



JUDICIAL INDEPENDENCE **(And What the Public Should Know About It)**

Introduction

Our system of government is divided into three branches: the legislative, the executive and the judiciary. Each has separate and independent areas of power and responsibility. In its simplest form, the legislative branch creates the law, the executive branch enforces the law, and the judicial branch interprets and applies the law in individual cases.

Over a long and difficult history, a constitutional balance has been struck between these three branches of government. This balance ensures that no one branch gains too much power or gains too much influence over the others. The judiciary is separate and independent from the other branches of government. It must remain so to preserve its impartiality.

What is Judicial Independence? Why is it Important?

The term “judicial independence” is often talked about when discussing the justice system. It is not always well-understood. The purpose of these comments is to help the public understand what judicial independence is and why it is important. Those who come before the courts must be certain that decisions made by the courts are not subject to outside influence.

Judicial independence means that judges are not subject to improper pressure and influence, and are free to make impartial decisions based solely on facts and law.

Judicial independence is often misunderstood as something that is for the benefit of the judge. It is not. It is the public's guarantee that a judge will be impartial. The principle has been expressed this way:

In the final analysis we value and stress judicial independence for what it assures to the public, not for what it grants to judges themselves. Ultimately, the sole purpose of the concept is to ensure that every citizen who comes before the court will have [their] case heard by a judge who is free of governmental or private pressures that may infringe upon the ability of that judge to render a fair and unbiased decision in accordance with the law.¹

Judges are not subject to the direction or control of either the executive or legislative branch of government. There are sound reasons for this. Government, in its many manifestations, is frequently a party to court proceedings in an adversarial role. For example, the state is behind every criminal prosecution. Government agencies are frequently either parties to court proceedings, or are subject to having their decisions reviewed by the courts. Courts are called upon to decide disputes between the Inuit and various levels of government or government agencies. Courts also have to rule on the validity of legislation, as to whether it is within the powers given to the Legislature or Parliament by the *Constitution* and whether it conforms to the requirements of the *Charter of Rights and Freedoms*.

Judicial independence is not a shield against scrutiny. Judges have a responsibility to protect their independence and impartiality. They do not do so out of self-interest, but as an obligation they owe to the public who have entrusted them with decision-making power.

To preserve judicial independence, the *Constitution* of Canada requires three things for the judiciary: i) Security of tenure, ii) Financial Security, and iii) Administrative Independence.

Security of tenure: Once appointed, a judge is entitled to remain a judge until the age of retirement, unless, for Superior Court judges, both Houses of Parliament agree that he or she should be removed from office. A judge must be at liberty to decide a matter on

¹ Garry D. Watson, "The Judge and Court Administration" in *The Canadian Judiciary* (Toronto: Osgoode 1976) at 183 quoted in British Columbia, Commission of Inquiry Pursuant to Order-in-Counsel #1885, July 5, 1979, *Report of the Honorable Mr. Justice P.D. Seaton, Commissioner* (October 23, 1979) at 11 ["*Seaton Report*"]

its merits, free from pressures, inducements or repercussions from outside influences.² It is for that reason that judges are appointed to hold office during “good behavior”. While judges may be removed from office for violating the code of judicial conduct, they may not be removed for making decisions that are unpopular or seen to be unfavourable to the wishes of one or both of the other two branches of government.

Financial security : Judges must be adequately paid so they are not dependent on or subject to pressure from other institutions. In their decision-making, they must not be distracted or influenced by their present or future financial state. Judicial compensation should be sufficient to attract the most competent and qualified citizens into the judicial ranks.³

A judge’s compensation may not be increased or decreased in response to a decision seen as favourable or unfavourable to one or both of the other two branches of government. To guard against that, an independent body called the Judicial Compensation and Benefits Commission reviews judges’ salaries, benefits and retirement pensions and recommends improvements and changes. Their recommendations are not to be ignored or rejected; it is fundamental to judicial independence that all branches of government show respect for the views of this independent Commission and the process put in place to provide for the objective assessment of judicial remuneration.

Administrative independence: Courts must be able to decide how to manage the litigation process and the cases judges will hear. The court as a whole must remain separate from other branches of government to prevent any suggestion of improper influence. The Supreme Court of Canada has identified the aspects of administrative independence necessary to maintain a constitutionally-sound separation between the judiciary and other branches of government. They include:

1. The assignment of judges to hear particular cases;
2. The scheduling of court sittings;
3. The control of court lists for cases to be heard;
4. The allocation of courtrooms; and
5. The direction of registry and court staff in carrying out these functions.

² Justice F.B. William Kelly, “An Independent Judiciary: The Core of the Rule of Law”, (1996) at 2; Online: http://www.icclr.law.ubc.ca/Publications/Reports/An_Independant_Judiciary.pdf [“Kelly”].

³ Kelly, at p.7

It is important to understand why these functions must remain within judicial control. First, the public could not have confidence in the independence and impartiality of the courts if others, outside the judicial branch, could control or manipulate proceedings by interfering in any of these functions. A judge cannot be independent if the necessary support staff is unavailable, or is subject to the control of and accountable to others. All branches of government recognize that there is a requirement for accountability for the allocation and disposition of the resources, human and financial, necessary to the proper functioning of the courts. There is bound to be continuing tension between the uncertain and varying demands for the resources, and the constraints on those who must budget for the supply of those resources. However, resource allocation must be made within the boundaries of what is permitted by the *Constitution*.

Judicial Independence and the need for adequate human and financial resources within Courts

There are many factors that require consideration when looking to improve the justice system. No one can predict with confidence the number of cases coming into the system at any given time. No one can predict with certainty the complexity or the time required to hear and resolve a particular case. For this reason, predetermined limits on human and financial resources by those outside the judicial system are likely to give rise to serious problems. Flexibility is necessary if changing demands for judicial and court resources are to be met.

The Senior Judge does an in depth review of all court systems and processes on an annual basis to ensure that the delivery of court services in Nunavut remains effective and efficient. This review is reflected in part by the detailed Annual Report prepared for the public and the other two branches of government. In conducting this review, the Senior Judge draws upon appropriate types of business analysis to develop projects and systems that better utilize resources and improve the delivery of court services to the public. This review must be done in a way that recognizes the institutional independence of the other two branches of government and the constitutional rights and responsibilities that underpin the legal system.

The judiciary in Nunavut is always open to discussing ways of improving the administration of justice with the other two branches of government. In being open to such discussion, however, the judiciary in Nunavut will nonetheless be relentless and unyielding in its insistence that judicial independence be protected from those who would challenge it, or seek to encroach upon it.