

4. ADMINISTRATION

The separation of administrative from judicial functions

22.1 Probably more attention has been focussed in recent years throughout the Commonwealth on the administration of the courts than on any other aspect of the judicial system.

22.2 In England, the administration of the courts is the responsibility of the Lord Chancellor, who has a dual role as the senior of the judges and as the head of an administrative department.

22.3 The present organisation of the court service was introduced in 1971. It is based on the circuits, with a Circuit Administrator for each, supported by a deputy and other staff. Below the Circuit Administrator, the courts are grouped under Court Administrators. There are Presiding Judges in each circuit, who are the channel of communication with the Lord Chief Justice and the President of the Family Division. They have broad responsibility for the deployment and well-being of all the judges within the circuit and they are expected to maintain a watch on the handling of court business in their circuits, but not to concern themselves with matters of detail. They draw fully on the help and support of Circuit Administrators.

22.4 The lack of proper management in the offices of the Chancery Division received scathing criticism in the Oliver Report.¹⁴¹ It is understood that the reforms recommended in the Report have largely been effected, but it is too soon to assess their success.

22.5 Canada has a Canadian Judicial Council, the functions of which are to promote efficiency and uniformity, and to improve the quality of judicial service in superior and county courts. The Chief Justice of Canada is its chairman. There is also a Commissioner for Federal Judicial Affairs. He is appointed by the Governor in Council after consultation by the Minister with the Canadian Judicial Council. He acts as deputy of the Minister in matters concerning judges and he has overall responsibility for preparing budgetary submissions for the Federal Court of Canada and the Canadian Judicial Council, and for their administrative arrangements, including staff, premises and equipment.

22.6 In British Columbia it was felt that there was a need for the creation of an administrative service to run the courts, but there was anxiety lest this should detract from the independence of the judiciary. The Chief Justice made his opinion clear: he said that -

"the judges must run the judiciary. If that takes extra time and effort, so be it."¹⁴²

In the end, a compromise was worked out, with the creation of an office of chief administrator of court services, whose duty it is to direct and supervise facilities, registries and administrative services for the Supreme Court, subject to the direction of the Attorney General and, in matters of judicial administration, to the direction of the Chief Justice. No attempt has been made to define the sphere of judicial administration, but there is a working arrangement and no difficulty is experienced in practice. There is also a joint committee to work out a separate court budget. The overlap of functions is particularly marked where the District Registrars are concerned. They are responsible for the administrative running of the registry and have also such quasi-judicial duties as recommending the quantum of maintenance, taxing lawyers' costs, presiding at debtors' hearings and hearing bankruptcy applications.

22.7 Another key appointment made was that of trial scheduler. He is employed by the Ministry of the Attorney General but works closely with the Chief Justice. "Scheduling trials", which is regarded as a judicial function, includes allocating the days for a trial and assigning the judge to try it.

22.8 An unusual feature of the British Columbia system is that the judges' programme provides for three weeks sitting time and one week for writing judgments, although the latter period may be interrupted for urgent business.

22.9 In Ontario, prior to 1968, county and district courts were administered by the individual counties and districts; in that year, for the first time, the Ministry of the Attorney General assumed provincial responsibility for courts administration.

22.10 In 1970, the Ontario Law Commission were asked by the Minister for Justice and Attorney General to undertake a study of the administration of the courts and where necessary to recommend reforms "for the more convenient, economic and efficient disposal" of the business of the courts. The Commission, who reported in 1973,¹⁴³ paid tribute to the ability, fairness and diligence of the judges but they found serious problems of inefficiency and delay in the administration of the courts. They were of the opinion that "the primary role of judges in our court system is to adjudicate, not to administer."¹⁴⁴ They recommended the appointment of a Provincial Director of Court Administration who would have regular consultations with the Chief Justice and Chief Judges of the various courts, but who would report directly to the Attorney General on all administrative aspects of the court system. Under the Provincial Director, there were to be Regional Directors and other officials. To assist the Chief Justice and Chief Judges in their adjudicative functions, it was proposed that they should have highly qualified executive assistants and, to ensure the independence of the judiciary, these were to be appointed by and be responsible only to the Chief Justice and Chief Judges. The distinction between administrative and judicial functions is generally clear, but there are "grey" areas; for example, the scheduling of cases was regarded as administrative but the assigning of judges as judicial.

22.11 These recommendations were generally accepted by the Attorney General and the Government, with some reservations. It was decided to set up a management project in a selected area, the Central West Region, to be run by a Project Management Team. Meanwhile, there had been a great increase in criminal work and so the experiment was applied, and limited, to the criminal courts. The aim was completely to re-schedule all the business of the courts by introducing a case-flow management system. This was not a success, although the team did achieve some of its objectives. In the view of the Government, the failure of the case-flow system was due to -

"the fundamental management weakness of dividing between the judiciary and the Ministry the overall authority for courts administration."¹⁴⁵

The conclusion was that -

"there can be no truly effective reform without the presence of a single authority having power to ultimately determine all issues related to court administration. Without a single authority, there can be no case-flow management: without case-flow management, there is no real court reform. Divided responsibility is unworkable."

22.12 These conclusions are contained in a White Paper issued in October 1976, which proposed the establishment of an Office of Courts Administration, headed by a Director of Courts Administration, to carry out the day-to-day administrative, financial and operational requirements of the courts, but it was recommended that the -

"ultimate authority and responsibility be conferred upon a Judicial Council composed of the senior judiciary."

The White Paper included a draft Bill to give effect to these proposals, but the Paper was given a very mixed reception, the Bill did not pass into law and the proposed Judicial Council was not set up. (There is a Bench and Bar Council which serves as a forum for discussion of subjects which would have been dealt with by the Judicial Council.)

22.13 The Kelly Committee recommended a reorganisation of the Court of Appeal Office. It was proposed that there should be a functional division at the top, with responsibility for the office divided between a manager of non-legal operations and a chief legal officer. Both would be responsible to the Director, save in respect of duties of a judicial nature. This recommendation has not been implemented and the matter is currently under consideration by a committee chaired by the Associate Chief Justice of Ontario.

22.14 In New Zealand, a Royal Commission which reported in 1978 expressed the view that administration of the courts was the key problem to be solved.¹⁴⁶ They recommended the appointment of a Judicial Commission, to consist of the Chief Justice as Chairman, a Supreme Court Judge, the Chief District Court Judge, the Solicitor General, the Secretary for Justice and two members nominated by the New Zealand Law Society and appointed by the Governor-General. It was proposed that the Commission should exercise unified control over case-flow and day-to-day administration of the courts and should have power to make recommendations for the appointment of judges. There was to be a Chief Court Administrator, with regional court administrators to organise the sittings of the courts after consultation with the list judges. The Chief Court Administrator, who would also be the Secretary of

the Judicial Commission, would ultimately be responsible to the Secretary for Justice, although he would, of course, work closely with the Chief Justice. The regional court administrators would be responsible to the Secretary for Justice through the Chief Court Administrator.¹⁴⁷ The report has not yet been implemented.

22.15 The administration of the courts of The Bahamas has undergone major reform. Formerly, the Supreme Court and the magistrates' courts were entirely separate and even within the Supreme Court itself, there was no court calendar and each judge ran what was almost a separate court, an application for a hearing date being made to the clerk to a particular judge, at the choice of the attorney. In 1977, the magistrates' courts were brought under the administrative control of the Registrar of the Supreme Court and in the following year new rules of court¹⁴⁸ enlarged the powers of the Registrar and the Assistant (now the Deputy) Registrar. In 1981, a Clerk to the List was appointed and all applications for hearing dates must now be made to him.

22.16 In South Australia, the Legal Department was abolished in 1981 and in its place there are now two departments, the Attorney General's Department and the Courts Department. The purpose of the Courts Department is to provide administration for all the courts and tribunals in South Australia. The Department has no judicial functions other than the administrative aspect of supervision of the magistracy. It is responsible to the Attorney General, but with a secondary responsibility to the Chief Justice of the Supreme Court and the Senior Judge of the District Court.

22.17 In Victoria, the despatch of business has been greatly improved by the appointment of a Court Administrator and a Listing Master.

22.18 In the Isle of Man, a great increase in legal work and civil litigation between 1970 and 1976 led to delays and consequently to a review of the procedure of the courts. Some of the reforms, which came into effect on 1 April 1982,¹⁴⁹ were aimed at relieving the Deemsters (the judges of the High Court) of purely administrative functions that can be exercised by administrative staff.

22.19 In Singapore, the court diaries of all subordinate courts have recently been brought under central control to ensure an even distribution of caseloads and the monitoring of congestion.¹⁵⁰

22.20 Malta appears to be the only country in the Commonwealth where the administration of the courts has been taken entirely away from the judiciary. A recent Act¹⁵¹ vests the ultimate control of the courts in a Law Courts Commission, consisting of a Chairman, four members and a secretary, all of whom are appointed by the Prime Minister. The Chairman is a person with experience in public affairs. Of the members, two are politicians, one a trade union representative and one an advocate. The judiciary is unrepresented. The Commission has the duty of supervising the workings of the courts and to recommend to the House of Representatives remedies that might lead to the more efficient functioning of the courts. It has the duty also of supervising the professional conduct of lawyers. It is required to report to the Minister of Justice and to the House of Representatives any instances of undue delay and to recommend measures to remedy such delays by reform of the law or its administration.

The complement of judges and other personnel

23.1 The obvious way to meet an increase in the volume of litigation is to increase the number of judges and magistrates, and in most countries of the Commonwealth there have been considerable increases in the last decade. In England the increases have not been great: between 1972 and 1982 the number of High Court judges only rose from 68 to 77 and the number of Lords Justices from 14 to 18. In New Zealand, the High Court judges were increased from 17 to 26 between 1972 and 1979 and the District Court judges from 50 to 68 between 1970 and 1980. In British Columbia, the number of High Court judges rose by 50% between 1972 and 1979. In Hong Kong, the High Court judges were increased from 10 to 15 between 1973 and 1981 and the District Court judges from 11 to 12. Manitoba increased its judiciary by two in the last five years and its strength is considered adequate. Increases were also reported from Alberta, Belize and Botswana.

23.2 In Ontario, the Williston committee recommended an increase in the number of Supreme Court judges from 36 to 44, following an increase from 21 to 36 between 1961 and 1976.

23.3 In India, the Law Commission in its 79th Report recommended temporary measures to deal with heavy arrears and suggested that the permanent establishment of judges should be adjusted to such figure as would result in the number of cases disposed of in a year corresponding approximately with the average number of cases instituted during the previous three years. This does not seem to take account of the large number of cases instituted that never come to trial because they are settled or abandoned.

23.4 From New South Wales it is reported that there are still too few judges in the Common Law Division of the Supreme Court, although additional judicial appointments have been made at all levels. The point has now been reached where further appointments would necessitate the building of additional courts and the question has been posed whether all civil disputes are of sufficient importance to the community to justify the very high cost of appointing more judges and building more courts. There is also a question whether appointees of the right calibre are to be found.

23.5 There have been complaints of too few judges also from Guyana, New Zealand and South Australia.

23.6 This may be the appropriate place to mention that the employment of qualified assistants to appellate judges (a practice in the United States) was considered and rejected in Ontario by the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court.¹⁵² The Committee did not believe that such appointments would save any appreciable judicial time because the hearing of argument, the making of decisions and the formulating of the reasons for those decisions is judicial work that cannot be delegated. On the other hand, the Committee thought that the practice then in existence of employing law clerks (graduates of law schools recently admitted to practice and engaged for one year) to assist the judges, mainly by legal research, was of advantage, saving the judges' time without encroaching on the decision-making process.

23.7 In Québec, the de Grandpré committee made the employment of qualified legal secretaries, to assist the judges by highlighting the issues of fact and of law raised by each case file, a major factor in the pilot scheme they proposed for clearing the backlog of cases.

23.8 Increasing the number of judges might be described as the easy answer to the problem of delays, but it involves difficulties and disadvantages and there is reason to doubt whether increases in numbers produce better results beyond a certain point. Sometimes it seems that productivity actually falls with increases in personnel. In Québec, where delays were very serious, the de Grandpré committee believed they could be eliminated without any increase in the number of judges, an increase which they believed would be nothing but "l'application de la loi de Parkinson."

23.9 One difficulty is that of finding sufficient additional judges of the right calibre without draining too much talent from the Bar. Cost is also an obvious consideration. This is not just a matter of the salaries and pensions of the judges. A material increase in the number of judges means an increase in the number of masters, registrars and other court officers, building additional court houses, and employing clerks and other subordinate staff, who, in their turn, need offices.

23.10 Ad hoc appointments are useful for extraordinary situations but are not generally favoured as a normal practice. In particular, it is thought that litigants may feel dissatisfied if a High Court case is not dealt with by a High Court judge.¹⁵³

Centralisation and decentralisation

24.1 Very little has been reported on the subject of centralisation and decentralisation. Where New Zealand is concerned, High Court judges are resident in three centres only; in 14 other towns, fixtures have to await the visit of a judge on circuit.¹⁵⁴

24.2 With the new structure of courts in New Brunswick, the Trial Division is decentralised, with judges resident in Judicial Districts.

24.3 South Australia began the decentralisation of its magistracy in 1975, when three magistrates were posted to major country centres on a residential basis, so expediting business that would otherwise have had to await the visit of a magistrate on circuit.

24.4 Contrary to the general tendency to decentralise, Singapore in 1975 centralised its subordinate courts and The Bahamas in 1977 its magistrates' courts.

Vacations

25.1 In England, the Beeching Commission, while they thought it justifiable for the courts to close for a month, came firmly to the conclusion that -

"the closure of the High Court for a summer vacation should be made progressively shorter and less complete than it is at present."

25.2 The Bar in 1978¹⁵⁵ were still strongly in favour of retaining the present long vacation. The Law Society think that the vacation should be shortened, certainly to six weeks and perhaps to one month.¹⁵⁶ The London Common Law Bar Association, addressing the Law Society in September 1980, recommended that the business permitted during the vacation should be extended.

25.3 The matter is touched on in the Oliver Report.¹⁵⁷ The Review Body did not think it appropriate, having regard to their terms of reference, to recommend that the Supreme Court should aim at year-round sittings and they did not propose it. They recorded that many, but not all, barristers and solicitors like the present system. Their recommendations were limited to the operation of the Chancery Division during the long vacation. They thought that as a bare minimum one judge should always be available. They suggested also that other judges might be willing to work during the vacation if they were given compensatory leave at other times. They thought that if it became known to barristers and solicitors that cases could be heard earlier and on fixed dates, a sizeable number would seize the opportunity.

25.4 In Ontario, the Law Reform Commission in its Report on the Administration of Ontario Courts¹⁵⁸ found that the complexity of society could no longer support a system whereby all trials of civil actions are precluded during a period which approaches one quarter of every year. They recommended the abolition of the court vacations and their substitution by -

"a system which takes account of the fact that while many litigants and their counsel will not wish to go to trial during the present vacation periods, others may and do want the services of the courts at these times."

Briefly, what they recommended was that new trials should not ordinarily be begun during the week before Christmas, although trials already begun would continue, and that during July and August civil cases should be heard by agreement or by order of the court on the application of one party. They did not think it would ordinarily be necessary for the Court of Appeal to sit during July or August to hear civil appeals, although the court might be convened if necessary.

Equipment

26.1 The Royal Commission on the Courts of New Zealand recommended¹⁵⁹ that consideration should be given to the use of computers for multiple indexing, jury selection and case scheduling and that there should be a pilot scheme to evaluate sound recording as a possible system of court reporting. As immediate measures, they recommended the purchase of electric typewriters, photocopying machines, sound amplifying systems and continuous stationery for typing evidence and the construction of soundproof boxes to house typists. They also stressed the importance of excluding external noise by the use of double-glazing and of minimising noise within the court by carpeting, acoustic tiles or panels and heavy curtains. These recommendations provide a convenient introduction to the present or projected use in the courts of Commonwealth countries of different forms of equipment.

26.2 In Western Australia, a new computerised listing method will soon be employed by the Local and District Courts and in South Australia an overall study is being conducted into the use of a "computer based system to provide an improved information flow which will enable expedition of Court business." No details are presently available.

26.3 An interesting suggestion from New Zealand¹⁶⁰ is that video-tape might be used for recording the evidence of witnesses taken overseas. So far as is known, this has not yet been tried.

26.4 In England, tape-recording has been in use in the Royal Courts of Justice for 14 years. A single control room regulates the recorders in 31 courts. This minimises the

cost of running the system. It has generally been regarded as satisfactory, but it is interesting to note that the members of the Royal Commission on the Courts of New Zealand "who inspected the installation were not impressed with what they saw."¹⁶¹ It is not clear why.

26.5 Originally, a daily transcript was made but it was discontinued on the ground of expense. At the present time, transcripts are not made in civil proceedings unless they are required for the purposes of an appeal or are requested by a party, and usually it is only the judgment that is transcribed. The work of transcription is carried out by private businesses, on a tender basis.

26.6 Computers are at present used in the English courts only for such matters as controlling funds in court. They are not used in listing, although this is expected to come, and possibly the monitoring of all pending actions.

26.7 The Review Body on the Chancery Division (the Oliver report) were very concerned about delays in the production of formal orders. They heard suggestions that word-processors might be used with advantage and they actually saw a demonstration of the use of one which contained a bank of drafts. They did not consider that investment in a word-processor was justified at that time but they did think there should be further study to see if the use of such a machine would enable orders to be produced more speedily or more economically. Now that the drafting of orders has been re-organised in accordance with the recommendations of the Review Body, the usefulness of a word-processor is being investigated.

26.8 In the Australian Capital Territories, the use of a computer by the Court of Petty Sessions is being considered, in the hope that it would lead to more productive use of court and registry time. Possible uses are for list management and production of a court list; for case management; and for accounting purposes particularly in connection with part payments.

26.9 Ontario in 1973 was using four systems of recording proceedings: shorthand, stenotype, stenomask and "electronic". "Stenomask" is a system in which a reporter repeats into a microphone everything said in the proceedings with a mask covering his nose and mouth.

26.10 Telex is about to be introduced into the Royal Courts of Justice in London to improve communications generally, and particularly between solicitors and the courts.

26.11 An interesting recommendation of the Williston committee is that the rules should include provision for the hearing of motions by conference telephone where the parties consent. This practice is followed in the United States.

26.12 Photocopying machines have proved their worth everywhere, both in enabling copies to be made quickly and in eliminating the need for anything more than superficial checking. There is one danger that has to be guarded against: the ease of copying encourages solicitors to add documents to the record without proper consideration whether they are really relevant and necessary, or whether extracts would not have sufficed.

26.13 Several countries¹⁶² have referred to their lack of modern reporting facilities or the inadequacy of the facilities they have, and have expressed a wish for a modern system, preferably tape recording. It may therefore be helpful to note some of the advantages and disadvantages of such systems.

26.14 The advantages are obvious. Tape recording provides a complete record of the proceedings, which can be retained as long as it is needed and can be re-played at any time if there is a doubt as to the correctness of a transcript or of a reference in a judgment. It records at the pace of the proceedings, so that there is no need to halt a cross-examination or an address because the speaker is too quick for the judge's pen. Transcriptions can be made by persons trained to do so but who lack the speed for direct court reporting.

26.15 Against that a tape-recording system is expensive to instal and to maintain, although the cost is reduced where, as in London, one control room regulates a large number of courts. It depends on a reliable supply of electricity or the availability of an emergency generator. It requires a court room from which external noise is excluded and in which internal noise and echoes are muffled. These factors make tape-recording unsuitable for some of the smaller jurisdictions.

26.16 Even with the best equipment, transcribing is not easy where witnesses speak badly or turn their heads suddenly from the microphone, or where two people speak at once, and the verbatim record is sometimes less reliable than the judge's notes.

26.17 In most countries competent transcribers seem hard to find, and they are expensive. The ideal of simultaneous transcription is therefore rarely realised. This means that where proceedings have been recorded in full, an appellate court may be looking at a record which is not only fuller but may be significantly different from that on which the trial judge had to rely.

26.18 Contrary to the popular belief, verbatim recording tends to protract hearings. It avoids the interruptions that occur when a judge has to ask counsel to go more slowly. On the other hand, examinations may take longer. Sometimes an involved question is answered by a monosyllable. Everyone in court knows what the witness means but counsel and the judge must consider how the answer will read in the event of an appeal. If on a grammatical reading it might appear ambiguous or the reverse of what was intended, the matter must be cleared up and this may involve lengthy questioning. Obvious slips of the tongue have formally to be corrected for the sake of the record, and so on.

26.19 As regards stenotyping, it is possible to obtain a coding attachment which can be attached to the machine and which will encode the record for feeding into a computer, which produces a transcript. Such equipment is used in the United States, but no report has been received of its use in the Commonwealth or of its reliability, accuracy or cost. Operators would have to be especially trained.

Accommodation

27.1 Little has been said in the reports about accommodation beyond passing references to the fact that lack of court accommodation sometimes precludes the appointment of additional judges and magistrates, while the cost of building and maintaining new courts is one of the economic factors that must impose constraints on the expansion of judicial services.

27.2 British Columbia is considering the feasibility of a double court day: that is, a judge and court staff working one shift and then another judge with another court staff taking over for a second shift. Cases would be scheduled either for the morning or for the afternoon; this would enable two courts to share one court house.

27.3 The evening courts that have been held experimentally in some jurisdictions were intended to meet the convenience of people who were at work during the day: they were not planned as a way of making more use of the available accommodation, but that may be a further argument in their favour.