



National Judicial Institute

THE CHALLENGE OF DIVERSITY

THE SKILL OF ADJUDICATION IN A DIVERSE SOCIETY

**COBA Conference
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The Nature of the Challenge for Adjudicators/Decision-Makers

1. Dealing with an Increasingly Diverse Community

- Even more so with Boards, Agencies



2. Access to Justice Will be Diminished if the Adjudicator Fails to Recognize and Deal with Such Issues As:

- Cultural Difference
- Language
- Disability
- Systemic Discrimination



3. Understanding the Context of Decision-Making Means:

- A. Understanding the diverse communities we serve, the impacts of disadvantage, the particular social, cultural, linguistic issues that shape the persons who appear before us



B. Considering how our own assumptions, perspectives affect what we see and the decisions we make

“Judges do not enter public office as ideological virgins. They ascend the Bench with built-in and often strongly held sets of values, preconceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting ‘inarticulate legal premises’ in the process of judicial reasoning.”



C. Understanding how rules, processes
can mask untested assumptions,
reinforce particular interests and
exclude other experiences and
perspectives



4. For decision-makers, awareness of social context is not only essential to good decision-making, it is the law

“There is no doubt that equality is a component of justice, just as independence and impartiality are. All three require that judges take into account the social context of facts and law in order to render justice since people are contextual as much as law is ... without social context, there is no justice”



In RDS the Supreme Court stated:

“Awareness of the context within which a case occurred does not constitute evidence that the judge was not approaching the case with an open mind fair to all parties; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality”



5. So, if all decision-makers are to:

“Recognize the experience/realities of social diversity and disadvantage across sex, race, disability, sexual orientation, age, religion, language” and are to be aware of their own assumptions, perspectives and how these may affect their decision making,

HOW DO WE ACCOMPLISH THIS? ...



(A) The appointment and hiring processes can help

e.g. a body of adjudicators that reflects the communities they serve

e.g. considering applicants' strengths in this area



BUT:

- broad agency or board make-up doesn't guarantee equally broad individual ability or understanding
- other criteria will always predominate
- understanding context is not an inherent skill but one that must be learned
- what you have to know changes over time



(B) It may but doesn't necessarily just come from experience

- e.g. We look for information that confirms existing perspectives
- e.g. Adults usually don't learn by experience alone
 - they learn through knowledge (which can come from experience); practice; feedback



CONCLUSION

- Good social context education can't be like an inoculation
- It is a career-long task



How do judges and other adjudicators learn best:

- Respected colleagues play leadership role (social context education requires “champions”)
- The education is balanced, well supported by good research
- It takes into account adult education principles



How do they learn Social Context best:

- If integrated with law and skills- tied to recognizable tasks
 - **“I might have to do this next week”**
- If an inclusive design or planning process :
 - Adjudicators; Academics and Researchers; Community members



THE NJI CURRICULUM

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PUTTING INTEGRATION INTO PRACTICE



1. DECISION MAKING

(a) Legal Reasoning

- “What enables us to make judgments which are not merely idiosyncratic statements of preference, what puts us in a position to “woo the consent of others,” is our capacity for “enlarged thought.” ... the process of taking diverse perspectives into account as essential to genuine judgment... the more perspectives we are able to consider as we make our judgments, the more people we will be able to communicate with, the larger the scope of persuading others, the more “enlarged” our mentality – and the better our judgment and the wider the scope of its validity.” Nedelsky



- Judges make a decision with existing perspective
- They then hear a range of other perspectives
- Then they make the decision again

(b) Judgment Writing

e.g. “Writing Without Prejudice”

writing without offending or reinforcing gender, racial, disability stereotypes.



(c) Oral Judgments / Communication Skills

- Who is the audience;
- ensuring what is heard is what you intended
- Communicating across cultural lines; in high emotion environments

(d) The Impact of Long Service

- Familiar Perspectives and Familiar Experts



2. CREDIBILITY AND FACT-FINDING

(a) Identifying truth tellers; liars

- Demonstrating the variability of individual judgment; the range of factors we rely on
- Eliminating unreliable factors

(b) Assessing credibility in context:

e.g. language

e.g. child witnesses

e.g. a witness with a cognitive disability



3. Assessing Legal Rules

e.g. evidence law and relevance

e.g. consent

e.g. “the reasonable man”

e.g. judicial notice

Context is always relevant and our understanding of it is always changing



4. Equality

- understanding substantive equality in Canadian Law
 - e.g. damage awards for loss of income
 - e.g. challenges for cause



5. Managing the Trial Process

- Vulnerable witness and parties
e.g. recognizing disabilities
- Self-Represented parties
e.g. Making wrong assumptions about
why they are self-represented?



6. Expert Evidence to Understand Context

- Who is an expert?
- What do we know as matter of common sense; taking judicial notice
 - e.g. expert evidence from immam to justify a self-defense plea
 - e.g. Expert evidence to help a judge understand, weigh evidence from a cognitively disabled witness



7. Law that Shapes/Guides Our Understanding of Context:

- Charter
- International treaties and conventions



8. Programming with major context content (all linked to concrete adjudicative functions)

- Intimate violence
- The impact of poverty e.g. compliance with court orders
- The impact of race, culture on custody decision-making
- Therapeutic jurisprudence
- Hearing and deciding Charter cases
- Judicial ethics
- Aboriginal law
- Judicial safeguards against wrongful convictions



THE DIFFICULT ISSUES

1. FINDING (DEVELOPING) CHAMPIONS

- Won't work without adjudicators who both understand the importance of context and how to teach it
- The NJI faculty development program (80 judicial champions)



2. Supporting Community Input

- Distrust of system
- Education, not advocacy
- Resources for meaningful input



3. Freeing up Adjudicators for Education

- Must be seen as essential part of the role
- Resources for education - learning from one another – sharing resources

4. Recognizing the Distinction between teaching new knowledge and skills and punishing for past behavior

5. Not losing sight of the integration principle



6. Building the belief that the task of understanding context never ends

- most important: building an openness to new knowledge and others' perspectives