THE RULE OF LAW AND JUDICIAL INDEPENDENCE: PROTECTING CORE VALUES IN TIMES OF CHANGE

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I. Introduction

For many, Ivan C. Rand is a name from the past. For me, he is far more than that. When I was called to the Bar of Québec in 1957, Ivan Rand was still a member of the Supreme Court of Canada.

The contribution that Ivan Rand made to this country remains significant even after his untimely death in 1969. The Rand formula remains a part of our labour law lexicon. The many thoughtful articles that he contributed to legal journals over the course of his career, as a practitioner, as a judge, and finally as a legal academic, continue to stimulate and to enlighten us. Most importantly the judgments that he wrote, particularly in the area of constitutional law, still provide us with inspiration and guidance as we face the challenges that confront our legal system, particularly those posed by the *Charter*. In fact, it is a rare decision of the Supreme Court of Canada that deals with one of the fundamental freedoms in the *Charter* for the first time and does not invoke a passage from one of Justice Rand's memorable decisions from the 1950s, such as *Boucher* v. *R.*,[1] *Saumur* v. *Québec (City of)*,[2] or *Switzman* v. *Elbling*.[3]

What makes the decisions of Justice Rand such useful sources of guidance on the interpretation and application of the fundamental freedoms of the *Charter* is that, unlike most Canadian judges prior to the advent of the *Charter*, Justice Rand recognized the importance of analyzing issues of constitutional policy in terms of the fundamental or core values of our system of government. For him, interpreting the meaning of "sedition" and applying it in *Boucher* was far more than a semantic exercise. It entailed an exploration of the underpinnings of a free and democratic society, particularly the importance of protecting the freedom of expression of dissentient minorities. The same was true in *Saumur* where he was required to determine the validity of a municipal by-law prohibiting the distribution of written materials in the streets without the permission of the Chief of Police, and in *Switzman* where he was required to determine the validity of Québec's infamous padlock law. Not only did Justice Rand recognize the necessity

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*P. C., Chief Justice of Canada. This paper is based on the text of the fourth Ivan C. Rand Memorial Lecture at the Faculty of Law, University of New Brunswick (Fredericton), 14 March 1996.

[1][1951] S.C.R. 265, [1951] 2 D.L.R. 369 [hereinafter *Boucher* cited to S.C.R.].

[2][1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641 [hereinafter *Saumur*].

[3][1957] S.C.R. 285, 7 D.L.R. (2d) 337 [hereinafter *Switzman*].

of analyzing these problems in terms of core constitutional values, he consistently sought to protect those values when, in his view, they were being placed at risk. Hence, it was essential, in order to protect freedom of expression, to interpret the crime of sedition narrowly and to strike down as unconstitutional both the municipal by-law in *Saumur* and the provincial padlock law in *Switzman*.

I emphasize these characteristics of Justice Rand's approach to problems of constitutional law because they connect very well with the theme of my lecture: protecting core values in times of change. Those that I have in mind are the rule of law and judicial independence; two fundamental values with which Justice Rand is closely associated. He turned to the rule of law in *Roncarelli* v. *Duplessis*[4] to support his decision that the Premier of Québec was liable for the economic loss suffered by a member of the Jehovah's Witnesses following the wrongful revocation of his liquor licence by the Premier. Judicial independence was a subject on which Justice Rand wrote an article, published in the University of Toronto Law Journal in 1951,[5] and which he considered with great care in his report as Commissioner of the Landreville Inquiry in 1966.[6]

I will not limit myself to an abstract discussion of the importance of these two core values. Instead, I propose to examine the importance of protecting each of them in a particular context. Regarding the rule of law, that context is the tendency of governments, both federal and provincial, to assign important adjudicative functions to bodies other than the provincial superior courts of inherent jurisdiction. Regarding judicial independence, that context is the developing trend to engraft upon our traditional understanding of judicial independence the somewhat novel notion of judicial accountability, which is epitomized in the recent report by Professor Martin Friedland of the University of Toronto.[7]

II. The Rule of Law and Judicial Independence: Core Constitutional Values

The importance of the rule of law to Canada's constitutional order was explained in the following terms in the *Reference Re Language Rights under s. 23 of the*

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[4][1959] S.C.R. 121, 16 D.L.R. (2d) 689 [hereinafter *Roncarelli* cited to S.C.R.].

[5]The Hon. I.C. Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951-52) 9 U.T.L.J. 1.

[6]The Hon. I.C. Rand, *Inquiry Re: The Honorable Mr. Justice Leo A. Landreville* (Ottawa: Queen's Printer, 1966).

[7]Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada* by M.L. Friedland (Ottawa: Canadian Judicial Council, 1995).

Manitoba Act, 1870 of 1985 by the Supreme Court of Canada:

> The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest ... . It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act, 1982*, and its implicit inclusion in the preamble to the *Constitution Act, 1867* by virtue of the words "with a Constitution similar in principle to that of the United Kingdom".
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> Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.[8]

The concern expressed in this passage for the need for normative order resulted from the situation with which the Court was confronted in that case. The Court, in applying the principle of the supremacy of the Constitution, was required to declare invalid all legislation enacted in the province of Manitoba since 1890 because it had been enacted only in English. Yet, the Court recognized that, if its declaration were to be given immediate effect, a state of legal chaos, or lawlessness, would follow. Powerful as the Court regarded the principle of the supremacy of the Constitution – itself an important aspect of the rule of law – to be, it had to yield to the even more fundamental principle that the relations between citizen and citizen and between citizen and the state be governed by a positive legal order. As a result, the Court decided to suspend its declaration of invalidity until the legislation enacted by the legislature of Manitoba after 1890 had been translated into French.

An important corollary of the normative order understanding of the rule of law, and another aspect which the Court explicitly recognized in the *Manitoba Language Rights Reference*, is that the exercise of power by the government and government officials is governed by law. Justice Rand invoked this aspect of the rule of law in *Roncarelli*. Having found Premier Duplessis guilty of "a gross abuse of legal power"[9] in ordering the Québec provincial Liquor Commission to cancel Mr. Roncarelli's liquor licence as punishment for his support of the Jehovah's Witnesses, Justice Rand said:

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[8]*Reference Re Language Rights under s. 23 of the Manitoba Act, 1870* [1985] 1 S.C.R. 721 at 750-51, (1985), 35 Man. R. (2d) 83 at 114 [hereinafter *Manitoba Language Rights Reference*].

[9]*Supra* note 4 at 141.

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.[10]

In order for any society to be able to fulfill its commitment to the rule of law, there must be an institution charged with the responsibility of ensuring that it is the law that rules. In Canada, as in the United Kingdom from which we inherited most of our constitutional traditions including our commitment to the rule of law, that institution is the judicial branch of government. This connection between the role of the courts and the rule of law is clearly made by Professor Dicey in his famous text, *The Law of the Constitution*. One must look, he wrote, to the "ordinary courts" both for protection against arbitrary government action and to ensure that all citizens, including those who occupy positions of public authority, are treated equally by the law.[11]

For historical reasons, the most important courts in this regard have been the superior courts of inherent or general jurisdiction. These courts are the only ones in Canada whose jurisdiction does not depend entirely on statute. One must go to one of these courts if one is trying to create a new cause of action, or if legislation is silent as to which court or tribunal is to enforce it.

The special position of these courts is reflected in the role they have traditionally played, and continue to play, in judicial review of administrative and other inferior tribunals and of the constitutionality of governmental action. That special position was explicitly recognized by the Supreme Court of Canada in *Canada (A.G.)* v. *Law Society of B.C.* where Estey J. speaking for the full Court held that it was unconstitutional for the Parliament of Canada to assign exclusive power to review the constitutionality of federal legislation to the Federal Court. In his words, for Parliament "to do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*."[12]

The importance of the superior courts of general jurisdiction within our constitutional system is also reflected in the Judicature sections of the *Constitution*

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[10]*Supra* note 4 at 142.

[11]A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan Press, 1959).

[12][1982] 2 S.C.R. 307 at 328, 37 B.C.L.R. 145 at 162.

Act, 1867.[13] While some of those provisions – for example, s. 96, dealing with the appointment of judges, and s. 100, dealing with the remuneration of judges – refer to all three of the superior, district and county courts in the provinces, s. 99, which deals with that most important of principles, the security of tenure for judges, refers only to the superior courts. Only the judges of those courts are given this strongest guarantee of security.

These provisions of the *Constitution Act, 1867* provide me with a natural lead into a discussion of the second of the two values that I wish to discuss: judicial independence. The Supreme Court of Canada has identified three distinct elements inherent in the principle of judicial independence as it has come to be understood in Canada. One is the security of tenure to which I have just referred. The second, reflected in s. 100 of the *Constitution Act, 1867*, is financial security. The third, which concerns the relationship between the judiciary and the elected branches of government regarding administrative matters bearing directly on the exercise of the judicial function, has been termed institutional independence.

Judicial independence is not an end in itself. We value it because it serves important societal goals, one of which is the maintenance of public confidence in the impartiality of the judiciary. As Justice LeDain said in *Valente* v. *R.*, "[w]ithout that confidence the system cannot command the respect and acceptance that are essential to its effective operation."[14] The importance of public confidence in the administration of justice was recognized by Justice Rand in his article of 1951, "The Role of an Independent Judiciary in Preserving Freedom". Noting that humankind had evolved from an approach to dispute resolution based on "seeking retribution and distrusting the judgment of men" to an approach based on what he termed "the procedure of a rational process", Justice Rand said that "although, in the public aspect, the conclusion of controversies is of paramount importance, it will be nullified in so far as it falls short of general acceptance by the community."[15]

The second purpose served by judicial independence – one that is reflected in the history of its evolution as a principle of our constitutional law – is the maintenance of the rule of law. As noted by Justice Rand himself, Lord Coke opposed the attempt of King James I to continue to adjudicate cases coming before his courts in order to allow the judges of England to apply what he called " 'the artificial reason and judgment of law' ".[16] The philosopher John Locke endorsed judicial independence to ensure that the law would not "be varied in

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[13] *Constitution Act, 1867*, ss. 96-101, (U.K.), 30 & 31 Vict., c.3.

[14] [1985] 2 S.C.R. 673 at 689.

[15] *Supra* note 5 at 6.

[16] *Supra* note 5 at 9.

particular cases, but [be the same] for rich and poor, for the favourite at court and the countryman at plough".[17]

This link between the rule of law and the independence of the judiciary is also reflected in s. 11(d) of the *Charter* which guarantees the right "to be presumed innocent until proven guilty *according to law* in a fair and public hearing by an independent and impartial tribunal".[18] No less than the guarantee of a fair and public hearing, the guarantee of an independent and impartial tribunal is understood to be a necessary, if not sufficient, condition for a determination of guilt or innocence "according to law".

The two values that I have chosen to focus on today are, therefore, closely linked, and that link is most clearly expressed in the institution of the superior courts of general jurisdiction. Because those courts lie at the centre of our judicial system, they lie at the heart of our commitment to the rule of law. For this reason, our Constitution guarantees those courts the highest form of independence.

III. Protecting the Rule of Law: A Core Jurisdiction for Superior Courts

The tendency on the part of goverments to assign important adjudicative functions to bodies other than the traditional superior courts has continued for several decades now. It is associated with the growth of the welfare state and government regulation, particularly after the Second World War. The recipients of these allocations of jurisdiction have been the provincial courts and administrative tribunals, primarily the latter.

The reasons for preferring such bodies over the superior courts as adjudicators are many and varied. One is the desire not to overburden the superior courts. They are more than busy enough dealing with the kinds of disputes with which they have always been primarily concerned – the more serious criminal and civil cases, and judicial review in both its administrative and constitutional law senses. A second is the desire for specialized expertise in the resolution of particular kinds of disputes which superior courts judges are generally thought to lack. A third is the desire to reduce the time and expense of the dispute resolution process; the superior courts, it is believed, are both costly and slow. Closely related to this rationale is a desire for less formality and greater flexibility in the manner in which disputes are resolved. The assumption here is that courts are unduly formal and rigid in their approach, and that administrative tribunals will not be. Then, there

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[17] *Second Treatise on Government*, (Peter Laslett, ed.), (Cambridge: Cambridge University Press, 1988), s. 142 at 363.

[18] *Canadian Charter of Rights and Freedoms*, s. 11(d), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [emphasis added].

is the desire of governments in some areas to combine dispute resolution with other functions such as rule-making and administration; here, it seems, the concern is with efficiency.

Not everyone has applauded the tendency of goverments to assign important adjudicative functions to bodies other than the superior courts. For some time now, opponents of this tendency have been able to challenge the validity of such allocations on constitutional grounds, at least where those allocations were made to bodies whose members are appointed by provincial governments. The basis upon which such constitutional challenges have been brought is s. 96 of the *Constitution Act, 1867*.[19] The argument that is made under s. 96 is in the form of a syllogism. Proposition one holds that the judges of superior, district and county courts are to be appointed by the Governor General. Proposition two holds that any person who performs the functions of a superior, district or county court judge must therefore be appointed by the Governor General. Proposition three holds that it is therefore unconstitutional for a person who has been appointed by a provincial government to perform such functions. The critical question in each case is whether the provincially appointed members of the impugned tribunal do or do not perform the functions of a superior, district or county court.

I do not propose to discuss the jurisprudence in this area in any detail. I simply want to make two basic points about the results of that jurisprudence. The first is that the courts, including my Court, have, over the last two or three decades, shown themselves to be willing to uphold as constitutionally valid a great deal of the legislation allocating important adjudicative functions to administrative tribunals. The unanimous decision of my Court last month in the *Nova Scotia Residential Tenancies Act Reference* bears witness to this fact.[20] In that case, albeit via two different analytical routes, the full Court concluded that provincial legislation assigning exclusive jurisdiction over residential tenancy disputes in the province of Nova Scotia to two bodies, one of which effectively sits in appeal of the other, did not violate s. 96.

The second and more important point that I wish to make in this regard is that, while a great many of these allocations of adjudicative jurisdiction have been upheld, the Supreme Court of Canada has nevertheless made it clear that it will not validate any allocation that, in the Court's view, would have the effect of placing our commitment to the rule of law at risk. The first indication of this came in the Court's decision in *Crevier* v. *Québec (A.G.)* which was decided in

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[19]*Supra* note 13, s. 96.

[20]*Reference Re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186.

1981, just a year after my appointment to the Court.[21] At issue in that case was the validity of provincial legislation granting to a body called the Professions Tribunal broad powers to confirm, alter or quash any decision made by a Discipline Committee established under any one of the various statutes governing the professions in the province of Québec. Those powers, which encompassed the review of law and fact as well as jurisdiction, were coupled with a broadly worded privative clause that the Court construed as removing altogether the supervisory authority of the Superior Court of Québec, not only in relation to questions of law within jurisdiction, but also with respect to questions going to jurisdiction.

Chief Justice Laskin, speaking for the full Court on this issue, ruled that this provincial legislation was invalid. As he put it:

> [W]here a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court.[22]

The Chief Justice explained the basis for this holding in the following terms:

> In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. *However, given that s. 96 is in the British North America Act and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.*[23]

More recently, in fact less than three months ago, the Court again acted to preserve the rule of law in a case involving s. 96. At issue in this case, *J. P.* v. *MacMillan Bloedel*,[24] was the validity of a section in the *Young Offenders Act* granting *exclusive* jurisdiction to youth courts over contempt *ex facie* of superior courts by young offenders.[25] The Court, again sitting as a full bench, was unanimous in concluding that there was no violation of s. 96 in the *grant* of

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[21][1981] 2 S.C.R. 220 [hereinafter *Crevier*].

[22]*Supra* note 21 at 234.

[23]*Supra* note 21 at 236-37 [emphasis added].

[24][1995] 4 S.C.R. 725 [hereinafter *MacMillan Bloedel*].

[25]R.S.C. 1985, c. Y-1, s. 47(2).

jurisdiction over contempt *ex facie* to the youth courts. The minority was also prepared to uphold the *removal* of that same jurisdiction from the superior courts. However, the majority, on whose behalf I wrote, was not prepared to go that far. My reasons were as follows:

> In the constitutional arrangements passed on to us by the British and recognized by the preamble of the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.[26]

It is important to note that, while s. 96 was integral to the Court's ruling on the validity of the *grant* of jurisdiction to the youth courts over contempt *ex facie* by young offenders, it played no direct role in the ruling on the validity of the *removal* of that same jurisdiction from the superior courts. That ruling, as the passage just quoted makes clear, derives from the rule of law itself and the special role played by the superior courts of general jurisdiction in preserving it. In form, at least, this feature of the decision in *MacMillan Bloedel* serves to distinguish it from the decision in *Crevier* in which s. 96 was explicitly invoked in support of the decision to strike down the legislation at issue there.

However, it seems unwise to place too much emphasis on this distinction. Section 96 was sufficient in and of itself to justify the decision in *Crevier*. The very act of removing the power of the superior courts to determine questions of the jurisdiction of administrative bodies necessarily constituted a grant of that same power to those self same bodies. Section 96 is concerned with precisely such allocations of adjudicative functions. Hence, there was no need in *Crevier*, as there was in *MacMillan Bloedel*, to go beyond s. 96 in explaining the Court's decision to strike down the legislation. Had there been, I have no doubt that the explanation would have been grounded, as it was in *MacMillan Bloedel*, in the rule of law and the special role of the superior courts in relation to it. It is precisely in order to preserve the rule of law in the context of the exercise of power by administrative bodies that the supervisory authority of superior courts arose and continues to play such an important role within our legal system. These constitutional commitments can be said to lie at the heart of both of these decisions.

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[26] *Supra* note 24 at 24 of the judgment.

IV. Judicial Independence: The Call for Judicial Accountability

The call for increased accountability on the part of governing institutions is not directed solely, or even primarily, at the courts. It is also being heard with respect to the legislative and executive branches of government. In fact, we have already seen significant reforms being made to the way in which these branches function as a result. For example, a number of provinces now have legislation requiring that a decision by a provincial government to endorse an amendment to Canada's Constitution must, before that endorsement can bind the province, be ratified in a referendum. We have also seen at least one province enact legislation allowing for the possibility of the electorate itself initiating legislation. Reforms such as these, as well as others being proposed – for example, cutting back on the number of situations in which party discipline can be imposed on M.P.s and M.L.A.s – have the potential of fundamentally changing the manner in which these two branches of government operate.

However, the call for increased accountability is also being directed at the judicial branch of government. Some members of the judiciary might be inclined to pay this call no heed; perhaps on the theory that it will disappear if it is ignored. I believe that would be a mistake. I think it is very important, not only for the judiciary but for all thinking persons, to understand the reasons underlying this call and to scrutinize very carefully the proposals for change that often accompany it. For the judiciary in particular, it is important to ensure that these changes do not place the critically important constitutional value of judicial independence at risk.

It is not possible for me to attempt to identify and examine either all of the concerns that lie behind the call for greater accountability on the part of the judiciary, or all of the changes that have been proposed to accommodate those concerns at this time. However, I would like to identify two areas in which these concerns have arisen and examine them briefly from the perspective of the relationship between judicial accountability and judicial independence. One of those areas is judicial misconduct; the other is judicial education. However, before I examine the first of these, I would like to say a word or two about the notion of judicial accountability.

The notion that the *legislative* and *executive* branches of government should be accountable to the public they serve is one with which we would all quickly agree. We would do so because the notion of accountability is not only consistent with, but necessary to, a democratic system of government. The fundamental characteristic of our political system inheres in the very fact that our governments can be replaced by the electorate from time to time – the ultimate form of accountability.

The notion that the *judicial* branch of government must likewise be accountable to the public it serves is not, I would hope, as free of controversy, at least if the term "accountability" is to be understood in the same sense in which it is used in reference to the other branches. I say that for obvious reasons. The primary obligation of the judiciary is not to the majority of the electors but to the law and the fulfilment of that obligation is integral to the preservation of the rule of law. We, as a society, guarantee the independence of the judiciary in order to make it possible for it to fulfill that obligation. At one level, the notion of accountability is fundamentally inconsistent with the maintenance of the rule of law and judicial independence.

Does this mean that the notion of accountability has no role to play insofar as the judiciary is concerned? I think not. What it means is that there is, or can be, a tension between judicial accountability and judicial independence, and that, in discussions about judicial accountability, one must always be attentive to the possibility that judicial independence will be placed at risk. Hence, in applying this notion to the judiciary it is necessary to be very clear about both the kind of judicial conduct to which it is to be applied and the form it is to take.

In an important sense, the judiciary is and has for a long time been accountable to the public for the manner in which it performs its most important function, adjudicating disputes. That accountability derives from the fact that, with only the rarest of exceptions, court hearings are held in public; the fact that reasons must be given to support court rulings; the fact that the rulings and the reasons are open to comment and criticism by the public, the media, the profession and the academic community; the fact that decisions made by the lower courts can be appealed; and the fact that the law as articulated by the courts can, as a general rule, be overridden by legislation duly enacted by the elected branches of government.

Accountability also exists in the possibility of removal from the bench – and, for some judges, other forms of discipline – for what I will term judicial misconduct. In the case of federally appointed judges, this form of accountability is governed by s. 99 of the *Constitution Act, 1867*[27] and the provisions of the federal *Judges Act*.[28] In the case of provincially appointed judges, it is governed by the relevant provincial statute.

My concern here is not with the manner in which the term "judicial misconduct" is or should be understood, although that question is an exceedingly important one for anyone who is concerned about judicial independence. For

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[27]*Supra* note 13, s. 99.

[28]R.S.C. 1985, c. J-1.

present purposes, I am prepared to accept as a definition the language of s. 65(2) of the federal *Judges Act*. That provision refers to a judge who "has become incapacitated or disabled from the due execution of the office of judge by reason of (a) age or infirmity, (b) having been guilty of misconduct, (c) having failed in the due execution of that office, or (d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office".[29] Rather, my concern is with the manner in which allegations of judicial misconduct are handled. In particular, I want to examine two dimensions of this subject. The first is the extent to which it is appropriate to have lay participation in the process. The second is the range of sanctions to which the process can lead. I have selected these two dimensions because they are the subject of much recent discussion by those calling for greater accountability on the part of the judiciary.

Before beginning this examination, I wish to make two things very clear. First, the views that I express are my personal views and cannot and should not be taken to be those of the Canadian Judicial Council which will soon be examining both of these issues in the context of its review of the *Friedland Report*.[30] The second is that the views I express are limited to the sphere of the judiciary with which I am most familiar, the *federal* judiciary. Our Constitution allows for variation in the legal requirements that must be met in order for a particular court within our system to qualify as an "independent and impartial tribunal".[31] It cannot be assumed that the views I am about to express in relation to the federal judiciary would apply necessarily, or at all, to the provincial judiciary.

I begin with the issue of lay participation in the process. By "process" here, I mean the process by which complaints of judicial misconduct are handled under the *Judges Act* prior to any action being taken by Parliament to remove a judge under s. 99 of the *Constitution Act, 1867*. For my purposes, it is not necessary that you understand the nature of that process in any detail. It is sufficient that you know that the process can entail a series of steps, beginning with an initial screening by a chief justice to ensure that the Council has jurisdiction and that there is sufficient merit to the complaint to warrant continuing. The great majority of complaints are disposed of at this stage on jurisdictional grounds, mainly because they involve complainants who are unhappy with the result in a case and who should be pursuing the matter through the appeal process. If a complaint survives that stage, it goes to a panel whose mandate is to determine whether a formal inquiry is needed. The report of a formal inquiry, if one is held, is then considered by Council as a whole. Council is obliged by the *Judges Act* to report its conclusions to the Minister and may, if it desires, recommend the

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[29] *Supra* note 28 s. 65(2).

[30] *Supra* note 7.

[31] *Supra* note 18 s. 11(d).

removal of the judge in question. As noted, only a very small percentage of the complaints filed reach the panel stage, and even fewer – a handful over the entire history of the Canadian Judicial Council – are the subject of a formal inquiry. Council has never yet had occasion to recommend removal. If that causes concern, it should not; generally speaking, judges against whom well-founded charges of misconduct have been laid resign before the matter reaches Council.

At present, the only stage in the resolution of a complaint at which persons other than judges participate is the formal inquiry to which it is possible – although not obligatory – to have lawyers appointed. This means that the overwhelming majority of complaints are resolved by judges – often, by chief justices and associate chief justices – on their own. Some commentators, including Professor Friedland, consider this to be a problem; in their view, not only should lawyers be permitted to participate at earlier stages, at least at the panel stage, but laypersons should be added to the mix as well.

As I understand it, the main argument in favour of lay participation in the complaints process is that it enhances its visibility and thereby increases public confidence that the complaints are being dealt with properly. Ensuring that the public has confidence in the process is clearly an important end, and if it were necessary to provide for lay participation in order to achieve that end, this argument would be a strong one indeed. However, as Professor Friedland himself acknowledges, the visibility of the process can be enhanced in a range of other ways. For example, as occurs in most of the circuits in the United States, the decisions could be made available for inspection by the media and the public in a "sanitized" form that leaves out the identity of the judge. In addition, provision could be made for periodic external reviews by respected independent outsiders who would report their findings publicly. Any doubts on the part of the public that the judiciary was not taking complaints seriously or, worse still, was covering up obvious misconduct, would be put to rest if such mechanisms were established. As well, it is important to bear in mind when discussing the issue of the visibility of the complaints process that the recent practice under the *Judges Act* has been to hold all formal inquiries in public. That is the case in the current inquiry into the complaints against Justice Bienvenue of the Québec Superior Court and that explains why we have been hearing so much about it recently.

It is also argued that the inclusion of laypersons in the process will improve the quality of the decisions made by introducing the views of the "public", or at least certain members thereof, to the deliberations. I find that argument unpersuasive. This is an area in which, in my view, there is no virtue either in knowing no law or in not being a judge. Can it be said, for example, that after retiring, a chief justice would contribute more to a panel or formal inquiry than before? I think not. It seems to me that the real argument here is again that lay participation will ensure greater acceptance of the outcomes by the public. Even

on this level, however, I am sceptical. I doubt very much that the public's perception of the rightness or wrongness of a particular outcome is going to be affected by the presence of laypersons on a panel or formal inquiry. My honest view is that lay participation in the process would be little more than window-dressing.

Can it be said that lay participation would threaten judicial independence? Because that very question, albeit in the context of provincially appointed judges, will very soon be before the Supreme Court of Canada in an appeal from the courts of Alberta, I am precluded from expressing an opinion on it. I will simply note that, in the decision from which the appeal is being taken, Justice McDonald, now of the Court of Appeal, answered that question in the affirmative, at least in the context of the particular scheme before him.[32]

I now turn to the range of sanctions available when federally appointed judges are found guilty of misconduct. Apart from the informal "expression of disapproval" that can come from a panel, the only sanction that can be imposed on a judge at present is removal by the Governor General "on Address of the Senate and House of Commons".[33] In some provinces, provision is made in legislation for the possibility of a much broader range of sanctions against their provincially appointed judges including formal reprimands and suspensions with or without pay. Should the federal *Judges Act* be amended to provide for these sorts of sanctions?

Professor Friedland expresses some doubt that the addition of such intermediate sanctions would be constitutional, presumably on the basis that the language of s. 99 of the *Constitution Act, 1867* can be read as stipulating that removal by joint address is the *only* formal sanction that can be imposed on a federally appointed judge.[34] Even if it were not unconstitutional, it would certainly be open to one to argue that a suspension amounted to a form of removal, and hence, absent a constitutional amendment, could only be imposed by Parliament.

Quite apart from s. 99, one could plausibly argue that the introduction of additional sanctions would be unsound as a matter of constitutional principle. To increase the range of possible sanctions would run the risk of inhibiting at least some judges from making the unpopular rulings that all of us are required to make from time to time. It would place at risk the sense of independence of mind

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[32]*R.* v. *Campbell* (1994), 160 A.R. 81 (Q.B.), McDonald J. aff'd (1995), 169 A.R. 178 (C.A.), Harradence J.

[33]*Supra* note 13 s. 99.

[34]*Ibid.*

that is critically important to a judiciary in a society based on the rule of law. Moreover, as Professor Friedland argues, such intermediate sanctions could be said to be "inconsistent with the dignity of the office of a judge who is to continue serving as a judge."[35]

Another dimension of judicial accountability, at least as that term is coming to be understood, is judicial education. I, for one, have some difficulty characterizing judicial education in this manner. However, given the prevalence of so characterizing it, I am prepared, at least for present purposes, to accept that characterization, if only because it permits me to discuss a particular form of judicial education about which a great deal is being said these days – "social context education".

Broadly understood, social context education for the judiciary is designed to make judges both more aware of and better able to respond to the many social, cultural, economic and other differences that exist in the highly pluralistic society in which we perform our important duties. It comprises, or at least can comprise, the examination of a broad range of issues: from the need to ensure that judges treat everyone in the courtroom with respect to ensuring proper access to justice on the part of the physically disabled; from exploring the dangers of stereotypes in dealing with witnesses and the evidence they give to improving awareness of the manner in which different cultures think about the institution of the family and the relationships between and roles of different family members; from increasing awareness of the social and economic realities of groups that have tended to live on the margins of mainstream society to ensuring familiarity with substantive law in areas like human rights legislation and s. 15 of the *Charter*.

So described, social context education should be seen by all judges as uncontroversial. Its goal, like that of other forms of judicial education, is to make us all better judges. What has tended to introduce controversy into this kind of judicial education is the fact that some of its proponents have argued that it be mandatory for all judges and designed by institutions other than the judiciary. In my view, these suggestions must be vigorously resisted. I say that, in part, because social context education initiatives that incorporated either or both of these suggestions would be counterproductive. I say it also because acting on these suggestions would threaten judicial independence in a fundamental way. Regarding making such education mandatory, one need only ask how one would deal with a judge – and let us assume a federally appointed judge whose record is in every other respect exemplary – who refused to attend such a program. How would one deal with a similar judge who registered for a program but attended very few of the sessions? Can anyone seriously suggest that it would be

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[35] *Supra* note 7 at 140.

appropriate for such a judge to be removed from the bench by Parliament? I would hope not.

As for the suggestion that some group or body other than the judiciary should control the design of social context education programs, the threat which that represents to judicial independence seems to be obvious. A judiciary upon which a dependency on outside bodies is imposed, in respect of the subject matter of its educational programs, can hardly be said to be independent. Moreover and more importantly, this lack of independence will almost certainly have an adverse effect on the perception, if not the reality, of the judiciary's impartiality.

I would not want the views that I have expressed about these two suggestions to leave you with the impression that I do not support social context education for judges. I do support it, and so do the Canadian Judicial Council and the National Judicial Institute, both of which I chair. Under the leadership of members of Council, many of the superior courts across the country have been actively engaged, for some time, in social context education in one form or another, as has the Institute. As well, the Institute is now in the process of designing a major initiative in this area which, like many of the others already undertaken, will entail a great deal of consultation with and considerable involvement by a broad range of organizations and individuals both inside and outside the judiciary. However, ultimate control of its design will remain throughout – as it must, for the reasons I have given – with the Institute, and hence with the judiciary. Whether or not the Institute will be able to mount an initiative of the magnitude that it considers necessary will depend on the level of funding that it is able to secure from the Department of Justice. However, I can assure you that the Board of Governors of the Institute fully appreciates the importance of this kind of education and is very much behind this initiative.

V. Conclusion

In my capacity as Chief Justice of Canada, I have received a great many requests from around the world for assistance from Canada and its judiciary in the development and strengthening of the legal and judicial systems in foreign countries. Those requests come to me – and to others as well – in large part because Canada has succeeded, where many countries have not, in entrenching within its legal system both the rule of law and judicial independence. The desire to learn how we have done this and how they too might do it lies behind these requests.

We would do well to bear this in mind when, because of changes within our own society, we see these values threatened. They are, as Justice Rand recognized, truly foundational values that we must all work hard to preserve intact.