ACCOUNTABILITY AND INDEPENDENCE

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The 1995 publication of Professor Martin Friedland's seminal study *A Place Apart: Judicial Independence and Accountability in Canada*[1] makes it unnecessary to engage in a lengthy discussion about the increasing public interest in how judicial conduct is dealt with in Canada. I therefore commence with a brief review of the constitutional framework within which the Canadian judiciary operates and will then embark on a detailed discussion of how complaints against judges are dealt with, and what steps the Canadian judiciary is taking in response to these new modern-day pressures.

A free and independent judiciary is recognized as one of the essential hallmarks of a democratic society. Only if the third branch of government is free from the two other branches (and I would add in our current society free from undue influence from any source) can we say that we live in a society where the rule of law is able to flourish.

There are three constitutional sources for judicial independence. The first is the preamble to the *Constitution Act, 1867* which states that Canada "desires... a constitution similar in principle to that of the United Kingdom." The second is Part VII of the *Constitution Act, 1867* itself and, thirdly, section 11(d) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) which guarantees to any person charged with a criminal offence the right "to be presumed innocent until proven guilty according to law... by an independent and impartial tribunal." This is consistent with the requirements of the rule of law which mandates "impartial and disinterested umpires".[2]

As Chief Justice Lamer put it in *R.* v. *Lippe*:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to an end. If judges could be perceived as "impartial" without judicial "independence", the requirement of independence would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite for judicial impartiality.[3]

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[1]Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, (Ottawa: Canadian Judicial Council, 1995).

[2]W.R. Lederman, "Judicial Independence and Court Reform in Canada for the 1990's", (1987) 12 Queen's L. J. 385.

[3]*R.* v. *Lippe*, [1991] 2 S.C.R. 114 at 139.

It is this impartiality which is the true guarantee of judicial independence. Independence provides the conditions for impartiality, and public confidence in this impartiality is what ultimately guarantees judicial independence. As Sir Ninian Stephen put the point:

> What ultimately protects the independence of the judiciary is a community consensus that the independence is a quality worth protecting, the citizen being better served if the judiciary is preserved from domination by those more overtly powerful elements of government, on whose support the judiciary is dependent, yet whose exercise of power the judiciary is charged with keeping within bounds prescribed by law.[4]

There are two kinds of judicial independence: institutional and individual. Institutional independence can best be summed up as "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function."[5] Individual independence, on the other hand, which includes security of tenure and financial security, "connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees."[6] It is this aspect of judicial independence and the inevitable (and I say healthy) tension between it and accountability that forms the broad background for this paper. The discipline process must never be permitted to intrude on the decision-making process.

One other introductory point needs to be made. Assessing and dealing with allegations of judicial misconduct is but one area of judicial accountability. To name but a few others, having a respectable and consistent judicial appointments and elevations process is, many would argue, the very best way to ensure accountability. There is, as Professor Friedland points out, an obvious connection between the quality of appointments and judicial conduct. Continuing judicial education is another example that helps ensure that judges are not only technically competent, but well-suited to perform our task in the social context of current realities.

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[4]Sir Ninian M. Stephen, "Judicial Independence – A Fragile Bastion", in S. Shetreet and J. Deschênes (eds.) *Judicial Independence: The Contemporary Debate*, (1985) 529-545 at 534.

[5]Le Dain J. in *R.* v. *Valente*, [1985] 2 S.C.R. 673. See, as well, *R.* v. *Beauregard*, [1986] 2 S.C.R. 56, and *MacKeighan* v. *Hickman*, [1989] 2 S.C.R. 796.

[6]*R.* v. *Valente*, at 685. See, as well, *R.* v. *Beauregard* per Dickson C.J.C. at 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.

But most importantly, all judges adjudicate in public and, with the exception of the Supreme Court of Canada, are subject to an appeal process. Accountability for the correctness or validity of our decisions is a key aspect of the judicial system. Our decisions are subject to ongoing review and debate by brother and sister judges, the academic community and the media. Judges cannot decide as they choose. We are bound by rules of procedure, and by precedent. Despite the confidentiality inherent within the judging process itself, few public institutions in our society are subject to such profound public scrutiny in terms of the "quality" of our work as is the Canadian judiciary.

The Current Federal Judicial Conduct Process

Now to judicial conduct. I shall concentrate in this paper on the discipline process respecting federally-appointed judges because this is what I am most familiar with. There is also a process in place in each province with respect to provincially-appointed judges which as we shall see, in most jurisdictions, varies considerably from that of federally-appointed judges.

The Canadian Judicial Council was established in 1971 to provide a national forum for the judiciary to promote and develop educational programs and to deal with judicial conduct. Currently, provisions respecting the establishment and authority of the Council can be found in Part II of the *Judges Act*, R.S.C., c. J-1. As section 60(1) states: "The objects of the Council are to promote efficiency and uniformity, and to improve the quality of the judicial service, in superior courts and in the Tax Court of Canada." Sections 63 to 65 deal with inquiries concerning judges.

The Judicial Council consists of the chief justice and associate chief justices of each superior court or division thereof in each province of Canada and the Territories, together with the chief judge and associate chief judge of the Tax Court of Canada. It is chaired by the Chief Justice of Canada.

Like the majority of such institutions, the Council performs most of its work through committees. One of these is the Judicial Conduct Committee which consists of members of the Executive Committee. Pursuant to the Council's by-laws which were significantly altered in 1992 to introduce greater procedural fairness, and in light of the provisions of the *Charter*, the Judicial Conduct Committee acts for the full Council at the initial stages of the complaint process.

Unlike many American jurisdictions, there is no formal procedure required with respect to a complaint. Once a complaint is received, the Executive Director of the Council directs the "complaint" or "allegation" to the chair or one of the two vice-chairs of the Committee. The chair, after consideration, may close the

file without seeking comments from the judge or the judge's Chief Justice. This will occur only if "the matter is trivial, vexatious or without substance." Otherwise, comments will usually be requested from the judge complained about and his/her Chief Justice.

At this stage, with or without further inquiries having been conducted, the file will either be closed if "the matter is without substance or where the conduct clearly is not serious enough to warrant removal" or it will be referred to a panel normally consisting of three members of the Committee. Members of the panel upon further inquiries and with outside assistance, if deemed appropriate, will then examine the matter to consider whether a formal investigation by an inquiry committee may be warranted under section 63(2) of the *Judges Act*, or whether the complaint file should be closed. If the former, the full Council (minus the members of the Committee and up to five other members of Council "set aside" should an inquiry committee be established) as a matter of policy will decide whether a formal hearing will take place.

If an inquiry committee is established pursuant to the *Act*, three members of Council will normally be designated to "investigate" the matter. In addition the Minister of Justice, pursuant to section 63(3) of the *Act*, may make appointments to the committee. The "investigation" in reality consists of a full hearing where all of the rules of procedural fairness and fundamental justice come into play.

The investigation committee has a discretion whether its proceedings should be held in public or in private – unless the Minister requires that they be held in public. When the inquiry committee has completed its work it reports its conclusions to Council. If Council's opinion is that the judge in question has "become incapacitated or disabled from the due execution of the office of judge" by reason of the matters set forth in section 65(2) of the *Act* (generally misconduct or failure in the due execution of the office), Council may recommend that the judge be removed. This is the only formal power given to the Judicial Council under the *Judges Act*. Pursuant to precedent and the provisions of the *Constitution Act*, a joint address of the Senate and House of Commons is then required to remove the judge from office.

Despite the absence of a reprimand power in the *Act*, on a number of occasions in recent years a panel, having recommended that a complaint not proceed to an inquiry, has communicated an "informal expression of disapproval" to the judge in question. This can occur in instances where the panel was of the view that, although it did not warrant removal proceedings, the judge's conduct was serious enough to merit criticism.

The number of complaint files opened and the total caseload of Council has increased significantly, especially in the last five years. In the fiscal year ended

March 31, 1995, 174 new complaint files were opened, and for the first eleven months of the current fiscal year this number stands at 179. You might be interested to know that Council has received 85 letters with respect to Mr. Justice Bienvenue – which count as one complaint.

I recognize at once that one complaint about a judge's conduct is one complaint too many, but we do not live in a perfect world. There are almost 1000 federally-appointed judges (active and supernumerary) across this country performing their task faithfully, effectively and in relative obscurity. Despite the increase in the relative numbers of complaints (and as earlier mentioned every allegation is categorized as a "complaint"), the level of complaints is nowhere near that against American state judges.

The majority of complaints about judicial conduct are what we call "disguised notices of appeal". In other words, upon examination, it becomes readily apparent that the complaint is not with the judge, but with the result. There is of course an appeal process for these unhappy litigants. These are the kind of cases that are resolved at the first stage.

In the fiscal year 1994-95, 9 of the 174 complaints were referred to a panel. During the past few years there have been two inquiries, both of which have been held in public, namely, the Marshall and Gratton inquiries. The Bienvenue inquiry is also being held in public. Pursuant to section 63(1) of the *Act*, Council is obliged to hold an inquiry when requested to do so by the federal or a provincial Minister of Justice (Attorney General). Both Marshall and Bienvenue are in this category; Gratton was conducted on Council's own initiative pursuant to section 63(2) of the *Act*. In the Marshall, Gratton and Bienvenue inquiries the federal Minister of Justice, as he is permitted to do under section 63(3) of the *Act*, designated two lawyers as members of the inquiry committee.

How does it all work? Like any complex system it has its imperfections and, as I am about to discuss, Council has undertaken a major initiative in this regard. But to answer my own question, I can do no better than to quote Professor Friedland who, after being given full access to Council's complaint files, stated:

> My overall opinion is that the Judicial Conduct Committee and the Executive Director have dealt with the matters received carefully and conscientiously. I never sensed that any matter was being "covered up" by the Council after a complaint was made to it. The descriptions in the Annual Report – at least for the past few years – in my view appear accurately to reflect the complaints that have been received by the Council.[7]

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[7] *Supra* note 1 at 94-95.

Other Jurisdictions

As noted earlier, most provincial jurisdictions do things somewhat differently. Under the new *Ontario Courts of Justice Act* for example the Ontario Judicial Council consists of an equal number of judges and non-judicial persons with the Chief Justice of Ontario, in the event of a tie, having a tie-breaking casting vote. Half the members of a panel established to deal with a complaint must be non-judges.

The Ontario Council has very significant powers. For example the Chief Judge, representing the judges, may initiate and prepare a judicial performance or evaluation program and may establish standards of conduct for the judges, but these programs can only be implemented after approval of Council. The judges are obliged to establish a continuing education program, but again it may only be implemented when approved by Council. Hearings are presumptively open to the public. Mediation is encouraged unless there is a significant power imbalance between the complainant and the judge. Thus in terms of both the mandate of the Council and the scope and composition of the Council itself there are stark differences between it and the federal Judicial Council.

Perhaps the most significant difference relates to the powers given to Council upon a finding of judicial misconduct. As noted earlier, under the *Constitution Act* the only statutory power is removal by a joint address of the Senate and House of Commons upon a recommendation by the Judicial Council. In all provincial jurisdictions their respective Judicial Council is given a wider range of disciplinary options extending from a simple warning, through reprimand, suspension and, ultimately, removal.

A similar dichotomy exists in the United States. While for each state and the federal judiciary there is a formal judicial Code of Conduct, the regime is much different. For federal judges, who like Canadian judges are appointed, judges alone are involved in the process. The process is initiated at the Circuit Court of Appeals level which encompasses a number of states. Most state judicial conduct procedures are at the opposite end of the spectrum. There are independent commissions set up and complaints are facilitated, if not encouraged. In most states all levels of sanction up to but not including removal are dealt with by the judicial conduct commission, the majority of whom are non-judicial persons.

Council's Principles of Judicial Conduct Process

This brings me to Council's current major project to develop a statement of principles of judicial conduct. For over twenty years Council – and, since 1979, the Canadian Judges Conference – flirted with the idea of a code of conduct, but eventually opted instead to prepare and publish guidelines or commentaries, the

most recent example being the 1991 book *Commentaries on Judicial Conduct*. But things have certainly changed since then.

In 1992, the Canadian Bar Association at its annual meeting in Halifax dealt extensively with the issues of judicial independence and accountability. "Who Judges the Judges" was a major theme. In early 1993, Council engaged the services of Professor Martin Friedland, a well-known and highly-respected law professor, to undertake a study of judicial independence and accountability. It seemed to us on Council that there was a growing misconception on the part of some people that the two terms were incompatible.

Then, in August 1993, the Canadian Bar Association report "Touchstones for Change" chaired by then recently-retired Supreme Court Justice Bertha Wilson was published. It contained a chapter recommending amongst other things the development of a code of conduct. It also became abundantly clear – even prior to the publication of Professor Friedland's report – that the development of a code of conduct for the judiciary, and by that I mean both federally and provincially-appointed judges, was going to be one of his firm recommendations.

All these factors (and others) resulted in Council realizing that the time had come to attempt to develop a draft code (principles) of judicial conduct. Thus it was that Council, in the spring of 1995, formed a working group to undertake the task. The working group consists of four members of Council, a representative of the Canadian Judges Conference, the Executive Director of Council, and Professor Tom Cromwell of Dalhousie Law School as our drafting and academic consultant. The first task of the working committee (which I happen to chair) was to develop a public discussion document which was widely circulated in the fall of 1995. While the document speaks for itself, there are a number of points that I think deserve special mention.

Firstly, we do not intend (contrary to the initial suggestions in the Canadian Bar Association's "Touchstones" report) that there be a list of prohibited behaviour with attached sanctions. Rather the purpose of the code, and this is generally the American approach, is to encourage and define acceptable judicial conduct, rather than cataloguing misconduct. It is a document that will speak in positive tones about how judges should behave as opposed to outlining what we should not be doing.

As the document says, "There should be no formal link between the principles of judicial conduct and the complaints process of the Canadian Judicial Council." This is the experience and process for the U.S. federally-appointed judiciary, but we are not naive enough to think that no reference will be made to these principles in the judicial conduct process of Council. The delicate task of delineating the fine line between principles of conduct and a catalogue of

misconduct is one of the most difficult and challenging tasks facing the working group.

We expect to consult widely and, indeed, have already started to do so. We have had one meeting with a special committee formed by the Canadian Bar Association and expect to receive significant input as our committee's work and drafts begin to move into the public realm. Other interested groups will be consulted as well. We have established a liaison with the Provincial Judges Association and look forward to a constructive working relationship. It is obvious, as Professor Friedland points out, that a well-developed and widely-accepted Code of Conduct for the federal judiciary will have a significant influence on all members of the judiciary in Canada – by whomever appointed.

In terms of content and organization, a tentative list of subjects has been drawn up as follows:

(a) integrity and independence;
(b) avoiding impropriety and appearance of impropriety;
(c) diligence and impartial discharge of duties;
(d) minimizing risk of conflict; and
(e) refraining from political activity.

In terms of organization and style, we have been heavily influenced by the approach taken in the U.S. federal code, with its organization into a statement of principles and expansive commentary. In addition, however, we are attempting to develop a number of specific examples for each topic so as to maximize the practical benefit to the public and the Canadian judiciary without at the same time being either exhaustive or dogmatic.

Perhaps I can illustrate the complexity of the task by mentioning just a few of the day-to-day problems that must be addressed in any comprehensive statement of principles:

(a) Everyone in this room will be aware of the very recent controversy that has arisen in Ontario respecting the proposed cutbacks by the government within the courts division and the highly public response thereto by the "three Chiefs". Was this an appropriate thing to do? Mr. Justice Sopinka, who recently revisited his "must a judge be a monk" theme, would likely think so. Claire Hoy, a well-known Canadian journalist, is strongly of the view that it was not. Who is right? Is there any difference between the "Chiefs" writing the letter as opposed to a puisne judge? Does it make any difference whether the communication is in public or private?

(b) What limits if any should there be on judges making speeches? In the Berger inquiry, Council was of the view that judges "should avoid taking part in

controversial political discussion except only in respect of matters that directly affect the operations of the courts." Is this still an appropriate view today? In any event, what exactly is "controversial political discussion"?

(c) Generally, to what extent (if at all) are judges' rights to free speech restricted or constrained when we don our judicial robes? In this respect are there any limits on a judge's ability to say what he/she "really thinks" in reasons for judgment or otherwise during the course of the court process itself?

(d) Are there any restrictions or constraints on a judge's private activities? For example, to what extent can judges participate in public or charitable activities that directly or indirectly involve fund-raising? Would it be appropriate for a judge to make a presentation to an outstanding volunteer as part of a fund-raising activity for a well-known and highly-respected charitable institution?

(e) What duty or obligation is there upon a judge to ensure as best one can that lawyers, witnesses and court staff behave appropriately and in a non-discriminatory manner? The model U.S. state Code prescribes a positive duty on the part of judges in these circumstances although this has not been adopted by the majority of U.S. states. The federal Code on the other hand contains no such specific obligation.

(f) The U.S. state Codes for the most part prescribe disqualification on the "perception of bias" principle. The U.S. federal Code on the other hand has adopted the *de minimis* rule, i.e. one share owned directly or indirectly in the most widely-held of public corporations would disqualify a judge from being involved in any aspect of litigation respecting that corporation, no matter how trivial. Is either appropriate for Canada? Does it make any difference if the judge has a discussion on or off the record with counsel and obtains their permission for him/her to continue.

These are just examples of the difficult task ahead for us.

How are we doing? We are certainly hard at it. Since getting under way in the summer of 1995 we have had two extensive committee meetings and have held monthly conference calls in an effort to move the project along. We have finished drafting our first document (on political activity), and I expect that by the time this paper is published the document will be public. We had intended to wait and release it as part of the omnibus chapter on off-the-bench activity (impartiality), but decided to move the time-table ahead. We are doing this because of our perception that the task before us may well not be completed within the original year-and-a-half/two year time span anticipated when the project was undertaken. In addition, as one would expect within such a diverse group of independently-minded individuals, the judiciary is by no means unanimous in their endorsement

of the principles of judicial conduct project. The sooner everyone has an opportunity to see a sample of what we are working on, the better.

I look forward to your help in ensuring that the project will be a success.