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ADMINISTERING JUSTICE FOR THE PUBLIC

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CHAPTER 1

JUDICIAL RESPONSIBILITY AND THE COURTS

Courts in Canada are established to serve the public. Courts serve the public by providing a place where people can come to seek justice and where disputes are resolved through fair hearings before impartial judges. Judges are trusted because they are independent and dedicated to upholding the rule of law.

Court administration is about how the courts are managed and how people experience the justice system. It covers everything from courtroom security to information technology, from the responsiveness of Court staff to the accessibility of Court forms and procedures. Court administration, in other words, is how the justice system works.

At the heart of court administration lie two central goals, each of which is inextricably linked to the other: to manage Courts in an effective, efficient and accountable fashion, and to enhance impartial, independent and high quality decision-making.

Under the system we have now in Canada, the executive branch of Government sets the budget of the Courts. Court staff report to Government officials, usually under the authority of the Attorney General or Minister of Justice. This situation has led to divided loyalties and in some cases a lack of direction and accountability. Judges (usually the Court's Chief Justice/Chief Judge) control the process of hearing cases, but do so with funds they have had little role in allocating. A Court cannot set its own priorities. If the Court identifies a promising initiative to improve the quality of judicial services for the public, the Court must seek the approval of the Government before this can go forward. The Court's security, information technology, and other services are often so integrated with the rest of Government that it is difficult for a Court even to know the full cost of Court Administration. Judges see the needs of the public first hand in courtrooms across the country, but under the Executive-led model, they do not have the capacity or authority to meet those public needs. Finally, under the Executive-led model there may be a perception of inherent conflict, as the same Government which decides on the budget and direction of Court administration, is also a frequent party in disputes before the Court.

In 2003, the Canadian Judicial Council (CJC) decided to examine how courts could best advance both goals of court administration. Could Courts, in other words, be run in a way that will enhance their effectiveness, efficiency, and accountability on the one hand, while enhancing impartial and independent decision-making on the other? The CJC concluded that these twin goals can best be advanced by moving from an Executive-led model of Court Administration to a model of limited autonomy for self-governing Courts (which will be called the "judicial responsibility" model). The judicial responsibility model is based on five central principles:

1. That the judiciary should be responsible for Court administration.
2. That Courts receive appropriate resources to meet the needs of the public.
3. That courts are consulted in a meaningful way in the process which determines the budget for their administration.

4. That Courts have their own staff and other resources, including information technology systems, needed to properly discharge their responsibilities.
5. That Courts have meaningful input into the planning and design of courthouses to ensure that the public's needs are met.

Under the judicial responsibility model, judges administer Courts in the public interest and are accountable for how effectively and efficiently the public's needs are met. In carrying out this mandate, Court staff are under the clear direction and leadership of the judges of the Court. The judicial responsibility model leads to greater public confidence in the administration of justice by ensuring there is no conflict of interest in how Courts are managed.

The judicial responsibility model also advances important constitutional values. The Supreme Court of Canada has recognized that impartial decision-making requires judicial independence. Judicial independence is a right of all people who come to Court. It means that judges must be free to decide cases according to the law without any extraneous considerations. For this reason, Courts need to be, and need to be seen to be, independent of Government.

The most important reason for changing how Courts are run in Canada is to improve the quality of Courts services to the public. The judicial responsibility model has a proven track record in delivering these services in those parts of the world that have embraced it. The Federal Court of Australia is a good example of how this model works. In Australia, the Government is responsible for making the final decision on the Court budget and the Court is responsible for deciding how best to spend that budget on the operation of the Court. For example, when a number of major aboriginal land claims reached the Federal Court, the Court decided that the hearings themselves should take place in the location of the land claim. For the Court, this required setting up judicial hearings in remote locations, transporting judges, Court staff and materials, and funding the initiative out of its own budget. This is just one example of how Courts can be more effective and more accountable when they take responsibility for their own management. Courts in the United Kingdom, Ireland and the United States all operate to varying degrees on the principles of judicial responsibility.

Canadian Courts are already moving in the direction of more judicial responsibility. Since 2002, the Canadian federal Courts have been administered by an independent government agency. In Ontario, since the early 1990s, the Chief Justice of the Ontario Court of Justice and the Attorney General have operated under a Memorandum of Understanding which gives the Chief Justice responsibility over a portion of the Court's budget. Similar arrangements exist in different courts in Quebec, British Columbia and Alberta. In Quebec, the Court of Appeal of Québec and the Court of Québec each have been delegated by the Government significant autonomy in administrative decision-making. In other provinces, such as Manitoba and Newfoundland & Labrador, Court Management Councils comprised of judges and Government officials consult on shared concerns relating to Court administration.

In light of the Canadian experience and that of other peer jurisdictions, the judicial responsibility model represents the best alternative for improving the quality and delivery of judicial services in Canadian Courts, and enhancing public trust and confidence in the judicial system, while preserving judicial impartiality and independence.

CHAPTER 2

HOW WOULD A JUDICIAL RESPONSIBILITY MODEL WORK?

While it is impossible to set out with precision how a judicial responsibility model would work (much will depend on the kind of Court, the judicial and administrative culture of particular jurisdictions and the individuals involved), it is likely that the judicial responsibility model would include the following features:

1) JUDICIAL LEADERSHIP AND DIRECTION

The judicial responsibility model would involve judges assuming overall responsibility for the leadership and direction of Courts and of the staff and personnel who work within the Courts. In most cases, this will mean that the Chief Justice/Chief Judge of the Court will act in a role analogous to the Chairperson of a Board of Directors. If more than one Court is involved – for example, the Canadian federal Courts model involves four Chief Justices – the Chief Justices will have to have defined roles and responsibilities or work by consensus.

In the provinces and territories, there are typically three courts – a provincially appointed trial court, a federally-appointed trial court and a federally-appointed court of appeal. Each Court is led by a Chief Justice or Chief Judge. Court administration for all three of these courts is funded by the provincial executive. In some jurisdictions, courthouses are shared, while in others they are not. In part because of this fact, the judicial responsibility model may involve separate arrangements with each Court or a shared arrangement between two Courts, or an arrangement under which all Courts in the province or territory participate.

2) PROFESSIONALIZED COURT SERVICES AGENCY

While the judicial responsibility model depends on judicial leadership and direction, the day-to-day operational management of Courts would continue to be handled by professional Court staff. Under a judicial responsibility model, these staff would report to the judiciary rather than the Government.

In addition, a number of staff currently with the Courts division in Attorney's General offices – for example, staff working on Court administration policy – would also be shifted to the responsibility of the Courts under a judicial responsibility model.

3) CAO OF THE COURT(S)

At the head of the professionalized Court services would be a Chief Administrative Officer. This office would include the functions of the Registrar of the Court and some functions now carried out by the Assistant Deputy Minister for Courts within the Government. This individual would assist the judiciary in managing the Court(s) and be the central point of contact between the Court(s) and other ministries of Government (for example, the Ministry of Finance with respect to financial reporting, etc).

4) RESOURCES

A central issue in the judicial responsibility model is stable and sufficient resources for Courts. The overall budget for Courts would continue to be set by Government and would be subject to the appropriate legislative and other oversight. The judiciary would be consulted on the overall budget to ensure it met the needs of the public and the Court. The judicial responsibility model will allow a Court to allocate its budget to its strategic priorities, to retain surpluses and/or reallocate funds from its overall budget to meet contingencies or take advantage of opportunities.

5) LIAISON WITH OTHER SECTORS OF GOVERNMENT, THE BAR, STAKEHOLDERS

A judicial responsibility model will improve the opportunities for the judicial branch of government to work collaboratively with the Bar, the community, including organizations representing users of the Courts, and the other branches of government to improve the justice system, all within the constraints of impartiality and independence. This will strengthen relationships and in doing so enhance the likelihood of new reform initiatives being proposed, developed and successfully implemented.

6) ESTABLISHED BENCHMARKS AND STRATEGIC OBJECTIVES

Since one of the rationales for shifting to a judicial responsibility model is that it will lead to more efficient and more effective Court services, it would be useful to devise a means of evaluating whether that objective has been achieved, for example by setting Court performance goals.

7) INDEPENDENT EVALUATION AND ASSESSMENT

While Courts will be more engaged in setting and meeting their own administrative benchmarks, the judicial responsibility model will also be strengthened by independent evaluation and assessment of the Courts' administrative performance. This evaluation and assessment could be undertaken by existing public bodies (the Provincial Auditor/Auditor General, etc) or by professional third party evaluators.

CHAPTER 3

THE TRANSITION PROCESS

There is not a single way in which to transition from the Executive-led model of Court administration to the judicial responsibility model. What follows is an attempt to map out a series of possible steps toward judicial responsibility based on how change in relation to Court administration has been undertaken in Canada, and how transitions to a judicial responsibility model have been undertaken in other jurisdictions.

1) MUTUAL UNDERSTANDING AND DISCUSSION

The first stage to change involving two or more organizations is to ensure there is clear communication between the organizations as to their needs and concerns. The Executive needs to hear more clearly why the current system is not meeting the needs of the Court and the needs of the public. The Courts need to hear more clearly the Government's concerns over the accountability of public funds expended on the administration of justice, and both need to understand that each has a responsibility and duty to the public.

2) AGREEMENT IN PRINCIPLE

The second stage involves an agreement in principle to pursue judicial responsibility in light of the mutual understanding achieved in the first stage. This need not lock in the form or degree of judicial responsibility. Instead, the agreement may leave some difficult issues for future discussion and negotiation – for example, it need not address how disputes would be resolved. The agreement in principle, rather, signals that the political and organizational will is present to proceed. It should be accompanied by a mandate of next steps which will serve as the point of departure for the transition, and will set clear roles and responsibilities for the parties involved, and realistic timeframes.

The agreement in principle will also address which Courts will participate in the initiative. It may be desirable for all Courts to participate in the judicial responsibility model but it is important to acknowledge the different culture, different fiscal and administrative arrangements, and different transition issues which face provincially appointed and federally-appointed Courts, as well as the differences between trial Courts and appellate Courts. As indicated above, it is certainly possible for a judicial responsibility model to be arranged with just one Court, or with different combinations of Courts, as well as with all the Courts within a jurisdiction. Further, smaller jurisdictions may have different challenges and opportunities than larger jurisdictions in this regard.

Where different Courts in a jurisdiction are participating in the judicial responsibility model, the agreement in principle may address the issue of how decision-making may be shared between the leadership of the Courts and where accountability will lie. These issues could also be deferred to a later stage. The federal Courts restructuring provides one model of how this may operate, where the four Chief Justices of the federal Courts collaborate on the leadership and direction of the Courts.

3) IMPLEMENTATION PLANNING

While securing an agreement in principle is significant, the real work of a transition to judicial responsibility will be in reaching agreement on the details. Implementation teams consisting of senior Court staff, judicial representatives, and ministry officials (and, where appropriate, representatives from the Minister's office) should be established in key areas (human resources, financial management, policy, security, information technology, etc). Focusing on details builds confidence and ensures that the concerns of the Executive and the judiciary are expressly addressed in any transition process.

4) CONSULTATIONS

Court administration affects a wide array of communities. In addition to a direct impact on Court staff and staff of the Minister of Justice/Attorney General's office (especially its Courts' Division), a transition to a judicial responsibility model will have significant effects for other segments of Government, the Bar and paralegals, community groups, and so forth. There should be meaningful opportunities for these individuals and groups to discuss the implications of the judicial responsibility model for the Court, for the Government and for the public. It will also be important to consult with Courts and Governments in other countries where a judicial responsibility model is in place (for example, Australia).

5) JUDICIAL MEETINGS

From the outset of the process, it is important that judges have opportunities to meet and discuss the transition to judicial responsibility. The purpose of such meetings would be to ensure the Court has full understanding of a judicial responsibility model and an opportunity to flag, address and resolve concerns and develop a set of strategic objective and benchmarks associated with the transition.

6) HUMAN RESOURCES ISSUES

A significant concern which has been raised in relation to self-governing Courts is the status of Court staff in relation to the public service, to the Court, and to other members of the justice system. Whether as part of the implementation planning referred to above, or as part of a separate process associated with the transition, it will be important to clarify the status of Court staff. Issues of job classification, union membership, career trajectory, training, salary and benefits all may need to be addressed as part of the transition process.

7) COURT GOVERNANCE

The judicial responsibility model would involve a shift of control and responsibility over Court administration from the Executive to the judiciary but leaves open how the judiciary itself will arrange decision-making. Most successful models of judicial responsibility include a provision by which ultimate authority for judicial decision-making resides with the Chief Justice/Chief Judge (although examples do exist of judicial councils and committees taking on this responsibility).

However, a Chief Justice/Chief Judge will often delegate certain kinds of decisions to key committees (which could be comprised of judges, staff or both), or develop a practice of consulting with advisory committees before reaching key decisions. Given the new role that the judicial responsibility model envisions for the leadership of the Court, it will be important to clarify how decisions will be reached and the role of judges and staff in this process.

8) FINANCIAL REPORTING AND ACCOUNTABILITY ISSUES

A legitimate concern of Government in making a transition to judicial responsibility is accountability once the Government no longer has direct control over the expenditure of public funds on Court administration. Perhaps the most important accountability measure is the control the Government will retain over the overall amount of the budget. In addition, Court expenditures would remain subject to public sector procurement and accounting policies, in addition to transparency and reporting requirements.

9) YEAR-ONE BUDGET

A key issue for the transition to the judicial responsibility model will be how to establish a baseline, first budget for the Court (or Courts) involved. The year-one budget has additional importance because future budgets are often expressed as a percentage increase from the “year-one” budget. It is critical that the Courts involved in a judicial responsibility model play a meaningful role in the budgetary process.

10) DISPUTE RESOLUTION

It may be useful to determine how disputes between the Courts and the other branches of government will be addressed or it may be preferable to leave these to be resolved with the benefit of experience as they arise. The Alternative Models Report recommended an independent commission for the resolution of disputes. The utility of such a commission were this route chosen, its mandate, composition and the effect of its decisions would all need to be the subject of further discussion, negotiation and agreement. Rather than tie a final decision on dispute-resolution to agreement on the other aspects of the judicial responsibility model, it may be advisable to create a working group or task force on the question of dispute resolution as part of the ongoing transition process, or simply leave this matter to be addressed as events unfold.

11) LEGISLATION

The final step in the transition will be the coming into force of a legislative transfer of responsibility to the judiciary. The potential content of this legislation is discussed below. In light of the nature of this transition, it would be desirable for such legislation to receive all-party support.

CHAPTER 4

WHAT AUTHORITY WOULD BE NECESSARY TO IMPLEMENT A JUDICIAL RESPONSIBILITY MODEL?

Shifting to a judicial responsibility model could be undertaken by several different routes, including:

- by way of a legislative provision (an example of this is the Australian *Courts and Tribunals Administration Act, 1989*),
- by a Memorandum of Understanding (such as the one signed between the Attorney General for Ontario and the Ontario Court of Justice),
- by an exchange of protocols (such as the protocols exchanged between the BC Government and the BC Provincial Court), or
- by a functional delegation of powers from the Executive to the Chief Justice/Chief Judge or other judicial bodies.

It is difficult to imagine that genuine judicial responsibility could have as its foundation a delegation of authority from the Executive. As long as it would remain possible for the Executive to revoke that delegation, a judicial responsibility model would not be able to fulfill its purposes. Some legislative authority, therefore, will be necessary for the judiciary to assume responsibility and accountability for the management of the Court.

In its simplest form, this legislation would have three main provisions:

- 1) A preamble or first section setting out the purpose of the legislation, including the principle of judicial responsibility and accountability.
- 2) The second aspect of this legislation would be a simple and direct grant of authority over Court administration to the Chief Justice of the Court(s) involved. A model for this type of legislation, as indicated above, is the *Courts and Tribunals Administration Amendment Act 1989* (the “Australian Act”) which since 1990 has provided the legislative basis for judicial responsibility for the Federal Court of Australia. The key provision of that Act states:

“18A. (1) The Chief Judge is responsible for managing the administrative affairs of the Court. (2) For that purpose, the Chief Judge has power to do all things that are necessary or convenient to be done...”

The Australian Act also provides that the Chief Justice may delegate some of her or his powers to a judge of the Court.

- 3) The third aspect of the legislation should be a provision dealing with the qualifications, status, powers and duties of the Registrar. The Australian Act provides that,

“18D. (1) The Registrar has power to do all things necessary or convenient to be done for the purpose of assisting the Chief Justice ... (2) In particular, the Registrar may act on behalf of the Chief Justice in relation to the administrative affairs of the Court.”

Other issues which could be addressed in legislation include:

- the requirement of an Annual Report of the Court to be submitted to Parliament/the Legislature;
- classification and status of other Court officials;
- a dispute resolution mechanism; and
- transitional issues around the coming into force of the new scheme.

SAMPLE JUDICIAL RESPONSIBILITY MODEL LEGISLATION

Section 1. The purpose of this Act is to enhance impartial and independent decision-making, and to improve the efficiency, effectiveness and accountability of Court services for the public, by placing the administration of the Court(s) at arm's length from the Government and by affirming the responsibility of the Chief Justice(s)/Chief Judge and judges in the management of the Court(s).

Section 2. (a) The Chief Justice(s)/Chief Judge of the Court(s) is responsible for managing the administrative affairs of the Court(s). For that purpose, the Chief Justice(s)/Chief Judge has power to do all things that are necessary or convenient to be done.

(b) The Chief Justice(s)/Chief Judge may delegate this power to one or more judges of the Court(s).

Section 3. (a) The Chief Administrative Officer, under the direction of the Chief Justice(s)/Chief Judge, has supervision over the work and staff of the Court(s).

(b) The Chief Administrative Officer of the Court(s) has power to do all things necessary or convenient to be done for the purpose of assisting the Chief Justice(s)/Chief Judge.