of Law Teachers went a little further and proposed that, while the Justice Minister and Cabinet should not be legally required to select from nominating committee lists, the minister should be required to give a public account of the government's reasons for appointing someone not recommended by a committee.¹⁶ The Law Teachers' proposal has the merit of retaining some flexibility for responsible ministers in the appointing process and yet requiring that they be genuinely accountable for the exercise of their discretion.

8 *Supra*, note 2, at 23-25, 27, and 33.

9 *Ibid.*, at 23.

10 *Ibid.*, at 25 and 33.

11 *Ibid.*, at 33.

12 *Ibid.*, at 37-38.

13 *Ibid.*

14 *Ibid.*, at 31.

15 *Supra*, note , at 67.

16 *Supra*, note , at 209.

Since judicial nominating committees are relatively new in Canada and because there are important differences in the circumstances of the provinces and territories that have been using them, Manitoba may be well advised to proceed experimentally in this area before encrusting a scheme in law. That, at least, is how Ontario has been moving. This reviewer, as the chairman of Ontario's Judicial Appointments Advisory Committee, can report one aspect of the Ontario experiment, which is now entering its second year, that throws into question a feature of the Manitoban proposal. Working out recruitment and assessment techniques and developing useful criteria has been truly a learning experience. In the course of making recommendations on a number of vacancies, we have learned a fair bit about methods and procedures and about the pool of talent available for the provincial judiciary in our province. This leads me to question the wisdom of setting up a new committee with its own criteria for each vacancy. There is certainly a danger of a fixed committee becoming just another political clique imposing its preferences on the selection process. But perhaps a better way of guarding against this danger and yet retaining some continuity would be to have a single committee with limited terms and staggered appointment dates.

For policy on judicial remuneration, the Commission proposes an independent committee similar to those at the federal level and in Nova Scotia, Ontario and Québec.¹⁷ Generally, I think it is a sound idea to establish a body that, in a reasonably objective manner, can research and make recommendations on issues of judicial remuneration. There is little prospect of building and maintaining a high quality provincial judiciary if judicial salaries and pensions are too low to attract and retain outstanding practitioners. In designing a structure for a Manitoban committee, the Commission has wisely rejected the labour relations model that in Ontario created much controversy but no tangible benefits for the provincial judges. Instead, it proposes that two of the committee's three members be appointed by the provincial government, of whom only one could be a civil servant, and that the third member be appointed by the provincial judges.¹⁸

The one feature of the proposal that I question is the recommendation that decisions of the committee be legally binding unless rejected by negative resolution in the Legislature.¹⁹ Granted this does not go as far as the Nova Scotia system under which the independent committee's recommendations are given automatic legal effect without any

17 *Supra*, note 2, at 52-53.

18 *Ibid.*, at 53.

19 *Ibid.*, at 52.

reference to the legislature,²⁰ still I think it goes too far in undermining parliamentary responsibility. Providing there is provision for some minimum annual cost of living increase such as has been built into the federal *Judges Act*²¹ (but which, curiously, is not recommended by the Manitoban Commission), then changes in the basic level of remuneration ought to be reviewed in the legislature. Debates on the adequacy of judicial remuneration provide one of the rare occasions when there can be a public account of the state of the judiciary. The negative resolution device makes it too easy to avoid these opportunities.

On the matter of judicial discipline, the Commission has been quite innovative and its innovative proposals make very good sense. Over the last two decades, all across Canada in every jurisdiction except Prince Edward Island and at the federal level, judicial councils have been established to perform the primary role in dealing with complaints about judicial misconduct. The Commission argues that the problem with all these systems is that the councils function as both prosecutor and judge. To break up this injudicious combination of functions, the Report recommends that Manitoba establish a Judicial Inquiry Board to perform the investigative function leaving the adjudicative responsibility in the hands of the Judicial Council.²² The Inquiry Board would be composed in a manner similar to the remuneration committee: a lawyer and a layman appointed by the government, and a person named by the judges.²³ The Board would operate in what would amount to a four-tier system. Initially, complaints would be handled by the Chief Judge, who might resolve a complaint informally, refer it to the Judicial Inquiry Board, or dismiss it as unfounded or as a matter more appropriately dealt with through the appellate process.²⁴ The Chief Judge's disposition of the complaint would be subject to appeal before the Board.²⁵ The Inquiry Board, in turn, after investigating the complaint could either dismiss it, giving the complainant written reasons for doing so, or bring charges before the Judicial Council²⁶. The Council then, following a hearing that would normally be in public, could either dismiss the charges or administer sanctions ranging from a reprimand to dismissal.²⁷ The Council's decisions could

20 *Judges of the Provincial Court Act*, S.N.S. 1976, c. 13 as am., S.N.S. 1988, c. 47, s.

1.

21 R.S.C. 1985, c. J-1, s.25.

22 *Ibid.*, at 68-69.

23 *Ibid.*, at 73.

24 *Ibid.*, at 71.

25 *Ibid.*, at 71.

26 *Ibid.*, at 75.

27 *Ibid.*, at 83.

be appealed to the Manitoban Court of Appeal by the judge or, presumably when the charges are dismissed, by the Inquiry Board.²⁸

The proposed system is fairer, I think, from both the judge's and the public's perspective, than the *status quo*. It would be even fairer if the Judicial Council were successful in developing the proposed Judicial Code of Conduct. One point that I question is that hearings before the Council be in public unless the Council deems it in the public interest to proceed *in camera*. A judge who has been the focus of a public inquiry, even one that concludes a complaint was groundless or warrants only a reprimand, may find it very difficult to continue in office. I would prefer to let the accused judge decide whether or not to have a public hearing. There is adequate protection against a judicial cover-up in the Inquiry Board's right of appeal to the Court of Appeal whose proceedings must be open.

Some might question a system that gives the judiciary itself such a dominant role in judging judges. Under the Commission's proposals, neither the executive nor the legislature would play a direct decision-making role in dealing with public dissatisfaction with provincial judges. But the answer to this democratic concern is not to give the cabinet or the legislature the ultimate responsibility for deciding whether or not a judge should be dismissed. These highly political bodies are most unsuitable to perform what is essentially an adjudicative task. A more appropriate way of achieving a reasonable measure of accountability is to ensure that the general performance of the judicial complaints process is monitored by the legislature. The Commission recommends that information about the discipline and complaint system be disseminated to the public.²⁹ While this is essential, it does not go far enough. The Judicial Council and proposed Judicial Inquiry Board should also be required to table annual reports in the legislative assembly outlining the volume and nature of complaints and how they have been handled. In addition, the proposed Judicial Code of Conduct should be reviewed and approved by the legislature. In a democracy, judicial independence should not be taken so far as to give judges themselves a monopoly of judicial, executive, and legislative powers with respect to the governance of the judiciary.

In their proposals on the evaluation of judges, the Commission moves from being innovative to being downright radical. Being evaluated by the consumers of one's services will be about as popular with judges as it was with professors when student appraisals were introduced a generation ago. Most of the protests against this idea will be

28 *Ibid.*, at 84.

29 *Ibid.*, at 73.

aimed at horrible schemes that no one in their right mind would support. So let me first make clear what the scheme proposed here does not entail. The evaluation scheme proposed here is not a popularity contest. It is not designed to publicly embarrass judges; unlike student evaluations of professors, the judicial evaluations are not to be publicly released.³⁰ The evaluations focus not on the substance of judges' decisions but primarily on how they conduct the business of their court, their methods and their manners.³¹ The evaluations are not tied to the discipline system.³² They are primarily aimed at the individual judge's professional development. Judges who believe that they have already achieved perfection can ignore them.

The Commission in designing an experimental evaluation programme for Manitoba has drawn thoughtfully from New Jersey's scheme, widely regarded as the best in the United States,³³ and on the American Bar Association's *Guidelines for the Evaluation of Judges*.³⁴ The proposed evaluations would be based on objective information about the judge's workload and on subjective evaluations of performance.³⁵ The latter would be obtained both from lawyers and non-lawyers, such as members of social agencies, who regularly participate in or attend proceedings before a given judge.³⁶ The results of each evaluation would be communicated to the individual judge in a manner that would respect respondents' anonymity.³⁷ The Chief Judge would also receive the results and might use them in assigning and counselling judges.³⁸ Aggregate data would be given to all of the judges for comparative purposes and to the proposed Judicial Performance Committee,³⁹ comprised of two of the provincial judges' appointees and three government appointees, two of whom must be laypersons, who would develop and supervise the programme.⁴⁰

No doubt, there is room for debate about details of this evaluation scheme. But there should be no doubt about the need for Canada to begin to give serious consideration to the use of performance review of

30 *Ibid.*, at 98.

31 *Ibid.*, at 104.

32 *Ibid.*, at 109.

33 *Ibid.*, at 93.

34 Special Committee on Evaluation of Judicial Performance, American Bar Association, *Guidelines for Evaluation of Judicial Performance* (Washington, D.C.: ABA, 1985).

35 *Supra*, note 2, at 102.

36 *Ibid.*, at 99.

37 *Ibid.*, at 104 and 107.

38 *Ibid.*, at 107.

39 *Ibid.*

40 *Ibid.*, at 96.

judges as a means of improving the quality of justice in Canada. Manitoba's proposed experiment would give us our first opportunity to appraise such a scheme in a Canadian context. I do not think this pilot effort should concentrate, as the Commissioners propose, on newly appointed judges.⁴¹ While such a focus will no doubt soften the resistance of sitting judges, it will rob the programme of any basis for making comparative assessments. Among other things, an evaluation scheme applied to new and old appointments would provide a useful basis for evaluating a new appointing system.

It is to be hoped that Manitoba will move ahead with all of the reforms proposed in this Report. Given their experimental nature, it would be prudent to introduce the new appointment and evaluation systems on an informal basis, whereas reforms of the remuneration and discipline systems might be given legislative expression. If Manitoba takes steps to reform its provincial judiciary in the directions proposed, it will move rapidly from being one of the most backward provinces in its treatment of the "lower court" judiciary to being one of the most progressive. The one step beyond these proposals that Manitoba may then be willing to consider is removing the invidious distinction between higher and lower trial courts that deal with important civil and criminal matters and establish a single trial court staffed by superior court judges. Such a move could only take place in collaboration with the federal authorities and would be desirable only if the federally appointed judiciary were subject to policies as progressive as those proposed here for the provincially appointed judiciary.

41 *Ibid.*, at 93.