Judicial Independence

Introduction

The judiciary is one of three branches of government in Canada: executive, legislative and judicial. Each of these branches has responsibilities rooted in Canada's Constitution and history. Judicial independence is foundational to the constitutional role of the judiciary. Courts must be "completely independent of any other entity," including other branches of government, social groups, and individuals.[1] A court must not only be independent, the public must also see it as independent. [2]

The Importance of Judicial Independence

Judicial independence ensures that the judiciary can properly exercise its judicial responsibilities. That includes adjudicating individual disputes. Judges should make decisions "based solely on the requirements of law and justice."[3]

The judiciary is also the protector of the Constitution and the values it embodies.[4] These values include the rule of law, democracy, equality, and fundamental justice.[5] Two sources make the judiciary the protector of the Constitution. First, Canada is a federal country, meaning it has two levels of government: central and provincial. Sections 91 and 92 of the *Constitution Act, 1867* give different powers to these levels of government. A federal system requires an independent arbiter (the judiciary) to resolve disputes between the two levels of government.[6] Second, the judiciary is responsible for protecting our basic human rights contained in the *Canadian Charter of Rights and Freedoms*, which is part of the Canadian Constitution. An independent judiciary protects us against government action that violates these rights.[7]

The importance of judicial independence for protecting the Constitution is also tied to the principle of separation of powers. Separation of powers means that the branches of government should be independent of one another.[8] Each of the branches exercises separate and distinct functions that the other branches cannot interfere with. However, this does not mean that each of the branches is completely separate from the other.

The branches of government have a particular relationship with one another based on their functions.[9] The Supreme Court of Canada has said that the relationship between the judiciary and the other branches is a depoliticized one. This means that the legislature and executive cannot put political pressure on the judiciary, and the judiciary should not speak publicly on issues that could come before the courts.[10]

Finally, judicial independence is essential for upholding the rule of law, which means that governments can only take actions that are permitted by law and the Constitution. [11] The judiciary makes sure that government actions and laws are consistent with the Constitution. An independent judiciary maintains public confidence that justice will be done by an impartial authority.[12]

Judicial Independence: Two Dimensions and Three Characteristics

Judicial independence has two dimensions: individual and institutional. Individual independence means that individual judges decide cases without interference.[13] Institutional independence means that courts are independent from other branches of government.[14]

Three core characteristics – security of tenure, financial security, and administrative independence – are necessary for maintaining judicial independence.[15]

Security of tenure means that judges cannot be removed on a whim. Judges are appointed until retirement, unless they cannot perform their duties.[16]

Financial security means that judges' salaries are set by law, and the executive cannot change them.[17] It also means that courts must be "free from political interference through economic manipulation by the other branches of government."[18] For example, if a provincial government wants to change or freeze the salaries of provincial court judges, it must set up an effective and independent commission to determine whether that can be done.[19] Otherwise, if a provincial government were to unilaterally change the salaries of provincial court judges, then it would be interfering with the financial security of provincial court judges. If a provincial government interfered with the financial security of judges, it would be interfering with judicial independence.

Administrative independence means that courts have control over their own judicial administration. This includes assigning judges to cases, court sittings, and direction over administrative staff.[20]

Sources of Judicial Independence

Judicial independence has two sources explicitly written into the Constitution. Sections 96 – 100 of the *Constitution Act, 1867* guarantee the highest degree of independence for superior courts. This includes security of tenure, salary and pension. Section 11(d) of the *Charter* guarantees the right to an "independent and impartial body" for every individual accused of an offence. These sources do not explicitly apply to all courts. For example, a provincial court dealing with a family law matter does not fall under any of these sections because it is not a superior court (in other words, sections 96-100 of the *Constitution Act* do not apply) and is not dealing with a criminal law matter (therefore, section 11(d) of the *Charter* does not apply).

That said, judicial independence does apply to all courts because it is an unwritten principle of our Constitution.[21] The preamble to the *Constitution Act, 1867* says that Canada is to have a Constitution "similar in principle to that of the United Kingdom." Since judicial independence is an important principle in the United Kingdom's Constitution, it was transferred into Canada's Constitution as an unwritten principle.[22] Over the course of the Constitution's history, the principle of judicial independence has evolved to apply to all courts.[23] Without this principle, some courts might not be protected from outside

interference.

The content of judicial independence is also a product of the political realm.[24] This means that the "day-to-day processes of negotiation and interaction" between members of the political and legal system determine how judicial independence is implemented. For example, the *Constitution Act, 1867* contains provisions for appointing judges and setting their salaries. These provisions relate to judicial independence, but the way that they are implemented is partially a product of the political process.[25]

The requirement for provinces to set up an independent commission to change the salaries of provincial court judges is an example of this political process. Provincial governments can make a political decision to adjust the salaries of provincial judges depending on economic circumstances. But the Supreme Court of Canada has mandated that an independent commission must be met for this happen. Here we have an interplay between the branches of government in determining how one aspect of judicial independence (financial security) should be dealt with.

Judicial Appointments and Independence

The politics of judicial independence can be seen clearly in the process by which judges are appointed. The Constitution gives the Governor General authority to appoint judges to trial and appeal courts. However, the Constitution does not provide for a process of appointment. In practice, the minister of justice selects a candidate from a list compiled after consultation with other judges and members of the legal profession. The minister then recommends the candidate to the federal cabinet, which includes the prime minister.[26] Qualifications for appointment of these judges can be found in section 3 of the *Judges Act*. If the appointment process for appointing judges is not open or transparent, those appointments might seem like political choices.

Does judicial independence require an open process for judicial appointments to avoid the perception that those appointments are based on political preference or interference? Perhaps, an independent commission should be required to appoint judges in the same way that an independent commission is needed to change judges' salaries.[27] This issue will likely receive more attention in the coming years.

Conclusion

Judicial independence is essential to the rule of law and to the effective functioning of our democracy. It must be safeguarded to ensure that the public remains confident in the judiciary. If the public loses confidence in the judiciary's independence, it might also lose faith in our justice system.

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[1] *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at para 35, [2002] 1 SCR 405.

[2] *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 47, [2005] 2 SCR 473.

[3] *Supra* note 1 at para 37.

[4] *Beauregard v Canada*, [1986] 2 SCR 56 at para 24, [1986] SCJ 50.

[5] *Ibid* at para 24.

[6] *Ibid* at para 27.

[7] *Ibid* at para 28.

[8]Guy Regimbald & Dwight Newman, *The Law of the Canadian Constitution*, 1st ed (Markham: LexisNexis Canada Inc, 2013), at 101

[9] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 at para 139

[10] *Ibid* at para 140

[11] *Provincial Court Judges Assn (Manitoba) v Manitoba*, [1997] 3 SCR 3 at para 10, [1997] SCJ 75.

[12] *Ibid* at para 10.

[13] *Supra* note 4 at para 8

[14] *R v Valente (No 2)*, [1985] 2 SCR 673 at para 20, 24 DLR (4th) 161.

[15] *Supra* note 2 at para 45.

[16] *Supra* note 11 at para 30.

[17] *Ibid* at para 40.

[18] *Supra* note 8 at para 131; see also *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3.

[19] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at para 166.

[20] *Supra* note 11 at para 49.

[21] *Supra* note 8 at para 83.

[22]*Supra* note 4 at para 29.

[23] *Supra* note 8 at para 106.

[24] Gee, Graham et al. *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015)

[25] *Ibid* at 9

[26] See http://www.cscja-acjcs.ca/judges_selected-en.asp?l=5

[27] See Joseph Arvay, Sean Hern & Alison Latimer, "Why we need a constitutional challenge on judicial appointments" *The Globe and Mail* (06 August 2015) online: The Globe and Mail < http://www.theglobeandmail.com/globe-debate/why-we-need-a-constitutional-challenge-on-judicial-appointments/article25867097/>.