HANDOUT 1: Appointment and Role of Judges

Judicial Appointment

Once appointed, all judges in all the courts across the country are “independent”. Judicial independence means that a judge must hear and determine each case based on the law, evidence and argument before the judge, and not based on other external factors, such as the views of government or the media. As well, judicial independence means that the judges are independent from each other. This means that no judge (including the Chief Justices, the Associate Chief Justice and the Chief Judge) can tell another judge how to decide a case.

Appointment of Provincial Court Judges

The Provincial Court Act governs the appointment of judges to the Provincial Court. To be appointed to the Provincial Court, a person must be a lawyer in good standing with a provincial law society and have practiced law for a minimum of five years (although in practice, persons with less than 10 years’ practice are rarely appointed). Lawyers interested in becoming a Provincial Court Judge must apply to the Judicial Council, a body established under the Provincial Court Act.

Appointment of Superior Court Judges

The federal Judges Act provides that a person interested in becoming a judge on a superior court must be a lawyer in good standing with a provincial law society and have practiced law for a minimum of 10 years, although typically those selected as judges have practiced law for longer than 10 years. The majority of appointments to the Court of Appeal are current Supreme Court judges, although some people have been appointed directly to the Court of Appeal from practice as lawyers. An interested and qualified person must complete an application form and send it to the Office of the Commissioner for Federal Judicial Affairs in Ottawa.

Appointment of Supreme Court of Canada Judges

The government of Canada established the Supreme Court of Canada in 1875 by an act of Parliament. It is now governed by the Supreme Court Act. The Supreme Court Act provides that appointees to the Supreme Court of Canada must have been a judge of a superior court or a lawyer with at least ten years’ standing at a provincial bar. Most of the justices have prior experience as trial and appellate judges, although one of the nine judges is typically a direct appointment.

Appointing Judges versus Electing Judges

Common law judges have historically been appointed, not elected. The main concern with electing judges is that an election could compromise judicial independence. Judicial independence is a right entrenched in the Charter of Rights and Freedoms as one of the

“principles of fundamental justice” provided for by section 7 and further guaranteed in section 11(d) which affords an individual charged with an offence the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”

Although some American states have an elected judiciary, there are many reasons to prefer an appointment process to an election process. Potential judges may not want to risk running for election to a judicial position because a rejection could have a detrimental effect on their legal practices. Requiring judges to stand for re-election would make it difficult for judges to make decisions that are unpopular.

The logistics of campaigning creates many problems. Often, candidates acquire debt and spend large amounts of time campaigning. If a candidate is running for re-election, he or she may spend valuable time campaigning that could be spent adjudicating. Subjecting the judiciary to elections would likely attract the same kinds of deals, incentives, and trade-offs that are associated with elections for politicians.

In the United States, there is an ongoing debate about the impact that campaign money has on judicial decisions. Recently, the Supreme Court of the United States released a decision in a case which involved an appeal court justice who had received significant campaign contributions from the president of a company who was appealing a lower court decision. The appeal court judge had been asked to remove himself from the case, but had refused and went on, ultimately, the grant the appeal. The U.S. Supreme Court was asked to decide whether the appeal judge should have removed himself from the case. The U.S. Supreme Court ruled that the appeal judge should have removed himself because of the perception of bias.

The appointment process has some disadvantages, as well. In 1984, the Canadian Bar Association released a publication identifying ten problematic aspects of the appointment process as it then existed (before the institution of the current process of application and independent vetting by the Judicial Advisory Committees):

- The public lacks knowledge about the appointment process generally
- The public perceives that appointments are often politically motivated
- In some provinces politics have played too large a role in appointments
- Regional ministers of justice (attorneys general) hold an inordinate amount of influence over the federal Minister of Justice
- The special advisor’s role is too large
- There is a lack of consistency in the consultation process engaged in by the Minister of Justice and the attorney generals and chief justices
- Information about candidates is often inadequate
- The provincial law societies are often not involved enough

- The process is lengthy and vacancies are often left open for months while the process is being completed
- There is evidence of uneven competence on the bench

The judicial appointment process was revised in 1988 and some of the concerns identified in the report, including lack of consultations, potential for political interference and delays in the review process were addressed. It is important to note that since the appointment of judges is set out in the Constitution, changing to an electoral system or a system which permitted the Ad Hoc Committee to veto the Prime Minister's nomination or appointment would require a constitutional amendment.

Term of Appointments
The federal Judges Act provides that federally appointed judges may serve until they reach the age of 75; the Provincial Court Act provides that Provincial Court judges must retire at the age of 70.

As judges are independent, a judge could only be removed from office in instances of serious misconduct. For less serious misconduct, the judge may be reprimanded or disciplined by the federal Canadian Judicial Council (federally appointed justices) or the provincial Judicial Council (provincially appointed judges). Otherwise, a judge can be assured that he or she will not lose their position for any decision made in the court, even if the decision offends the public, the media or politicians. This is part of the notion that a judge must be able to act independently of outside influences.

The Role of Judges

Judicial Independence
Because the judiciary is an independent third branch of government, courts and judges function independently of political influence. This is the principle of "judicial independence." There are many important facets of this principle, one of which is that the government - the legislative and executive branches - cannot tell a judge how to decide a case, nor can they fire a judge for making a decision even if the judgment may make the government officials, or even the general population, unhappy.

This is not to say that judges have completely free rein. Judges are subject to discipline through the Canadian Judicial Council (for superior court judges) or the provincial Judicial Council (for Provincial Court judges). A judge can only be removed from office for serious misconduct, after a decision to remove the judge by Parliament (for superior court judges) or by the Legislative Assembly (for Provincial Court judges).

The Hierarchy of Laws

The courts are the arbiters of the law of the land – the judges declare what is or what is not the law. But again, the judges do not have free rein to decide arbitrarily – they must decide according to the law. In the Canadian legal system there are three main sources of law:

- The constitution, which includes the Constitution Act, 1867, the Constitution Act, 1982, and the Canadian Charter of Rights and Freedoms
- Legislation, bylaws, and regulations, such as enacted by the federal and provincial legislatures, municipal councils, and executive agencies
- The common law (i.e. decisions of the courts), which includes what was historically the common law and the rules of equity (since 1858, it is safe to treat "common law" as encompassing both "common law" and "equity").

A number of fundamental principles govern the role of courts and judges. One such principle is called "parliamentary supremacy" (or "legislative supremacy"). This means that enacted legislation, bylaws, and regulations are paramount over common law. In this respect, legislation overrides court judgments.

However, all laws must conform to the constitution - this is the principle of constitutionality - and it is the courts that decide whether a statute, for example, does or does not conform to the constitution. Thus, a court or judge may find that a statute is unconstitutional and so declare that statute to be invalid and therefore not law.

Trials

The term "court of first instance" indicates that a case is heard for the first time in this court. This is the trial. In the Provincial Court, all trials are heard by a judge alone. In the B.C. Supreme Court, some cases may be heard by a judge alone and some by a judge with a jury. Either way, there are two functions that must be performed – decisions must be made about the facts and decisions must be made about the law. In a jury trial, the jury is the "trier of fact" – that is, the jury decides what the facts are – and the judge is the "trier of law – that is, the judge decides what is the applicable law. In a judge-alone trial, the judge is both the trier of fact and trier of law.

The trier of fact must decide about the facts based on the evidence that is presented in court. This can include testimony of witnesses, documents, and physical evidence (such as a piece of clothing, or a rock sample). The judge, as trier of law, will decide whether a particular piece of evidence is admissible or inadmissible. If admissible, the trier of

fact can consider it; if inadmissible, the trier of fact cannot consider it (a jury may not even know that it exists; a judge alone is expected to put it out of mind when deciding about the facts). The judge is essentially a gatekeeper as to the evidence.

At the end of a trial, a decision will be made. If the trial was by judge with jury, the jury will give its verdict. In a civil case, the jury will decide both liability and remedy (damages, that is, the monetary compensation that the defendant must pay to the plaintiff). In a criminal case, the jury will decide guilt or innocence, but the judge alone will impose sentence. If the trial was by judge alone, the judge will issue a judgment, about which more will be said below.

Appeals

A litigant who is dissatisfied with the outcome of a judgment may appeal to a higher court. An appeal is not a chance to re-fight the trial. Generally speaking, the appellate court accepts the facts as found by the trier of fact at the trial. Appellate courts generally do not hear new evidence.

This is true both if the appeal is to an appellate court from a trial court (e.g. to the B.C. Court of Appeal from the B.C. Supreme Court), or to an appellate court from an appellate court (e.g. to the Supreme Court of Canada from a judgment of the B.C. Court of Appeal). In technical terms, appellate courts, are bound by the "standard of review," which means that they can only intervene (reverse a lower court judgment) if there is a legal error in the judgment of the lower court.

The party appealing the judgment may require leave (permission) to appeal. Different rules apply, depending on whether the appeal is to the B.C. Supreme Court, the B.C. Court of Appeal, or the Supreme Court of Canada. Different rules also apply depending on the nature of the appeal (civil or criminal, final or interlocutory, and special rules based on legislation).

Appeals, unlike trials, are heard by panels of judges. In the B.C. Court of Appeal, most appeals are heard by a panel of 3 judges (some cases have 5 judge panels). In the Supreme Court of Canada, panels may be made of 5, 7, or 9 judges.

Appellate courts do not hear witnesses and typically do not see the evidence first hand. Instead, they review the "record" of the trial, which includes the reasons for judgment of the court below, the transcript of oral evidence, and the appeal books that contain copies of documentary evidence (such as letters and photographs). The appeal judges consider the legal arguments presented by the lawyers or the litigants in person if they are unrepresented.

Judgments

Jury trials are decided by the verdict of the jury, so there is no “judgment”. However, for judge alone trials, and for appeals, the judges render their decision by way of judgment (sometimes called reasons for judgment or opinions).

In many cases, the reasons for judgment are written, although some decisions are made orally. Oral judgments can be transcribed- the practice differs from court to court. Copies of written judgments, and sometimes of transcribed oral judgments, are typically made available to the public through case reports (books that provide copies of collected court judgments; many are now also available online through various publishers). As well, many courts now post copies of their judgments on their websites. CANLII.org has posts judgments from courts all across Canada.

- B.C. Provincial Court: www.provincialcourt.bc.ca/
- B.C. Supreme Court: www.courts.gov.bc.ca/
- B.C. Court of Appeal: www.courts.gov.bc.ca/
- Supreme Court of Canada: www.scc-csc.gc.ca/decisions/index-eng.asp