

“Economics, Jurisdiction and Independence”
(«Gestion des juridictions et ind*pendance»)
Questionnaire

Country: **CANADA**

1. "New Public Management" in the Judiciary

1.1 Introduction

New public management (NPM), management techniques and practices drawn mainly from the private sector, are increasingly seen as a global phenomenon. NPM reforms shift the emphasis from traditional public administration to public management.

NPM reforms have been driven by a combination of economic, social, political and technological factors. A common feature of countries going down the NPM route has allegedly been the experience of economic and fiscal crises, which triggered the quest for efficiency and for ways to cut the cost of delivering public services. However, it may well be argued that "fiscal and economic crises" are just used as excuses to push forward political intentions!

NPM refers to two concepts. The most relevant may be the new institutional economics. "The new institutional economics refers to introducing incentive structures (such as market competition) into public service provision. It stresses aggregating bureaucracies; greater competition through contracting-out and quasi-markets; and consumer choice." (Rhodes, 1996.)

The NPM style of government involves distinguishing between policy decisions and service delivery. Service delivery, proponents of NPM argue, is best left to "entrepreneurial" governments based on principles like competition between service providers, outcome based performance standards, decentralized authority, market mechanisms and other qualities not traditionally found in government bureaucracy. Rhodes notes that "NPM and entrepreneurial government share a concern with competition, markets, customers and outcomes." (1996)

Key elements of NPM may include

- various forms of decentralizing management within public services (e.g., the creation of autonomous agencies and devolution of budgets and financial control),
- increasing use of markets and (internal) competition in the provision of public services (e.g., contracting out and other market-type mechanisms such as benchmarking),
- increasing emphasis on the quantity of outputs, performance and customer orientation.

1.2 Questions

1.2.1 There are Ideas of NPM which are or are planned to be applied in several countries in the judiciary. They may infringe on the independence of the judiciary and the judge. Please give a short survey of certain tendencies or features which may derive from NPM in your jurisdiction.

The popularity of NPM initiatives in government is driven by the political agenda of the party in power in a given jurisdiction. Canada is a federal state with both federally and provincially appointed judges. Most aspects of the life and work of judges are controlled provincially, as a result of the division of powers in the Canadian constitution. Some provinces have a government with a political philosophy which favours privatization. Others do not. Curiously, it is the wealthier provinces which have more vigorously adopted this approach. It is not driven so much by a financial crisis but rather by the philosophy of government of those in power.

Most of these initiatives to date have been in the health and education fields, two areas which consume the bulk of provincial budgets. The cost of administering justice is about 1% of total provincial budgets in the larger provinces which is possibly a reason we have not been in target range as much as these other big-ticket areas.

That said, there have been some privatization attempts in the administration of justice. For example, in Alberta before parties may litigate in small claims court (for claims to a maximum of \$25,000) they must attempt to mediate a resolution before a private mediator whose fees they must pay. The government seriously considered but ultimately rejected having a private partner build and own its largest courthouse, with the right to lease portions of it to other businesses and enterprises. Some security services are privately contracted.

1.2.2. Please report on the following typical features of NPM.

Are they applied in your judiciary? If yes, in what way are they applied?

See 1.2.1 above. In addition, some court house managers receive salaries based, in part, on the amount of money by which they under-spend their budget. This has resulted in reduced spending on staffing with resulting increased in delays. For example, it now takes up to 6 weeks to process an uncontested divorce which does not require a hearing, a procedure which used to take less than 1 week prior to the introduction of the bonus-based system of remuneration for managers.

Do you think that they infringe on the independence of the judiciary?

Yes, to a degree. To this point any infringement has been modest, however. Judges remuneration is independent of volume or quality of output. All judges receive the same salary without consideration of their years of service or the type of court on which they serve (Chief Justices receive a different salary level but they all receive the same as one another; the same is true of our 9 Supreme Court of Canada judges)

Global budget, devolution of budgets

financial control,

internal competition, benchmarking

best practice

quantity of outputs

flexible distribution of workload

customer orientation,

emphasis on performance, incentives

Quality control

Others

2. Costs of the judiciary

2.1 How many professional judges are there in the judiciary of your country? (absolute figure and per 100'000 inhabitants)

As of 2002-2003 there were 2068 judges in provincial, territorial and federal courts in Canada, of which 1030 were federally appointed. Salaries for the judiciary totalled \$417 million dollars. In that year Canada had 6.89 judges per 100,000 population.

2.2 How much is the share of the judiciary of the overall annual budget of the state? Indicate the percentage out of the total state budget)?

In 2003 they were about .002% of the total federal budget. This information is not available for each of our 10 provinces but in 2003 was .001% of the total provincial budget for our two largest provinces, Ontario and Quebec. Therefore it is safe to assume that total expenditures on judges salaries and benefits ranged between .001 and .002%.

The figures are larger, of course, for the cost of the entire Administration of Justice Courts which would include judges salaries and benefits. As mentioned above those costs are entirely borne by the provinces . In 2003 , .01% of the provincial budget of Ontario and 1.8% of the provincial budget of Quebec was allotted to the cost of the Administration of Justice.

2.3 Is there any fixed percentage in the overall budget of the state?

There is no fixed percentage

2.4 What is the recent development (1995-2005) of finances allocated to the judiciary? Give a short survey.

No finances are allocated to the judiciary. We do not control our own spending. The government simply decides what services to provide and pays the costs of those, except for the judges salaries which must be paid in accordance with the directions of an independent tribunal composed of an equal representatives of the government and of the judges.

2.5. Can you report on any cost-cutting measures in the last 10 years (1995-2005)? If yes, give a short description of them (please consider especially changes of court procedures, remedies etc.)

There have been significant cost-cutting measures in the last 10 years which have not had the desired effect (as spending overall has significantly increased) but which have impacted our lives. They are:

a. video and telephone conferencing - certain applications are heard by telephone or video conferencing facilities from remote locations, making service more accessible and cutting the need for judges to travel to those centres as often as in the past

b. security - the number of security officers has been reduced; some courtrooms operate without security in the courtroom

c. secretarial services - many governments have cut secretarial services as they have provided judges with computers and expected judges to take a greater responsibility for preparing their own written decisions, etc.

d. divorces and adoptions are increasingly dealt with on a document only basis, with no oral hearing

e. the jurisdiction of lower court judges has increased significantly, both in civil and in criminal matters which has the result of reducing the number of pre-trial steps for those matters, including reducing the number of criminal matters which require a preliminary inquiry to be held before a judge

f. some jurisdictions have introduced mandatory mediation prior to commencing litigation in some types of cases; as the government does not pay the mediator (the parties do) this reduces the volume of litigation which comes before the decision-makers the government does pay (i.e. judges)

2.6. Is there any influence of these cost-cutting measures on judicial independence and jurisdiction? If yes give a short description.

To the extent that the cost of mediators must be borne by the litigants where pre-lawsuit mediation is mandatory, that reduces access to justice as some parties may decide not to litigate because of this cost.

3. Privatisation of the judiciary

3.1. Are the tendencies to shift competences from the state courts to private arbitration, mediation and "private courts" ("rent a judge")? What are your experiences?

Rent-a-judge is very popular in many places in Canada. It assures parties a voice in the choice of adjudicator. Use of these arbitrators/mediators is largely found in the more-sophisticated business litigation and only where all parties are represented by counsel.

4. Diversa

4.1 Is remuneration for judges dependant at all on their performance (quantity or quality of output)?

Not at all. All judges are paid the same salary and receive the same benefits (Chief Justices and Supreme Court of Canada judges receive higher salaries but are each at the same salary level as one another)