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BALANCE AND INDEPENDENCE: THE JUDICIAL PROCESS IN THE *CHARTER* ERA

SEAN MACDONALD[†]

In January of 2007, the Chief Justice of Nova Scotia, the Honourable Justice Michael MacDonald, sat down with the author for a conversation about the role of the judiciary in era since the introduction of the Canadian Charter of Rights and Freedoms¹. The conversation sparked discussion about the broad spectrum of important relationships in which the judiciary must engage. These include the relationships that the judiciary maintains with the bar, the litigants before it, the media, the public and, ultimately, the personal and professional relationships that exist between individual members of the judiciary. Maintaining these relationships requires judges to engage in a variety of balancing acts. One systemic concern for judges is the sometimes difficult effect that these balancing acts may have on judicial independence. The issue is particularly acute in the Charter era as individual rights are increasingly emphasized, sometimes in preference to other rights or interests. For example, where is the appropriate balance between the media's freedom of expression and a judge's judicial independence? The need to balance individual rights and judicial independence resonates throughout much of this conversation.

Chief Justice MacDonald brings a broad perspective to this conversation. He has been able to witness these issues play out in a variety of different contexts, both before and after the advent of the Charter. After graduating from Dalhousie Law School in 1979, he worked as a litigator in Sydney, Nova Scotia for fifteen years before being appointed to the Trial Division of the Nova Scotia Supreme Court in April of 1995. In January of 2005, he was appointed Chief Justice of Nova Scotia, filling the void left by the retiring Honourable Justice Constance Glube.

In a recent interview,² Chief Justice Beverly McLachlin described the role of the judiciary in the *Charter* era as being a “constitutional gardener who most occasionally pull out a noxious weed.” Do you feel this is an accurate description?

I would certainly agree with that assertion. I have always conceived of the judiciary as a constitutional guardian, but I certainly agree with the constitutional gardener metaphor as well. It is worth noting that this is the 19th anniversary of the decision in *R. v. Morgentaler*.³ Former Justice Bertha Wilson of the Supreme Court of Canada, in that case, gave what I thought was a very succinct, and overall, the best description of a judge's role as far as the *Charter* is concerned. She said at paragraph 226 of that judgment:

The *Charter* is predicated on a particular conception of the place of the indi-

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*]

² Kirk Makin, “Osgoode Professors on Chief Beverly McLachlin,” *The Globe & Mail* (8 January, 2005), online: Osgoode Professors on Supreme Court Appointment Process <http://osgoode.yorku.ca/media2.nsf/83303ffe5af03ed585256ae6005379c9/27767bd56d67b0e685256f8500700ae7>.

³ [1988] 1 S.C.R. 30.

vidual in society. The individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while, at the same time, placing limits on the proper scope of that control. Thus the rights guaranteed in the *Charter* erect around each individual (metaphorically speaking) an invisible fence over which the state will not be allowed to trespass. The role of the court is to map out, piece by piece, the parameters of that fence.

You graduated from Dalhousie Law School in 1979, which meant that you worked as a lawyer for a brief period in the pre-*Charter* era. What is your perspective, having worked on both sides of the bench, on how litigation has changed in this *Charter* era?

The *Charter* is twenty-five years old in a few months time and I have seen an amazing transition during this period. When the *Charter* first came out, at least at the lower court level, it was not given much attention at all. I must say that it has been given significant attention -- and teeth -- through the various rulings of the Supreme Court of Canada. We have clearly gone from a parliamentary democracy to a constitutional democracy. I think, as such, the role of the Court has never been more important. The courts have been designated as the guardians of the *Charter* and, while Parliament obviously still remains supreme, this new role for the judiciary certainly puts the courts in the forefront. Parliament can only enact laws that pass constitutional muster, that don't trespass unreasonably or improperly upon our constitutional rights and, in many ways, because of this role, the courts have been accused by some of being "activist." The courts attempt to interpret the *Charter* while, at the same time balancing the rights of various individuals as these rights may apply to the *Charter* while still paying heed to Parliament's supremacy. There is necessarily a balancing act going on there. It's a natural tension. It's a healthy tension, I think, and there is what has been referred to as the dialogue between the courts, primarily the Supreme Court of Canada, and Parliament, in terms of Parliament passing legislation, the courts finding it unconstitutional, either reading it down, or perhaps providing guidance, and then Parliament responding and so it goes. *Vriend*⁴ is probably the most applicable case that comes to my mind in that regard.

You began to discuss briefly the issue of the public perception of the judiciary in the *Charter* era, and how the judiciary is sometimes accused of being "activist." Certainly the portrayal of the judiciary throughout the media helps to feed this perception. In the *Charter* era, the media itself has seen some of its fundamental practices become constitutionally enshrined.⁵ How do you perceive the relationship between the courts and the media in the *Charter* era?

4 *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*].

5 Most importantly, in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, the Supreme Court of Canada gave a broad interpretation to the media's right to freedom of expression. The majority of the Court essentially stated that the press has to be free to comment on court proceedings to ensure that the courts were seen by all to operate openly in the penetrating light of public scrutiny.

I think the media's role, in covering the courts and in being interested in the judiciary, has become more predominant because of the judiciary's role in interpreting the *Charter* and striking down laws that were made by Parliament, which is supreme. I think that is new and that is controversial. We have been accused of being political, and that is news. That is important, and I think that is where the coverage comes from. I never did sense that because section 2 is now in the *Charter* that the media now has a wholly different job. I think our work has become much more newsworthy. The judiciary is making news because it is complying with its role as gatekeeper of the *Charter* and it is striking down laws that Parliament has passed, and that is controversial. When Parliament speaks and the courts say "no," that is news. You have to be very, very aware of the important role the media plays in society. We are much better off defining that role of the media as expansively as we can. The goal when you are balancing rights is that you have to try to get the formula that brings out the most in both rights. You have to use maybe a chisel as opposed to an axe—you have to try to carve out this metaphorical fence. Can you allow more media access and still preserve fair trial rights? It is an oversimplification to say "Let us in for everything" and it is an oversimplification to say, perhaps for the judiciary's sake, "You're in for nothing." So you've got to work together and balance these competing rights.

An important issue in the interplay between the media and the judiciary is judicial free speech. The boundaries of judicial free speech are far from clear. The media is not sure when judges can comment on certain issues, and sometimes neither are the judges. On this point, Dr. H. Mellon has stated that,

Delineating the bounds of appropriate judicial comment is an exercise rooted in the protection of judicial independence and the maintenance of societal respect for the judiciary.⁶

What is your perception, as a provincial Chief Justice, on the boundaries of judicial free speech? When, if ever, is it appropriate for a judge to speak out on a particular issue?

I think the rule remains that short of extraordinary circumstances, judges should speak through their judgments only and should not comment on specific cases. However, there is a limited role for the Chief Justice if the judiciary as an institution is under unfair attack. Then I think there is a role for the Chief Justice, by convention, to speak up. I think it should be restricted to those cases. We've done something, I think, somewhat unique in Nova Scotia and that is that in order to address the dilemma of having an inability to speak on specific cases, but at the same time wanting society to have a better understanding of the role of the judiciary in these various topics, we have on our Web site papers written by judges on these controversial topics. So we have on the shelf, so to speak, what would be our response generically. So that gives us the opportunity to at least respond generally about the topic without addressing the specifics.

Keeping with the theme of the interplay between the courts and the media, the Attorney General of Ontario recently stated that he wanted to institute cameras

⁶ H. Mellon, "Meeting the Public: The *Charter*, Public Debate and the Judiciary" (2002) 21 Windsor Y.B. Access to Just. 33.

within the Ontario Court of Appeal in order to “clear up glaring public misperceptions about the justice system.”⁷ What is your position on the placement of cameras within the courtrooms?

Interestingly, we have had the ability to bring cameras into the Nova Scotia Court of Appeal for the past twelve years. In fact, the study that prompted the action in Ontario refers significantly to the progress that has been made in Nova Scotia as far as the relation between the courts and the media is concerned. I think, I must say, that we in Nova Scotia have been on the cutting edge, if I can be so bold as to suggest insofar as our relationship with the media goes, and specifically cameras, at least in the Court of Appeal. We have a process where you have to apply to have cameras in the Court of Appeal but, strangely enough, we haven't had that many requests.

There are all kinds of interesting issues involved in cameras in the courthouse, whether you have gavel to gavel coverage or just coverage here and there ... whether you have one pool camera that is stationary and unobtrusive, or whether you have a bunch of cameras at the back of the courtroom. It's very much a live issue. There are arguments going both ways, particularly in the trial courts because, of course, you are balancing these respective rights again. I think that if anything is learned, it is that this is a live issue and it deserves respectful study. I think if we are going to solve the issue, we have to look at what would be evidence, and therefore, perhaps affected by the fact that cameras are present. That's why there are fewer risks in having cameras in the Court of Appeal.

Another means of publicizing the judicial process has recently come to the forefront, with the Conservative government's move first to initiate confirmation hearings for judicial appointments to the Supreme Court of Canada, and second to televise these hearings. This move has been met with both criticism and praise. Critics claim that this move “politicizes” the judicial process.⁸ Proponents argue that the confirmation hearings add “transparency” to an otherwise secretive process.⁹ What was your take on the implementation of these confirmation hearings at the time that it was occurring? Has your opinion changed in any way since that time?

I think many members of the judiciary were apprehensive that a process like that, if it became like the process in the United States, would deter certain highly qualified lawyers from wanting anything to do with it. There are privacy issues, too. When do you tell your senior partners that you've even applied? I think some judges afterwards thought the process wasn't as bad as it could have been. But that doesn't take away the overall concern about the appointment process at a time when there existed a highly charged debate involving the judiciary. Does the process have the potential of becoming something akin to what we've seen in the United States, which I don't think is necessarily the best way to go for Canadian judges? I think that I still have a healthy apprehension.

7 Kirk Makin, “Ontario Justice System Ready for its ‘Close-Up’” *The Globe & Mail* (11 January, 2007).

8 Sue Bailey, “Clarence Thomas a Cautionary Tale as Harper Requires Hearings for Top Judges” *Canadian Press* (20 February, 2006), online: Osgoode Professors on Supreme Court Appointment Process <http://osgoode.yorku.ca/media2.nsf/83303ffe5af03ed585256ae6005379c9/025060fa50426f5b8525711c00642fc6>. One of the principal critics identified in this article is Chief Justice Beverly McLachlin.

9 *Ibid.* The chief proponent identified in this article is Dean of Law at Osgoode Hall, Patrick Monahan. He states that the move is a “check on the discretion of the Prime Minister” and overall a “positive development.”

Going back to the issue of public perception, the Supreme Court of Canada has, in recent times, received media attention because of an overall decrease in the number of decisions that it is publishing.¹⁰ Observers argue that this decrease has both negative and positive aspects. Some argue that in an increasingly technological society there are fewer impediments to writing a decision. Precedents are literally at the judge's fingertips. Conversely, others argue that the decrease in decisions indicates that the Supreme Court is investing more time and effort into the decisions it is making. What is your take on the decrease in decisions emanating from the Supreme Court of Canada?

I have a concern, actually, about the way decisions are reported now. When I first started studying and practising law, it seemed that, obviously, there were much fewer decisions and it seemed a decision was published if it had precedential value; it was polished like an apple, it was out there and it stood for something. Now, with electronic publishing, everything gets published, so it's quantity over quality. My point would be simply this: we should look at the quality of decisions, which I think has been first rate. I think it has been great that many of the decisions coming from the Supreme Court of Canada have been unanimous on very, very tough issues. I have no concern about the number of judgments issued by the Supreme Court of Canada. Obviously, they have a leave process and they have the responsibility to limit decisions. Certainly, I think their book of business is healthy and I wouldn't worry about the fact that there may be fewer [decisions] in one year than in another. Generally speaking, however, I would, prefer to perhaps tweak the system a little bit so that only those decisions with some precedential value did become available.

Closer to home, the 1989 Marshall Inquiry was publicly perceived to have left a black eye on the Nova Scotian legal system. Professor Philip Girard has argued that in the post-Marshall era, your predecessors, the former Chief Justices Lorne Clarke and Constance Glube, have taken large strides in attempting to alleviate the negative public affects of the Marshall Inquiry.¹¹ Do you still feel that there is work to be done to fully alleviate the deleterious effects on the public perception of the judicial process brought on by the Marshall Inquiry?

Every crisis presents an opportunity. The Marshall Inquiry is one such example. The tragedy involving Sandy Seal and Donald Marshall Jr. has resulted in reform in criminal law and the law of disclosure, which was non-existent prior to the Marshall Inquiry, to create a very comprehensive set of rules for disclosure and other measures to preserve the presumption of innocence in this country, which makes Canada leading the way in many ways. It is through that tragedy that this has happened. I think another example may be unfolding as we speak and that is the challenge of youth justice and the tragedy involved with the McEvoy case. We now have a very comprehensive report "Spiralling out of Control: Lessons Learned from a Boy in Trouble,"¹² written by retired Justice Merlin Nunn. I am optimistic

10 Kirk Makin, "Dramatic Drop in Supreme Court Rulings Fuels Questions" *The Globe & Mail* (30 December, 2006).

11 Philip Girard, "The Supreme Court: Confederation to the Twenty-First Century," in Philip Girard, Jim Phillips and Barry Cahill, eds., *The Supreme Court of Nova Scotia, 1754 – 2004: From Imperial Bastion to Provincial Oracle* (Toronto: Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, 2004) at 189 – 91.

12 Online: Nunn Commission Inquiry <http://www.nunncommission.ca/home/index.cfm?id=160>.

this report will be a platform for the kind of change that is necessary today and was as well at the time of the Marshall Inquiry. Very often we call it a silver lining, but within tragedies, there are opportunities. I think it's important for all of us involved in the justice system to take this opportunity now and follow up on serious initiatives for youth justice, which is a major challenge for everyone involved in the justice system. Under the theme of addressing tragedy and opportunities as they arise, that's hopefully what we have learned from Marshall and what we hope to learn from the McEvoy case as well. Hopefully, it will be a springboard for change, just as the Marshall Inquiry was a springboard for significant change in this province and in this country. Overall, in Nova Scotia, I think we've made wonderful progress, but are we there yet? No. I think there are still significant changes to be made.

Professor Girard has stated that, as result of the Marshall Inquiry, the Nova Scotia judiciary has become a "leader in social context education."¹³ Could you elaborate a bit on when and how such social context education takes place, and any issues it might raise in the course of adjudicating a case?

It's a major initiative as far as judicial education is concerned. It's a big part of judicial education; there are stand-alone social context seminars dealing solely with social context issues. It's also superimposed in educational initiatives on substantive law. Education is a big deal, as it should be. But there is also a natural justice issue there – that is, the more that I, as a judge, learn about what somebody tells me of how society works, what duty do I have to counsel those who tell me the opposite. Do I say to them, "Well, I went to a conference last week and they said you're wrong. What do you say to that?" I'm not knocking, but, in fact, am complimenting the social context initiatives, noting however that with them come procedural complexities. If judges are learning things about cases outside of the courtroom, then where does the right to respond come in? For instance, if a defence lawyer says to me in a sexual assault case "Of course she's lying, Judge. Of course she's making it up. Because she told the police this and she said this at the preliminary inquiry and she said that at the trial. She has three different versions of her story. Now there are some similarities, but she said three different things. Disbelieve her. You can't rely on this. This is unreliable." Now what if last week, hypothetically, I went to a social context seminar and an expert on memory says, it has a ring of truth if there is a slight variation between the three. Do I say "By the way, have you read this article?" or do I decide that case on the basis on what I've learned outside of the courtroom and the defence lawyer has no idea that was an important part of the decision. What about the accused? These are difficult questions to which there is no clear answer.

Intimately linked to the issue of social context education is the concept of the judiciary being a springboard for social reform. Does the Court ever pick and choose areas of the law in which it wishes to instigate some form of social reform? Do you perceive the Court to be a springboard for social reform?

Well, the thought I have on this is that judges may play that role, but it's not one that they invent for themselves. In a vain attempt to be funny, I will say that judges don't wake up in the morning and say, "I think I'll legalize marijuana today. So let's

13 *Supra*, note 10.

call a case and let's do it." In every case we decide, we are reacting. So we may be springboards for social change, but that's a product of our role. It's not a product of any kind of initiative on our part. It wouldn't be at our instigation, but it would be the product. That's why our role with the media is so important. I think the media has to better understand where we're coming from and I think we have to better understand where they're coming from. They are demanding more access to us because they can be accurate if they have more access. We want them to better appreciate our role and they want us to better appreciate their role.

Is there ever an implicit thinking from the bench that, in certain cases, to pursue a matter would be socially right or wrong? Or is that something where a judge has to be fearless and independent?

We're all, as judges, products of what we internalise from our lives. But would you consciously go out and say, "Today's the day I'm going to start moving society in a different direction?" No. Furthermore, it is dangerous to think that you know something about a particular issue when you really don't. For example, what I've learned in my poverty law seminar is that often judges, because they've gone to college and occasionally didn't have enough money to pay the bills, think they know poverty. When in reality, poverty is a day in, day out, lifelong event for many people. So maybe if someone comes to your court late, it might help to know how many bus transfers you need to get from where they're coming. And when they come to court with their two-year-old child (which happened to me) who runs up on the bench and crawls under the seat, you say, "This person may not have money for childcare." So, of course, if I know more of what's going on, that should make me a better judge..

The concept of judicial independence, of course, leads to the inevitability of dissents in certain cases. Can you give some insight into the dissent process, particularly on the issues of when, how and why a judge may decide to dissent? Do you ever feel that a judge may dissent because he or she feels that the law should be moving in a certain direction?

The dissent process is really a deductive process. You write a dissent when you cannot agree with the majority judgment. So I don't think that you would ever write a dissent to move the law in a certain way, but your more fundamental question, which is an interesting one, is when should you say, "We want to, at least in Nova Scotia, make a statement on the law on this." I think we err on the side of caution on that. We try to only decide cases on issues that are essential to resolve the matter. Very often there will be an appeal court judgment saying that there is no need to reply to grounds 2, 3, 4, 5 and 6—we'll leave those for another day. The Supreme Court of Canada often does that. The reason being is that the Supreme Court of Canada's decisions are binding on all of the country's courts. When I went to law school, the major dissenters were [Justices] Laskin, Spence and Dickson. Very often, what they said became the majority. So they were forerunners in terms of social justice for social change and change within the judiciary. But at the same time, they were still dealing with cases brought before them and responding to requests that were presumably made by lawyers. So there is a reactive element to everything. It's just the nature of the institution.

Our decisions are binding on lower courts. If you're going to make something that is binding, you should really stick to the issues that were full and square before you. If you pluck an issue that you find so fascinating and interesting, but that was not articulated in the way that it should have been, then you're really doing a disservice to every other litigant and every other court in Nova Scotia who's bound to this decision, because maybe it wasn't really the product of a fulsome debate as it should have been. I try to be very cautious in terms of resolving issues that aren't squarely before me. It's hard to estimate the trickledown effect. Every sentence we say may be taken out of a certain context. You almost have to review your decision sentence-by-sentence to make sure that you're not saying something that could be misconstrued or inconsistent with something else you've decided. We are usually pretty conservative in resolving issues that may be tangentially connected to the case before us.

Going back to the issue of balancing on the part of the judge, this characteristic is often most severely challenged in litigation involving self-represented litigants. The number of self-represented litigants is reported to be on the rise.¹⁴ The Canadian Judicial Council, in light of the increasing number of self-represented litigants, has gone so far as to issue judicial guidelines for cases involving self-represented litigants.¹⁵ What specific challenges do you see self-represented litigants presenting?

I think the challenge for self-represented litigants represents one of the biggest challenges for the judiciary in this country, if not the biggest. It is a very complex problem, requiring a comprehensive solution. Courts have a very difficult time, as does everyone involved in the process, when there are self-represented litigants. There is a bit of a challenge for the judge not to act as the lawyer, but, at the same time, to see that the process is completed in a timely and fair manner. You are trying to ensure a fair and efficient process; in order to do that, you have to provide some guidance. Our role is not to act as advocate for the self-represented litigant but, rather to ensure that the process is fair.

It is perhaps even more challenging when one party is self-represented and the other party is not. That leads to all kinds of problems in the litigation process that aren't necessarily unfolding in the courtroom. For example, lawyers provide the very valuable service of giving undertakings and handling documents in escrow in a solicitor's practice and this type of thing. How does the court treat a self-represented litigant as far as undertakings are concerned? They aren't lawyers, nor are they officers of the court with the responsibility that lawyers would have.

A self-represented litigant can do more harm than good if there is a jury, so there is a delicate walk as far as that is concerned. There are so many different aspects of the jury trial from jury selection, to challenge for cause, to opening submissions, to the evidence, to closing submissions - and every step along the way is much more complex when you have a self-represented litigant. There are things you should

14 *Supra*, note 10.

15 Continuing Legal Education Society of British Columbia, "Canadian Judicial Council Issues Statement of Principles on Self-Represented Litigants and Accused Persons" online: Continuing Legal Education Society of British Columbia <http://www.cle.bc.ca/CLE/Stay+Current/Collection/2006/12/06-cjc-selfrep?practiceAreaMessage=true&practiceArea=Litigation>.

and shouldn't do. Self-represented litigants very often, since they are caught up in their own case and are very emotional, do not understand the difference between submissions and evidence. So, when they're giving a submission to a jury, they are often giving evidence. For example, when they are accused, and don't take the stand in their own defence, so they're not cross-examined but then try to give whatever evidence they would have given when they're summing up to the jury. It's very complex and is driven by the rule of thumb. You can expect a trial with a self-represented litigant to be twenty to forty percent longer. For example, a five day trial will become an eight day trial.

Clearly not every self-represented litigant is the same. People will choose to represent themselves in court for different reasons. Keeping this in mind, are there any common characteristics amongst different groups of self-represented litigants?

There are various types of self-represented litigants. There is a body of litigants out there who cannot afford lawyers. We could spend the whole day talking about trying to solve that problem and we have to do what we can to help those people. With the Internet, there is also a group of self-represented litigants who probably could afford lawyers but think, "There's nothing to this," so they do it themselves. I think the more we try to provide access and help for people who really do need help, the more we accommodate people who really should and could have lawyers, but have chosen not to.

So, there are about three categories: first, the legitimate, self-represented litigants who have to be self-represented to have access to justice. Those are the people we want to target and help as much as we can. Second, we have the "Nothing to this" group, if I can refer to them as that. Lastly, and, tragically, we have a smaller group of litigants who may be small in number, but take up an enormous amount of court time. Their problems are intertwined with mental health issues and it becomes very much a challenge for the judiciary when they bring cases; these cases can go on and on, and they don't necessarily appreciate the process. For instance, they will issue subpoenas for the Pope, the Governor General, the Premier, the Prime Minister. It's very sad. It provides a challenge not only for judges, but also for lawyers and litigants on the other side. Self-represented litigation is a big, big challenge for the judiciary right now.

Coupled with an increase in self-represented litigants is an increase in potential litigants choosing to funnel their dispute through Alternative Dispute Resolution (ADR) processes such as negotiation, mediation and arbitration. Thus, as Professor Girard puts it, the courts are now simply "one alternative among others."¹⁶ Professor Girard further claims that the courts will consequently have to take on a coordinating role in a growing world of legal pluralism.¹⁷ From your perspective, what do you perceive the role of the court to be in an era of growing proxy legal processes?

The judiciary is principally involved in what we call J.D.R. (Judicial Dispute Resolution). With certain judges there are philosophical problems with the court being

¹⁶ *Supra*, note 10.

¹⁷ *Ibid.*

involved in Judicial Dispute Resolution, particularly on the criminal side. Even on the civil side, some judges feel that they were appointed to adjudicate and not to mediate, that that's not our role. Personally, when I was at the Trial Court, and in my role as Associate Chief Justice of that court, we promoted and embraced Judicial Dispute Resolution. It answers the issue of access to justice. It does however come with its own set of complications when you are dealing with self-represented litigants. You certainly have to tape every conference because sometimes, at least when you're dealing with two lawyers, there is usually not much dispute about what the judge said, but there could be a dispute about what the judge said with self-represented litigants or a misunderstanding about what the agreement was - again, only because they are not trained in the law - and so we tape those.

But, they are very beneficial because they do provide access to justice in a couple of ways. The most important is the ability to have an impartial person trained in the law give a view as to what the outcome of their case may be. That judge will not be the trial judge, so it can be a very economical way to resolve the case, short of a trial. This benefits every other potential litigant out there in line for a trial date because if you can settle the case, then that frees up more [court] time. Then, instead of waiting a year for a trial date you may only wait six months. That is a benefit to the system, so to speak, in terms of our scheduling, and it is a benefit to the litigants because most lawyers will tell you that a case is better off if it can be settled because it is just so expensive to take a case through to its conclusion.

So, it has a role that can be very positive and is something that we've embraced. However, there is an important distinction that has to be drawn. There is a role for the judiciary in Judicial Dispute Resolution, but it is not to resolve every dispute. There is very much a timing issue. Early on, before the matter even approaches court, ADR should be encouraged. However, judges should not, in my opinion, be involved in the early ADR process. Let's leave that for the private sector. We don't want to build a product that is cheaper and competes with the private sector. Cynics might say, "People get married in churches, not because of their religious convictions, but because it's free and it's a beautiful surrounding." Well, people may want to go see the judge because it's free. So there is an important distinction to be made about when the judiciary should be involved in Judicial Dispute Resolution. There is a role for the private sector which we strongly encourage before you ever ask for a court date, but if you're involved in our process and booking a date in our docket, then we will do what we can to resolve it for the benefit of the parties specifically, and for the benefit of those litigants that are lining up to get into the system.

Do you feel that there are any advantages to JDR as opposed to ADR?

The advantage of the existing JDR is that it is meshed with the system, in terms of having us set the dates and tweaking it so that it's timed, we think, best for settlement, vis-à-vis the court date. Having that dynamic work hand-in-hand gives it a bit of an advantage. Can independently trained arbitrators or mediator/arbitrators reach great solutions on most cases? Absolutely. I think there is an advantage of having it annexed to the court system, at least, from the Court's perspective, because otherwise I don't think the incentive would be there to time it so that we're alerted early enough to use the case. This way it's resolved early enough and the system can be sensitive to the needs of the court as far as scheduling is concerned.

I think it fits a little bit like a hand in a glove because it's really all one system that you are working with.

In spite of the increase in popularity of ADR and JDR, cases are still going to court. It appears, however, that once they reach the litigation phase they are becoming more drawn-out and complicated. This is especially true in the criminal context.¹⁸ This plays into the issue of case management, which has ramifications on access to justice issues, such as timelines. Can you give some insight into the processes utilised to achieve efficient case-flow management? How is judicial intervention in terms of case-flow management balanced against lawyers' independence?

I was on the Case-Flow Management Committee, which was a joint committee of the bench and bar. Through our Case-Flow Management Project (about eleven or twelve years ago), we were very proactive in managing our cases with the philosophy that, if you asked for the Court's involvement, your case became our business. We had thirty, sixty and ninety-day letters going out. We had timelines for three different types of cases: fast-track, medium-track and complex-track. You had to have your case through the system within certain restricted timelines and this was great for the public, we felt, but the lawyers understandably felt pressured and [that] it was a breach of their independence. So, we had to fix it - which we did. We now have a very good system; it's a home-grown Nova Scotia thing that I think works very well.

I think we finally have it right in the sense that we now have timelines to preserve the efficient flow of cases through the system, but at the same time, give the bar the independence it needs to control its own cases with the lawyers' respect to its clients. We will now react as opposed to being proactive. We have this relatively simple, efficient, and hopefully inexpensive appearance day system where every Friday at noon you can, on a couple of days' notice, file a one-page notice saying, "I want to go to court because I'm delayed on this." You will see the judge who will take fifteen minutes, or whatever it takes, to get the case back on the rails. Or, if defence has filed and in a certain one or two-year period, nothing has happened and the file is sleeping, we will instigate a wake-up call and ask the lawyers to come to that same appearance day session. So, the appearance day session will serve a couple of purposes: it will get cases back on track and will allow us to, not as aggressively as in the past, but proactively, make sure a case is getting through the system.

Focusing now on litigation, and keeping with the issue of an increased complexity in modern litigation, do you think that there are particular areas of the law which require a certain amount of expertise on the part of the judge?

I do. I think judges would be assigned on that basis. On the trial court, for instance, I think an effort would be made, if it's a rather unique subject-matter or complex case and you have a judge with a certain expertise, to assign that judge. They have

18 *Ibid.*

the luxury of doing that in Ontario. Justice Farley, now retired, was a bankruptcy expert. But I think that's different than having sections isolated, like silos of justice within the court.

What areas of law do you think are a little more complex?

Bankruptcy can be a complex area. Family law, as I've indicated, is a separate area. In Toronto, I think and I could be wrong, they don't have judges doing just murder cases for a career. But they had a murder group for a couple of years. They have the numbers to specialise in it, [for example] Justice Watt does murders. We wouldn't have the luxury of doing that. I suppose if you have somebody with a very strong criminal background as a lawyer and there was a very complex criminal case, you may want them to hear the matter. Commercial transactions is another area, [particularly with] minority share-holder rights and these types of things. Complex commercial matters, I think, are sometimes best heard by someone with expertise. I don't want to say, nor do I want to be taken as saying, that judges aren't able to do these types of cases. But certain cases may be a better fit, depending upon [the judge's] background.

But, at the end of the day, we are a generalist court in Nova Scotia. Most superior courts in the country are generalist courts in the sense that their book of business covers everything. We do have a Family Division where there are experts in family law. Aside from that, and aside from picking a particular specialist for a particular type of case, which would be more of the exception than the rule, all the judges do everything. I personally view that as healthy for this reason: the more specialised you become in one area, the stranger another area becomes to you. I think the superior courts in this country have to have a broad perspective about how justice is being administered generally. I've had many cases where I've had the top criminal lawyers before me [and] they had no idea about the civil process. When I suggest that they exchange expert reports in the civil process, where in the criminal process defence expert [reports] can come late, they were amazed at this process. For instance, this whole *O'Connor*¹⁹ jurisprudence and disclosure of third-party records - the civil side has been dealing with these kinds of issues forever. There is a lot of cross-pollination going on. If you have people who know just this area of the law and that area of the law, who knows it all? It sounds flippant, but who has got their eyes on the whole process here? I think the superior courts in this country have to be that way. That doesn't mean you cannot have judges who develop expertise in certain areas, but the book of business has to be general in many ways.

You have already named some crucial characteristics of a good judge. You have now had two years' experience as Chief Justice. From your perspective, what characteristics make up an ideal judge? In light of judicial independence, do you feel that a Chief Justice has any control over the development of these characteristics on his or her bench?

A judge who is flexible to go hear a case on short notice in this part of the province. A team player, which is interesting because you have to be fearlessly independent on a case-by-case basis, but in the court, you have to be a team player. So there's an

19 *R. v. O'Connor* [1995] 4 S.C.R. 411.

irony there, but it is important. On every one of your cases, of course you are independent, and neither the Chief Justice nor anybody else can influence you. What influence do Chief Justices have? None. They have a leadership role and hopefully the ability to have people come together and cooperate. But every judge is independent for the very good reason, that neither you, I, [nor] any of us, may interfere with how you make your decision.