

TWELVE PARADOXES OF JUDICIAL DISCIPLINE

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The notion of judicial discipline is difficult, and perhaps (at least in any strict sense) even insoluble. It is at core just another iteration of the ancient problem of “who shall guard the guardians?” or, in its more colloquial and casual form, “who will cut the barber’s hair?” But it is a very special version of that problem, and one that is more critical today than ever before.

It is more important because we live today in an age of judicial power. At one time, we may have thought of judges as wielding a purely mechanical power grounded in a sharply limiting professional expertise, delivering decisions that were presented and accepted as outcomes predetermined by technical processes working on objective texts, with any initial appearance of pervasive discretion vanishing as one understood the constraints inherent in the professional skills involved. But this perception has crumbled on two fronts. For one thing, we no longer find the mechanical model of judicial decision making plausible, and the contemporary style of written judgments itself concedes the need for more broadly drawn explanations. For another, a range of developments (of which the Charter is only one) have drawn the judiciary into more contested territory where it must frequently take positions on controversial social issues that exhilarate one set of partisans while outraging another.

Judicial power is, therefore, both greater and more visible than it was a generation ago, and this creates a new set of problems. In a democratic and civilized society, power and accountability must come in a balanced package, such that greater power calls for greater accountability. If the power of judges has broken outside of the bounds of a purely mechanical expertise deployed down formally defined channels in accordance with purely objective technique, then the professional and conventional limitations of the past are no longer enough. We cannot rely on the scorn and praise of fellow professionals on the one hand, and the process of formal appeal to higher courts on the other,

to keep judges in line. We need other structures and procedures to hold judges to account.

But this simply raises the fundamental paradox that lies at the core of the concept of judicial discipline: Judges must be independent in order that they may adjudicate impartially between the parties who appear before them, calling things as they see them without fear of retaliation from the losing parties or their political allies. Yet, at the same time, judges must be accountable for the way that they behave, subject to sanctions should they step beyond the appropriate limits. Inevitably and unavoidably, independence and discipline play off against each other — you can only have more of one by having less of the other.

The primary device for achieving this balance in Canada has for about thirty years been the judicial council — a general label that covers a bewildering diversity of memberships and powers and procedures. Rather than vanish into that particular morass, I simply will assume a generic judicial council as the backdrop and, again for purposes of simplicity, I will narrow my discussion to provincial judicial councils overseeing the performance of provincial judges. (In fact, of course, the first of this country’s judicial councils was the Canadian Judicial Council, one of whose functions is to receive complaints about provincial superior or federal judges.¹) This generic body simply will be assumed to include the provincial Chief Judge and one or more provincial superior judges and one or more lawyers and one or more laypeople — these are fairly typical elements of the membership, although each and every one of them is, in fact, missing from at least one provincial council. It almost is literally the case that no two sets of judges in the country face the same accountability structures and procedures; but for discussion purposes the benefits of my oversimplification far outweigh the costs.

¹ See Jules Deschênes, *The Sword and the Scales* (Toronto: Butterworths, 1979).

In keeping with the spirit of a symposium, I wish to promote discussion by raising questions rather than laying down definitive answers. I will explore the dilemma of judicial discipline by unraveling it into a dozen smaller paradoxes, each highlighting opposing principles that must be balanced in any system of judicial discipline. Some of these observations may be rather obvious, although I hope that not all of them will be.

PARADOX NUMBER ONE: PROTECTOR OR ENFORCER (OR: WHICH WAY DO THE CANNON FACE?)

Years ago, I conducted a research project which involved interviewing every member of every provincial judicial council who would talk to me — which turned out to be most of them.² One of my questions involved an open-ended request to the interviewee to express an opinion as to what they thought was the single most important value served by the establishment of the councils. As always with open-ended questions, I received several responses, but two easily led the way: the first was to protect judges from public pressure and political interference so that they could do their job; and the second was to keep an eye on judges to make sure that they did their job right.

To some extent, this is not surprising — a judicial council must serve both functions, protecting judges when they deserve protecting and frowning sternly on the judges a bit when they deserve to be frowned upon. By and large, it was predictable which members of the council would give which response — provincial judges emphasized protection and Section 96 judges emphasized control. But if the answer is unsurprising this does not mean that it is unproblematic, the more so if the differences might sometimes distinguish one province from another rather than one membership type from another. Surely it makes a very large difference — not least to the judges themselves — which of these two roles a council emphasizes over time. There are occasionally “slam dunk” situations for councils to deal with, in which the blamelessness or the inappropriateness of the behaviour in question simply speaks for itself, but in the large grey zones in between it matters a great deal whether the council starts off by seeing itself as enforcer or protector.

Maybe the only possible answer is the obvious one — the debate is one that should take place within the council itself every time they deliberate. There should be those members on the council who start off by looking at every complaint with a stern frown for the judge (although they can be talked out of it) and those who start off with a mild surge of sympathy (which can be switched off if it turns out to be inappropriate). But I suspect that the issue is so basic as to be invisible — responding to this question, most council members said either “I had never really thought about it” or “It is so obvious it hardly bears discussing,” and neither response suggests that the paradox has been confronted intentionally and rigorously. At the same time, even if we assume that attitudes correlate with positions, the variety of membership structures from one province to another means that a balance between the two cannot simply be assumed.

PARADOX NUMBER TWO: TO ACCOMMODATE IS TO INVITE

All the procedures for judicial councils of which I am aware have a wide-open complaint process. That is to say, they make it very easy for a variety of actors to register a complaint about a judge: lawyers or parties or witnesses or spectators (although for a variety of reasons lawyers hardly ever make the complaints). And they make it easy for these people to complain, not worrying about requiring the right form or complaints specifying the right section of the right act or stated in precisely the right terms or filed within some strictly enforced time period. Once the complaint is made, it is screened and then investigated and, if necessary, pursued without requiring the complainant to have any ongoing role or expense.

If the door is open, it also is largely invisible — hardly anybody is aware of the procedure, or the parameters, or the potential of complaining about a judge’s demeanor or performance or attitude. And this is one reason (a relatively high quality of judicial performance is presumably another) why the wide open door does not lead to a flood of complaints, leaving most judicial councils with an extremely modest caseload and an even smaller load of serious cases. Under these circumstances, more rigorous procedures and more tightly controlled access to them would probably strangle the caseload altogether.

But if most people are unaware of an opportunity, then those who are aware potentially enjoy disproportionate leverage. One aspect of this problem is that not all behaviour that deserves investigation triggers a complaint; but another is the opportunity that

² The results of this project are reported in P. McCormick “Judicial Councils for Provincial Judges in Canada” (1986) 6 *The Windsor Yearbook of Access to Justice*.

it gives groups with a specific agenda. For example, about a dozen years ago, a women's group in Ontario publicly announced that it would be keeping a close eye on family court judges in the province, and complaining to the judicial council about any untoward behaviour. There are several different ways to read this, some rather positive. For one thing, the announcement undoubtedly increased manifold the number of people in Ontario who were even aware that there was a council to whom they could complain, and this probably is a good thing in itself. For another, given the prevalence of the attitudes within the judiciary of which the Bartlett case³ in Nova Scotia is only the top of the iceberg, it certainly is conceivable that there were a number of judges who needed the warning — and who probably deserved the hassle of a complaint if they ignored it. But at the same time, there is the overtone of a threat, like a an obstreperous student warning you after the mid-term that they will appeal any grade of less than a C, leaving you to wonder if you can now be completely neutral should their performance fall precisely into the D/C borderland.

PARADOX NUMBER THREE: TO CODIFY OR NOT TO CODIFY

Much of the “first generation” of judicial council legislation couched in the vaguest of terms the expectations which judges were to be sanctioned for failing to live up to. “Behaviour appropriate to a judge” and “actions tending to bring the administration of justice into disrepute” were the standard terminology — the assumption being that everybody (or at least all judges) knew to a fair degree of precision what sort of behaviour was expected of judges, and could recognize with a large degree of spontaneous unanimity any behaviour that fell culpably short of this level.

In any context other than the immediate one, I suspect that such language would be challengeable for unconstitutional vagueness. Consequently, considerable energy has been expended in several jurisdictions to come up with a more explicit code of judicial conduct. But the problems with the codification project lie down two different channels. The first is the fact that it is undesirable (and probably impossible) to list everything for which a judge might conceivably need to be sanctioned. This conjures up visions of codes on everything from bodily functions to personal hygiene to facial expressions — all with the problem that anything omitted is implicitly permitted until an amendment to the code closes the loophole. The second is the fact that

the more specific the code, the more time bound is must be; any statement on judicial free speech drafted fifteen years ago would now be totally unacceptable. The judicial role is very much a moving target, a phenomenon still in the evolving process of self-definition, and an answer that seems useful today may be useless tomorrow.

PARADOX NUMBER FOUR: LAY MEMBERS ARE AN INDISPENSABLE TROJAN HORSE

Most judicial councils include several lay members — that is, members who are neither judges nor lawyers. In at least one province (Alberta), the practice is for one of the lay members to chair the council, although this particular aspect is not widely imitated. The alternative, a council staffed entirely by legal professionals, runs the risk of appearing to be an invitation to a whitewash even when it is not, a way in which the profession defends itself and its members from the profane criticism of outsiders. This would be a serious built-in liability should the council find for a judge after controversial and colourful complaints. As well, the lay members provide a common-sense person-on-the-street viewpoint that can help to keep the council's feet on the ground, and remind it of the feelings of the public it is trying to communicate with and reassure. The legal world is not the everyday world, and sometimes lawyers and judges can lose track of those circumstances under which abstractions and technicalities do not carry the weight. Lay members are necessary because this is a time when the public is suspicious of closed shops and self-governing professions.

³ See text associated with note 17, *infra*.

But if the presence of lay members is necessary, it also is problematic. It is instructive that Justice MacDonald's decision in the Alberta judicial independence case, as it started its trip to the Supreme Court, expressly questioned the provincial judges act because it was just possible, under some extreme and unlikely scenarios, that the lay members of the judicial council might outvote the judicial members. This, he said, shadowed judicial independence in the province.⁴

Most members of provincial judicial councils would find this concern unlikely. For them, the major problem is the acquiescence of the lay members — far from taking too much part, they often take no part at all. It is hard to blame them, given that the typical judicial council includes a senior bencher of the law society and every chief justice and judge in the province — a daunting group for even the most self-confident person to confront. Perhaps the potential problem lies in the way that the lay members are selected. It hardly seems credible to elect them, and they certainly are not picked at random from the pages of the telephone book — instead, they are limited-term order-in-council appointees of the government of the day. It is unreasonably paranoid to paint scenarios of governments stacking their judicial councils to pay off political vendettas or conduct ideological purges of the judicial ranks — but much less so to imagine circumstances in which matters of principle could put a radical government at odds with a traditionalist judiciary, with complaints about judicial performance triggering the confrontation. Perhaps Justice MacDonald's concerns were not so unrealistic after all. The challenge is to find a credible and legitimate method for appointing lay members with motivation but without axes to grind who will contribute something to the council's deliberations but not the wrong something or for the wrong reasons.

PARADOX NUMBER FIVE: HIERARCHY IS THE SOLUTION — AND THE PROBLEM

Many of the provincial judicial councils include section 96 judges among their judicial members — and some councils include only section 96 judges. There is a double advantage to this move: for one thing, section 96 judges are appointed by the federal government, not

by the provincial government, and therefore they are in no sense subject to provincial government pressures that could theoretically be brought to bear on the provincial court, a consideration that is all the stronger when these judicial council members hold their positions *ex officio*, by virtue of holding another office (such as Chief Justice), rather than as single-purpose designations. As well, the decisions that they are making have no direct bearing on their own positions, and therefore even the appearance self-serving is minimized. For another, because section 96 judges staff the “superior” courts to which the decisions of provincial judges can be appealed, their decisions and their recommendations might be thought to carry more weight with the provincial judges than pronouncements from their own colleagues of coordinate responsibility. To put the matter in its strongest terms: the section 96 judges have long been thought of as the “real” judges, the ones whose independence was entrenched in the British North America Act even before the Charter extended the principle, and their participation in the discipline process is therefore doubly reassuring: first, for their guaranteed independence and professionalism and, second, for the standards that their courts long have embodied.

But to emphasize this latter factor is simply to expose the other side of the paradox. There is a longstanding tendency, more pronounced in some provinces than others but present to some extent in all of them, to think of the various provincial courts in terms of a hierarchy of merit rather than in terms of a specialization of function gratuitously linked by an appellate process. The more seriously the section 96 judges take this image, the more it compromises their role in the review of the performance of provincial judges. When I conducted my interviews, more than one provincial court judge reported their senior colleagues as having an attitude roughly summed up as follows: “This isn't a very good level of performance, and we wouldn't put up with it on our court, but I suppose it is good enough for a provincial judge.” Given the lack of a regular practice of elevating provincial judges to the section 96 bench, there is also a lack of familiarity with the special working conditions of the provincial bench — very high caseload, predominantly criminal cases, with many parties not represented by counsel and, hence, needing more explanation and more informality. To expect provincial judges to conduct trials to the same exacting and time-consuming standards as the provincial superior courts is patently unreasonable, on grounds that have nothing to do with the competence of the provincial judges or the adequacy of their procedure.

⁴ [1995] 2 W.W.R. 469. The Supreme Court decision that marked the end of this particular road was *Reference re: Public Sector Pay Reduction Act (PEI)*, s.10; *Reference re: Provincial Court Act (PEI)*; *R. v. Campbell*; *R. v. Ekmeic*; *R. v. Wickman*; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3.

PARADOX NUMBER SIX: THE CHIEF JUDGE MUST AND MUST NOT BE THERE

The Chief Judge is a member of most provincial judicial councils, for the most obvious of reasons. For one thing, this is the individual who combines practical “hands-on” experience of what it means to be a provincial judge with the broader overview which administrative responsibility implies, and a council would be badly handicapped without such grounded judgment. This double viewpoint is also invaluable in distinguishing the groundless and frivolous complaints from the potentially serious ones, a role which the Chief Judge typically plays in most jurisdictions (and which also allows the Chief Judge to use the moral suasion of the office to head off situations which are not yet serious enough to warrant council action but could conceivably do so over time). The Chief Judge has further reason to be engaged because he or she is the connecting point between the provincial bench and the provincial government, as well as the individual who does most of the recruiting. It is, in a very real sense, the “Chief’s” court.

But from this description, it is clear that the Chief Judge is already wearing several different hats and balancing several different responsibilities. If I am the one who recruited somebody, might this not make me more likely to feel personally let down if they fail to apply themselves to reach the appropriate standard? If I have tried to help a judge by giving discreet warnings, might this not incline me to a harsher review when the anticipated complaint materializes? The *Ruffo* case⁵ from Quebec, which in the end went all the way to the Supreme Court of Canada, points at even further possible complications — what if the Chief Judge is also the complainant? And even if that additional element takes him off the immediate panel (as it did in Quebec), what sort of a corner does this put his replacement in?

A provincial judge once told me about a recent phone call from the Chief Judge, who had received a couple of fluffy complaints about his sentencing practices but, after looking into it, had decided that there did not seem to be anything worth taking to the judicial council. Still, the Chief Justice added, the judge might want to keep an eye on the matter to prevent future problems. The judge said he had been wondering about that conversation ever since — had he or had he not been threatened? Had or had not his judicial independence been compromised? He said he honestly could not say, and neither could I. But the more extensive the Chief Judge’s role within the judicial council complaint process, the larger must be the potential question marks.

PARADOX NUMBER SEVEN: PUBLICITY IS ESSENTIAL BUT DEADLY

When I conducted my research project fifteen years ago, most of the judicial councils conducted their enquiries and made their recommendations shrouded in complete secrecy — even the fact that a judge was being formally investigated, and could conceivably be recommended for removal from office, was not widely known and not openly reported. Indeed, the Chairman of the Ontario Judicial Council, although he was kind enough to grant an interview, could tell me little apart from the deliciously cryptic “we do exactly what you would expect we would do in such circumstances.”

For the reputation of the judicial profession, such secrecy was a double asset. On the one hand, if there was “dirty linen” that had been accurately targeted by a complaint, it could be aired and cleaned and disposed of in private, without setting the public to wondering if there might be more where that came from. And, on the other hand, if the complaint proved to be groundless and unsubstantiated, then it could be resolved and the judge returned to work without anyone outside of a small circle hearing anything more than the vaguest rumors that some questions had been raised. And, finally, if the truth was somewhere in between these two, then the judge would have been put on notice that he was walking rather close to the edge of the cliff, and would have the chance to do better without having had his reputation destroyed by the publicity.

⁵ *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267.

But even then, there were several jurisdictions (most notably British Columbia) where the secrecy was unacceptable, and this surely is the emerging consensus. Once a complaint is determined to have some threshold level of credibility and seriousness, all or part of the process moves out into the public realm, to the delight of the television cameras and the edification of millions of viewers. Just a few years ago, an Ontario judge and a Quebec judge were left to dangle in the wind of a curious media and a critical public, until we had heard more than we cared to hear about Hryciuk's lightswitch and Bienvenue's views on female depravity⁶. But closing the doors and keeping the names secret and releasing brief cryptic communiqués is just not on any longer. These days, the idea of justice being seen to be done has taken on completely new overtones.

To be sure, Canadians had always been aware that their judges were human beings with lives and personalities much like everyone else; to that extent, it was less than a blinding revelation to discover that some judges had strange ideas about the appropriate way to treat the female staff, and other judges have unprintable opinions about certain minority groups. But the judiciary pays a price every time it allows millions of people to dwell on the ordinariness of the person beneath the gown, and this price is a necessary part of the new style of judicial discipline.

PARADOX NUMBER EIGHT: THERE MUST BE A PROCESS, BUT THE PROCESS IS THE PUNISHMENT

The removal process was much less complicated when provincial judges served at pleasure, and could be terminated by a simple phone call — but this completely compromises the ideal of judicial independence. What has emerged instead is a formalized process of enquiry by a judicial council that is dominated by legal professionals, although the precise details of the process and the exact composition of the body empowered to recommend dismissal vary significantly from one jurisdiction to another.

But it is hardly a surprise that a process in which the person complained against is a legal professional, and most of the people involved are legal professionals, should wind up looking very much like a trial — because this is the kind of proceeding with which everybody involved is the most familiar, as well as the

kind of proceeding that seems best to serve the formal values that are at issue. Everybody hires lawyers, and the two sides present evidence, and witnesses are cross-examined, and the decision cites case law (typically the proceedings from other provinces) on its way to a rigorously defensible conclusion. As an alternative to the kangaroo-court appearances of informal procedures conducted behind close doors, such a process has much to recommend it — yet it also has significant disadvantages.

The first problem, which it shares with the trial process in general, is the potential irrelevance of the victim. As personal experience of outrage becomes translated into the formalities of legal abstraction and common sense observations yield to technical formulations, the very professionalism of the outcome loses touch with the everyday world from which the problem first arose. Many things which cannot be proven are nonetheless true, and the very formalization of the process may defeat the plausibility of the outcome it is intended to validate.

The second problem is that professionals such as judges are even more vulnerable than the average citizen to the lingering effects of the trial process itself. Reputations and public confidence can often be destroyed by evidence that is legitimately adjudged insufficient for conviction; some of the mud always sticks. And the fact that “not guilty” may sometimes just mean “not quite proven” constitutes a standing invitation to further appeals or complaints, some genuine and some simply tactical. The legal principle may well be the presumption of innocence, but in actual fact most citizens believe that there is usually no smoke unless there is at least some fire; in such a world, even objectively innocent judges may shy away from behaviour that might, rightly or wrongly, trigger formal (and, these days, often public) hearings before a judicial council. Along these same lines, Justice David Marshall (former head of the National Judicial Institute) recently warned against a “judicial chill” created by the very presence of judicial councils and the readiness of some parties to resort to them.⁷

PARADOX NUMBER NINE: JUDGES MUST SPEAK UP, WHILE REMAINING QUIET

At one time, judges were expected to be seen but not heard except within their courtrooms in the process

⁶ See, for example, “Judicial committee recommends judge be axed” *Canadian Press Newswire* (4 July 1996).

⁷ “Judges suffering from ‘judicial chill’” *Canadian Press Newswire* (25 November 1997).

of rendering judgment. The price of a judicial position was effectively a vow of silence with regard to the broader political and social issues of the day. This was the view that Chief Justice Bora Laskin championed so relentlessly and vehemently — Mr. Justice Tom Berger was the sacrificial lamb on the alter of judicial silence, even though Berger's championing of the cause of Aboriginal peoples was completely consistent with things he had been saying for years, and arguably grew out of the McKenzie Valley Pipeline hearings over which he had presided a decade earlier. The rule was simple if somewhat draconian: judges were not to use their positions of power and influence as a pulpit or a lobby point or for leverage, and if the burden of silence got too great they were to leave the bench before speaking up.⁸

Clearly Berger was simply unfortunate in his timing: he would not be reprimanded for his comments today, and it is highly unlikely that such a complaint would even go to a formal hearing before it was dismissed. Mr. Justice Sopinka has sounded the new orthodoxy with his suggestion that judges need not be monks (surely a quote that should have been rendered gender neutral before it was uttered),⁹ and both on and off the bench judges are much more outspoken than Chief Justice Laskin would ever have countenanced. Judges routinely give public speeches and publish journal articles on a range of topics going far beyond the traditional topics like legal education or judicial process or the nature of the legal decision. And judicial decisions themselves are much more than dry technical legal analyses: the Supreme Court decision in *Vriend* was a passionate lecture to Albertans about the history of the treatment of gays and lesbians and, therefore, their entitlement to protection from discrimination, just as the Alberta Court of Appeal decision that it overturned was a powerful argument about the role of the courts in social change.¹⁰ The Charter has given judges a responsibility to apply the law even when this puts them well in the advance of public opinion, and so far they have not shown any signs of shirking this responsibility.

But the new doctrine of judicial outspokenness and candor carries its own pitfalls. It is still the case that

judges can expect to be called to account for comments about fraternity dinner parties (à la new Supreme Court Justice Binnie)¹¹ or about the gambling propensities of Chinese Canadians (à la Supreme Court Chief Justice Antonio Lamer)¹² or about the “fantastic” aspects of first nations religious beliefs (à la Justice MacLean)¹³ or about sexual assault (à la Judge McDonald¹⁴ or Judge Matheson¹⁵) or any other comment or behaviour that might offend the sensitivities of specific groups. And it is not gratuitous to wonder how often and under what circumstances and with what consequences this discontent might take the form of formal complaints to judicial councils — as it did for Justices Wilson and McLachlin and their comments on feminism and law.¹⁶ As Judge Bartlett discovered, his traditional Christian viewpoint on the permanence of marriage and the role of women was still enough to get him removed from office even in the new age of judicial free speech — it would seem that some types of leadership from the bench are more welcome than others.¹⁷ This just highlights the new dilemma of the judges and the judicial councils alike. The advantage of an absolute ban is that it is much easier to articulate and to enforce than evolving understandings about what sort of advocacy on what issues and in what context is to be permitted — these minefields have yet to be fully charted.

PARADOX NUMBER TEN: JUDGES MUST HAVE AND CANNOT HAVE A PURELY PRIVATE LIFE

Judges are not judges all day long — they also have a private life, a factor that is becoming increasingly more important now that many judges are being appointed at lower ages than used to be the case, even while human life span (and, along with it, the length of a normal career) is rising. It was never appropriate to assume that most judges were (in the words of an American journal article) “judicial

⁸ See “Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger and Resolution of the Canadian Judicial Council” (1983) 28 McGill L.J. 378.

⁹ The comment was originally made in a 1989 speech; for a more recent and unrepentant restatement, see John Sopinka “Must a Judge Be a Monk — Revisited” (1996) 45 University of New Brunswick Law Journal 167.

¹⁰ *Vriend v. Alberta* (1998) 156 D.L.R. (4th) 385 (S.C.C.), reversing (1997) 132 D.L.R. (4th) 595 (Alta. C.A.).

¹¹ “Binnie complaint sails right out the window” *The Globe & Mail* (18 March 1998).

¹² “Judicial Council rejects complaint against top judge” *Calgary Herald* (24 January 1998).

¹³ “Lonefighter trial judge rebuked” *Windspeaker* vol.11 (4) May 10, 1993.

¹⁴ “Judge faces review over complaints” *Winnipeg Free Press* (11 May 1993); and “Women Dem and Probe” *Winnipeg Free Press* (28 June 1993).

¹⁵ “Judge reprimanded for controversial remarks about women” *Canadian Press Newswire* (23 May 1996).

¹⁶ Referred to by Sopinka in “Must a Judge Be a Monk — Revisited,” *supra* note 8.

¹⁷ See, for example, “White ribbon runs red” (1993) 58 *Canada and the World Backgrounder* 12-15.

pensioners” finding a temporary home between an active career as a lawyer, on the one hand, and full retirement, on the other. But it is increasingly the case that many judges are being appointed in their forties or even their thirties, when they have children in school or at university, and when they still enjoy an active social life that may not easily be replaced for a world in which judges only associate with other judges.

It may be appropriate to argue that judges should be fully accountable for their professional duties, which is to say that they should be subject to discipline when their comments from the bench include inappropriate or controversial utterances about Aboriginal peoples or women or lesbians. It may also be appropriate to argue that judges should be comparably accountable for their activities in the other aspects of their professional life, outside the courtroom but still involving interaction with other legal professionals and para-professionals. (The Ontario case of Judge Hryciuk is an example: someone who was, by many accounts, an excellent judge in the courtroom, but with curious ideas about how to treat female court clerks and ancillary staff members.)¹⁸

But the critical question involves the private activities of individuals who are also judges; if one principle is that judges are professionals with a public persona that must be held to high standards, the counter principle is that being a judge is, like other jobs, something that does not and cannot consume a person’s entire being. At what point do we draw the line — because at some point we must draw the line — and say that the private life of a judge is his (or increasingly, her) own business and nobody else’s? Should we discipline a judge for a drinking problem that never touches their courtroom performance? For impaired driving offences? For domestic disputes? For income tax irregularities? For the e-mail list services to which they subscribe? It seems equally unacceptable to suggest that these things *never* matter, and to say that they *always* matter.

PARADOX NUMBER ELEVEN: JUDGES ARE INDIVIDUALS AND MEMBERS OF A TEAM

The traditional view of judicial independence has always related to the independence of the individual judge sitting in a courtroom presiding over a trial — this is the person who most needs the independence,

and this is the moment when independence is most needed. This solo practitioner model has long been the dominant model in the Anglo-American tradition. It is operationalized in its purest form in the old District or County Courts, which essentially created a territory within which a single individual was the voice of judicial authority from appointment until retirement — although if we narrow the territory to the single courtroom, the same model fits trial judges at every level equally well. Even the language of the Charter, which mentions an independent and impartial tribunal, seems to me to carry the same overtones of “the individual judge on the bench in the moment of making the decision.”

But one of the more intriguing developments of the last thirty years or so is that all the trial benches in Canada have acquired their own Chief Justices and Judges, and sometimes associate or assistant chiefs as well. And I understand that it is sometimes the practice (neither routine nor exceptional) for the trial judges of a particular locality to meet and discuss how to handle certain issues or problems that are coming before them. What this points to is an organized bench model, supplementing (even partially replacing) the solo practitioner model — a judge is not merely a person who exercises integrity and personal independence in the critical moment of decision, but also a person who voluntarily and reciprocally coordinates activities and standards and expectations with other judges. Years ago, I interviewed a provincial judge who insisted that, whatever the Court of Appeal might say, he knew what sentences the Criminal Code required him to hand down for those young males who were consorting in the city’s central park. I have long treated that anecdote as demonstrating feisty judicial independence, but I now wonder if it is not becoming anachronistic — if the nature of the bench, and therefore the form of judicial independence, is not changing.

The continental European systems, of course, have never been comparably enamoured of the solo practitioner model, but (as I keep trying to persuade my students) they have a working concept of judicial independence, nonetheless. In the continental system, it is the judicial system as a whole that is rigorously independent of the government of the day, but within the judicial hierarchy junior judges are very much subject on an ongoing basis to the authority of the senior judges. But if I am right to think that we are taking even a tiny faltering step in such a direction, this means that we have to take a much closer look at that mysterious figure, the Chief Judge of a territorially dispersed trial court. Five years ago, Justice David Marshall (just having stepped down from the National

¹⁸ See, for example, *Macleans* Vol.106 (20 December 1993) at 14-15.

Judicial Institute) gave an interview in which he warned of the real and growing power of chief judges.¹⁹ He was castigated widely for this suggestion at the time, but it struck me then and still does that this is an issue that deserves investigation. Do the Chief Judges really have that much power and, if so, how are they using it and within what constraints? And should we see this (as Marshall suggests) as a bad thing that constrains judicial independence in its traditional form, or as a good thing that is part of an evolution to a new “organized bench” version? What are the criteria that would allow us to decide which description is the most accurate and useful?

PARADOX NUMBER TWELVE: THE BEST PROCESS IS THE ONE YOU NEVER NEED TO USE

This is perhaps not so much a legitimate paradox as a segue into my conclusion, combined with a desire to have my paradoxes add up to a neat number (like twelve) rather than an awkward number (like eleven).

That said, it seems to me that the very best way to approach the problem of judicial discipline is to appoint judges who do not need to be disciplined. This rather smug notion always infuriates my students, especially after I have tantalized them with alternatively wanting to defend the absolute freedom of fearlessly independent judges and then wanting to squash like bugs those despicable judges who misuse their power, this complicated by the knowledge that these may very well be exactly the same judges. I know the suggestion always annoyed me when I came across the argument years ago. I have come to think, however, that it contains a fundamental truth: ultimately the best way to square the circle of an accountable and yet independent judiciary is scrupulously to screen potential candidates, and simply never to appoint anyone about whom there are significant questions. The best disciplinary mechanism is a ruthless and rigorous appointment process; everything else is backstop. To return to my initial metaphor: the question of who will cut the barber’s hair becomes much more manageable if we concentrate relentlessly on finding ourselves bald barbers. □

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¹⁹ See “Chief judges seen as too powerful” *The Globe & Mail* (9 June 1993) at A4.