

Court of Appeal of British Columbia | Supreme Court of British Columbia | Provincial Court of British Columbia

Judicial Independence
(And What Everyone Should Know About It)

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Introduction

The provincial government's "Justice Reform Initiative" presents an opportunity to provide information to the public about the courts and the role of the judiciary in our system of government.

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.

Through a long history, a balance has been struck among these three branches of government, keeping each branch from gaining too much power or having too much influence over the others.

Every resident of Canada remains subject to the application of the law. No person nor government is beyond its reach. This principle is often called the "rule of law" and is important in a democratic system of government. A former Secretary General of the United Nations has defined the rule of law as follows:

> *It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards*.[1]

This principle has a long history, but the independence of the judges, who are tasked with interpreting and applying the law in individual cases, is an important part.

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[1] U.N. Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General.* (S/2004/616). 23 August 2004. Online: http://www.unrol.org/files/2004%20report.pdf.

What is Judicial Independence and Why is it Important?

The term "judicial independence" is often talked about when discussing the justice system, but 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.

A famous English judge said that "Justice must be rooted in confidence." He was referring to the confidence litigants and the public must have that judicial decision-makers are impartial. Those who come before the courts must be certain that decisions made by those courts are not subject to outside influence. Judicial independence means that judges are not subject to pressure and influence, and are free to make impartial decisions based solely on fact 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 impinge upon the ability of that judge to render a fair and unbiased decision in accordance with the law.*[2]

It has been suggested that judges may use independence as a "shield" against scrutiny. This is a mistaken view.

Judges have a responsibility to protect their independence and impartiality. They do so not out of self-interest, but as an obligation they owe to the public who have entrusted them with decision-making power, and to whom they are ultimately accountable to maintain the public's confidence. One judge expressed it this way:

> *It is the judge [...] who is primarily responsible for the maintenance of [their] independence and the independence of the judiciary generally. The Chief Judge and others with administrative duties must act as a buffer between the executive and individual judges. All judges, especially those with administrative duties, must be vigilant to preserve their independence and the independence of their court. They must keep the Ministry, just as they must keep all others, at arm's length.*[3]

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[2] 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-Council #1885, July 5, 1979, *Report of the Honourable Mr. Justice P.D. Seaton, Commissioner* (October 23, 1979) at 11 ["*Seaton Report*"].

[3] *Seaton Report* at 60.

To preserve judicial independence, the *Constitution* of Canada requires three things:

1. **Security of tenure:** Once appointed, a judge is entitled to serve on the bench until the age of retirement, unless, for Superior Court judges, both houses of Parliament agree that he or she should be removed from office, or for Provincial Court judges, a tribunal established under the *Provincial Court Act* has ordered that he or she should be removed from office.

2. **Financial security:** Judges are paid sufficiently and in a manner so they are not dependent on or subject to pressure from other institutions.

3. **Administrative independence:** Courts must be able to decide how to manage the litigation process and the cases judges will hear.

It is easy to see how the first two aspects are important to ensure judges are free from government or private pressures affecting their impartiality. The third aspect, administrative independence, is more complex.

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 stated 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.

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 recognize there is a requirement for accountability for the allocation and disposition of the resources, human and otherwise, 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. But if there is a business case to be made for cost savings, that case must be made within the confines of what is permitted by the *Constitution*.

Reforms also need to be examined in context. For example, it has been suggested that "overbooking" (the setting of more than one case before the same judge on the same day) is inefficient and costly, because one or more counsel and parties who attend on the appointed day will have their cases adjourned. That can be one result of overbooking. But this view overlooks the fact that overbooking often leads to more effective utilization of judicial and other court resources, taking into account the number of cases that normally settle on the eve of trial or do not proceed for other reasons.

By long history, our court proceedings are based on an adversarial system. The parties present their opposing positions, witnesses are called and cross-examined. The judge sits as a neutral decision-maker. It is not a perfect system, and it continues to evolve, but in its essential form, and particularly in the area of criminal law, it is a system that has worked well for centuries.

In the adversarial system, the preparation and presentation of cases is left primarily in the hands of the lawyers representing the adverse parties. The courts exercise some measure of control over this, but they must respect the accused's constitutional rights, as well as the professional obligations of the lawyers to their respective clients.

The adversarial system is one feature of the legal system that makes it an uneasy fit with the application of business analysis and systems management designed for a business or government enterprise. The judiciary of each Court has drawn upon such analysis to develop projects and systems to better serve the public in a manner that also recognizes the constitutional structures and rights that underpin the legal system.

There are many other factors which require consideration when seeking to improve the justice system. No one can predict with confidence the number of cases coming into the system at any given time, and no one can predict their complexity or the time they will require to be heard and resolved. Predetermined limits on human 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.

Other Types of Independence

It is important to distinguish between judicial independence and the sort of independence that characterizes the role of other members of our legal system. Police, prosecutors and defence counsel all have to make important decisions in the detection, prosecution and defence of persons alleged to have committed crimes.

There is a critical distinction between the police and Crown prosecutors on the one hand, and the judiciary on the other. The police and prosecutors are in the employ and within the authority of the executive branch of government. Although required to exercise their duties impartially and independently, at the end of the day they are agents of the Crown.

Judges by contrast are not subject to the direction or control of the executive 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 in the courts. Courts are called upon to decide disputes between our Aboriginal peoples, 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*.

So while police and prosecutors must be independent within their proper spheres, theirs is an independence of a different nature or quality than judicial independence. While police and prosecutors must be objective, they are ultimately part of and answerable to the executive branch of government. Judges are not, and their independence safeguards their impartiality.

Conclusion

The judiciary is always open to discussing ways to improve the administration of justice. Indeed, all levels of court have engaged in extensive discussions with government officials over the past several years with a view to achieving that end. In being open to discussion, however, the judiciary will remain steadfast in protecting the essential elements of judicial independence, as the precursor and guardian of judicial impartiality.

Chief Justice Lance Finch
Chief Justice of British Columbia

Chief Justice Robert Bauman
Chief Justice
Supreme Court of British Columbia

Chief Judge Thomas Crabtree
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