

Canadian Bar Association Judge's Forum
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Strengthening the International Legal Community:
«What do Canadian Judges and Lawyers Offer»

**«Building democracy....
A multistoreyed endeavour»**

By

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INTRODUCTION

Dear colleagues,

Firstly, I would like to thank the Canadian judges Forum and the ICJ who asked me to address on a topic which is for us judges, for us lawyers, of the utmost importance. They asked me to address you through the experience I had when I was in charge for ICJ Canada of a Project dealing with Independence and Impartiality of the Judiciary in the South-East Adriatic Countries. That project lasted from 1999 to 2005. It involved more than 60 Canadian judges and more than 300 Serbian, Montenegrin, Croatian, Bosnia-Herzegovinan and Macedonian colleagues .

Furthermore, I want to thank them since they permitted me to go again to Signal Point and to remember the superb story of Marconi in 1901. They also permitted me to feel again the friendship and the smiles of people of this province, of this city.

"Building democracy.... a multistoreyed endeavour": the title of my presentation shows, I think, the complexity of the task for us judges, for us lawyers, who are trained to do the best we can, during our day to day work, applying Canadian norms to Canadian situations.

What I will try to do today is to give you some thoughts on the issues as presented by the organizers, namely the following questions:

1. The Canadian Justice system as a model for countries in transition
2. When is involvement appropriate and how?
3. The challenges of working in fragile countries

1. The Canadian Justice system as a model for countries in transition

The international involvement of judges and lawyers on the international scene has become over the last ten to fifteen years more and more important. It is in great part related to the important strength of our Bar and our Judiciary. Canadians, I will suggest, in such a work, are generally very well appreciated, specifically because we never want to impose our views, to propose that we have the solutions. The success of our endeavour depends on the role we play and it is linked to the transfer of ownership to the judges and the lawyers with whom we are working. I want to address each of those questions.

1.1 Strength of the Bar and of the Judiciary: A phenomenal asset

The Canadian justice system is comprised of two important pillars which are the Bars and the Judiciary. Their high competencies, professionalism and reputation have contributed to its worldwide recognition in the field of international development.

More specifically, the Independence and Impartiality of the Canadian Judiciary, well established now, have been immensely developed conceptually by the landmark decisions of the Supreme Court of Canada since the last 25 years. We also have developed, through our Judicial Councils, both at the federal and provincial level, important thoughts and guidelines, on Judicial conduct and ethics. Namely, for instance, we have put in place Judicial discipline mechanisms. We have established important education programs through our Judicial Councils, through the National Judicial Institute, through the Canadian Institute for the Administration of Justice.

Canadian lawyers and prosecutors have also played and still are playing an important role, especially concerning criminal law, civil law and international Human Rights norms.

The role of the Bar as a voice for the promotion of the rule of law is an important plus when dealing with countries in transition.

The Canadian legal system is comprised of two different legal traditions, civil law and common law, a situation that offers a unique and strategic position for development on the international scene.

The Canadian legal system incorporated the Charter of Rights in 1982. Developments of the jurisprudence under the Charter now permit us to have an important expertise in the field of Human Rights, that can be shared with colleagues who have namely to apply the *European Convention on Human Rights*, who have ratified the *Covenant on Political and Civil Rights* and the *Covenant on Social, Economic and Cultural Rights*.

The State Union of Serbia and Montenegro joined the Council of Europe in April 2003, Croatia in November 1996. Both countries ratified the *European Convention on Human Rights*. The Convention is now part of the country's domestic legal system, directly applicable before domestic courts and, at a larger stage, in Strasbourg. It is now essential to provide all legal professionals, including judges, prosecutors and lawyers, with in-depth training on the *European Convention on Human Rights*, its additional Protocols and the case law of the European Court of Human Rights.

Furthermore, Canadian experience in the field of court settlement and mediation is well recognized. Judicial dispute Resolution mechanisms were introduced into Canadian system some years ago, at first as experience or pilot project, before leading the Government and the Legislative power to reform its legislation or its *Code of Civil Procedure*. This Canadian capacity of implementation, that has been achieved through the years, is of the outmost relevance for the Judicial system of the Southeastern Adriatic countries.

In Croatia, Canadian expertise has contributed to the adoption of many amendments to the Croatian *Code of Civil procedure*, regarding namely management case and pre trial conference.

The adversarial system of criminal law in Canada was also very useful in Bosnia- Herzegovina, which recently underwent major procedural reform, while changing from investigative to adversarial system. This change represents, of course, a major change for judges, defence lawyers and prosecutors in their daily practice. Canadian experience was put to contribution with other organizations to do training on the new amendments.

1.2 The Canadian Justice system: not to be imposed

The lessons learned indicated that we must not lose sight of the fact that any model of intervention, Canadian or other, must not ignore the still existing or past situation of conflict in the countries in transition. In other words, the Canadian model must not be applied on an abstract level. On the contrary, it should be employed contextually. Each situation must be assessed individually, since each situation has its own complexity and characteristics, whether it is cultural, historical, constitutional or legal. This raises the issue of the *flexibility of interventions*.

As for example, in our seminars dealing with efficiency of the courts with case management, pre trial and conferences, Canadian experience was explained and discussed. It permitted imaginative solutions to the phenomenal backlog of cases in many civil courts of first instance in Croatia, solutions that also conducted to the amendments of the *Code of Civil procedure*, as I have already mentioned.

Of course, no involvement of Canadian judges or lawyers should be done without a complete understanding of local substantive law, legal institutions and cultural background. This is a prerequisite to any type of international work.

Justice cannot be guaranteed, except when there is internal participation that integrates cultural, historical and societal values with “international” values. We must strike a balance between principles that cannot be compromised (as for example, right of equality, women and children rights as proclaimed in International instruments like the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*) and the situation to be addressed.

One of the strength of Canadian working internationally is to never impose our solutions, our approaches. We base our work on partnerships, on dialogue.

We though experienced constantly the proverb that "a picture is worth a thousand words". The venue in Canada of our colleagues home abroad, showing them how we work, how we behave in a Courtroom, how we deal with other lawyers, parties or witnesses, is an appropriate way to explain independence, impartiality.

By participating to intensive seminars in Canada, lawyers and judges from other countries have the opportunity to follow Canadian counterparts into action and to develop sense of being part of a respectful and respected justice system. Moreover, it gives them the occasion to develop bilateral sustainable professional relationship.

1.3 Importance of ownership

Moreover, I would suggest, at the right beginning, that "the" project should be the one of the judges or of the lawyers of the country with whom we are working.

Canadians should play the role of facilitators: facilitating the organization of seminars, providing Canadian judges or lawyers as speakers on panels with colleagues of the country, so that the structures in place be reinforced.

Experience in the field showed us that judges speak the same language. Lawyers as officers of the courts, as promoters of the rule of law, also speak the same language. Between ourselves, we can go more in depth in defining the problems and seeking for solutions.

Our role is to present a problem in a Canadian context, the solution that we arrived to, while permitting our colleagues to find a specific solution for their specific reality. To do so, it is important that our colleagues have and feel they have the ownership of the project. They should consider it is their project. In fact, it is the only way that leads to sustainability.

2. When is involvement appropriate and how?

This question raises a long range of issues. I do not want to address the technical aspect of it, as: should we work through seminars or major conferences? Should we adopt a pilot courts approach? Should we deal with the same level of courts? Should we work on regional basis? Each of these approaches has values and pitfalls depending of the goals to be achieved.

I want to address the subquestions, of time frame, of the "niche" to be chosen, of the security of Canadians when working abroad and, finally, I want to mention the difficult issue of Independence of judges when working for lucrative enterprises, financed namely by the Canadian International Development Association (CIDA).

2.1 Importance of Canadian involvement at a very early stage

Relevant actors of the Justice system need support at every early stage of the reform, and in some cases, even before the reform has started.

This rises the question of who wants the reform in a given State? Is it the legal professional community, the government, the people? It is not enough to invoke the need for political will. It is important to engage forces who are already inclined to favour a reform. However, although public dissatisfaction is a good pressure to initiate a reform, realistically, support must be sought among those who already have power.

Even when there are some insufficient local institutional capacity, work can be started and insufficient capacity should not always be an obstacle

Canadian international projects have to be implemented in partnership with local institutions and NGOs. That is how local institutional capacity will build on. However, it is very important to take a step by step approach (iterative approach). In this avenue, probably that a modest or "humble" approach by planning interventions should be favoured, in order for the local institutions to be able to absorb the new method, the new approaches. For example, the period of six months between the

regional seminars on Court efficiency in Croatia was too short to implement the Alternative Dispute Resolution method they had learned.

Of course, there should not be involvement when the personal security of people is at stake. However, when there is a minimum of stability, involvement should start as early as possible. The examples of Afghanistan, Sudan and Haiti show the great difficulty of determining, in terms of prioritizing interventions, what is the most urgent, since ultimately, everything is important at the same time, especially in countries of extreme poverty. If personal security is guaranteed, I suggest that "good governance" work should start.

2.2 Coordination with other national, regional or international initiatives

It is essential to avoid duplication when there is an overarching international involvement, as for example in Bosnia – Herzegovina. It is also important to pursue certain issues even though we receive negative advice from other international organizations or when other organizations would like to take over the same project.

It is necessary to find a "niche" that will emphasize on the specificities of the project and highlight them. For instance, Justice Claire L'Heureux-Dubé of the Supreme Court of Canada has worked intensely in India on the development of a specific project introducing equality between men and women, targeting a specific group of people with a specific theme.

In our case, that "niche" was found in the South-East Adriatic Countries with, namely, our endeavour in mediation. Our different reports explained in depth the work done in that area with local judges, and the important results achieved.

2.3 Independence of Judges

The international work of Canadian judges should never compromise their judicial independence. Many Canadian judges are now involved in judicial reform in several countries in transition. How far can a judge go? It is easy to say that the same Canadian rules of ethic apply when working abroad.

But can a judge work in a project when it involves a Canadian profit organisation who directs it? Do persons should be given by Chief Justices? How to ensure that the domestic work is perfectly done before organizing international projects? These are among others questions that are now addressed and discussed at the level of the Canadian Judicial Council, and advice and guidelines are needed.

Not entering into the substance of these issues, I submit that it will be highly versatile to find guidelines that will apply generally to all judges, federally or provincially appointed.

3. The challenges of working in less established countries

Of course, when we work in countries where Judiciaries and Bars have to be strengthened, we face many challenges. The situation can evolve very quickly and we constantly have to adapt our interventions to the new reality. To do so, we have to continuously reassess our work, to establish, as closely as possible, relationships with official authorities, and we have to monitor potential obstacles. I will now say a few words on these three questions.

3.1 Reassessing constantly appropriate partnerships and monitoring potential obstacles: reducing the risks of negative impacts

We discussed, earlier, about the necessity to build a project with local NGOs, and to transfer the ownership of such a project to the judges and lawyers with whom we are working in that country, as early as possible.

Experience showed us that in a country in transition, the political situation can evolve quickly, and that the civil society can also change rapidly. It means that we regularly have to readjust and might have to modify the partnership established with the NGOs. As for example, I would suggest that as soon as a Judicial Training Centre is put in place in a country, we might transfer the work already done with judges through other NGOs to that JTC, as a new structure to be strengthened.

Working in close collaboration with the JTCs was of primary importance in order to facilitate the transfer of the curricula and to improve the capacity of the Centres. Many of the seminars or activities organised by ICJ-Canada were held at the JTC's premises in Belgrade, in Serbia, or in Podgorica, in Montenegro. This close collaboration has contributed to enhance all JTC's capacity training.

Nevertheless, as relatively new institutions, the JTCs are facing considerable challenges in securing adequate funding and resources necessary to service more than 15,000 legal professionals in Serbia: 2,500 of them are judges, more than 700 are prosecutors and deputy prosecutors, almost 1,000 are interns, professional associates and advisers in courts and prosecutions, and around 11,000 are judicial administrative staff. In Montenegro, the JTC is responsible to service less than 250 judges.

The JTC is also open to cooperation with other parties in the judicial system: prosecutors and lawyers, forensic and other expert witnesses. As it is the case in Serbia, JTC needs more funding resources.

The technical needs of the project and the capacity of the partners in terms of analysis and implementation have constantly to be reassessed, considering the real influence of the partners and the perception of the local beneficiaries.

Considering the inevitable political aspects of the justice systems, it is necessary to be well informed of the political situation all the time through the project. It is of the utmost importance, I will suggest, to keep, when it is possible, governments, Ministers of Justice informed, trying to have their approval through our Canadian Embassies.

We have to work with Chiefs Justices of different level of courts to increase participation of judges and, also, to be helped in the specific design of the project. Canadian Embassies and their personnel are considerably useful and could have an important role to play.

To address obstacles before they could jeopardize the project, we have to certainly consult the local partners in each country to relay the information and to offer essential advice to the project management team.

Field presence is important as it is also important but difficult to share information with the different foreign donors, at the national and international level.

As I said before, despite the reality of the ongoing uncertainty in transitional countries, it is of the highest importance to maintain regular contacts with those who are active at the policy level in order to adapt plans and strategies when it is required. High degree of diplomacy may be required.

During the course of the project in Serbia, the Government changed, the Minister of Justice position was vacant for a long period and two new Supreme Court Presidents were appointed. All these factors contributed to delaying any responses or actions for the implementation strategies at the policy level.

The scheduling of the activities in the project had to be closely adapted to the situations as the project evolved. Its inherent iterative structure was essential to quickly respond to the result in progress. Some activities had to be rethought in order to meet our objectives. The initial scheduling was remodelled during the course of the project with the formal approval of the CIDA.

The assassination of the Serbian Prime Minister Mr. Zoran Djindjic, March 18th, 2003 and the state emergency forced ICJ-Canada to postpone its one-week mediation seminar from April 2003 to October of the same year. Also, an organized crime Roundtable was added to the original activities to meet urgent needs of training in this matter, following the creation of the Organized Crime Court in Serbia.

3.2 Lessons learned in the South-East Adriatic Countries

Through out its five years experience, ICJ-Canada learned few lessons, that can be summarized as follow:

- There are still a lot of **Human Rights training** to be completed. Specifically in the cross-influences of the International, European and National regulations;
- Judges need time to digest the flowing information and to adapt it to their reality. The needed reflection cannot happen overnight. **Changing mentality** or habits may take some time with the best devotion;
- As an image worth a thousand words, intensive **seminars in Canada** have permitted judges from these countries to see their Canadian counterparts into action and to develop bilateral sustainable relationship. Exchanges between judiciaries at an international level have proven to contribute to judge's sense of being part of a respectful and respected justice system.
- As it is essential to ensure continuity and trust from the local community, ICJ-Canada will enhance **its presence in the field**. Even though committed local institutions will promote the project itself, ICJ-Canada's presence in the field energizes and strengthens the relationship between the communities and will ensure better links with local government representatives.
- The process of reform often depends on its organisation itself. While ICJ-Canada can assist with diagnosis, analysis of issues, and sharing of knowledge and methods, **ownership of the transformation** process is crucial to its success and long-term sustainability;

- Since this project targeted the promotion of democracy and good governance, the turmoil of new ideas emerging from in depth reflection must be maintain. The *momentum created*, led judges to believe in the sustainability of the reform and results as small as they can be perceptible should continue at a regular paste;
- Trust within the judiciary is also a key to the success of such an initiative. The credibility ICJ-Canada believed to have created with its *judges-to-judges approach* is unique and beneficial in the sustainable reform. Many personal relationships between Canadian judges and local judges have led to ongoing discussion and allow sharing personal and professional experience in specific contexts. The affinity shared by judges, despite the differences in their legal tradition or legal background, led to a network of sharing information and knowledge;
- The **assessment of the results** remains problematic in the execution of such project. Good Governance and Democracy are concepts difficult to measure. Initiatives might develop series of indicators to base their final evaluation, both qualitatively and quantitatively. Research methodology already have different tools that can be used and consultation with experts in assessment of changes in democracy need to be developed;
- Finally, **flexibility** remains a great consideration in carrying out the activities. The scheduling of the activities in this project had to be closely adapted to the situation as the project evolved. Its inherent iterative structure was essential to quickly respond to the results in progress;
- Redesigning project's activities and correlative during its phase of implementation can be difficult and need to be done more rapidly

Although most activities were performed nationally, the project intended to bring both participants of Croatia and Serbia & Montenegro at the end of its implementation phase to share their own experience. With the trauma of the war, practices and outlooks still in place, citizens and judges need to learn to share their experience, and consequently, learn from one each other.

Nevertheless, resistance to be involved in regional activities was put forward by some Croatian participants. On the contrary, Serbian, Montenegrin, Bosnian, Slovenian and Macedonian judges were not reluctant at all to participate in regional events.

The Croatian participants expressed that the issue of improving the Court efficiency remains a national issue. They alleged there was little interest in sharing their experience with their neighbouring countries. However, some Croatian judges felt the contrary and did participate in the regional activities.

This situation was unexpected for the project, but in order to maintain a harmonious relationship and to pursue the national objective as a priority, ICJ-Canada continued its regional component with the limited number of Croatian judges involved in the Court efficiency module. On the other hand, Croatian judges were more willing to be integrated as leaders concerning the Human Rights regional conference. With that in mind, regional conferences of the project have contributed to create links between key figures of the judiciary in each country, although better relationships still need to be strengthened in the coming years. Common bridges will have to be identified as links between the two countries, even if the pace of the reform is different.

The results of the meetings that have taken place between Association of judges and JTCs are of a great value since regional conferences are not yet well integrated in the mentality and are organised on sporadic occasions.

All countries of the former Yugoslavia are looking to join the European Union and this factor serves as a catalyst in the growing exchanges of legal information between the countries. Even if tensions are still present from few actors, a growing majority of jurists understand the advantages and the needs of exchanging legal knowledge.

Conclusion

Sensitivity, flexibility, adaptability, and I would say humility, are the paramount requirements to work internationally, in a successful way.

After my six years of experience in the Balkan's region, combined with many discussions with my colleagues, I strongly believe that opening dialogue with the key members of the judiciaries leads to a more sustainable reform process. It was a great learning experience for the judges in the Balkan countries, as it was for their Canadian colleagues. I feel privileged to have been part of an initiating long-lasting dialogue with members of the different judiciaries and to have witnessed many changes.

To be successful, we have to target our involvement and to plan the specificities of our interventions, to find an appropriate "niche". We also have to establish synergy of efforts with the beneficiary countries. In addition, we need to coordinate with various stakeholders and to ensure a real presence in the field.

Evaluating «Justice» in terms of results measurement might be difficult when measurement is mathematic. It shows that building democracy, enhancing and strengthening Judiciary and Bars, is a long and complex task.

But the difficulties of the task are, from far, less important than the fantastic plus that we gain in such an endeavour.

Opening our minds, we distance ourselves, we question our own domestic ways of analysing and resolving problems, we get in close connection with the world and, at the end of the day, we become, I think, a better lawyer, a better judge.