

THE CONTROVERSIAL CODE

By Justice Adrian D. Saunders

I understand that Justice Mitchell has thrown out a challenge to his colleagues. A reliable source informed me that my learned Brother would like to see us provide him with some “intellectually stimulating” and “controversial” articles for our electronic journal, which he has a large part in editing. I don’t know how “stimulating” the following will be but I have good reason to suppose that it will not escape the other criterion.

Before launching into controversy, I wish to take this opportunity to extend warmest congratulations to the Hon. Chief Justice, the Court of Appeal staff and technicians, Mitchell, J. himself and all who have a hand in the production of our newsletter and web site. In a short space of time our Court has certainly come a very long way in the use of modern information technology. The mastery of electronic communication certainly provides the easiest, fastest, cheapest, surest means of developing our court facilities and overcoming the limitations posed by our multi-island structure. It truly makes one proud to be able to boast to colleagues from other countries of our modest accomplishments in this field. I must add that those colleagues are invariably suitably impressed and envious.

The introductions over, now to the controversy: A Code of Ethics for Judges of the Eastern Caribbean. (Do I hear someone groaning, “Not *him* and *that* **again!!!**”) Well, I’m sorry but I don’t think this issue is going to go away. I feel that even if we tuck it away somewhere, sooner or later the general public will require us to re-visit it.

Let us back up a little so that we can briefly go over some of the background. In March of this year (2000), the Dumas Report on the Judicial and Legal Services Commission recommended, in fairly strong terms, that there should be an enforceable Code of Ethics for our Judiciary. It was further recommended that this Code should contain disciplinary procedures and graduated sanctions.

Even prior to the submission by Mr. Dumas of his report, the Latimer House Guidelines for the Commonwealth in June, 1998 mandated that “A code of judicial Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges.” The CMJA (Commonwealth Magistrates’ and Judges’ Association) was, in the Latimer House Guidelines, encouraged to complete its Model Code of Judicial Conduct.

It was perhaps in response to the Latimer House Guidelines that Sir Dennis had requested me, even before the Dumas Task Force had embarked upon its mission, to do some preliminary work on the matter of a code of judicial ethics. Just about the time that the Dumas report was made public, a committee of judges was already being constituted to produce a draft for consideration by the entire judiciary. Our judiciary did have some

preliminary discussions among ourselves on the matter and, at those discussions, support for the idea of a Code of Ethics was at best lukewarm.

Since then, the Ethics Committee, which includes Justice of Appeal Redhead, and Justices Benjamin, Alleyne, Mitchell and myself, has completed a draft code. It was modeled on the United States Code. An electronic copy of this draft is readily available but it is my hope that each judge should shortly receive a hard copy.

In the mean time, throughout the Commonwealth, a serious re-think has been underway about the desirability of Judicial Codes of Ethics. For a start, it was recognized very early on that a Code of Ethics is radically conditioned by the circumstances in which it is intended that the code should operate. The idea of a Commonwealth Draft was therefore quickly debunked as being unfeasible and counter-productive. This is not a view with which one can argue. I certainly support it. Where I do have a problem is in the steadfast resistance that is encountered in the very idea of putting into written form principles and standards of judicial behaviour. In other words, there is a feeling that the participants at the colloquium at Latimer House may have been entirely dead wrong on this whole issue of judicial ethics.

The main burden of this article is to respond to some of the views that I have heard justifying such resistance. Interestingly, only judges seem to be opposed to the idea of a code of ethics for judges. I have not met many persons outside the ranks of the judiciary who have said to me that that was a bad idea. Far from it, most welcome such a measure.

I will concede at the outset that the issue of whether to adopt or not adopt a written code is not as easy or as straightforward a matter as at first blush I thought it to be. I find it difficult however to subscribe to some of the arguments against. For example, I recently heard a judge from another part of the Commonwealth state his opposition to a code of ethics in these terms. The judges in his country, he said, are either fit or unfit. There is no intermediate status. I believe the point that he was thereby making was that there was no room for a determination that a judge had fallen short of some particular ethical standard while that judge held office.

I can understand this viewpoint in the context of the practical problems involved in incorporating into a code a regime of sanctions. I think I have been won around to the view that it would be inappropriate in our circumstances for a code to contain a sanctions regime. It is difficult to envisage how this will work in practice. Who will judge the judges? Can a member of the public lodge a complaint? If such a complaint is justified (but is not serious enough to warrant dismissal) and the judge is sanctioned, then surely the public is entitled to know how the complaint was dealt with and the nature of the sanction, if any, that was imposed. But after all that, can there still be a sufficient level of public confidence in that judge's ability to continue carrying out the functions of the office? Would not each judge under investigation be entitled to Counsel and a full hearing during the complaints procedure? Who will sit in judicial review of the tribunal's decisions? A panel of judges one or two of whom have in the past been sanctioned for some infraction not dissimilar to the one under review? In our jurisdiction of less than a

score of judges, would the foregoing undermine or heighten the integrity of the judiciary? It seems that the practical problems that can arise are as huge as the consequences for public confidence in the judiciary are uncertain.

It is one thing however, to illustrate the problems involved in maintaining a sanctions regime. It is quite another to make the quantum leap that these problems necessarily mean that it would be inappropriate to define in writing key concepts of ethical principles and standards.

Resistance to the idea of a code of ethics is rooted in a variety of other reasons. The one that least appeals to me is that British judges do not have such a code and hence we do not need one. I would have thought that British traditions and practice had, with independence, ceased to be the sole yardstick for measuring the value of our own cultural norms and constructs. British traditions evolved in Britain over centuries under specific conditions. If they appear to work well there that is no guarantee that they have functioned or will function equally well in our region. On the tapestry of British cultural and social existence there are various threads (some not quite visible) that reinforce and support any particular tradition. The absence or acute under-development of those threads in our context renders any transplanted tradition susceptible to being severely undermined.

Then there is the claim that the United States only devised a code because their judges are elected. I am intrigued by this argument because the reasoning may well be a good explanation for the relatively early introduction of a code in that country. But it does not explain why the U.S. code applies not only to elected judges but also to federally appointed ones.

Another view that is quite popular is that a code can hardly be ever necessary because a judge is presumed to be ethical. This notion is more or less like the fit or unfit contention. If you were unethical you would not be a judge because you would not have been appointed in the first place. If you are a judge then that is proof positive that you are ethical and it is somewhat of an affront to suggest, via a code or some similar document, that you need to be reminded of what is or is not ethical.

I believe that this line of reasoning can be attacked on several fronts. The way I would respond to it here is that it assumes that ethical behaviour, and its antithesis, is always easily identifiable. That is a patently false assumption. Ethicists disagree, sometimes very violently, with each other. Two reasonable judges of high moral fibre can fail to reach agreement on whether a particular form of conduct is or is not ethical. What's important is not so much which of them is right but rather to which standard should they and their colleagues conform. This is why I find the level of detail in the U.S. code to be truly useful. To have a code that briefly states platitudes and clichés is to my mind tantamount to having no code at all.

I believe the most pervasive and often the most eloquently articulated point made about a code of ethics is that there is a risk that the existence of a code with strict prohibitions and imperatives may imply the establishment (or the perception thereof) of limitations upon the independence of the judiciary.

In passing I must say that it takes a little time to get over the paradox that one of the very purposes of a properly drafted code is to assure, or at least to assist judges in maintaining, judicial independence and to identify for judges the standards and criteria that should be met in order for their independence to be truly secured. If this is the case, how then can such a document have the very opposite effect?

Nevertheless, I believe that this point cannot be dismissed. Listening to some judges articulate it though, I was left with the distinct impression that while there was resistance to having a CODE (a word that seems to denote a cold inscription of inflexible injunctions and commands) there was in principle no opposition to the idea of publishing principles and standards of judicial behaviour.

The Canadian judiciary has apparently balked at the notion of adopting a code along U.S. lines. Instead they have published a document titled Canadian Ethical Principles and Commentaries. These are excerpts of what they have had to say about their intent in doing so:

... The intention is that Canadian judges will accept these Statements, Principles and Commentaries as reflective of their high ethical aspirations and that they will find them worthy of respect and deserving of careful consideration when facing any of the issues addressed in them.

...Setting out the very best in these Statements, Principles and Commentaries does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval.

... The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.

Interestingly, even before we were referred to this Canadian position, our Committee had stated our intent in the following terms in our Draft Canon 1:

... These Canons are rules of reason. They should be applied consistent with constitutional requirements and other law, and in the context of all relevant circumstances. The Code is to be

construed so as not to impinge on the essential independence of judges in making judicial decisions.

... The Code is designed to provide guidance to judges and nominees for judicial office. The Code may also provide standards of conduct for application in proceedings under the Courts Order, although it is not intended that disciplinary action would be appropriate for every violation of its provisions.

... Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper conduct, and the effect of the improper conduct on others or on the judicial system. Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct in question is proscribed. The Code is not designed or intended as a basis for civil liability or criminal prosecution.

... The purpose of the Code would be subverted if the Code were invoked by lawyers or litigants for mere tactical advantage in a proceeding.

Ultimately, I still hold firmly to the view that we need to address the ethics issue by publishing a document that serves to guide us and inform the public on the ethical principles to which we subscribe. Already the public demands this of legislators and of Ministers of Government. I think that sooner or later it will be demanded of us. The trenchant manner in which Mr. Dumas cast his comments on this aspect of his Report ought not to be ignored. I think he was there reflecting not his own perceptions but those of the people with whom he held discussions .

My hope is that we will all look at the Draft that the Committee has come up with and carefully prepare our views both on the philosophy that underlies it Draft and on the terms of the Draft itself.

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