

Judicial Independence and Democracy in Nova Scotia

Introduction

What is judicial independence and what does it have to do with democracy?

The concept has two main features. One relates to attitudinal independence (or impartiality): we want judges to have an open mind and not to privilege the views of any particular group or interest in society (including their own).

The other relates to political independence: while the judiciary is an arm of government, we want judges to be free from the influence of the executive branch who appoint them. Both types of independence are crucial for the maintenance of democracy, but only the latter is dealt with through explicit measures such as constitutional guarantees of tenure and the like. The former is dealt with largely through the appointment process, the ability of litigants to challenge judges for bias, the existence of disciplinary bodies such as the Canadian Judicial Council, and via informal mechanisms such as continuing judicial education.

The requirement for the political independence of the judiciary has grown slowly over the past few centuries, along with the idea of separation of powers. This doctrine holds that the executive, legislative, and judicial branches of government are supposed to be separate and distinct so that each may check and balance the other. We do not want the executive arm of government acting without due authority, or enforcing legislation in a way that was not intended by the legislature. Nor, in a country with a written charter of rights protecting fundamental freedoms, do we want legislatures

passing laws that negate those freedoms or impair them unreasonably. The solution to both of these problems is an independent judiciary which can listen to all sides of the argument and decide whether the government's or the citizen's interpretation of the existing law is correct. Of course, we also value the independence of the judiciary when it decides disputes between private parties as well. Whether the parties to a dispute are both private, both governmental, or one private and one governmental, we want and need judges to decide disputes fairly, based on their understanding of the law, without fear of adverse consequences or hope of reward. To this end, a variety of formal and informal mechanisms exist in modern liberal democracies to insulate judges from such pressures. The strongest institutional mechanism in jurisdictions following the British parliamentary tradition is guaranteed tenure and salary, so that once appointed a judge need not fear dismissal (except for serious cause), nor reduction of salary. This formal mechanism developed slowly in colonial Nova Scotia, but some knowledge of the English context is necessary to understand local developments.

The Act of Settlement 1701 was the first time Parliament limited the Crown's power to establish the conditions of judicial appointment for English judges. Prior to that date, judges were mostly appointed 'at pleasure,' which meant that they could be dismissed at will by the monarch. Many feared that this insecure tenure meant that the judges would be too timid ever to decide against the interests of the government. In the wake of the 'Glorious Revolution' of 1688, which brought William and Mary to the throne but

significantly limited their power, Parliament decided to act on the topic of judicial independence. Since the Act of 1701, all English judges have been appointed 'during good behaviour'; they are only removable for serious cause upon a joint address by both Houses of Parliament to the government, and their salaries once established cannot be reduced. These safeguards did not instantly create an independent judiciary, however. Sixty years after the passage of the 1701 Act, the English jurist Sir William Blackstone in his *Commentaries on the Laws of England* feared that judges were still too subservient to the Crown that appointed them, and commended the institution of the jury rather than the judge as the best check on possible abuse by the Crown or the executive branch. By the middle of the nineteenth century, however, the Crown's power had been much reduced and the reputation of English judges for independence much enhanced. Thus, it can be seen that the formal security offered by institutional protections such as the Act of Settlement are necessary but not sufficient conditions for judicial independence. The achievement of judicial independence relates as much to legal/judicial culture as it does to formal constitutional arrangements.

Pre-Confederation Nova Scotia

This gradual development of judicial independence was also reflected in colonial Nova Scotia. Thus when Jonathan Belcher was appointed by the Crown as the first chief justice of the Supreme Court of Nova Scotia in 1754, he served 'at pleasure,' like the pre-1701 English judges. His salary was paid by the imperial government but when additional judges were added to the

court, their salaries were controlled by the House of Assembly and paid from local taxes. The salaries fluctuated and were sometimes not paid on time until a local law of 1789 put a stop to such practices. Although Nova Scotia's political representatives were sometimes reluctant to pay the price of judicial independence, this is not to say they did not value it. In 1782 the House of Assembly passed a law declaring the appointment of all future assistant judges (i.e., judges other than the chief justice) to be 'during good behaviour,' but it was disallowed in London, principally because it would have put the assistant judges in a better position than the chief justice, whose Crown appointment was still expressed to be 'at pleasure.'

In spite of the absence of formal protections for the judges, their independence from the executive was never seriously attacked, in part because they were such key players in colonial governance and administration. The judges were expected to provide advice to government, assist in drafting legislation, undertake commissions of inquiry, and use their tact and authority to help resolve the many political disputes that erupted in a fractious colonial society. The threat was more from the judges exceeding their already considerable authority in support of the government than from government muzzling or interfering with the judiciary. In fact, no judge was ever removed or disciplined prior to 1848 when the government had the theoretical power to do so.

It was not until the achievement of responsible government in 1848, after which the conditions of all judicial appointments were finally set by local authority and not by London, that future judges were appointed 'during good

behaviour.’ After 1848, it was up to the party that held a majority in the House of Assembly, and thus formed the government, to appoint the judges and to fix their salaries and conditions of appointment. The fact that the Assembly quickly passed a law constraining the government from dismissing judges without good cause shows how important the issue was to them.

This is not to say relations with the judges were always harmonious. In particular, pensions remained a contentious issue. Aged judges often wanted to retire but had no guarantee of a pension, and unseemly battles between them and some members of the Assembly were not infrequent. Not until after Confederation would a pension scheme be created for the judges, thus removing a major irritant in relations between the judiciary and the government.

On occasion the judges could use their authority to advance democratic values: for example, by 1810 a series of decisions consistently undermining the right of masters to recover their slaves had effectively abolished slavery in the province. Nonetheless, the link between judicial independence and democracy was rather weak during the early decades of Nova Scotia’s existence. The idea that judicial independence was necessary to protect democratic values developed slowly, in part because democracy itself developed slowly. While a democratic element was present in the Nova Scotian constitution, it was a carefully limited one, just as it was in Britain. Before 1848 most people thought in terms of the mixed and balanced constitution, in which the Crown, the appointed upper house of the legislature, and the elected Assembly each played an important and not just

a symbolic role. The elected Assembly was by no means supreme – its wishes might be frustrated by the upper house, or by the lieutenant-governor refusing to assent to legislation for reasons related to imperial policy rather than local conditions.

The idea of the separation of powers also developed slowly. Several judges continued to sit in the Assembly after their appointment to the bench in the eighteenth and early nineteenth centuries, but the cumulation of roles was increasingly frowned upon. In 1809 the Assembly passed a law forbidding Supreme Court judges from holding any other office except that of member of Council, but there continued to be some debate about whether sitting in the Assembly was covered by the prohibition. The last example was Charles Rufus Fairbanks, who refused to surrender his seat in the Assembly in 1834 after being appointed to the bench, forcing the Assembly to pass a law declaring his seat vacant. The fact that the chief justice presided over the Council, which until 1837 functioned both as the cabinet and as the upper house of the legislature, also came to be seen as improper. Joseph Howe declared that 'the presence of the chief justice at the Council Board is unwise and injurious, having a tendency to lessen the respect which the people ought to feel for the Court over which he presides.' After the Council was divided into an Executive and a Legislative Council in 1837 the judges were excluded from both, thus formalizing the separation of powers in the province.

The most famous trial during Nova Scotia's period of political reform, that of Joseph Howe for libel in 1835, revealed the cogency of Blackstone's

observation about the need for the jury to check any possible tendencies by judges to defer to the governments that appointed them. The presiding judge, chief justice Brenton Halliburton, revealed in his charge to the jury that had it been up to him, Howe would have been found guilty as charged. The jury thought otherwise, however, and acquitted the journalist and budding politician.

Before 1848, even if the judiciary did not directly foster democracy, it played an important role in maintaining order and promoting loyalty – conditions within which democracy could evolve.

Post-Confederation Nova Scotia

The guarantee of judicial tenure achieved in 1848 was carried forward into s. 99 of the British North America Act 1867, which states that federally appointed judges can only be removed by the Governor General on joint address of the Senate and House of Commons. S. 100 states that the salaries, allowances, pensions of such judges shall be ‘fixed and provided by the Parliament of Canada.’ The creation of a pension plan for judges in 1868 provided a further enhancement of judicial independence, in addition to creating an incentive for judges to retire at a reasonable age. No formal retirement age was mandated, however, until 1961 when a constitutional amendment set it at 75 for judges of the superior courts such as the Supreme Court of Nova Scotia.

These formal protections for judicial independence were somewhat undermined by the practice of naming judges almost exclusively from the

ranks of those lawyers who had been active on behalf of the political party appointing them, particularly by running for elected office. If judicial appointment was seen as a reward for political service, it was natural to ask whether once on the bench, a judge might in turn allow partisan considerations to influence his or her judgment, especially in cases involving the government that had appointed the judge in question. When governments were pressed to defend the practice, they usually fell back on the need for 'balance.' If the incumbents on the bench had all been appointed by the opposing party when it was in power, it was only 'fair' that the current government should fill vacancies with candidates of its own party in order to ensure balanced representation on the bench.

The creation of assessment committees in 1988 to scrutinize the dossiers of candidates for federal judicial appointments, with representatives from government, the judiciary and bar societies, has led to a diminution in the numbers of judges who have held political office or run unsuccessfully for elected office. Some observers, however, have detected an increase in the numbers of successful judicial candidates with extensive organizational and fund-raising experience for a political party, albeit no direct electoral experience. Whether partisan experience of various kinds should be considered positively, negatively, or neutrally in the judicial appointments process remains a contentious issue across Canada today.

When we turn to the post-Confederation record of the Nova Scotia courts in using their independence to foster the conditions in which democracy can flourish, there are both high and low points. The trial of

union leader J.B. McLachlan in 1923 was a low point. McLachlan was charged with seditious libel arising out of a letter he wrote to union members decrying what he saw as an excessive response by provincial police to public disorder during a strike in Sydney. The letter was published without his consent in newspapers in Sydney and Halifax, and the Nova Scotia Supreme Court did not challenge the government's efforts to ensure that McLachlan was tried at Halifax rather than Sydney, where it was likely that a jury would not have convicted him.

A decade later, however, the court rendered one of the most significant democracy-enhancing judgments in Canadian history since the days of Joseph Howe. As a provincial election loomed in 1933, the government of G.S. Harrington began to abuse the Franchise Act it had passed two years earlier. The Act gave government-appointed registrars the task of preparing voters' lists and posting them 'in conspicuous places,' but stipulated that corrections had to be made within three days. Only three registrars were appointed for all of Halifax, with its 11,000 voters. The opposition Liberal Party applied for a mandamus requiring the appointment of forty registrars, one for each polling station, and the court issued the remedy. A week later some registrars were still refusing to make the lists public or posting them in obscure places for short periods of time. Long waits to register provoked demonstrations at Province House by individuals who feared being deprived of their vote. Again the court had to issue a mandamus, this time ordering the registrars to make the lists public. The

franchise scandal provided the relatively unknown Angus L. Macdonald with the issue upon which he swept to power in the August 1933 election.

Events such as the franchise scandal are rare in Canada, and judges are seldom called upon to uphold democratic values in such a direct way. Since the enactment of the *Canadian Charter of Rights and Freedoms*, the judicial role in enhancing democracy is more likely to involve adjudicating on issues of free speech, and in dismantling barriers to the full and effective participation of all citizens in Canadian political and social life. The Donald Marshall Inquiry of 1989-90 revealed that even some members of the judiciary harboured stereotypical attitudes about Aboriginal people and members of minorities, but in the wake of the Royal Commission's report Nova Scotia courts have become national leaders in social context education and judicial performance evaluation. With regard to free speech, a 2002 decision of the Nova Scotia Court of Appeal is a landmark case which speaks to the right and duty of citizens to engage in public criticism of police and public officials where the latter are honestly and reasonably believed to have committed significant violations of constitutional rights. After a police officer conducted an illegal personal search of three black girls suspected of stealing ten dollars, the girls' counsel stated at a press conference that the search would not have occurred had the girls been white. The police officer sued for defamation and won a jury verdict, but the Court of Appeal reversed by a two-to-one majority, finding that in a community where systemic discrimination is a matter of historical record, the counsel in question had not only a right but a duty to speak out which prevailed over the reputational

interest of the police officer. Upholding the jury verdict would have created a chilling effect on vigorous criticism of police and public institutions, and arguably set back the cause of free speech upon which democracy rests.

Like democracy itself, judicial independence is a work in progress. The *Canadian Charter of Rights and Freedoms* has given judges more authority than they had under earlier constitutional arrangements, and in that sense the need for their independence is greater than ever. Only an engaged citizenry and an independent bar can ensure that strong candidates continue to be appointed to the bench, and that their independence is secured and respected during their tenure.

Dr. Philip Girard
Professor of Law, History, and Canadian Studies
Dalhousie University