TRY JUDGING™

B. Resource Materials

1. The Origins and Importance of Judicial Independence

Three centuries ago, British judges were not independent. In the words of Francis Bacon, an attorney general of the 17th century, judges were "lions under the throne" who served at the pleasure of the ruling monarch and could be dismissed for any reason. It was even common practice to replace all judges when a new king or queen ascended to the throne. *The Act of Settlement* of 1701 established fixed salaries for judges, who could only be removed from office for misbehavior and then only after a vote of both houses of Parliament. By the 1830s these principles of judicial independence had been extended to judges in Britain's North American colonies, and were later enshrined in the British North America Act – the forerunner of our constitution – in 1867. The *Charter of Rights and Freedoms* guarantees every Canadian charged with a crime the right to receive a fair trial before a court that is "independent and impartial."

The independence of the judiciary is a cornerstone of Canadian democracy. As an institution the judiciary is independent from all other branches of government, and individual judges are independent not only from government but from each other. The government prosecutes crimes and often appears as a litigant in the civil courts, so any appearance of impartiality would vanish if government could fire a judge on a whim or slash a judge's salary as punishment for ruling against its position. Independence ensures judges are free to assess the evidence, apply the law and decide the outcome of cases without regard for who will be pleased or displeased with the result. Judges have a duty to uphold the rule of law, and independence ensures they can fulfil that duty free from outside influences. Judicial independence ensures cases are dealt with fairly and impartially, and citizens can be confident in the integrity of the results. "Judicial independence is critical to the public's perception of impartiality," the Supreme Court of Canada noted in a 1991 ruling. "Independence is the cornerstone, a necessary prerequisite for judicial impartiality."

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2. How Judges are Selected

While judges are appointed by government, they are not government employees. The federal government appoints judges to the superior courts and the Supreme Court of Canada, while provincial and territorial governments choose judges for provincial-level courts. The process is the same at all levels – the minister of justice recommends candidates to the cabinet, which makes the final decision. Appointments to the Supreme Court of Canada are an exception – the prime minister recommends candidates to the federal cabinet for approval.

Superior court judges are selected after wide consultation with the judiciary and the legal community. Lawyers who have at least 10 years' experience in practicing law can apply to arms' length screen-

ing committees of judges, lawyers, government officials and members of the public who interview and screen candidates and recommend those who are qualified. The provinces and territories have similar screening processes for their courts, but in some jurisdictions lawyers need only five years' experience before being considered for appointment. The prime minister selects Supreme Court of Canada judges after wide consultation, but there is no screening committee for these appointments. As of 2004 the federal government was considering proposals to allow a Parliamentary committee to hold hearings to review the qualifications of those chosen for the country's highest court.

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Candidates for judicial office are assessed on their legal knowledge and accomplishments, their volunteer work for legal organizations and the wider community, the soundness of their judgment, their decision-making abilities, and whether they can deal with issues and people in a fair and impartial manner. It is common for judges who have served with distinction on lower courts to be promoted to a superior court or court of appeal, but judges do not apply for these posts and they are not put through a screening process for a second time.

Another model for selecting judges, followed in some American states, is to allow citizens to elect judges in the same way they vote for politicians. While this process may appear more democratic, it has serious implications for the independence of judges and their appearance of impartiality. To win office or to be re-elected, candidates and incumbent judges must appeal for the support of voters. If that means campaigning on a tough law-and-order platform or ensuring that the public gets the harsh sentences it demands, impartiality and the rule of law may be seriously undermined. As well, judges and candidates would not appear to be impartial if they sought donations from law firms and corporations to finance their election campaigns.

3. Security of Tenure

Once a judge has been appointed, governments have no control over how long he or she will serve on the bench. Under the constitution, superior court judges can remain in office until reaching 75, the mandatory retirement age. For provincial-level courts, the age for mandatory retirement varies and is usually 65 or 70. Judges who have reached a threshold age and have a certain number of years of experience on the bench may choose to become supernumeraries. A replacement judge will be appointed but the supernumerary judge will continue to work part-time, at the same salary, providing the courts with experienced judges to deal with long trials or to help clear up backlogs of cases.

Under the federal *Judges Act*, superior court judges can be removed from office for misconduct, due to advanced age or infirmity, or if they fail to properly exercise the powers of judicial office. Only Parliament has the power to remove a superior court judge from office on such grounds. A joint motion of the House of Commons and the Senate is required, but this procedure has never been used. At the provincial and territorial level, the cabinet or legislature has the power to remove a judge for misconduct.

4. Financial Security

To ensure government has no influence over the financial security of judges, independent commissions are established at regular intervals to review the salaries of judges. At the federal level a commission is struck every four years to undertake the review and recommend any increase to Parliament. Salaries are set at a high level to attract the best candidates and to ensure judges are unlikely to run into financial trouble or to be tempted if

offered a bribe. To further ensure financial security, the pensions of superior court judges are pegged by law at two-thirds of their salary.

5. Protection from Outside Influences

Courts operate in a manner that shields judges from outside influences. While governments cover the cost of running the justice system – providing courthouses and facilities and paying support staff – they have no control over how judges do their jobs or who hears a particular case. The courts establish policies, set dates for hearings and assign judges. The chief justice or chief judge of the court oversees these administrative matters, but cannot tell a judge what ruling to make because judges have complete independence from each other.

Independence enables judges to make rulings that may be unpopular. Justice is not a popularity contest and the courts must be able to uphold the legitimate rights of individuals and minority groups regardless of the views of the majority of citizens.

Judges cannot be sued for anything they do while carrying out their judicial duties. This immunity is crucial if judges are to fulfil their duty to assess the evidence and apply the law – if judges could be sued for defaming someone's character, for instance, it may prevent them from stating whether a witness is telling the truth.

Judges provide reasons for their decisions, often in writing, but do not have to justify or explain their decisions to the public or to anyone in government. Independence enables judges to make rulings that may be unpopular. Justice is not a popularity contest and the courts must be able to uphold the legitimate rights of individuals and minority groups regardless of the views of the majority of citizens. Judges may make rulings that outrage victims of crime, the police, politicians or lobby groups, or force governments to change policies or amend the law. It is the role of the courts to do justice and uphold the rule of law, not to please everyone. Each case will have a winner and a loser and, no matter what the outcome, judicial independence assures that both sides will receive a fair and impartial hearing.

6. Judicial Accountability

Judges are independent but remain accountable for their actions. Court proceedings are open to the public – private hearings are rare and only held to protect a person's privacy or other important interest – and journalists and citizens are free to debate and criticize a judge's decision. Judges are accountable to the higher courts for all their decisions – a party who is unsuccessful in court has the right to appeal and, if a higher court finds a legal error has been made, the ruling will be altered or reversed. The Canadian Judicial Council investigates formal complaints about the conduct of federally appointed judges (it does not, however, review judges' rulings). The council – made up of the chief justice of Canada and the chief justice and associate chief justice of each superior court – has the power to counsel or reprimand a judge and, in cases of serious misconduct, can recommend that Parliament be asked to remove a judge from office. The provinces and territories have judicial councils to review complaints about the conduct of judges serving on their courts.