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The Role of a Chief Justice in Canada

Peter W. Hogg

Professor Hogg describes the duties of Chief Justices in Canadian courts, and explains that the effective discharge of their many administrative functions plays a significant role in maintaining the independence of the judiciary.

Introduction

I. Appointment
II. Tenure
III. Payment
IV. Administration of Court
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Introduction

Professor William R. Lederman, in the course of his long, productive, and brilliant career, influenced the way we think about most areas of Canadian constitutional law. His influence on scholarship, practice, and doctrine has been immense. One of his early contributions was a massive two-part article entitled "The Independence of the Judiciary," which appeared in the Canadian Bar Review in 1956. That article is still universally recognized as the seminal work on the topic. It continues to be cited frequently, and later writers have had to be content to nibble at the edges of the topic. This article is one of those nibbles.

* Professor of Law, Osgoode Hall Law School, York University, Toronto. I acknowledge the research assistance of Margot Ferguson, LL.B. 1993. I also acknowledge the help of my colleague, Garry Watson, and of Jeannie Thomas, Executive Director of the Canadian Judicial Council, both of whom made useful comments on an earlier version of the paper. An earlier version was delivered at a seminar for the Canadian Judicial Council on 24 March 1993, and I benefitted from discussions that took place there.

Professor Lederman never turned his attention to the role of a Chief Justice in the maintenance of the independence of the judiciary. Indeed, very little has been written on the topic by anyone. And yet it is the Chief Justice of each superior court who manages the relationship between the court and the government which is responsible for the administration of justice in that jurisdiction. It is that relationship which carries the most obvious risks to the independence of the judiciary. The Chief Justice, therefore, has a unique responsibility, which is not shared with the puisne judges, for safeguarding the independence of the judiciary. In this article, I will first describe the office of Chief Justice of a superior court, and then I will address the issue of judicial independence.

I. Appointment

The Chief Justice of Canada, the Chief Justice of the Federal Court of Canada, and the Chief Justices of the superior courts of the provinces are all appointed by the Governor in Council—that is, by the federal Cabinet. In law, the appointment process for a Chief Justice is the same as for a puisne judge of the same court. It is often claimed, however, that in practice there is a slight difference in the process; the recommendation to Cabinet for the appointment of a Chief Justice is made by the Prime Minister,

2. The only study that I could find was A. Linden, et al., "The Status and Role of the Chief Justice in Canada" (Study commissioned by the Canadian Institute for the Administration of Justice, 1981) [unpublished]. This proved to be a very useful source.

3. The scope of this article is confined to Chief Justices of the superior courts in Canada. I do not deal with Associate Chief Justices that exist in most of the superior courts, or with Chief Judges of the Provincial Courts. However, most of what I have to say is applicable to them.

4. Supreme Court Act, R.S.C. 1985, c. S-26, s. 4(2) [hereinafter Supreme Court Act].

5. Federal Court Act, R.S.C. 1985, c. F-7, s. 5(4) [hereinafter Federal Court Act].

6. The mode of appointment of the judges of the superior, district, and county courts of the provinces is stipulated by the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 96 [hereinafter Constitution Act, 1867].
while the recommendation for the appointment of a puisne judge is made by the Minister of Justice.\textsuperscript{7}

The qualifications for appointment as a Chief Justice are, in law, no different from those for a puisne judge of the same court. In the case of the Supreme Court of Canada, the appointee must be either a judge of the superior court of a province or a member of the bar of a province of at least ten years' standing.\textsuperscript{8} In the case of the Federal Court of Canada, the requirement is the same.\textsuperscript{9} In the case of the superior courts of the provinces, the appointee must be a member of the bar of the province of at least ten years' standing.\textsuperscript{10} In practice, however, Chief Justices are rarely appointed directly from the bar, but usually from the ranks of the puisne judges.\textsuperscript{11} As well, of course, in practice, a Chief Justice must possess qualities of leadership, organization, and diplomacy that are not always essential to the task of being a judge.\textsuperscript{12}

As will be elaborated later in this article, the Chief Justice of each superior court has the power to assign judges to particular cases. This includes the power to assign himself or herself to a particular case. The Chief Justice also controls the list of cases, including the order in which they are to be tried or heard and the courtrooms in which they are to be tried or heard. As will be elaborated later, it is a constitutional prerequisite of judicial


\textsuperscript{8} \textit{Supreme Court Act}, s. 5.

\textsuperscript{9} \textit{Federal Court Act}, s. 5(5).

\textsuperscript{10} \textit{Judges Act}, R.S.C. 1985, c. J-1, s. 3 [hereinafter \textit{Judges Act}]. The statutory requirement of ten years' standing supplements the constitutional requirement that judges be selected from the bar of the province. See \textit{Constitution Act, 1867}, ss. 97 and 98.

\textsuperscript{11} In the case of the Supreme Court of Canada, all but the first of the Chief Justices have been appointed from within the Court.

\textsuperscript{12} It goes without saying that Chief Justices have no power to select the new judges to fill vacancies on their courts. These vacancies are filled by the Governor in Council, acting under the powers referred to above, supra notes 4-6. The federal Minister of Justice normally consults a Chief Justice before making an appointment to the court of the Chief Justice.
independence that these functions be carried out by or under the
control of judges and not of the government.13

II. Tenure

Chief Justices hold office on the same basis as puisne judges;
that is, they hold office "during good behaviour," and are subject
to removal only by a joint address of the Senate and House of
Commons.14 There is mandatory retirement at age 75.15 However,
the Chief Justice of a provincial superior court may
relinquish the office after five years and revert to being a puisne
judge.16

Chief Justices play a unique role in securing the tenure of
superior court judges through their membership in the Canadian
Judicial Council. The Canadian Judicial Council is chaired by the
Chief Justice of Canada, and comprises all Chief Justices and
Associate Chief Justices of the superior courts.17 As well as
certain coordinating and educative functions, the duty of the
Council is to inquire into complaints against superior court judges
and to report to the federal Minister of Justice. If the Council
recommends that a judge be removed from office and Cabinet
agrees, then (if the judge does not resign), a joint address of the

text accompanying notes 20-22, below. The constitutional requirement applies to
all courts of criminal jurisdiction and stems from s. 11(d) of the Canadian Charter
14. Supreme Court Act, s. 9(1); Federal Court Act, s. 8(1). The tenure of judges of
the superior courts of the provinces is stipulated by the Constitution Act, 1867,
s. 99. For analysis, see P.W. Hogg, Constitutional Law of Canada, 3d ed. (Toronto:
Carswell, 1992) at s. 7.1(c).
15. Supreme Court Act, s. 9(2); Federal Court Act, s. 8(2), as am. by S.C. 1987,
c. 21, s. 7. The retirement age of judges of the superior courts of the provinces is
stipulated by the Constitution Act, 1867, s. 99.
16. Judges Act, s. 32.
17. Ibid. at Part II. All provinces except Prince Edward Island have established
provincial judicial councils, with power to investigate complaints of judicial
misbehaviour against judges appointed by the province. The composition of these
bodies varies considerably from province to province.

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two Houses of Parliament is required under the Constitution\textsuperscript{18} in order to carry out the recommendation.

III. Payment

The salaries of superior court judges, including Chief Justices, are "fixed and provided" by the federal Judges Act.\textsuperscript{19} Each Chief Justice is paid more than the puisne judges on the same court.

IV. Administration of Court

The most obvious way in which a Chief Justice differs from other judges is that the Chief Justice is responsible for administering the operations of his or her court.

In carrying out this function, a Chief Justice is subject to external constraints. The most obvious and important of them is lack of access to public funds. The Chief Justice can only request funds from the Minister of Justice (or Attorney General), and hope that the Minister will succeed in persuading his or her Cabinet colleagues, including the Minister of Finance (or Treasurer), that the full amount requested should be included in the estimates for the Department of Justice (or Attorney General). The estimates have to be approved by the Parliament (or Legislature), of course, and they will have to be defended from Opposition criticism by the Minister of Justice.

Once funds have been appropriated, the ability of a Chief Justice to spend them is severely constrained. The buildings, equipment, books, and other physical requirements of the court are all supplied by the Minister of Justice, who must obey the same procurement rules that bind other departments of govern-

\textsuperscript{18} Supra note 10.

\textsuperscript{19} Judges Act, ss. 9-22. Section 100 of the Constitution Act, 1867 provides that the salaries of superior, district, and county court judges must be "fixed and provided by the Parliament of Canada."
ment. The personnel of the court are public servants within the Department of Justice. Their appointment, job descriptions, and other terms and conditions of employment are all governed by the same rules as apply to the public service generally, including, in many cases, the provisions of collective agreements. Their career prospects are not confined to the courts, and their ultimate loyalty may be owed to Ministers and senior officials in government rather than to the Chief Justice in whose courts they are serving for the time being.

In summary, the Chief Justice may be unable to obtain the resources that he or she is convinced are required for the efficient operation of the court. With the resources that are available, the Chief Justice may be unable to secure the personnel, facilities, and services that he or she is convinced would be best for the efficient operation of the court. An analogy may be drawn to the dean of the law faculty of a university, who must endure the same absence of power to carry out his or her responsibilities. This does not mean that a Chief Justice (or a law dean) is necessarily an ineffective administrator. But it does mean that the ability of the Chief Justice to engage the sympathetic cooperation of the Minister of Justice and the Deputy Minister is of critical importance. This is the part of the work of the Chief Justice that carries risks to the independence of the judiciary.

V. Protection of Institutional Independence

In Valente, the Supreme Court of Canada held that "institutional independence" was an essential element of the independence of the judiciary. This required that a court be independent of government "with respect to matters of administration bearing directly on the exercise of its judicial function." Those matters of administration included the "assignment of judges, sittings of

20. Supra note 13.
21. Ibid. at 708.

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According to Valente, the management of the docket of a court is essential to judicial independence. The Chief Justice, or other judges or officials acting under his or her supervision, must prepare court lists, determine the order in which cases are to be tried or heard, and assign judges and courtrooms to the cases.

These tasks require resources. These resources must be obtained by the Chief Justice from the Minister of Justice. The problem which the Chief Justice has is that the judiciary has nothing to give in return. The most obvious and valuable consideration for government funding and cooperation would be the rendering of decisions that are pleasing to the government. That cannot be promised or delivered by the Chief Justice, because it would be the most serious breach of the independence of the judiciary imaginable. Any partiality to government would involve an abandonment of the rule of law, which requires (among other things) that judges be even-handed in resolving disputes between Crown and subject. Thus, the Chief Justice must deal with the Minister and the Deputy at the same time as the judges of the court of the Chief Justice (including the Chief Justice himself or herself, of course) are doing things that are displeasing to the government. Judges acquit defendants who are charged with crime by the Crown; they award damages and other civil remedies against the Crown; and they strike down legislation, regulations, and administrative acts that were drafted, made, or performed by the Crown. Some of these things are bound to be resented by some ministers and officials in the government. Therefore, when the Chief Justice of the court meets with representatives of the government, the Chief Justice does not occupy a position of tangible strength.

The relationship between the Chief Justice and the Minister of Justice (or Attorney General) is further complicated by the fact that the Minister of Justice is the Minister who is responsible for conducting litigation on behalf of the Crown. This means that the Minister of Justice, acting through his or her Crown attorneys (or

22. Ibid. at 709.
prosecutors) and his or her civil counsel, is far and away the principal litigant in every jurisdiction. It is anomalous that the Minister who is the principal litigant in the courts is also the Minister who provides the courts with their support staff and services and who presents and defends the budget for the courts in the Parliament or Legislature.

Within a system of responsible, parliamentary government, there are serious limits to the degree of financial and administrative independence that can be accorded the judiciary. Obviously, only the Parliament or Legislature can authorize the expenditure of money, and a Minister of the Crown must be responsible for defending the budget of the courts in the legislative chamber. In principle, as well, a Minister should be responsible for the funding of the courts, because it is the government that is accountable to the electorate for problems in the court system caused by underfunding. Nor is it reasonable to demand that the courts should always receive every cent that the Chief Justice believes is necessary. It is right and proper that the government should ration the available funds among many worthy objects, and the courts cannot be immune from that process.

A Chief Justice is not a member of the Parliament or Legislature or a member of the Cabinet, and is not accountable to the electorate for problems in the court system. Nor could a Chief Justice make direct representations to the Parliament or Legislature (as occurs in many jurisdictions of the United States) without becoming involved in the political process, which would give rise to serious perceptions of a lack of independence from political parties and from government. It seems to be both unavoidable and desirable that the Chief Justice should have to persuade a Minister of the fiscal requirements of the court, because the Minister is then able to carry the brief in Cabinet and in the Parliament or Legislature.

One possible reform would be to confer responsibility over the courts on a minister other than the Minister of Justice (or Attorney General). In this way, the role of funding and staffing the courts would be separated from the role of prosecuting criminal and civil cases before the courts. Here, however, it is important to balance practical concerns with theoretical concerns.
about judicial independence. I say theoretical concerns because there is no evidence that the Minister of Justice (or Attorney General) uses his or her position to pressure the courts to favour the government side in criminal or civil cases. The practical concerns that arise in my mind are that a minister other than the Minister of Justice (or Attorney General) is likely to be less senior, less influential, and less committed to the rule of law than the Minister of Justice (or Attorney General). A shift to another portfolio might leave the courts with a weaker champion in Cabinet and in Parliament or the Legislature. The courts would be more exposed to competing claims on public funds, and their own level of funding might suffer.

In the federal jurisdiction, an attempt has been made to give the courts a greater degree of institutional independence. The Minister of Justice remains responsible for the courts. But the Judges Act establishes an official called the Commissioner for Federal Judicial Affairs, who has "the rank and status of a deputy head of a department" and who is responsible for preparing budgetary submissions for the Federal Court, the Tax Court, and the Canadian Judicial Council, and for providing premises, equipment, and other supplies and services to those courts and the Council. In the case of the Supreme Court of Canada, the Judges Act confers these functions on the Registrar of the Court, who also has the status of a deputy head. In this way, the officials who provide support services to the federal courts are separated from those in the Department of Justice who conduct the litigation of the government. As well, the Supreme Court Act confers on the Registrar of the Court the duty to "superintend the officers, clerks and employees appointed to the Court," and the Act makes this duty "[s]ubject to the direction of the Chief Justice." In this way, the Act seeks to locate the legal authority over the staff of the Supreme Court of Canada within the Court.

23. Judges Act, ss. 73 and 74.
24. Ibid., s. 75.
25. Both the Commissioner for Federal Judicial Affairs and the Registrar of the Supreme Court report to the Minister of Justice.
26. Supreme Court Act, s. 15.
A few provinces have established a separate division of court administration within their departments of justice, and some provincial statutes also require court staff to work under the direction of the Chief Justice. These measures, like the federal measures, do reinforce the institutional independence of the judiciary. However, no Canadian jurisdiction has removed the funding of the courts from the budgetary responsibility of the Minister of Justice or exempted the funding of the courts from the regular governmental process of budgetary control. Nor has any Canadian jurisdiction excluded the personnel of the courts from the rules of the public service on recruitment, classification, promotion, remuneration, and like matters. Thus, in no Canadian jurisdiction can it be said that the theoretical concerns about judicial independence have been eliminated. In every jurisdiction, the Chief Justice is dependent upon the Minister of Justice (or Attorney General) for the funding of the courts of the Chief Justices, and in some degree upon the Minister of Justice or other Government Ministers or officials for the courtrooms, equipment, supplies, and services that are needed to operate the courts.

In 1981, Jules Deschênes, who was then Chief Justice of the Superior Court of Québec, wrote a report entitled Masters in their Own House, which proposed a series of radical reforms to fully secure the independence of the judiciary. Relying on American models, Deschênes C.J. recommended that the courts should present their own budgetary estimates directly to the Speaker of the House of Commons or Legislative Assembly. The estimates would be examined by a legislative committee on judicial affairs before which the Chief Justices (or other spokespersons for the

29. J. Deschênes, Masters in their Own House (Ottawa: Canadian Judicial Council, 1981). The report proposed three stages of reform — consultation, decision-sharing, and independence — of which only the final stage is described here. The Report of the Canadian Bar Association Committee on the Independence of the Judiciary (Ottawa: Canadian Bar Foundation, 1985) at 40, stopped short of endorsing the final stage of the Deschênes proposals.

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judiciary) would appear. Upon approval by the committee, the judicial estimates would be automatically included in the budget of the Minister of Justice. In this way, the funding of the courts would be exempt from treasury board constraints and all other internal governmental rules of financial management. The funding of the courts would not be compared with the funding of other areas of government until all the estimates were presented to the Parliament or Legislature for approval.

As I indicated earlier in this article, in my view such a system would be an abdication by government of its responsibility for an important part of the administration of justice. In the United States, a real debate on spending estimates takes place within the Congress or Legislature, and the appropriations that emerge from the legislative process, as well as any related taxing proposals, may well differ from what was initially proposed. But this is not the case in Canada, where the conventions of responsible parliamentary government virtually preclude the Parliament or Legislature from modifying the fiscal measures proposed by the government. In Canada, the effective review of spending proposals takes place within the government before the estimates are placed before the Parliament or Legislature. To exempt the funding of the courts from the Treasury Board or other internal governmental controls would place the administration of the courts in a privileged position enjoyed by no other part of government.

That privileged position was the goal of the Deschenes proposals, which were premised on the proposition that the independence of the judiciary was a value to which competing fiscal considerations should yield. That is obviously a tenable position, but I do not share it. In my view, since only elected Ministers can be politically accountable for problems caused by the underfunding of the courts, it is elected Ministers who ought to determine funding levels. The funding of the courts has a powerful political constituency in the organized legal profession. There is also the interest of the press and the Opposition in the administration of justice, especially criminal justice. And the requirement in the Charter that a person charged with an offence must be tried
within a reasonable time\textsuperscript{30} adds legal weight to the political forces at play.\textsuperscript{31} The democratic process thus seems unlikely to produce major problems of underfunding for the courts.

However, even if that conclusion is too optimistic, it seems wrong in principle to me that the courts alone should be exempt from the competition among worthy claimants for their share of scarce public revenues. It is the task of an elected government to assign priorities to the various claims on the public purse, and to take political responsibility for those priorities. The administration of the courts should not be exempt from that process.

Conclusion

A Chief Justice is unlike a puisne judge, not only because of membership in the Canadian Judicial Council, but also because of his or her responsibility for the administration of the court. That responsibility is not accompanied by control over the amount of funding that the court receives. The Chief Justice must persuade the Minister of Justice (or Attorney General) of the requirements of the court, and must hope that the Minister will succeed in obtaining desired funds through the internal budgetary process of the government and through the legislative process. Once funds have been obtained, the Chief Justice must rely upon government procedures regarding recruitment and procurement to obtain the personnel, premises, equipment, and services that are needed to operate the court. These are all constraints on the institutional independence of the court of the Chief Justice, but they are constraints that are difficult to remove without fundamental changes to the system of parliamentary government in Canada.

\textsuperscript{30} Charter, s. 11(b).

\textsuperscript{31} See R. v. Askov, [1990] 2 S.C.R. 1199, which held that a trial must be held within six to eight months of committal. It was followed by the staying or withdrawing of 47,000 criminal charges in Ontario alone. The publicity that was given to this virtual amnesty for many persons accused of crime was followed by prompt increases by the Attorney General in the resources available to the courts. The case and its aftermath are discussed in Hogg, supra note 14 at s. 49.8(e).
It is realistic to acknowledge that a Chief Justice is inescapably dependent upon government for the resources needed to operate the court. Within those important constraints, however, the Chief Justice must be independent of government "with respect to matters of administration bearing directly on the exercise of [the Court's] judicial function."32 The most important role of the Chief Justice is to make sure that the ineluctable reliance upon government for resources does not infect the independence of the judicial function.

32. See Valente, supra note 13.