TEACHING JUDICIAL SKILLS

Abstract: This article draws on Canadian practice to consider how judges can develop the skills necessary to become effective communicators in the courtroom. The judicial skills model practised in the National Judicial Skills Institute in Canada is based on the idea that in teaching a skill, it is necessary to provide some theory on the skill, then model the skill, have the learners practise the skill and also have them critique that practise and practise again. The oral judgments course is given as an example of a course which adopts this method. This approach, which often uses actors as participants, allows judges to practice the skill of effective courtroom communication; it allows judges to learn how and when to intervene in various scenarios, how to communicate with persons in the courtroom, including counsel as well as upset, emotional, and vulnerable complainants. Developing effective scenarios for these exercises and facilitation of training more generally is time-consuming and labour-intensive but ultimately is a very worthwhile endeavour in terms of furthering the skills of the judiciary.

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Introduction

If asked, most people are likely to define a skill as something that you do that is mostly mechanical, like operating a car or woodworking. If pushed to think more, some may agree that there is skill in being a good communicator or a good leader. Pushed further, some might agree that there is skill in being a doctor, a lawyer, or a judge. If asked to define the skills of being a judge, most people are likely to use words like fairness or impartiality and leave it at that. They may go on to talk about being a good listener or keeping control of a courtroom. They would be correct. Those are some of the skills of judging, but there are others. This article sets out how the National Judicial Institute ('NJI') identifies judicial skills and how it teaches those skills to Canadian judges.

Judicial Training in Canada

First, some context about the NJI. The NJI is a Canadian not-for-profit that teaches Canadian judges and works internationally with other judicial institutes on a project basis. Canada is a federal state and becoming multi-jural. Nine provinces and three territories are common law jurisdictions, and Québec is a mixed system (a civil law jurisdiction for most non-criminal matters, but for some things like criminal law, a common law system). More and more, Canadian systems are acknowledging the need to incorporate Indigenous legal principles into the broader Canadian context. The art of how to do that is a work in progress. Some judges are appointed by the federal government, while others are appointed by provincial or territorial governments. Delineating the jurisdiction between federal judges and provincial and territorial judges is complicated and should not be confused with the federal and state division of judiciaries in the United States. Most of the funding for the NJI comes from the federal government, which in turn means that most of its judicial education is targeted at federally appointed judges. The NJI began its work in 1988 and now delivers about 200 days of education per year to courts across Canada. It has a growing digital presence, accelerated by the past two years of almost exclusively on-line learning.

Judges access in-person judicial education in two ways. First, almost all courts have one or two seminars yearly within their own court or shared with another court in the same region. Those typically last about 3 days for each seminar. The NJI assists with the design and delivery of those courses for all courts made up of federally appointed judges and for some provincial courts. It is up to the Chief Justice or Chief Judge of each court to decide whether the judges of their respective courts must attend those seminars. For most courts, however, unless a judge is hearing an urgent matter or has personal reasons for being unable to attend, judges are expected to attend. The second way judges can access in-person education is through the NJI's offering of national courses. These courses are available to all judges, and those who attend are determined by the judge themselves and by their Chief Justice.

Judicial education for federally appointed judges is governed by the Canadian Judicial Council. In 2018, the Council issued a new set of policies and guidelines for professional development.[1] The document says the following about professional development generally for judges:

> Judges should invest the equivalent of ten days per year of professional development, which includes any local court-based programs. Unless excused by the Chief Justice or designate, all judges are required to attend their court's local court-based programs. Each judge's professional development should incorporate the three-dimensional approach recognized by Council and referenced above, which encompasses substantive content, skills development and social context awareness.[2]

General Principles of National Judicial Institute Education

The NJI organises its training around three dimensions – substantive law, judge craft skills and social context. The NJI is currently undergoing a significant curriculum review and one of the questions on the table is whether those dimensions sufficiently incorporate issues like wellness, unconscious bias and effective decision-making. The need for these topics are rapidly coming to the forefront and they top the list of necessary additions to the new curriculum.

There are a few characteristics of the judicial learner that are always important to keep in mind when considering what to teach and how to teach it. First, judges are very busy. Most want to spend their educational time learning about things that they can use the next day or the next week in their work. Judges value peer to peer learning. One of the debates that has surfaced because of the need to do virtual learning during the pandemic is the value of informal and formal interaction amongst the judges at in-person programs. The pandemic has shown how to provide effective learning on-line, but at what cost to the informal discussions about what was learned during the day over a joint meal in the evening or breakfast the next day? Finally, judges are curious and open; it is a requirement to do their job. For educational purposes, this means that they are open to feedback by their peers and from respected academics.

[1] CJC, *Canadian Judicial Council Professional Development Policies and Guidelines* <https://cjc-ccm.ca/sites/default/files/documents/2019/CJC%20Professional%20Development%20Policies%20and%20Guidelines%202018-09-26.pdf> accessed 7 March 2022.
[2] ibid 5.

Before moving into a discussion about teaching skills, a few words about the NJI's teaching on law and social context will be provided. First, law. While this is seemingly the most self-explanatory dimension, in some respects, it is the most difficult to do well. The NJI has, for years, adopted an experiential method of teaching, following the experiential learning theory of David and Alice Kolb and Pat Murrell.[3] In its simplest form, this means that judges are not taught 'from the front of the room' but must be engaged in the learning process through reflection, experience, and experimentation. How easy it is, however, to default to a lecture-style process when the subject is, for instance, the latest case from the Supreme Court of Canada on consent in sexual assault cases. Judges are good listeners. They will listen, and although there may not be any empirical data to offer, it would not be surprising to find that judges absorb more of what they hear than others. The reason being is simple: it is because their job, day after day is to listen actively to evidence and submissions from lawyers and other parties. However, the research explored by experts like Kolb shows that even for good listeners, lecture-style teaching is less effective for long-term retention of the information. As a result, the NJI aims to ensure that when legal concepts are at the centre of a program, the objective is to have the judges engage using techniques like polling questions, application of an analytical framework to a case study or the creation of a checklist. Judges appreciate acquiring these tangible takeaways.

Social context is the dimension of judicial education which has had the most attention both within the judiciary and latterly, in the public square in Canada. Judges are not neutral referees. While that may be an easy way to describe a judge's role, it is simply not correct. Judges operate within a context of fundamental values of equality and fairness. To ensure that those values underpin a judge's work, it is imperative that they do two things as part of their professional development. First, they must look to the people who come into the courtroom to understand the context of their lives. What is the impact of poverty or indigeneity or cultural difference on what is happening in the courtroom that day? In a multi-racial, culturally diverse country still struggling with the intergenerational trauma of the residential school system, the 'sixties scoop',[4] and ongoing child welfare processes all inflicted on our Indigenous population, judges cannot come to the bench with all of the knowledge they need about the people coming into the courtroom. Education is fundamental to gaining that knowledge. Second, judges must look inwards to their own background and identify how that affects their unconscious assumptions and biases about the world in which they judge. Taken together, social context education ensures that a judge is better equipped to ground their decisions in the idea of substantive equality, in turn upholding true impartiality. These notions are not a construct of the NJI, but rather are embedded both in Canadian jurisprudence,[5] and directions from the Chief Justices through *The Ethical Principles for Judges.*[6]

[3] For example, Alice Y. Kolb and David A. Kolb, 'Experiential Learning Theory as a Guide for Experiential Educators in Higher Education' (2017) ELTHE: A Journal for Engaged Educators, 7-44; and Patricia Murrell, 'Experiential Learning and Learning Styles: A Model for Continuing Legal Education' (2000) 2(2) The CLE Journal.

[4] As described in a Government of Canada background paper – Government of Canada, *Sixties Scoop Agreement in Principle* (7 November 2017) <https://www.canada.ca/en/indigenous-northern-affairs/news/2017/10/sixties_scoop_agreementinprinciple.html> accessed 7 March 2022. The Sixties Scoop is a dark and painful chapter in Canada's history. Between the 1960s and 1980s, Indigenous children were removed from their homes by child welfare authorities and many were placed in foster care or adopted out to non-Indigenous families.

[5] See for example *R v RDS,* 1997 3 SCR 484; *R. v. N.S.* 2012 SCC 72.

[6] Canadian Judicial Council, *Ethical Principles for Judges* (2020) <https://cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual_Final.pdf> accessed 7 March 2022.

For the majority of the NJI's history, social context has consisted of looking outward to individual vulnerabilities of Canadians – poverty, gender, race and culture, religion, Indigeneity, disability, sexual orientation and so on. It is only recently that the education has grown to include systemic racism and unconscious bias. There are several articles that chronicle the development of social context education in Canada.[7]

While there are a few courses which focus on only one of the dimensions, most courses attempt to integrate all three dimensions. One of the best examples is the NJI's course on sexual assault cases. This 5-day course includes sessions on the increasingly complex legal principles that judges must understand, and the context of everyone in the courtroom, including unacceptable myths and stereotypes about sexual assault victims and vulnerable witnesses. It also ensures that the judges acquire the skills necessary to apply law and context in small group sessions where they consider management of examination and cross-examination of witnesses, credibility assessment, evidentiary issues and sentencing.

Teaching Judicial Skills

Turning to judicial skills, the first question is what is a judicial skill? Admittedly, the characterisation of what is a skill is somewhat arbitrary. The experience at the NJI, however, is that the more a topic can be imagined as a skill for judges, the more likely the judges will become engaged in learning and practicing the skill. A more fruitful way to understand how the NJI characterizes skills and how it fits into judicial education is to look at how they are taught.

How do you teach a judicial skill? The teaching pattern may vary depending on the type of skill being taught, but generally the process followed is the one first introduced to the NJI by George Thomson, a former executive director of NJI and one of Canada's most skilled judicial educators. The process starts with the provision of some theory on the skill. Then the skill is modelled and the learners practise the skill, critique that practice and practise the skill again.

How does that work in practice? The best example is using a course which was one of the first clearly identified skill courses in the NJI curriculum, *Oral Judgments*. Before explaining the course, some context about how Canadian judges render their decisions will help in appreciating its importance. Unlike some jurisdictions, where all judgments must be in written form, Canadian judges may deliver their judgments either orally, colloquially described as 'off the bench', or through written reasons. There are no hard and fast rules governing when to choose to deliver oral reasons and when to provide written reasons. There are obvious cases where an oral decision is mandated because the parties need to know immediately; perhaps in a case involving a child, an injunction where there is a real risk that property will be irretrievably lost or an otherwise time sensitive case. Often, a judge will issue oral reasons where the law is clear, and the judge's task is to sort through facts to see how the law applies to the facts. Cases that usually mandate written reserved reasons are where the law is not clear and the judge must do some analysis, where there are complex questions of credibility or where the bundle of facts and law is so large that an oral judgment simply does not make sense. Canadian courts, like everywhere else, have very large caseloads.

[7] For example, C. Lynn Smith, *Judicial Education on Context* (2005) 38:2 UBC L Rev 569; and Rosemary Cairns-Way and Donna Martinson, 'Judging Sexual Assault: The Shifting Landscape of Judicial Education in *Canada*' (2019) 97 The Canadian Bar Review, 367.

Reserved decisions take more time to do. The judge is more likely to produce more than one draft as they work through the decision, there may be a delay in preparing drafts by the judge's assistant and there is a reluctance to sign off on written reasons until the judge is satisfied that it is the best it can be, both in content and in style. The advantage of giving oral reasons is that they take less time to prepare which in turn means that the parties know the outcome sooner.

A couple of other facts are helpful. First, proceedings in Canadian courtrooms are all on the record in the sense that there is some mechanism to record everything that is said. Nowadays, the court reporter is mechanical, not human, which is both good and bad. It is good because the recording catches not only the words, but tone of voice, speed, and inflection. It can be bad because the recording is only as good as the machine doing the job. If it stops operating, proceedings are usually halted until it is repaired. What is more likely is that it functions sub-optimally so that parts of what occur are inaudible. With that said, however, because there is a record, for purposes of appeal, a transcript of the evidence and submissions made in the case is always available. That in turn means that not everything needs to be said in the judgment itself. The oral judgment can be short because any appeal record can contain a transcript of the recording. Second, oral reasons are not necessarily the same as an immediate decision. An oral judgment can be delivered the day after the proceedings, a week after, or even longer.

For all the reasons set out above, drafting and delivering good oral judgments is an important judicial skill.

So, what does the NJI's *Oral Judgments* course look like, accepting the framework set out above – theory, modelling, practicing, critiquing, and practicing? The program begins with the participants reflecting in small groups about the importance and role of oral judgments – how they fit into the work of judging. That is followed by theory – presentations from experienced judges and legal and language educators about creating a template or outline to use in drafting oral judgments and the value and content of a good introduction to an oral judgment. Over the next two days, judges first prepare and present an introductory paragraph to a small group of 6-7 judges with a senior judge facilitator. Each judge receives expert and peer feedback on that introduction. Next, they prepare and discuss in small groups an outline for their judgment, receive expert advice on structuring a judgment like the use of headings and numbering, and finally they prepare a judgment which they present to their small group, again receiving feedback. The final version for each judge is videotaped and that recording is given to the judge.

This general outline is how the NJI teaches a skill. The skill being learned will dictate the need for any modifications. For example, the NJI has a course, *Communications in the Courtroom*. In this course, judges address what they are saying, how they say it, how they listen and how they take into consideration their audience. Because it requires judges to practice their skills 'in the moment', actors are employed in mock courtroom situations. An important part of this training is communications in sensitive situations, for example with children. What is clear from both examples is that teaching skills takes a great deal of time to design and requires sufficient judicial facilitators and academics to ensure the quality of the learning. The courses requires work from video technicians, actors, and increased program team planning as well as additional facilities including a greater number of meeting rooms. It is worth it, however, since skills training consistently receives excellent evaluations from the participants.

In terms of judicial tasks, delivery of effective oral judgments and good oral communication are obvious. But some important judicial skills are less obvious. The NJI teaches judicial

ethics as a skill.[8] As noted by Devlin et al,[9] there are those who believe ethics are not something that can be taught; an ethical identity comes to the bench with the judge. Those same people and others may find that describing judicial ethics as a skill devalues its importance as a pillar of a strong judiciary. Leaving that debate aside, judges can become better at making hard choices about appropriate behaviour as it relates to the ethical obligations that the judicial role requires. The article by Devlin et al explains in detail the development of the *Ethics* course, including the decision early on to use a framework to work through ethical dilemmas. The judges leave the course with a tool that they can use each time an ethical issue arises.

Conclusion

Having considered these three examples, does the NJI consider everything it teaches a skill? The answer is no. There are complex legal and social concepts which require judges to acquire the knowledge, and then analyse and assimilate it so that it becomes a part of their judicial expertise – the other two dimensions of judicial education referred to above. What can be characterised as a skill is how that knowledge, once assimilated, is applied as part of their judicial duties. The result is that an ideal course incorporates law, social context and skills are part of the learning process.

[8] Richard Devlin, C. Adèle Kent and Susan Lightstone, 'The Past, Present…and Future(?) of Judicial Ethics in Canada' (2013) 16 Legal Ethics, 1.
[9] ibid.