

The Independence of Jurists in Canada and in Other Osce States*

Allan McCHESNEY**

INTRODUCTION 65

 I. INDEPENDENCE OF JUDGES IN CANADA 65

 II. INDEPENDENCE OF JURISTS IN THE OSCE 70

CONCLUSION 71

ANNEX I: **Moscow Meeting — CSCE Conference on the
Human Dimension** 73

* The OSCE (Organization for Security and Cooperation in Europe) is the successor body to the Conference on Security and Cooperation in Europe (CSCE), a political forum that operated during the Cold War. The CSCE had as its core document the *Helsinki Accord of 1975*. Following the collapse of the Berlin Wall, member states of the CSCE devised a number of institutions to make a more permanent and concrete OSCE. The OSCE includes over 50 states, including Canada, USA, European countries and independent states formally in the Soviet Union (including those in Central Asia).

** Barrister & Solicitor, Ottawa, Ontario.

Canada's legal culture features the independence of judges, barristers and solicitors, a governing tenet inherited from colonial traditions. Globally, the primary legal instruments pertaining to the independence of judges and lawyers are those developed under United Nations' auspices: the *Basic Principles on the Independence of the Judiciary* (1986), the *Basic Principles on the Role of Lawyers* (1985) and the *Guidelines on the Role of Prosecutors* (1990). In addition to the work of the UN's Special Rapporteur on independence and impartiality, monitoring of the implementation of the UN standards is carried out by non-governmental organizations (NGO's) such as the Centre for the Independence of Judges and Lawyers (CIJL) in Geneva and its companion NGO, the International Commission of Jurists. The latter NGOs were also instrumental in the development and adoption of the standards by the United Nations.

The Director of the CIJL, Mona Rishmawi, is addressing the CIAJ Conference on how these minimum universal standards paly out in the real world of national situations and UN politics. As a complement to Ms. Rishmawi's insights on the United Nations scene, my paper adds perspectives from Canadian and regional (European) vantage points. Issues of the independence of judges have been raised in Canadian courts, but it is instructive to contrast our perceived problems with the difficulties faced by judges and lawyers who seek to act independently in countries without long-established democratic foundations.

Discussions on independence of the bench and bar tend to concentrate on the judiciary. My paper also touches on the climate for lawyers in nations whose legal and political traditions differ markedly from those prevailing in Canada, such as post-Communist states within the Organization for Security and Cooperation in Europe (OSCE).¹

I. INDEPENDENCE OF JUDGES IN CANADA

Section 11(d) of the *Canadian Charter of Rights and Freedoms*² provides that any person charged with an offence has the right:

to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

That language can be traced to article 10 of the *Universal Declaration of Human Rights* whose 50th anniversary we should all celebrate in 1998.

-
1. My observations about the OSCE arise largely from having been Official Co-Rapporteur of the OSCE Rule of Law Seminar in December 1995. The seminar was held in Warsaw and was attended by over 160 representatives of countries, international organizations and non-governmental organizations (NGO's).
 2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

In the past decade, there have been a few landmark decisions on judicial independence from Canada's highest Court, in which Charter section 11(d) has been one facet of debate. A pivotal judgment was *Valente v. R.*³ A provincial Court judge in Ontario declined to hear a Crown appeal against a sentence pronounced in a driving case, positing that ability to provide independent adjudication was hampered by, *inter alia*, the way in which salaries and pensions were fixed at the discretion of the Ontario Executive. The Supreme Court of Canada affirmed the constitutional requirement of independence of provincial courts, but held that the relevant group of judges were sufficiently independent, based on a test of "reasonable perception" of independence.⁴

The *Valente* Court also stated that the essential conditions of judicial independence are security of tenure, financial security, and institutional independence. It was determined that the scheme controlling rights to pensions and other benefits did not permit interference by the Ontario Government executive branch on a discretionary or arbitrary basis. The Court decided that the essentials of institutional independence were also present. These were said to pertain to judicial control over administrative decisions that bear directly and immediately on the exercise of the judicial function.

On the issue of tenure raised in *Valente*, the terms of superior court judges are constitutionally secure. Based on section 99 of the Constitution, subject to their good behaviour, judges are in office until age 75. They have an option to retire on two-thirds pension at age 65 with 15 years service, or to serve as a full-time or part-time judge until age 75.⁵

Regarding federally appointed judges, section 100 of the *Constitution Act, 1867*⁶ states:

100. *The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts, [...] shall be fixed and provided by the Parliament of Canada.*

Not long after *Valente* the Supreme Court of Canada ruled on compensation packages affecting high court Judges. In *Beauregard v. Canada*⁷ a Quebec Superior Court

3. [1985] 2 S.C.R. 673.

4. In *Valente*, Le Dain J. stated that discriminatory treatment of judges vis-à-vis other citizens would give rise to serious concerns about judicial independence; a law that thus discriminated might well be held *ultra vires*.

5. A. McEachern C.J., "Judicial Independence", 11th Commonwealth Law Conference/Canadian Bar Association Annual Meeting, Vancouver, August 1996 at 4. The Canadian Judicial Council, comprised of all federally appointed Chief and Associate Chief Justices, investigates complaints and may recommend removal for a breach of good behaviour and, probably, for mental or physical infirmity.

6. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

7. [1986] 2 S.C.R. 56.

judge challenged the constitutional validity of an amendment to the *Judges Act*⁸ requiring judges to contribute to their pensions. While musing at length on independence, the highest Court upheld the amendment.⁹

Disagreements concerning possible hindrances to the independence of provincial court Judges are churning in all ten Canadian provinces, and related litigation is currently in process before the Supreme Court of Canada. Challenges have been raised by judges and/or by certain accused persons who appeared before them. The challengers contend that their provincial systems for fixing judicial salaries and benefits violate constitutional and/or administrative law principles guaranteeing fair trials and court independence.¹⁰ The provincial wage freezes or rollbacks in controversy are often part of austerity measures applied in general to public servants, and not just to judges. It would be easy to characterize the resulting disputes over money and benefits as self-interest advocacy. One must recall, however, that the intended beneficiaries of independence are not only the judiciary, but also those who are judged, including litigants in contests where a government is on the other side.

The constitutional questions stated at the Supreme Court on behalf of judges from Prince Edward Island focus on legislated reductions in remuneration.¹¹ As judges are well aware, not only do their salaries come from the public treasury, but governments are instrumental in court administration, including the hiring and supervision of court staff, and bureaucrats can thus hamper or help judicial independence on a practical level. The current Supreme Court appeal from Alberta, in addition to matters of judges' remuneration, spotlights issues of legislation restricting where judges may reside, their authority to fix sitting days for court, mechanisms for handling complaints about a judge's

8. *Judges Act*, R.S.C. 1985, c. J-1.

9. The Court ruled that the constitutional foundation for judicial independence was not only the 1982 *Canadian Charter of Rights and Freedoms*, but also Canada's federal system and the *Preamble to the Constitution Act, 1867*, stating that Canada is to be federally united "with a Constitution similar in principle to that of the United Kingdom". It reasserted that financial security is integral to judicial independence, and suggested that bad faith by a legislature in dealing with salaries could vitiate judicial independence.

10. D.A. Schmeiser Q.C., "Judicial Independence at the Provincial Court Level", 11th Commonwealth Law Conference/Canadian Bar Association Annual Meeting, Vancouver, August 1996 at 2-3.

11. *Percival Dean Lowther v. The Queen* (P.E.I.) per Chief Justice Lamer, July 17, 1996.

1. *Do ss. 10 and 13 of the Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51 legislating a reduction in the amount of remuneration for judges of the Provincial Court of Prince Edward Island, infringe the independence of the said judges as guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?*

2. *If so, can those provisions be justified under s. 1 of the Canadian Charter of Rights and Freedoms?*

conduct and the range of allowable grounds for complaint.¹² Predominant Canadian political and legal thought holds to the traditional common law view that judges ought to be able to reach decisions free from outside influences of governments, powerful litigants, or even judicial colleagues. Put another way, the judge should be in a position where she or he has nothing to lose by doing what is right and little to gain by doing what is wrong.¹³ Outside interference appears to be extremely rare in Canada, and in a few instances where cabinet ministers intervened in proceedings in recent decades, they offered to resign, at least temporarily.¹⁴

12. *R. v. Shawn Carl Campbell* (Alta.) per Lamer C.J.C., August 16, 1996.

1. *Does the provision made in s. 17(1) of the Provincial Court Judges Act S.A. 1981, c. P-20.1, for the remuneration of judges of the Provincial Court of Alberta [...] in conjunction with the regulations, [...] fail to provide a sufficient degree of financial security to constitute that court an independent and impartial tribunal within the meaning of s. 11(d) of the Canadian Charter of Rights and Freedoms?*

2. *Does the 5% salary reduction imposed by the Payment to Provincial Judges Amendment Regulation A.R. 116/94 infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?*

3. *Do ss. 11(1)(c) and 11(2) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, relating to the handling by the Judicial Council of complaints against judges of the Provincial Court of Alberta, when read in light of ss. 10(1)(e) and 10(2) of the Act, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?*

4. *Does the inclusion of "lack of competence" and "conduct" in s. 11(1)(b) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1 infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?*

5. *Do s. 13(1)(a) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, authorizing the Minister of Justice to designate the place at which a judge shall have his residence, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?*

6. *Do s. 13(1)(a) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, authorizing the Minister of Justice to designate the Court's sitting days, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?*

7. *If any of the foregoing questions are answered "yes", are any of the provisions justified under s. 1 of the Canadian Charter of Rights and Freedoms?*

13. R. McGregor Dawson said that the judge should be "placed in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong [...]"; R. McGregor Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1957) at 486, cited in M.L. Friedland, "Judicial Independence and Accountability: A Canadian Perspective", conference of the Society for the Reform of Criminal Law, Whistler, B.C. August 1996 at 2.

14. In three instances, in the '70's, '80's and '90's, federal cabinet ministers apparently spoke to judges about pending cases. Each minister offered to resign. Two resignations were accepted, but both returned to cabinet after brief periods as backbenchers: McEachern C.J., *supra* note

In 1996, an official of the federal Department of Justice, as well as two Federal Court judges, have run into trouble because of their private consultations on speeding up the pace of litigation aimed at alleged Nazi war criminals. The cases involve accused persons who purportedly gained Canadian entry and citizenship through giving false information. The three men have not been charged under war crimes legislation, but are subject to revocation of citizenship, as well as deportation, if found guilty. The Department of Justice carries out the prosecution, and an Assistant Deputy Attorney General approached the Chief Justice of the Court to try to have perceived delays dealt with. Proceedings against the three accused were stayed in July 1996 by Federal Court trial Justice Cullen, because of what he regarded as serious interference with independence of the judicial process. The stays are under appeal by the government.¹⁵

Among other consequences, this affair has led to reviews, by their respective professional disciplinary bodies, of the appropriateness of the conduct of the government lawyer and of the judges involved. The assessment regarding the Crown lawyer, an Assistant Deputy Attorney General (now reportedly demoted to "special advisor") is being carried out by the Law Society of Upper Canada, the governing body for Ontario lawyers. They will determine whether the Justice Department lawyer is guilty of professional misconduct for his controversial meeting with Chief Justice Julius Isaac of the Federal Court.¹⁶

Meanwhile, the Canadian Judicial Council, which has the power to investigate complaints concerning federally-appointed judges, has reported on its investigation of Chief Justice Isaac's conduct.¹⁷ The Council found that Chief Justice Isaac did not act improperly when he met with Associate Chief Justice Jerome of his Court to ask that he speed up proceedings in the relevant hearings. According to the *Globe and Mail's* summary of the Council's decision:

The findings of the panel, established to investigate a complaint about Judge Isaac, are remarkably different from the July ruling of another Federal Court judge who dismissed the war crimes case because of the behaviour of the Chief Justice.

In dismissing the case, Mr. Justice Bud Cullen said his own Chief Justice had acted wrongly.

The three-member panel, however, did say Judge Isaac behaved inappropriately in two ways that were "not serious" on the day in March when he met with a senior Justice department official who urged him to expedite the cases [...] then

15. *Canada (Minister of Citizenship and Immigration) v. Tobias*, July 4, 1996 per Cullen J., (unreported); *The [Toronto] Globe and Mail*, July 1996; *Lawyers Weekly*, July 1996.

16. "Lawyer who discussed trial still under investigation" *Ottawa Citizen*, (September 1996).

17. As reported October 9, 1996 by *CBC Radio* and October 10 by *The [Toronto] Globe and Mail*. Re the latter, see: A. McIlroy, "Council says Judge's errors were minor — Judicial review find Chief Justice did not act improperly; contradicts earlier ruling in war-crimes trials" *The [Toronto] Globe and Mail* (10 October 1996) A6.

went to Associate Chief Justice James Jerome and asked him about the time being taken to handle the cases.

The panel said Judge Isaac should have ensured that notice of the March 1 discussions was given to the lawyers representing the three men alleged to have committed war crimes.

[...]

The panel also found Judge Isaac had used "unfortunate" wording in his letter about the meeting to a senior Justice Department official, Ted Thompson [...]

It was Mr. Thompson, who met with Judge Isaac on March 1, who had said the government did not want to embarrass the Federal Court by referring the case to the Supreme Court because it was taking so long.

The panel said the wording created the impression that the Chief Justice was responding to a threat, rather than "pursuing timely justice as an objective in itself".

But it said there was nothing improper with Judge Isaac meeting with a senior Justice Department official about delays, or in meeting with Judge Jerome on the same day.

"A chief justice must not attempt and must not appear to attempt to influence the decision of a judge in relation to a litigious issue before the judge", the panel said:

"However, a chief justice, who has the status of 'first among equals', has the responsibility to initiate a meeting about whether there is a problem [about court delays] and, if so, how it can be resolved".

Counsel for the men facing potential deportation understandably express preference for the findings of Justice Cullen, and denounce the Judicial Council's findings. Not surprisingly, other groups and individuals had expressed outrage earlier at the stay of proceedings. Many were astounded that cases against alleged war criminals could be set aside for what respected lawyers such as D. Matas regarded as improprieties that were minute in proportion to crimes against humanity or war crimes. No doubt this *Rule of Law* drama will be with us for some time, forcing all of us to take a deeper look at issues of judicial independence and justice for all.

II. INDEPENDENCE OF JURISTS IN THE OSCE

Broader issues of justice and democracy were also in our minds last December at the Warsaw Seminar on the Rule of Law, organized by the OSCE Office for Democratic

Institutions and Human Rights.¹⁸ As Co-Rapporteur of the Warsaw forum, I can offer the following highlights that relates to our current discussions of independence of the judiciary and bar.

Except for the very youngest lawyers, a few of the most senior, and some returned expatriates, the profession in the former East Block is not accustomed to operating in an atmosphere of independence. As in China today, their practice for decades was to treat law as an instrument of the state, for advancing their rulers' non-democratic version of "socialism". The outcomes of trials were often predetermined. Lawyers and judges were often seen as officers of the state as much as "officers of the court".

In Canada it is almost a given fact that the Executive and legislators will not interfere with judicial freedom, and it is quite diverting when they do, providing fodder for legal commentators and cartoonists alike. In former Soviet client states of Europe and Central Asia, governmental persuasion and even threats to judges and their families are not unheard of. There is a continuing need for training and encouragement (of judges, bureaucrats and court officials) concerning the concepts and methods of approaching decision-making on an independent basis.

The Canadian norm of having one professional body in each jurisdiction acting as an independent supervisory body for lawyers is not universal; nor is it universally thought appropriate. In addition to provincial and territorial bar or law societies we have the Canadian Bar Association, and groups that cluster corporate lawyers, criminal lawyers, refugee lawyers, and so on. In some countries, specialist groups may be the only grouping, and codes of ethics or conduct are legislated by the State, if at all. In a very few Central European countries, however, there is an old (pre-Communist) tradition of independent governing bodies for lawyers' associations, which is now being revived.

One of the difficulties pointed to by some participants at Warsaw was that in their jurisdictions, there are still judges who refuse to recognize the right of certain lawyers to represent clients in their courts, apparently on political grounds. I have also heard that many judges (for example in former Yugoslavia) have left the bench for the newly lucrative private practice of law. This phenomenon of independence has left many courtrooms without decision makers, I am told.

Canada and the other 50 plus states in the OSCE (successor to the CSCE) have pledged to bolster the Rule of Law through fostering the independence of jurists. The main principles agreed upon, as set out in the Moscow Document of 1991, are attached as Annex I to this paper.

CONCLUSION

18. See: *Human Dimension Seminar on the Rule of Law — Consolidated Summary* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, December 1996).

Like the framers of a recent Resolution of the UN Commission of Human Rights, I am [c]onvinced that an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.¹⁹

Canadian jurists are fortunate to be in a country whose *Charter of Rights and Freedoms*²⁰ proclaims that we are governed by the Rule of Law. I would respectfully contend that as lawyers and judges we have a moral obligation to support efforts to ensure that impartial, fair and independent justice is available in Canada, in newly emerging democracies and elsewhere. Under standards applicable in the UN, the OSCE, the Francophonie, the Commonwealth and the Organization of American States, our joint obligation is arguably also a legal one, reaching beyond our borders.

19. Preamble. Resolution 1996/34, *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers* adopted 19 April 1996. (E/CN.4/1996/L.11/Add.1, at 52)

20. Preamble to the *Canadian Charter of Rights and Freedoms*.

ANNEX I

Moscow Meeting — CSCE Conference on the Human Dimension

The representatives of the participating States of the Conference on Security and Cooperation in Europe (CSCE), Albania, Austria, Belgium, Bulgaria, Canada, Cyprus, the Czech and Slovak Federal Republic, Denmark, Estonia, Finland, France, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands-European Community, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the USSR, the United Kingdom, the United States of America and Yugoslavia, met in Moscow from September 10 to October 4, 1991, in accordance with the provisions relating to the Conference on the Human Dimension of the CSCE contained in the Concluding Document of the Vienna Follow-up Meeting of the CSCE.

The participant States express their collective determination to further safeguard human rights and fundamental freedoms and to consolidate democratic advances in their territories. They also recognize a compelling need to increase the CSCE's effectiveness in addressing human rights concerns that arise in their territories at this time of profound change in Europe.

In order to strengthen and expand the human dimension mechanism described in the section on the human dimension of the CSCE in the Concluding Document of the Vienna Meeting and to build upon and deepen the commitments set forth in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, the participating States adopt the following:

1. The participating States emphasize that the human dimension mechanism described in paragraphs 1 to 4 of the section on the human dimension of the CSCE in the Vienna Concluding Document constitutes an essential achievement of the CSCE process, having demonstrated its value as a method of furthering respect for human rights, fundamental freedoms, democracy and the rule of law through dialogue and co-operation and assisting in the resolution of specific relevant questions. In order to improve further the implementation of the CSCE commitments in the human dimension, they decide to enhance the effectiveness of the mechanism and to strengthen and expand it as outlined in the following paragraphs.

[...]

- (19) The Participating States
 - (19.1) will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, *inter alia*, the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*;

- (19.2) will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary which, *inter alia*, provide for:
- (i) prohibiting improper influence on judges;
 - (ii) preventing revision of judicial decisions by administrative authorities, except for the rights of the competent authorities to mitigate or commute sentences imposed by judges, in conformity with the law;
 - (iii) protecting the judiciary's freedom of expression and association, subject only to such restrictions as are consistent with its functions;
 - (iv) ensuring that judges are properly qualified, trained and selected on a non-discriminatory basis;
 - (v) guaranteeing tenure and appropriate conditions of service, including on the matter of promotion of judges, where applicable;
 - (vi) respecting conditions of immunity;
 - (vii) ensuring that the disciplining, suspension and removal of judges are determined according to law.
- (20) For the promotion of the independence of the judiciary, the participating States will:
- (20.1) recognize the important function national and international associations of judges and lawyers can perform in strengthening respect for the independence of their members and in providing education and training on the role of the judiciary and the legal profession in society;
- (20.2) promote and facilitate dialogue, exchanges and co-operation among national associations and other groups interested in ensuring respect for the independence of the judiciary and the protection of lawyers;
- (20.3) co-operate among themselves through, *inter alia*, dialogue, contacts and exchanges in order to identify where problem areas exist concerning the protection of the independence of judges and legal practitioners and to develop ways and means to address and resolve such problems;
- (20.4) co-operate on an ongoing basis in such areas as the education and training of judges and legal practitioners, as well as the preparation and enactment of legislation intended to strengthen respect for their independence and the impartial operation of the public judicial service.