

# **What do lawyers think about judicial evaluation?**

## **Responses to the Nova Scotia Judicial Development Project**

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#### **ABSTRACT**

As a contribution to evaluation practice, this paper reports on an evaluation of the Nova Scotia Judicial Development Project (NSJDP). Lawyers who completed evaluation questionnaires regarding the performance of judges responded to yet another questionnaire concerning the project. An analysis of their responses allows us to reach conclusions concerning the over-all evaluation process and specific issues of confidentiality, judicial independence and accountability.

The NSJDP provided individual judges with feedback on their performance in areas of legal ability, impartiality, judicial management skills, disposition practices and comportment. It remains the only Canadian experience with the systematic evaluation of judicial performance in this format. Concerns for judicial independence shaped the development, marketing and implementation of the project. Nova Scotia lawyers affirmed the over-all evaluation initiative while noting some concerns for response burden and confidentiality. Most lawyers did not believe the project threatened judicial independence.

The pilot project was considered a success in providing individual judges with useful information for further professional development, but has not moved past this pilot stage. The barriers to further implementation are identified as practical barriers of budgetary limitations, remaining reservations concerning judicial evaluation and the lack of innovation “champions” within the Canadian provincial court systems. International awareness and interest in the NSJDP is noted.

#### **Introduction**

This research is more a contribution to evaluation practice than it is to evaluation theory. The Nova Scotia Judicial Development Project (NSJDP) represented an evaluation context in which the implementation of a relatively straightforward methodology challenged traditions of professional isolation and understandings of judicial independence. The NSJDP, then, was an innovation in evaluation implementation which overcame concerns that evaluation would be a threat to judicial independence. For the judges who volunteered to participate, it provided a first time systematic feedback on their performance from a key constituent group, the lawyers appearing before them. It also implemented a within-court standard of performance in the absence of any available external benchmarks.

This paper reports on an evaluation of an evaluation. From August 1995 through the fall of 1996, the judiciary of Nova Scotia implemented a pilot project in judicial development

that represented (and remains) Canada's only attempt at the systematic evaluation of judicial performance. Lawyers who appeared before participating judges completed a performance appraisal questionnaire for the pilot project. At the project's conclusion, these lawyers, 750 in all, were sent a final questionnaire. It asked them to evaluate the project itself and their participation in it. Sixty-seven per cent of the lawyers returned the questionnaire. Their responses allow us to reach conclusions concerning the over-all evaluation process and specific issues of confidentiality, judicial independence and accountability.

### **The Nova Scotia Judicial Development Project**

The Nova Scotia Judicial Development Project (Poel 1994, Poel 1997) sought to promote the quality of justice in Nova Scotia courts by providing individual judges with information concerning their performance. The project objectives were to introduce the Nova Scotia judiciary to the concept and process of judicial development through systematic assessment and to provide the Nova Scotia judiciary with the practical experience necessary to finalize plans for an ongoing program of judicial development, should that be a desired next step.

#### ***The following were key features of the project:***

- judicial performance was evaluated through a lawyers=questionnaire and an individual judge's parallel self-assessment
- the lawyers' assessment was based on *general experience* with the judge and was not case specific
- the lawyers=questionnaire requested assessments of *legal ability, impartiality, judicial management skills, disposition practices and comportment*
- judges=participation in the pilot project was on *a voluntary basis*
- the information process sought to guarantee the *confidentiality of both judges and lawyers*
- senior or recently retired judges served as a "mentor@to the participating judges and organized a conference in which the questionnaire results and self-assessment were reviewed and goals for judicial development were proposed

A Coordinating Committee of judges representing four provincial courts assumed responsibility for the administration of the pilot project. The project was in place for 15 months beginning 1 August 1995. Over 60 per cent of Nova Scotia judges volunteered to participate. Each of four courts (Family, Provincial, Supreme and Court of Appeal) had at least 50 per cent of its judges involved. About 750 lawyers received one or more questionnaires and returned 1,797 questionnaires to the project's office.

#### ***Judicial independence and judicial evaluation***

Some Canadian judges believe the first and possibly only form of judicial evaluation is found in the possible appeal of their decisions to higher courts. This keeps the "evaluation process" within the formalities of the courts and focuses on questions of legal process and interpretation. It does not speak, however, to questions of comportment or nuances of judicial behaviour in the court room. Martin Friedland (1995) provides an overview of the origins of

judicial independence and the development of that concept under the Canadian Bill of Rights and, more recently, the Charter.

Nova Scotia lawyers were asked whether or not they thought the concept of judicial independence was threatened by the evaluation process implemented in the NSJDP. Why should this be a question? The notion of judicial independence suggests that nothing should inappropriately influence a judge's decision making. Friedland (pp. 9-10) points to three "essential conditions of judicial independence" that were elaborated upon by Justice LeDain in an early Charter case (*Valente*, 1985). LeDain identified security of tenure, financial security and the "institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial functions." This institutional independence could be considered to preclude the evaluation of judicial performance by any process other than the process of appeal or, only in the most extreme cases of inappropriate behaviour, judicial discipline.

Whether or not judicial independence precludes systematic, external evaluation of judicial performance depends on what one includes under "matters of administration." A very broad statement of inclusion is found in an opinion written by Chief Justice Dickson (*Beauregard*, 1986). He stated that:

. . . the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere with the way in which a judge conducts his or her case and makes his or her decision. (from Friedland, p. 12)

Most Nova Scotia judges did not think the process implemented by the NSJDP interfered with their judicial independence, but some did. The largest reference point to judicial evaluation is the American experience (See, e.g., ABA) and, in that regard, an important distinction is made. Nova Scotia used the New Jersey experience with judicial evaluation as their reference point and began their consideration of the pilot project with a visit from senior judge from New Jersey (New Jersey 1986).

Friedland notes a critical distinction between New Jersey's approach and other American state experience with judicial evaluation. The New Jersey model has as its primary objective "to develop and capture reliable information concerning judicial performance or individual judges to the end that judges can gain needed insight into their performance and to improve that performance accordingly." The New Jersey evaluation process focused on judicial self-improvement and, most importantly, was not linked to an election process. (ABA 1985, cited in Friedland). The crafting, marketing and implementation of the NSJDP rested in a very critical way on this understanding of "evaluation for judicial self-improvement." In fact, the "e" word was avoided in requesting individual judges to participate.

### ***Project office and staffing: implementation***

The project office was free standing in its office space, computer equipment and staffing. The planning committee considered it important that the office not be attached to

either the provincial Department of Justice nor be perceived as within the domain of the Chief Justices and Judges. Its databases were resident only within the office's desktop computer, not the provincial main frame or a departmental server. The Project Coordinator and support staff were "employees" of the Coordinating Committee, paid with the funds administered by the Law Foundation of Nova Scotia and were not provincial civil servants. These features assured both the appearance and reality of confidentiality with respect to information concerning individual judges.

A Project Coordinator was selected who was well known and respected by the Nova Scotia judiciary, was familiar with the law, court personnel and administration, had the ability to write the confidential review of an individual judge's performance, and would not appear before any particular judge in the future.

### **A questionnaire-based strategy**

The questionnaire was organized around the five judicial performance areas: *legal ability, impartiality, judicial management skills, disposition practices and comportment*. Within each area, lawyers were requested to assess a judge's performance on a number of related criteria. The criteria for each performance area are given in Appendix 1. For each criterion, lawyers indicated whether the judge's performance was: *excellent, good, adequate, less than adequate or poor*. The criteria used to assess legal ability are shown in the text box.

In addition to the five criteria, the questionnaire concluded with an invitation to provide "overall evaluation" of the judge's ability. In each performance area and, at the conclusion, lawyers were invited to provide written comments. Participating judges completed a self-evaluation questionnaire, which followed the same format as the lawyer's questionnaire.

### **Performance Area: Legal Ability**

#### Assessment criteria . . .

1. Knowledge of relevant substantive law
2. Knowledge of rules of procedure
3. Knowledge of rules of evidence
4. Factual analysis ability
5. Legal reasoning ability
6. Giving reasons for rulings when needed
7. Clarity of explanation or rulings
8. Clarity of judge's decisions (written or oral)
9. Completeness of judge's decision (For jury trial only)
10. Identification of relevant issues and analysis of applicable law in the jury charge
11. Formulation of a charge that is understandable and usable by the jury

The design of the questionnaire was based on similar questionnaire strategies in the questionnaire to the Nova Scotia context -- e.g., broadening "sentencing" to "disposition practices" and modifying the questionnaire for use in the provincial Court of Appeal. The Planning Committee was more concerned with "marketing" the project to the Nova Scotia judges than they were in fine-tuning a questionnaire, which, on its face, seemed comprehensive and feasible.

<sup>1</sup> The evaluation results came to the individual judge in a conference with a senior judge "mentor." The mentor came to the conference with a briefing document summarizing the results of the lawyer questionnaires received the judge. The briefing document used the average results from all other judges in the individual judge's court (Family, Provincial, Supreme, Court of Appeal) as the performance benchmark. The over-all assessment of Nova Scotia judges was favourable and, for the individual judge, the question was whether or not she or he was below, at or above the over-all assessment levels of his or her peers. See Poel (2001, p. 33) for discussion of judicial performance outcomes and the development of within- court performance standards. The conference goal was to establish two or three performance objectives for the individual judge. The briefing document was left with the individual judge at the end of the conference and, at the end of the pilot project, the document files were destroyed (along with the hard drive).

## Lawyer responses to judicial evaluation

The lawyers contributing to this evaluation of Nova Scotia judges were, for the most part, experienced lawyers who regularly appeared in court before the judges they

### The evaluation process – the questionnaire

An appearance by a lawyer before a participating judge triggered the evaluation process. Court officials forwarded the lawyer's name to the project office and a questionnaire was sent to the lawyer with a request to participate. The project evaluation asked these same lawyers about the length, comprehensiveness and clarity of the judges' questionnaire and about the importance of the option for written comments. Their responses are shown in Figure 1.

**Figure 1: Lawyer's assessment of the project's questionnaire**

| Questions/<br>Responses  | Questionnaire<br>was too long | Questionnaire was<br>comprehensive<br>regarding judicial<br>performance | Judicial<br>performance<br>criteria were<br>clear | Options for<br>written comments<br>were <u>not</u><br>important |
|--------------------------|-------------------------------|---|---|---|
| <b>Agree strongly</b>    | 7%                            | 6%  | 7%  | 4%  |
| <b>Agree</b>             | 31                            | 88  | 85  | 28  |
| <b>Disagree</b>          | 59                            | 4   | 8   | 52  |
| <b>Disagree strongly</b> | 3                             | <1  | <1  | 17  |
| TOTAL                    | 100%<br>(495)                 | 100%<br>(490)   | 100%<br>(492)                                     | 100%<br>(492)   |

The lawyers' assessment of the questionnaire as the data collection strategy was important. The project would not have been successful without their willingness to complete what was a relatively long and complex questionnaire. While most lawyers did not think the questionnaire was too long, 38 per cent did. The burden of completing questionnaires was also compounded by the small and specialized nature of the Nova Scotia Bar. Some lawyers were asked to fill out several questionnaires because of the nature of their practice (family and/or criminal law) and their position as a Crown prosecutor or lawyer with Nova Scotia Legal Aid. There were no important differences between lawyers on any of these assessments. The text box provides some comments in this respect.

**Questionnaire response burden:**

While the project was valuable, I found that having to complete three reviews was excessive and time consuming.

The questionnaires took a long time to complete – maybe ONE questionnaire a year could be mandatory and more on a voluntary basis.

I realize you needed detailed information, but these questionnaires really were time consuming – you have to remember that every billable second counts

As a legal aid lawyer, I was sent too many questionnaires too frequently. Cumulatively, it was too much of a demand on lawyers who are already overworked.

The project's final report suggested a shorter version of the questionnaire that would cover the same areas of professional assessment in a less demanding way. Maybe because of its length, almost all the lawyers considered the questionnaire comprehensive. They also found the performance criteria clear (see Appendix 1).

There were positive and negative consequences to this voluntary participation. On the positive side, the judges of the Nova Scotia courts did voluntarily participate in numbers more than sufficient to pilot the concept and gain this professional experience -- 66 per cent, over-all, participated.

So, the proposed pilot project was implemented. In addition, the participating judges did receive performance information that crossed the barriers of their professional isolation from feedback and allowed them to set goals for their professional development.

A negative consequence of the voluntary nature of the project was that, in fact, not all judges participated. Some of the judges who did not participate were those who needed feedback on their performance more than others. This was documented in comments received from lawyers both during the questionnaire mailing process and in the project's evaluation stage.

**It's voluntary character:**

A major weakness -- most of the judges who participated are our better judges. Many of those who did not participate are "problem" judges. All should be required to participate.

It would have been much more helpful for all judges to be involved because I found that the judges who volunteered did not attract criticism, but those who could have benefited, did not volunteer. Too bad.

It should be mandatory for all judges to participate. I fear the judges who perhaps are most in need of review did not participate. I applaud those who were comfortable enough with who they are to put their names forward.

**Issues of confidentiality**

The confidentiality of an individual judge's performance information and the anonymity of the lawyers providing the assessment were considered essential to ensure judicial independence and to assure the capacity of lawyers to continue in practice without fear of retribution or benefit of judicial favor. Two characteristics of the practice of law in Nova Scotia were a concern with respect to these two requirements: the specialized nature of law, especially in criminal and family law, and the small size of the Bar generally, but especially in rural areas. Lawyer responses to these two issues are shown in Figure 2.

**Figure 2: Lawyer assessments of guarantees of confidentiality**

| Questions/<br>Responses  | I was satisfied with the assurances of confidentiality offered to lawyers by the research process (limited background data, separate return notification card) | The relatively small size of the Bar did not threaten the confidentiality of the project's information process |
|--------------------------|--|--|
| <b>Agree strongly</b>    | 14%  | 7%   |
| <b>Agree</b>             | 73   | 79   |
| <b>Disagree</b>          | 10   | 13   |
| <b>Disagree strongly</b> | 3  | 3  |
| TOTAL                    | 100%<br>(496)  | 100%<br>(479)  |

The project took precautions to assure the anonymity of participating judges, the confidentiality of performance information provided to individual judges and the anonymity of lawyers who completed questionnaires. At the project's conclusion, the only information identifying individual judges remained with the participating judges in the form of the project's briefing document used in the mentor/judge conference. The individual judge "variable" in the project's questionnaire database has been deleted and the original questionnaires have been shredded.

Over 80 per cent of the participating lawyers agreed that the confidentiality of lawyers=participation was *not* threatened by either the research process (questionnaire design, return, or analysis) or by the small size of the Nova Scotia Bar. In spite of this pattern in the response to these two questions, lawyers did express concerns about the ability to preserve their anonymity. Their concerns reflected both the specialization of the practice of law and the small size of the bar. Examples of these concerns are found in the text box above.

**Concerns for confidentiality/anonymity**

My office mates and I do 70% of the Provincial Court defense work and 90% of Family Court work. Negative opinions from the defense are easily spotted in the outlying areas as from Legal Aid. It's impossible to overcome this, but it is a problem.

I had concerns with confidentiality because of questions at the end of the questionnaire – age, sex, etc. I am the only female lawyer in my region with less than five years at the bar.

As a rural practitioner in a small bar with minimum variation of judges, I found it worrisome . . .



**Judicial independence and accountability**

Two characteristics of the pilot project were meant to assure that participation in the project would not jeopardize a judge's independence. First, judicial participation was voluntary. Second, the individual performance information was neither associated with nor available to a government department, the Chief Justices/Judges of the respective courts or stakeholders within the judicial system. Instead, the individual performance information came only to the participating judge through the project-mentor linkage. The project's evaluation questionnaire asked two questions related to this question of judicial independence and, by implication, the desirability of on-going accountability through some formal performance appraisal process. Figure 3 shows the lawyer responses to these questions.

**Figure 3: Views on judicial independence and accountability**

| Questions/<br>Responses | The assessment of judicial performance by lawyers could be a serious threat to judicial independence | A periodic questionnaire-based review similar to this pilot project should be an ongoing feature of the NS judicial system |
|-------------------------|--|--|
| Agree strongly          | 2%   | 33%  |
| Agree                   | 7  | 58   |
| Disagree                | 51   | 8  |
| Disagree strongly       | 41   | 2  |
| TOTAL                   | 100%<br>(497)  | 100%<br>(494)  |

Almost all Nova Scotia lawyers responding to the project's evaluation question (92%) *disagreed* with the suggestion that assessment by lawyers could be a serious threat to judicial independence. Although some Nova Scotia judges who chose *not* to participate may have had this concern, it was not raised by Nova Scotia judges in their post-project feedback. Similarly, 91 percent of Nova Scotia lawyers thought some type of questionnaire-based review should be an ongoing feature of the Nova Scotia judicial system.

The balance of written comments from lawyers responding to this survey called for some ongoing form of judicial performance appraisal for a group of professionals, judges, who are in the normal course of their work relatively isolated from professional feedback. The first comment in the text box represents a minority opinion.

**Judicial independence and accountability:**

Although well intentioned and satisfactorily structured, I have strong reservations in principle about the assessment of judicial performance by either the practicing bar or, especially, the academic bar. I completed the first assessment sent to me but, having thought better of it later, have returned no others.

A good project based on a sound principle – judicial accountability

My observation would be that being a judge is a lonely occupation with little feedback on performance . . . Most of our judges are conscientious and strive to do their best – they should not feel uncomfortable in any way with such a process which has the potential to improve their performance and to see themselves as others see them. This is accountability, not a threat to judicial independence. The two principles are quite distinct.

## Conclusions

Did the Nova Scotia Judicial Development project do what it was supposed to do? Did it make a difference? Should the Nova Scotia courts consider a similar initiative as an on-going strategy for judicial development? This project evaluation by participating lawyers would suggest a “yes” to each of these questions. The more interesting question is why the Nova Scotia courts have not moved from the “pilot” to an “ongoing” program of some sort. Post-project interviews with representatives of the Nova Scotia courts suggest the main reason is a lack of budgetary resources and, possibly, the absence of a “champion.” The courts, however, are in the process of developing a mentoring process which was one of the NSJD project recommendations.

The barriers to on-going judicial evaluation, then, are neither theoretical nor methodological. They are practical barriers: barriers of budgetary resources, political barriers and the absence of leadership pressing the case. While all levels of government in Canada have adopted various strategies for “results-based” management and more transparent accountability, the provincial courts have not been able to marshal increased budgetary resources for the equivalent administrative directions in their environment. While academics and some provinces can write and talk supportively about judicial evaluation (Friedland, Russell 1987, Manitoba 1989), there apparently remains considerable reservation within the Canadian judiciary against a movement towards judicial evaluation.<sup>3</sup> While interest in judicial evaluation remains amongst many judges of the Nova Scotia courts, there has not been a champion to press for further implementation.

To some extent, the Nova Scotia Development Project has received wider recognition outside of Canada. Representatives of the Dutch judiciary and Ministry of Justice, for example, consider the NSJD project significant experiment that will be a “trendsetter” (Lampe) and an “inspiring ‘best practice’ example” (Lauwaars, van der Doelen and Weimar). The Nova Scotia project also has contributed to interest and developments in judicial evaluation in Australia (Colbran 2002a/b), Belgium (Colaes) and France (Sibony). Although there is interest nationally within the Canadian National Judicial Institute (personal interview), there

### Did it make a difference?

This was the first time I had a chance to talk about my work with another judge (the project’s mentor)-- a participating judge

I noticed a general improvement in the demeanor of the least satisfactory judges since the initiation of the project – a lawyer

The project was well done. This should be an ongoing process –a lawyer

I did notice a change in attitude (positive) with respect to one judge – a lawyer

<sup>2</sup> Nova Scotia judges attending national meetings have reported criticisms for the “precedent” they have established in the NSJDP.

seems to be little momentum in Nova Scotia or other Canadian provinces to move beyond the pilot stage. The character of the Canadian federal system prevents a strong lead in this field by the federal government. The interest and champions need to be present at the provincial level.

**About the author:**

**Dale H. Poel, Ph.D. / *dhpoel consulting*** was a Professor in the School of Public Administration, Dalhousie University, during the period of the NSJDP. He served for several years as an advisor to the ad hoc planning committee appointed by then Chief Justice Lorne Clark and continued to serve as a consultant to the project's implementation committee. He has published research on the evaluation of legal aid and judicial evaluation, as well as on municipal amalgamation and municipal legislative reform. He now works as a private consultant in program evaluation with interests in the fields of health policy, judicial administration and municipal government. His current work includes the evaluation of a CHSRF/CIHR Chair in Drug Use Management and Policy (Dalhousie University, College of Pharmacy) around questions of knowledge transfer from the academic researcher community to the applied world of health policy, management and practice. Questions concerning the research reported here can be directed to Dr. Poel at [dhpoel@hfx.eastlink.ca](mailto:dhpoel@hfx.eastlink.ca).

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**Appendix 1: Criteria within each area of judicial assessment**

| <b>Legal Ability</b>  | <b>Impartiality</b>   | <b>Judicial Management Skills</b>  | <b>Disposition Practices</b>  | <b>Comportment</b>   |
|---|---|--|---|--|
| <p>Knowledge of:</p> <ul style="list-style-type: none"> <li>• substantive law</li> <li>• rules of procedure</li> <li>• rules of evidence</li> </ul> <p>Factual analysis ability</p> <p>Legal reasoning ability</p> <p>Giving reasons for rulings when needed</p> <p>Clarity of explanation of rulings</p> <p>Clarity of judge's decision</p> <p>Completeness of judge's decision</p> <p>FOR JURY TRIAL:</p> <p>Identification of relevant issues and analysis of applicable law in jury charge</p> <p>Formulation of charge that is understandable and usable by jury</p> | <p>Absence of bias based on:</p> <ul style="list-style-type: none"> <li>• race</li> <li>• sex</li> <li>• ethnicity</li> <li>• religion</li> <li>• social class</li> </ul> <p>Open mindedness</p> <p>Ability to decide issues without concern for the popularity of the decision</p> <p>Evenhanded treatment of litigants</p> <p>Evenhanded treatment of counsel</p> <p>Projection of an impartial image</p> | <p>Adequate preparation</p> <p>Allowing adequate time for presentation of the case . . .</p> <p>Rendering rulings and decisions without unnecessary delay</p> <p>Moving proceedings in an appropriately expeditious manner</p> <p>Maintaining appropriate control over proceedings</p> <p>Punctuality</p> <p>FOR SUPREME AND FAMILY COURTS:</p> <p>Appropriateness of judge's settlement or pre-trial initiatives</p> <p>Thoughtfully exploring the strengths and weaknesses of each party's case in settlement discussions</p> <p>Skills in effecting compromise</p> <p>Absence of coercion, threat or the like in settlement efforts</p> | <p>Clarity and quality of rulings</p> <p>Adequacy of findings of fact in dispositions</p> <p>Dispositions rendered without unnecessary delay</p> <p>Sensitivity to the parties involved (including victims)</p> <p>Knowledge of possible dispositions and resources</p> <p>Consideration of sentencing principles</p> <p>Creativity in use of possible sentences and resources</p> <p>Adequacy of reasons for sentences imposed</p> | <p>Courtesy to participants and staff</p> <p>Patience</p> <p>Attentiveness</p> <p>Dignity</p> <p>Absence of arrogance</p> <p>Sensitivity to the impact of his/her demeanor</p> |