

THE ROLE OF THE JUDICIARY

A Paper by the Department of Justice, Canada

1. Few institutions are more important to a healthy democracy than the courts. Their importance comes from the power they hold: the power to determine rights between individuals and between individuals and the government and the power to uphold the rule of law. They are entrusted to determine a multitude of issues and are responsible for making decisions over rights, obligations, freedoms and property of individuals. That is why it is so crucial to have an independent judiciary.

2. The objective of an independent judiciary is to ensure that everyone has access to an impartial judge, who is in control of the judicial proceedings, so that the rights of the person appearing before the bench will be determined solely on the basis of the facts and the law.

3. In Canada, the independence of the judiciary is a constitutional and legal principle of foremost importance. This principle has received recognition in Canada's Constitution and has continued to be developed and strengthened in Canada's statutes. The basic constitutional provisions with respect to the independence of the judiciary are those set out in sections 96 to 101 of the *Constitution Act, 1867*. They specifically acknowledge the concept of judicial independence through the judicature provisions respecting tenure and removal and the fixing and payment of salaries, annuities and allowances.

4. The relevant provisions read as follows:

"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, are made uniform, the Judges 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 Organization 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."

5. Section 96 has two important functions. By mandating that superior court judges must be appointed by the federal government, the effect of narrow, local concerns and pressures on the judiciary is reduced. Furthermore, 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 thus constitutes a guarantee that the superior courts' jurisdiction will not be eroded.

6. The effect of the other constitutional provisions is to give judges very substantial guarantees against arbitrary interference or removal by the executive level of government. The fundamental status of the judges, as well as the

provision of their salaries, allowances and pensions, is constitutionally guaranteed.

7. Certain of the rights established in the *Canadian Charter of Rights and Freedoms* by implication guarantee the independence of the judiciary by setting out minimum standards for the courts and tribunals which hear cases relating to criminal offenses and specific fundamental rights. Sections 7 and 11(d) of the *Charter* state the following:

"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.

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."

8. On the basis of these provisions, the constitutional independence of Canadian courts has been recognized and affirmed in the strongest terms by the Supreme Court of Canada 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 held 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 the government.

9. Three essential elements of Canada's justice system were identified by the Supreme Court of Canada: the security of tenure of the judges, financial security and the constitutional independence of the tribunal with respect to issues of administration bearing directly on its judicial functions.

10. A great deal of care is taken to see to it that these conditions are complied with. Such structures as statutory provisions, administrative regimes and many of the practices and traditions of Canada's courts have been established to ensure that these constitutional guarantees are effective.

SECURITY OF TENURE

11. With respect to security of tenure, it is guaranteed by section 99 of the *Constitution Act, 1867* and by statutory provisions. Federally appointed judges stay on the bench until the age of 75 unless they voluntarily resign, are removed from office or die. They cannot be involuntarily removed from office except following an independent inquiry by the Canadian Judicial Council, a recommendation for removal made by the Council to the Governor General of Canada and a joint address of the two Houses of Parliament to effect removal. No Canadian Superior Court Judge has ever been removed from office pursuant to a joint address.

12. The Canadian Judicial Council, composed of the Chief Justices and Associate Chief Justices of the superior courts and the Tax Court, is the responsible body for federally appointed judges. It is tasked 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/her duties through age or infirmity, misconduct, a failure to duly execute his/her office or otherwise having placed him/herself in a position incompatible with the execution of his/her office. Having given this important function of inquiring into judicial behaviour and conduct directly into the hands of the judiciary itself clearly indicates the importance that the Canadian system places on the maintenance of the essential security of tenure of the judges.

FINANCIAL SECURITY

13. A statutory and administrative regime is in place to ensure that the constitutional guarantee of independence of the judiciary with respect to their financial security is maintained. In Canada, the salaries of the judges are not determined by the executive. This function, as set out in the Constitution, must be performed by Parliament. The constitutional provision states that Parliament must fix and provide judicial salaries, allowances and pensions. There is as well legislative provision for the automatic indexation every year of judges' salaries, judges' pensions, and the pensions of surviving spouses and children.

14. Furthermore, the law requires that an independent commission be set up every three years to review the adequacy of judicial salaries and benefits. The federal Government takes this responsibility very seriously to ensure that judicial salaries are protected from arbitrary interference. Under section 26 of the *Judges Act* an independent commission, the Triennial 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, the Commission must submit, within six months after being appointed, a report to the Minister of Justice which is then tabled in the House of Commons. The Government then decides whether to introduce legislation implementing the recommendations of the Triennial Commission.

15. Notwithstanding that this process has a totally independent commission as its origin and basis, that it is statutorily mandated and that the ultimate level of judicial compensation is established by Parliament only after careful consideration and a full open and public debate, the current system has been seen by the judiciary as unsatisfactory. The fiscal realities have made it difficult in recent years for the Government to recommend to Parliament the increase in spending that is required to improve the judicial compensation scheme. At the moment, a legislative scheme has frozen judges' salaries at the level it was in 1992 until 1997, as part of an overall fiscal restraint initiative.

INDEPENDENCE WITH RESPECT TO MATTERS OF ADMINISTRATION

16. Recognizing the principle that the judiciary must be independent with regard to issues of administration bearing directly on its judicial functions, the system by which the courts and judicial affairs are administered in Canada has been set up with particular care. A prime 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.

17. In terms of the resources required to perform their judicial functions, the federally appointed judges receive generous salaries, pensions and allowances from the federal government but they must rely on provincial governments to supply their needs for things like courtrooms, secretarial assistance, computers and supplies since the provinces must supply the resources necessary for the administration of all the courts in Canada except the three federal courts. The adequacy of the financial and human resources given to the courts to carry out their judicial functions can be a source of

tension between governments and the courts. Some judges are of the view that in order to make the judiciary effectively independent, it must not be dependent on the government for its material resources and budgets.

18. The Minister of Justice is responsible in Parliament for the spending estimates of the three federal courts (the Supreme Court, the Federal Court and the Tax Court). He is also responsible in a technical sense for the money voted by Parliament to pay the salaries, pensions and allowances of the 981 federally appointed judges. But in order to keep the Minister and the Department of Justice at arm's length from the administration of the courts and of judicial compensation, Parliament has created the office of Commissioner for Federal Judicial Affairs which reports directly to the Minister.

19. The Commissioner is responsible for all matters pertaining to the administration of judicial compensation and oversees the administration of the support services for the Federal Court, the Tax Court and the Canadian Judicial Council. The Registrar of the Supreme Court of Canada performs a comparable function for the judges of that court and she reports directly as well to the Minister. These measures separate the judiciary from the executive in a very real and practical way, enhancing the independence of the judges and their courts while, at the same time, preserving the principle of ministerial accountability to Parliament for the spending of public moneys.

20. It is clear that in Canada, strong constitutional and statutory guarantees ensure that the judiciary will be truly independent. As stated above, measures have been taken to reinforce and to enhance this principle in practice as well as in law which is to the benefit of everyone in Canada.

JUDICIAL TRAINING

21. Public interest demands a judiciary of the highest possible quality and this requires a high caliber of continuing judicial education. Innovative and effective judicial education is as well essential to preserve and enhance the independence of the judiciary. This has been taken very seriously by Canadian judges and several institutes have developed programs on legal issues, skills training and on gender, racial and other social awareness issues. The course content is determined by the institutions thereby reducing concerns over possible interference with judicial independence.

22. The National Judicial Institute (NJI) was established in 1988. It is a body funded by the federal, provincial and territorial governments, providing judicial education in both official languages to federally and provincially appointed judges throughout Canada. The mission of the NJI is to foster a high standard of judicial performance through programs that stimulate continuing professional and personal growth; to engender a high level of social, gender and multicultural awareness, ethical sensitivity and pride of excellence, within an independent judiciary, thereby improving the administration of justice.

23. The Institute organizes approximately 40 programs a year covering three main areas: substantive law, skills training and social context issues. In the category of sensitivity training, the Institute has received funding and overseen the production of training videos in the areas of race relations, family violence, child abuse and gender equality. The NJI as well developed a judicial education policy and is active in co-ordinating educational activities. The Institute undertook a project in 1992 which resulted in the development and publication of standards for judicial education. This was a first attempt to articulate precisely the educational needs of the Canadian judiciary. It recommended that every new judge should take approximately ten days of intensive judicial education as soon as possible after appointment and subsequently about ten days per calendar year attending judicial education programs relating to the judges' responsibilities or court assignment. Training materials for sensitization programs have been prepared and continue to be distributed. For example, a video and related materials on the issue of gender equality are being given to all newly appointed judges, federal and provincial. The judges' libraries are also provided with a copy and loans can be arranged to other interested parties. The NJI estimates that more than 60 per cent of all the judges in Canada have viewed this single program.

24. Other organizations are also involved in continuing education for judges, such as the Western Judicial Education Center(WJEC) and the Canadian Institute for the Administration of Justice (CIAJ). The WJEC was established in 1984 for the provincial court judges sitting in the western provinces. It provides training sessions for newly appointed provincial court judges. Their workshop series relating to social issues has been evaluated as extraordinarily successful and their gender equality program is considered to be a model program. The

CIAJ has organized judicial education sessions for all judges. They have developed courses and training for new judges and presented seminars on the Charter, judgment writing, as well as several other topics.

25. In each province there exists a provincial judges association which represents the interests of its members in matters of local concern. The Canadian Association of Provincial Court Judges (CAPCJ), whose membership is composed of the majority of provincial court judges in Canada, acts to unify the efforts of these organizations. Judicial education is of highest priority for the CAPCJ. They offer a new judges' program yearly to newly-appointed provincial and territorial judges from across Canada. It is a seven day program which concentrates on topics of particular interest to new appointees. Instructional emphasis is placed on particular areas of the substantive law, such as a refresher on the rules of evidence, the impact of the Charter, the conduct of a preliminary inquiry and judicial interim release. In addition, precise topics of special interest are considered such as dealing with child witnesses and the law related to contempt of court. Skills training forms a part of the curriculum as well with instruction being offered on the delivery of reasons for judgement and the enhancement of memory skills.

26. Other provincial organizations are also involved in providing continuing judicial education to the judiciary. Such an organization is le Conseil de la magistrature du Québec which provides training for judges in the province of Québec. It organizes an annual meeting which is attended by all judges in Québec falling under the jurisdiction of the Conseil. In 1995, the annual meeting touched particularly on the topics of family violence and judicial independence. With the assistance of the Conférence des juges municipaux du Québec, the Conseil was involved in a conference given to municipal judges on subjects relating to their particular work. The Conseil as well ensures that the judges are able to participate in activities and can attend conferences given and organized by other organizations providing continuing education to the judiciary.

27. The programs prepared by and for the judiciary themselves have been well received by the judges. Continuing judicial education is very important to ensure that the judges keep up to date with the law, improve their judicial skills and are equipped to treat equally and with respect everyone who is affected by their work.

INTERNATIONAL ASSISTANCE

28. Canada has provided and continues to provide technical co-operation and assistance to a number of countries with respect to issues pertaining to the independence of the judiciary and judicial education and training. This co-operation has taken the form of presentations and documentation provided to visiting judges and officials directly by the NJI, Department of Justice and court officials, and through the direct participation of the NJI and other organizations in designing and presenting intensive study programs for international delegations both in Canada and abroad. This technical co-operation and assistance is as well available in the areas of promulgation of national legislation, exchange of experience, mentoring, research, policy and planning and direct training.

29. One example of such an intensive study program involved a co-operative effort in the fall of 1992 on the part of the NJI, the Canadian Bar Association, the Supreme Court of Canada and the Department of Justice, in which ten judges from the Czech and Slovak Federal Republics were given the opportunity to experience first hand the Canadian court system directly by being teamed up with a Canadian judge in a mentorship relationship over a period of one month.

30. Another example of Canadian co-operation and assistance in the field of judicial education and training occurred in August 1992 when a NJI lawyer, a law professor from the University of Ottawa and a judge traveled to Uganda in a project funded by the International Centre for Human Rights and Democratic Development. In Uganda, that Canadian delegation met with judges, justice officials, human rights organizations, and members of the Bar for the purposes of assessing the need for judicial education in Uganda. The Canadian delegation gave a full-day session on judicial independence and related subjects to Ugandan judges and masters.

31. In November of 1992, a seven-person delegation from the Francophonie countries of Ivory Coast, Senegal and Cameroon visited the NJI to learn about the Canadian model for judicial education. This visit was part of a longer program organized by the Centre International de la common-law en français at the University of Moncton.

32. In June of 1993, the NJI assisted the South African Education Trust Fund in putting together a three week program in Canada for a delegation of

lawyers representing the South Africa National Association of Democratic Lawyers.

33. The International Appellate Judges' Conference was organized and hosted in September 1995 by the Supreme Court of Canada. Appellate judges from around the world gathered and discussed issues of common concern including law and cultural diversity, aboriginal cultures and the law, and the administration of justice. The Supreme Court as well organizes visits from judges of different countries such as the visit by members of the Supreme Court of Hungary in June of 1994 and the visit of judges of the Russian Federation in August of 1994.

34. Canada is actively addressing issues of judicial education and judicial independence through the Commonwealth Judicial Education Institute. Some of the initiatives undertaken include the following programs, which were for the most part funded by the Canadian International Development Agency (CIDA) and partly by the Commonwealth Secretariat. In October of 1995, the Institute conducted a two week study education program for judicial educators from Kenya, Uganda, Ethiopia, Tanzania, Mauritius, Malawi, South Africa, Swaziland, Zimbabwe, Zambia and Papua New Guinea. A program for Caribbean jurists was held recently in the Cayman Islands on the topic of judicial accountability. A first Round Table Discussion of Commonwealth Chief Justices on the topic of "The media and the image of justice" was held at the Institute in September of 1995 which has led to the planning of five future regional programs in Britain, the Caribbean, Asia, Australia and Africa. The next one will be in April of this year in Britain.

35. Canada has been asked to provide assistance to the South African Government in the reform of its system of justice. The Canadian contribution is likely to include some element of judicial training.

36. The Office of the Commissioner for Federal Judicial Affairs is currently working with CIDA to develop a three-year program of assistance to the reform of the judicial system of Ukraine.

37. Programmes of this nature are ongoing. In the past, the federal Department of Justice has on a number of occasions helped organise study tours on matters pertaining to the independence of the judiciary or the management of courts. The Canadian judiciary has been extremely supportive of the endeavours in international judicial education,

and have freely given their time to participants as planners, instructors and mentors thereby contributing to the success of these initiatives.

38. Direct financial aid in these areas is, however, severely limited or generally unavailable. The dramatic increase in the number of requests for this type of assistance in the past few years strains Canada's capacity to continue dealing with these demands on an ad hoc basis. The Department of Justice is now inclined to believe that there should be fewer interventions in this field, but that interventions should be more systematic. The Department of Justice has no funds in its own budget for international assistance programs, and must work with development agencies such as CIDA. As a result, all significant co-operation initiatives require the granting of financial support by CIDA. CIDA establishes the Government of Canada's priorities for technical assistance and the training for judges falls into this category.

CONCLUSION

39. The foregoing has been an attempt to set out the concrete measures taken by the Parliament of Canada to ensure that the concept of an independent judiciary is truly recognized and that the separation between the judiciary and the executive at the federal level clearly exists. In Canada, the independence and impartiality of the judiciary is a constitutional and legal principle of paramount importance. It is hoped that this principle will continue to be developed and strengthened in Canada's statutes as both Parliament and the courts strive to ensure that the independence of the judiciary is reinforced and enhanced to the benefit of all persons in this country.