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A KZNJETCOM Newsletter

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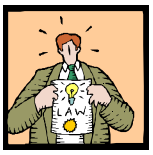
Welcome to the fourth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. An Explanatory Summary for *the* ***Firearms Control Amendment Bill, 2006*** was published in GG 28843 dated 19 May 2006, p3.

   Amongst others the following proposals are made in the Bill:

   a) The definition of ammunition must be substituted by the following definition: "ammunition means a primer or cartridge".

   b) A *muzzle loading firearm* is now to be regarded as a firearm and is defined as follows: "a barrelled portable weapon that can fire only a single shot per barrel and which requires after every shot fired the individual reloading through the crown of the barrel with separate components consisting of a measured black powder charge, wad and pure lead ball to enable it to function as a projectile and further primed with a flintlock or percussion cap."

   c) There is also an addition to section 103 in the form of section 103(6) which reads as follows:
   (6) section 103 does not apply in respect of the payment of an admission of guilt fine in terms of section 57 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)
   (In this regard see the decision in S v Makolane 2006 (1) SACR 589 TPD discussed In Recent Court Cases hereunder.

2. The Regulations in terms of the ***National Credit Act*****, No. 34 of 2005** has been published in Government Gazette No. 28864 of 31 May 2006, p3.

Recent Court Cases

1. S v Mostert 2006(1) SACR 560 NPD

The accused was charged with assault and *crimen iniuria*. The defence of obedience to orders was raised at trial and again on appeal.

Held, that obedience to orders entailed an act performed by a subordinate on the instructions of a superior, and was a recognised defence in law. Although it usually arose in a military context, it was not applicable only to soldiers. For the proper functioning of the police and the protection services, it was essential that subordinates obey the commands of their superiors. Accordingly, the defence was available to traffic officers. (At 563*i*-564*c*.)

Held, further, that there were three requirements for this defence: the order must emanate from a person in lawful authority over the accused; the accused must have been under a duty to obey the order; and the accused must have done no more harm than was necessary to carry out the order.

Held, further, regarding the charge of *crimen injuria*, that the magistrate's finding that the appellant had called the complainant a 'piccanin' was, in light of the evidence, justified. *Crimen injuria* was the unlawful and intentional violation of the dignity or privacy of another, where such violation was not trifling. South African society was still, understandably, sensitive about racial slurs, and the word 'piccanin' bore negative racial connotations. It was necessary to eliminate such expressions if the right to dignity were to be protected. There was no doubt that, provided intention was present, calling a black person a 'piccanin' could constitute a violation of that person's *dignitas*. The appellant must subjectively have foreseen the possibility that his use of that appellation could insult or hurt the complainant; and the latter had testified that he had indeed felt bad and defamed. (At 570*b*-573*e*.)

2. S v Makolane 2006(1) SACR 589 TPD

The accused was charged with the theft of two bags of cement. He was issued with a notice in terms of s 57A of the Criminal Procedure Act 51 of 1977, and given the opportunity to admit guilt and pay a fine of R300. He did so and the admission of guilt was confirmed by the magistrate. Thereafter, the matter was sent on special review to the High Court on the basis that there should have been an enquiry in terms of s 103(2) of the Firearms Control Act 60 of 2000 into the accused's fitness to possess a firearm and that, therefore, an accused charged with an offence mentioned in Schedule 2 of the Firearms Control Act should not be entitled to pay an admission of guilt fine

Held, that s 103(1)(*g*) of the Firearms Control Act referred to offences in respect of which direct imprisonment without the option of a fine was imposed; a person so sentenced was automatically unfit to possess a firearm. Section 103(2), on the other hand, referred to offences mentioned in Schedule 2 to the Act; among these (at para 7(*c*) of the Schedule) were offences involving dishonesty in respect of which the accused was *not* sentenced to a period of imprisonment *without* the option of a fine. Where a court handed down such a conviction and sentence, it was required to determine whether or not the accused was fit to possess a firearm. Section 103(2) read with para 7(*c*) of Schedule 2 was difficult to

understand, but the confusion would be resolved if para 7 *(c*) were recognised as referring to cases where an accused was sentenced to a jail term *with* the option of a fine. Thus, s 103(1)(*g*) referred to cases of imprisonment without the option of a fine (and made a declaration of unfitness to possess a firearm automatic), while s 103(2) referred to cases of imprisonment with that option (and made an enquiry into the accused's fitness mandatory). Neither of these sections was applicable to cases where the accused paid an admission of guilt fine under s 57A of the Criminal Procedure Act since there was no question of a jail sentence – with or without the option of fine – in terms of that section. Accordingly, s 103 of the Firearms Control Act did not preclude the use of the procedure set out in s 57A of the Criminal Procedure Act, and the accused's admission of guilt and the fine imposed were in order. (At 502*d*-593*e*.)

3. Mindi v. Malgas 2006(2) SA 182 (ECD)

The plaintiff borrowed R6 000 at the rate of 30% per month. Having repaid the capital and interest in an amount of R34 692, she claimed that such payment had been made in the honest and reasonable belief that the full interest was payable and reclaimed the excessive interest from the lender who, she alleged, had been unjustly enriched to that extent. The Magistrates Court agreed with her and found that she had not been obliged to pay the usurious rate she had been charged. The court accordingly awarded her the difference between the interest charged and paid and interest at the legal rate of 15,5% per annum – namely R26 612. Unhappily for the plaintiff, the magistrate was found to be wrong. Instead of interest at the agreed rate, the lender was held, on appeal, to have been entitled to interest at the maximum applicable rate prescribed by the Usury Act which was 32% per annum. The enrichment was, therefore, only R4 435, which the plaintiff was awarded on appeal.

From The Legal Periodicals

Criminal law

Bakker, P 'Bestaanbaarheid van bigamie as misdryf in 'n kultureel heterogene samelewing' 2006 *THRHR* 64.
Bhamjee, S and Hoctor, S 'Constructive breaking – a constructive part of the housebreaking crime?' 2005 *Obiter* 726.
Hoctor, S 'The right to freedom of expression and the criminal law – the journey thus far' 2005 *Obiter* 459.

Criminal procedure

De Villiers, DS '*Nolle prosequi* van 'n *prima facie* saak beoordeel teen die lig van die onafhanklikheid en vervolgingsdiskresie van die staatsaanklaer' 2006 *TSAR* 173.
De Villiers, WP 'Negotiated pleas: notes about and towards effective assistance by counsel' 2006 *THRHR* 152.
Watney, M 'Judicial scrutiny of plea and sentence agreements' 2006 *TSAR* 224.

Legal profession

Budlender, G "Transforming the judiciary: the politics of the judiciary in a democratic South Africa" 122.4. *SALJ* 715

Contributions from Peers

Eviction of unlawful occupiers – Does the criminal law offer protection?

I have often been approached by tenants who have been threatened by their landlords with eviction because they are in arrears with their rent. Normally they are given a notice to vacate the property on a certain date and are then told that if they do not move out they will be removed by force by the landlord. I normally advise them that such an eviction cannot be done except on the authority of the competent court. Still they ask, what are they to do if the landlord carries out his threats (which he invariably does)?
Section 8 of the *Prevention of Illegal Eviction from and unlawful occupation of Land Act*, No. 19 of 1998 is of particular importance in such a case:
The section reads as follows:

8. **Offences and private prosecutions**, -

1) No person may evict an unlawful occupier except on the authority of an order of a competent court.
(2) No person may willfully obstruct or interfere with an official in the employ of the State or a mediator in the performance of his or her duties in terms of this Act.
(3) Any person who contravenes a provision of subsection (1) and (2) is guilty of an offence and liable on conviction to a fine, or to imprisonment not exceeding two years, or both such fine and such imprisonment.
(4) Any person whose rights or interests have been prejudiced by a contravention of subsection (1) has the right to institute a private prosecution of the alleged offender.
(5) The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), apply to a private prosecution in terms of this Act: Provided that if-
    (a) the person prosecuting privately does so through a person entitled to practice as an advocate or an attorney in the Republic;
    (b) the person prosecuting privately has given written notice to the public prosecutor with jurisdiction that he or she intends to do so; and
    (c) the public prosecutor has not within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence,
    then-
        (i) the person prosecuting privately need not produce a certificate issued by the
        Attorney-General stating that he or she has refused to prosecute the accused;
        (ii) the person prosecuting privately need not provide security for such action;
        (iii) the accused is entitled to an order for costs against the person prosecuting privately if-

(aa) the charge against the accused is dismissed or the accused is acquitted
or a decision in favour of the accused is given on appeal; and
(bb) the court finds that such prosecution was unfounded or vexatious; and

(iv) the Attorney-General is barred from prosecuting except with the leave of the court concerned.

A similar provision is enacted in the extension of Security of Tenure Act, No. 62 of 1977 (Section 23).

As can be seen from the above provision an unlawful occupier has criminal law protection from abusive landlords. An attempt to evict an unlawful occupier in these circumstances will also be illegal. Here the provisions of section 18 of the *Riotous Assemblies Act,* Act 17 of 1956 are applicable which reads as follows:

18. Attempt, conspiracy and inducing another person to commit offence,-

(1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

(2) Any person who-

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

The fact that there has been no reported cases dealing with this offence indicates that it is either unknown or otherwise underutilized. Maybe more attempts must be made to bring these provisions to the attention of the public, SAPS and prosecutors.

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MAGISTRATE/GREYTOWN

If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest for Magistrates

JUDICIAL EDUCATION, JUDICIAL INDEPENDENCE AND INTEGRITY - Hon. Justice Michel Bastarache

SECOND INTERNATIONAL CONFERENCE FOR THE TRAINING OF THE JUDICIARY
NATIONAL JUDICIAL INSTITUTE
Ottawa, Ontario

October 31 - November 5, 2004

I have been asked to speak here today about the relationship between judicial education, judicial independence and integrity. At the outset, I think it important to define what exactly is captured by the phrase “judicial independence”. The concept, of course, refers broadly to freedom from control or interference by any outside group. In *R. v. Valente*, a Supreme Court of Canada decision dating back to 1985, the court wrestled with the meaning of the phrase “independent tribunal” in s. 11(d) of the *Canadian Charter of Rights and Freedoms*, which guarantees the right of any person charged with an offence “to be presumed innocent until proven guilty according to law in a fair and public hearing by an *independent* and impartial tribunal”. Justice LeDain held that “[t]he word "independent" in s. 11(d) [...] connotes [...] a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees”.

Of course, while the concern has historically been that judges be independent from the executive power, it is now widely recognized that judges must be independent as well from powerful non-governmental interests. Thus, the Supreme Court made absolutely clear in 1986 in *R. v. Beauregard* that “no outsider--be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision”.

It is interesting to note that much of the analysis in the *Valente* case as to the meaning of the phrase “independent tribunal” turns on distinguishing the concept of independence from the concept of impartiality. Impartiality, according to Justice LeDain, refers *not* to a status or relationship to others, but to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.

Thus, J. E.S. Fawcett argues that “the often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay -or legal”. Understood in this way, it is debatable whether there is in fact a need for two distinct concepts; after all, any objective strictures on the independence of the judge or court will only be significant if they are manifest by apparent or real subjective impartiality of the judge.6 Justice LeDain himself may have thought so, holding in the *Valente* case that “[...] the concern is ultimately with how a tribunal will actually act in a particular adjudication, and a tribunal that does not act in an independent manner cannot be held to be independent within the meaning of s. 11(d) of the *Charter*, regardless of its objective status”. The point was made even clearer a few years later by former Chief Justice Lamer in *R. v. Lippé*, who stated:
The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary.

However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality. The point for now is that any discussion about the impact of judicial education on judicial independence naturally lends itself as well to a discussion about the impact of education on judicial impartiality.

This brings us to now consider the relationship between education and independence. As I see it, there is both a direct and an indirect relationship between judicial education and the effective operation of the judicial system. There is a *direct* relationship in that educating

judges towards the refinement of their courtroom skills and the development of their substantive legal knowledge will simply result in more efficient trials and in better decision making. There is also an *indirect* relationship - which is the focus of this discussion - in that education may contribute to increasing judicial independence and impartiality. I will explain how soon. For now, it is important to note that independence and impartiality contribute to public confidence in the administration of justice, since an independent and impartial tribunal both produces just decisions *and* readily appears as being *capable* of producing just decisions. (Remember that the test for independence and impartiality in Canada asks not only whether there is *actual* independence or impartiality, but also whether there is *apparent* independence or impartiality; public perception is paramount.) Of course, this is all necessary in large part since, as discussed by Mr. Guarnieri, judicial decision-making is widely recognized to be a creative process - and this in particular for courts of appeal. Further, as pointed out by Justice LeDain in the *Valente* case, public confidence in the administration of justice is necessary for the system to command the respect and acceptance that are essential to its effective operation.

Stated simply by Justice T. David Marshall, "[i]f the litigants and, through them, the public are not convinced of the judges' complete impartiality, the system will not be respected and hence will not be followed". Thus, insofar as judicial education may play a role in promoting and sustaining independence and impartiality, its implementation is invaluable to the operation of a judicial system. On the other hand, we must proceed carefully, since, as will I will discuss shortly, education may in some circumstances in fact undermine independence and impartiality. Indeed, this is the very paradox that is the relationship between education and independence...

Moreover, if all this was important yesterday, today it is crucial, and this because of ever increasing significance of the role played by the judiciary in modern society. This is due, in part, to society having become more litigious and more reliant on the legal system. But more than that, it is because courts have in the recent past been increasingly called upon to rule on issues that define the fundamental values of society. Mr. Guarnieri discussed how today, the judiciary's role in a democracy is understood as defending the rights of citizens against political majorities, and protecting citizens from potential abuses by representative institutions and the majorities that control them. Indeed, in Canada, for example, the *Canadian Charter of Rights and Freedoms* has dramatically increased the visibility of the judiciary in Canadian society. In the last twenty years or so, our courts have addressed a plethora of issues truly targeting our most important morals and values, whether it be with regard to freedom of expression or religion, human cloning, or the definition of family. As we speak today, the Supreme Court is in the process of deciding whether homosexuals can marry and whether the government can ban the provision of private health care. These cases - and hundreds like them - are of huge significance to every citizen and make the judiciary subject to regular and intense media scrutiny. Law is a particularly adept instrument for solving problems, since it offers a process that promotes legitimacy and an analytical framework that fosters rationality and equality.

The very justification for relying on law as our mechanism for resolving disputes – and in particular those disputes which raise questions of fundamental importance – relies heavily on the independence and impartiality of the judiciary.

Only in the last twenty years or so has judicial education been widely recognized as a useful means of assisting judges in their work. Initially, the argumentation for implementing a system of judicial education in Canada - as presented at the time by Justice Edson Haines - was threefold. First, given that Canadian judges are appointed from a heterogeneous group, including academics and lawyers, some of whom have had little experience in court, and

some of whom are knowledgeable only in one branch of the law, judicial education is necessary to fill any gap existing in the new judges' experience. Second, once appointed, a judge at the trial level is never again witness to another judge's functioning, and bringing all judges together allows each to learn from the other's experience and errors. Third, while a judge may take his time to learn or relearn substantive law during individual cases, he/she must immediately become knowledgeable in the law of evidence and procedure, in order that trials are conducted efficiently and fairly.

Overall then, the justification for first instituting a judicial education program was to ensure that judges possess the substantive legal knowledge to render good legal decisions and the skill set to conduct efficient trials. Even more important, however, and perhaps not explicitly envisioned at the time, is that education contributes to independence and impartiality. Indeed, proponents of education emphasize the desire to achieve an independent and impartial judiciary as perhaps the primary justification underlying the implementation of a judicial training program. Thus, former Chief Justice of Canada Antonio Lamer stated that "the independence conferred upon judges is a great responsibility. It requires a judge be as well trained as is possible". As well, former Supreme Court Justice Frank Iacobucci, while serving as Vice-Chair of the Board of Governors of the National Judicial Institute, noted, "[w]e believe that innovative and effective judicial education is crucial to maintaining and enhancing the independence of the judiciary".

The question of course is *how* does judicial education help to promote and sustain judicial independence and impartiality. Mr. Guarnieri discussed some of the mechanisms - such as how judicial competence breeds identification with the norms of the judicial profession and of the judicial organization, and how competent judges require less intrusive day-to-day controls on their performance. I would add the following two observations. First, stated simply, judges who are lacking in skills and knowledge may be more vulnerable to outside influence, and may appear to the public as being so vulnerable. This vulnerability does not extend merely to influence from powerful entities, such as interest groups or the media, but even to other judges. Indeed, there is an accountability to society in being a judge, insofar as judicial decisions are made public, and this accountability is inherently threatening. Yet, there is a self-assurance which comes with knowledge and qualification, and this self assurance propels one to act in accordance with one's own understanding and perspective. Impartiality requires a judge to approach a case with his mind open to the issues, and not to be inclined to sway in favor of some colleague, a particular group, or even society-at-large.

The second manner in which education contributes to independence is closely related to the first, and this is that education actually opens a judge's mind to all the subtleties and nuances to the issue before him, to all of its social and political ramifications. In this regard, I am reminded of Justice Cory's words in *R. v. S.(R.D.)*, who himself quoted from the Canadian Judicial Council:

The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial does not mean that a judge does not, or cannot bring to the bench many existing
sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

Mr. Guarnieri talked about how judges are increasingly confronted with cases having dramatic implications, yet without possessing knowledge of the way their decision will impact the human environment. In my view, to approach a case with an open mind requires a judge to be acutely aware of all of its various dimensions, and in particular of its human aspect. Decisions which are the product of a narrow and single-minded perspective can be said to be impartial no more than decisions which are influenced by the perspective of a particular group. Indeed, as argued by Allan Hutchinson, professor at Osgoode Hall Law School, "[i]f independence or neutrality is to mean anything, it must mean a recognition of one's own predispositions and a constant willingness to re-interrogate them". True impartiality requires a judge to approach the issue before him knowing as much about it as possible, to fully understand the ramifications of deciding one way or another, so that the ultimate judgment reflects a careful consideration of all relevant factors.

Indeed, one of the recent initiatives of the National Judicial Institute to this end is the institution of social context education. As explained by former Chief Justice of Canada Antonio Lamer, "social context education for the judiciary is designed to make judges both more aware of and better able to respond to the many social, cultural, economic and other differences that exist in the highly pluralistic society in which we perform our important duties".Among the issues addressed in social context education is "increasing awareness of the social and economic realities of groups that have tended to live on the margins of mainstream society to ensuring familiarity with substantive law in areas like human rights legislation and s. 15 of the Charter". Certainly, this type of program would have great potential to contribute positively to judicial independence and impartiality, along the lines I just described. It would prod the judiciary to question and evaluate its assumptions and predispositions.

Yet, the social context education program at one time produced some controversy. This is no longer the case, obviously, everyone concerned with judicial education having accepted that more knowledge about social conditions is necessary to enlightened decisions. The controversy, in part, was attributable to the concern that these programs affect *result* rather than *process*. A useful paradigm to understand this dichotomy comes from Dr. Kate Malleson of the London School of Economics, who argues that education contributes to independence insofar as it influences the way in which judges carry out their tasks, and that the difficulty only arises where training influences or appears to influence the substance of the decisions themselves. She argues that social context training may on the one hand be understood as a way of teaching judges to deal sensitively with issues of, for example, race and gender, and that, on the other hand, it may in some circumstances directly impact the substance of a judge's decision, reflecting the ideological orientation according to which the information was imparted. To some degree, approach impacts result. It is evident that more knowledge will have an impact on decisions, and that the very reason for imparting more knowledge is to affect changes in decisions that were seen in the past as unjust or insensitive.

This does not mean that judicial education on a subject like social context education is a form of indoctrination inconsistent with judicial independence. The quality of any program will depend on its foundations, its objectives, and the professionalism of those providing it. Though it may not be easy to draw the line between approach and result, there are certain factors pertaining to judicial education which undermines independence and impartiality in more obvious ways. Chief Justice Lamer argued that social context education itself is uncontroversial, but that making it mandatory for all judges and having it designed by institutions other than the judiciary would threaten judicial independence in a fundamental way.

In his words: Regarding making such education mandatory, one need only ask how one would deal with a judge - and let us assume a federally appointed judge whose record is in every other respect exemplary - who refused to attend such a program. How would one deal with a similar judge who registered for a program but attended very few of the sessions? Can anyone seriously suggest that it would be appropriate for such a judge to be removed from the bench by Parliament? I would hope not. As for the suggestion that some group or body other than the judiciary should control the design of social context education programs, the threat which that represents to judicial independence seems to be obvious. A judiciary upon which a dependency on outside bodies is imposed, in respect of the subject matter of its educational programs, can hardly be said to be independent. Moreover and more importantly, this lack of independence will almost certainty have an adverse effect on the perception, if not the reality, of the judiciary's impartiality.

The former Chief Justice raised a number of important issues with regard to teachings which are inherently value-laden, such as social context education, but indeed for all types of training. The possibility for independence and impartiality to be undermined even where the subject matter itself is neutral exists, depending on the larger education paradigm. For example, who should organize and conduct courses and seminars? According to Justice Marshall, only a centralized delivery mechanism, such as the National Judicial Institute in Canada, can be strong enough to remain independent of either federal or provincial executives or other powerful groups.

Most obviously, a program which is sponsored by and/or controlled by government would seriously affect perceptions of the separation of the judiciary from government.
This paradigm would readily risk the perception that government was telling judges what to do and how to do it. Justice J.A. Dowsett of Australia goes further, arguing that "government would then quickly come to believe that it was doing just that, start enjoying it, and seek to go further".

Moreover, even if neutral organizations provided training in a totally independent way, these organizations would likely require outside funding, and there may be a tendency to direct programming at subjects advocated by funded interest groups who can pay for them, or who have the influence to encourage governments to pay for them. It is clearly inimical both to judicial independence and impartiality to have subjects chosen by a public interest group with influence rather than according to judicial need. What seems to be important is that judges have the ultimate control over the selection of topics and the choice of persons to prepare and deliver education programs.

Second, from what fields should teachers be recruited? In the past, a prominent view was that, ideally, judges should teach judges. It was thought that academics or community representatives may not be spokespersons for interest groups, but nevertheless may raise a legitimate concern in the public's eye as to the political orientation of their teachings. I think it is clear that judges can draw from a broad spectrum of qualified persons to deliver programs and that it is unnecessary and unrealistic to expect judges to deliver all education or even most of education to other judges. As noted earlier, the necessity of involvement of judges lies foremost in the control over the whole process.

Third, who will decide which courses a judge must take? Ideally, each judge should have the ability to select the assistance which he requires, and thus be independent in regard to gaining information or experience or broadening his perspective as a judge. Even a chief justice should not make these decisions for the puisne judges, let alone use training opportunities as a reward for certain conduct; it would be very difficult for a judge to differ in ideology or approach from a chief judge controlling educational opportunity.

Fourth, how do we assess the success of the judicial education programs? Surely we must always strive to make the programs better, and yet any direct assessment of judges' performance on the bench, as indicator of the success of the programs, would threaten judicial impartiality and the appearance of it.

Overall, there is no easy solution to these difficulties, no clear point at which the line is crossed. My goal here today is merely to illustrate the precarious and vulnerable relationship that exists between judicial education and judicial independence. Education may foster as much as it may undermine independence. What is taught is as important as how it is taught and who is teaching. All aspects of a judicial education program must be carefully scrutinized before implementation, to ensure that the means chosen do not frustrate the ends envisioned. We now have more experience in this area and are less concerned about the way in which we deliver judicial education, having found a variety of ways to ensure quality education by drawing on the expertise of persons from many venues without particular risk to the independence of judges.

Before I leave you, a quick word about judicial education and integrity. Often, it is said that judicial integrity is achieved by a judiciary that is competent, independent, and impartial. Indeed, in my view, judicial integrity means properly carrying out one's oath of office. Justice Cory discussed the importance to the judge of taking this oath in *R. v. S.(R.D.)*:
It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

These comments were made in the specific context of apprehension of bias, but they reflect the interrelationship between the various concepts at play. Simply stated, a judge who is better educated, who is more knowledgeable in substantive law and in the law of procedure and evidence, who is less vulnerable to outside influence, who is more open to new ideas and who is better able to assesses them critically, is a judge who is better able to fulfill his oath of office. At the end of the day, this truly is what the proper administration of justice is all about.

I wish you all good luck.

Accessed 30 March 2005
http://www.nji.ca/internationalForum/bastarache.pdf

[This is an edited version of the address of Mr. Justice Bastarache . All references have been deleted for easier reading.]