

Independence of the Judiciary in Canada

Paper submitted by Canada

In Canada, the Independence of the Judiciary is a constitutional and legal principle of foremost importance. This principle received recognition in Canada's constitution and has continued to be developed and strengthened in Canada's laws as both Parliament and the Courts have moved to ensure that this bulwark of the rights of Canadians is real and vital.

The basic constitutional provisions with respect to the Independence of the Judiciary in Canada are those set out in sections 96 to 101 of the Constitution Act, 1867. These provisions state:

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96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organisation of a

General Court of Appeal for Canada, and for the Establishment of any additional Courts for the Better Administration of the Laws of Canada.

Section 96 has two important functions, one apparent, one not so apparent. By mandating that judges will be appointed by the federal level of government, the effect of narrow, local concerns and pressures on the judiciary is minimised. As well, section 96 has been interpreted and applied by the courts as guaranteeing that the essential jurisdiction of these courts cannot be eroded, on the argument that the power of appointment might thereby be rendered meaningless. Section 96 therefore promotes independence from local pressures and constitutes a guarantee that the jurisdiction of Canada's superior courts will not be unduly eroded.

The intended effect of the other constitutional provisions is somewhat more apparent. The effect of these provisions is that judges are given very substantial guarantees against arbitrary interference or removal from the executive level of government and that the fundamental status of members of the judiciary, as well as their salaries, allowances and pensions, are constitutionally guaranteed.

Another provision which serves to entrench the concept of the independence of the judiciary is the preamble to the Constitution Act, 1867, which states that Canada shall have a constitution similar in principle to that of the United Kingdom.

In addition to the above basic provisions relating to the judiciary and its independent status, certain of the rights established in the Canadian Charter of Rights and Freedoms by implication guarantee the independence of the judiciary by establishing minimum standards for the courts and tribunals in Canada which adjudicate in respect of criminal offences and certain fundamental rights. Of particular importance are sections 11(d) and 7 of the Charter:

- 11.** Any person charged with an offence has the right
 - (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- 7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

On the basis of these Charter provisions, the constitutional independence of Canadian Courts has been recognised and affirmed in the strongest terms by Canadian Courts in the cases of Valente v The Queen [1985] 2 S.C.R. 673 and The Queen v Beauregard [1986] 2 S.C.R. 56. In these cases it was indicated that the principle of judicial independence is a fundamental precept of the Canadian Constitution and requires that Canadian judges be completely separate in authority and function from all other participants in the justice system, and not in any way dependent on the legislative, and particularly the executive, branches of government.

The three essential components of Canada's justice system identified by Canada's highest court in these two cases were financial security, the security of tenure of the judges, and the constitutional independence of the tribunal with respect to matters of administration bearing directly on its judicial functions.

Great care is taken to ensure that these three conditions are met. The structures which have been established to ensure that these constitutional guarantees are effective, include statutory provisions, administrative structures and even many of the practices and traditions of Canada's courts.

A very illustrative example is the statutory and administrative structure which has been established to ensure that the constitutional guarantee of independence of the judiciary with respect to their financial security is maintained. In Canada, judicial salaries are not established by the executive. By the Constitution this function must be performed by Parliament and Parliament undertakes this very serious responsibility with the utmost caution to ensure that judicial independence is truly preserved.

The procedure followed by Parliament has its basis in legislation. The Canadian Judges Act, section 26 provides:

- 26 (1) Within six months after April 1, 1986 and within six months after April 1 in every third year thereafter, the Minister of Justice of Canada shall appoint not fewer than three and not more than five commissioners to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.
- (2) Within six months after being appointed, the commissioners shall submit a report to the Minister of Justice, containing such recommendations as they consider appropriate, and the Minister shall cause the report to be laid before Parliament not later than the tenth sitting day of Parliament after he receives it.
- (3) For the purposes of subsection (2), "sitting day of Parliament" means a day on which either House of Parliament sits.

Parliament does not approach this responsibility in a partisan spirit. Under this section, an independent commission of three to five persons, is appointed to hold hearings as necessary and to prepare an independent set of recommendations with respect to the level of judicial salaries and other related issues of judicial compensation, including pensions.

Pursuant to this mandate a report is produced which is tabled by the Minister of Justice for discussion and consideration in Parliament, with the accompanying public debate, before the ultimate decisions are taken on the appropriate levels of judicial salaries.

Following consideration by the Standing Parliamentary Committee on Justice and Solicitor General with the accompanying open and public debate, which generally has a non-partisan tone, the Judges Act, which provides for the salaries and other benefits of judges, will be amended to establish the new levels of salaries and other remuneration which this open process establishes is appropriate.

In the way that the important issue of salaries is treated, the importance of independence of the judiciary may be seen. The Supreme Court of Canada has identified financial security as one of the three essential conditions of true independence. The process of establishing judicial salaries has a totally independent commission as its origin and basis, the process is statutorily mandated, and the ultimate level of judicial remuneration is established by Parliament only after careful consideration and a full open and public debate. At every stage all of the mechanisms of both the law and the democratic process are brought to bear to ensure that judicial independence has real content and meaning.

Similar care is exercised with respect to judicial tenure. In Canada, members of the judiciary are appointed until age 75 unless, prior to that date they voluntarily resign or are removed from office or die.

Removal is only possible pursuant to the provisions of section 99(1) of the Constitution Act, 1867 by the Governor General of Canada on address of the Senate and House of Commons. To this date, in Canada, this procedure has never been relied upon for the removal of a judge.

There have, of course, been situations in which issues of judicial discipline or judicial behaviour have surfaced which require a careful, considered attention. At present, the same high standards that apply in other matters of judicial independence in Canada are preserved by assigning this function to a Council made up solely of members of the judiciary itself. This statutorily established Council, the Canadian Judicial Council, is composed of the Chief Justices and Associate Chief Justices of Canada's superior courts and the Tax Court. The Canadian Judicial Council is charged with the responsibility to inquire into and investigate situations

where there are allegations that a member of the federal judiciary may have become incapacitated from the due performance of his duties through age or infirmity, misconduct, a failure to duly execute his office or otherwise having placed himself in a position incompatible with the execution of his office.

By placing the important function of inquiring into judicial behaviour and conduct directly into the hands of the judiciary itself, the Canadian system clearly signals the importance that it places on the maintenance of the essential security of tenure of the Canadian federal judiciary. It should be noted that, in respect of provincially appointed judiciary, the systems relating to the assessment of the conduct of members of the judiciary in general parallel the federal model.

In recognition of the principle that the judiciary must be independent with respect to matters of administration bearing directly on its judicial functions, the systems by which the courts and judicial affairs are administered in

Canada have been structured with similar care. A foremost concern has been to ensure that the assignment of members of the judiciary to specific cases, the establishment of judicial workload and similar issues are matters not subject to administrative or executive pressures. In practice, such decisions are taken by the judges themselves, usually in a collegial fashion under the authority of each court's chief justice.

It is clear that in Canada, strong constitutional and statutory guarantees ensure that the judiciary will be truly independent. These guarantees are of course important, indeed essential, in themselves. But also of great importance is the tradition which they manifest and to which they owe their origins. Judicial independence must be founded on the constitution, on legal principles and, where appropriate, on democratic principles and free and open debate. It is Canada's belief that the very important tradition of judicial independence will continue to be an essential element of Canadian society.