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N.B. This research is the work of Maria Liu in consultation with Gail Davidson. The research paper is unfinished and has not been edited for errors and omissions. The work contains omissions and may contain errors. The information is not intended as a substitute for professional advice.

International Law Protection of Judicial Independence:

“The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary” (Basic Principles on the Independence of the Judiciary).¹

An independent and impartial tribunal “is an absolute right that may suffer no exception” (HRC Miguel González del Río vs. Peru).²

“the principle of the separation of powers [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded. (Report of the Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995).³

Absolute/Non-Derogable Rights

Principles in International law thus provide that the individual right to and the state duty to ensure determination of rights and criminals charges by an independent, impartial and competent judiciary is non-derogable and cannot be lawfully restricted, suspended or extinguished under any circumstances including war and a declared emergency.

Non-derogable rights as defined by UNHRC are fundamental human rights that cannot be suspended, limited, or derogated from under any circumstances, including during times of public emergency or national crisis. They are essential to human dignity and the rule of law.⁴

Note: this does not mean that no limitations can ever be justified, but the derogability is always distinct from the permissibility of restrictions.⁵

UN Basic Principles on the Role of the Judiciary:

"1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."⁶

¹ Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly Resolution 40/32 of 29 November 1985, and adopted on 6 September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, para. 1.

² *Gonzalez del Rio v. Peru*, Comm. 263/1987, U.N. Doc. CCPR/C/40/D/263/1987 (HRC 1990), at para 5.2.

³ *Report of the Special Rapporteur on the independence of judges and lawyers*, UNHRC, 51st sess, E/CN.4/1995/39, at para 55.

⁴ *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, UNHRC, 31 August 2001, CCPR/C/21/Rev.1/Add.11.

⁵ *Ibid* at para 7.

⁶ *Supra* note 1.

This means that the judiciary shall decide matters "**impartially**, on the basis of facts and in accordance with the law, **without any restrictions**, improper influences, inducements, pressures, threats or interferences, direct or indirect..."⁷

The judiciary has **exclusive authority to decide whether an issue is within its competence**.⁸ That there is **no inappropriate interference** with the judicial process, that everyone has the **right to be tried by courts** and that no processes will be used to **displace court/tribunal jurisdiction**, and that "each Member State should provide **adequate resources** to enable the judiciary to properly perform its functions."⁹

Independence of the judiciary is what enables judicial proceedings to be conducted in a fair manner that respects rights of the parties involved.¹⁰

In short, judicial independence requires:

- 1. Impartiality,**
- 2. Absence of improper restrictions,**
- 3. Exclusive authority to decide on competence,**
- 4. A right to be tried by courts,**
- 5. Absence of processes that displace court/tribunal jurisdiction, and**
- 6. Adequate resources provided by the State.**

UN Human Rights Council Resolution adopted by the Human Rights Council on 16 July 2020. Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers:

Importance of independence and impartiality of judiciary and independence of lawyers: "*Emphasizing* that the independence and impartiality of the judiciary and the independence of lawyers and the legal profession are necessary elements in the realization of Sustainable Development Goal 16 of the 2030 Agenda for Sustainable Development... to provide access to justice for all and build effective, accountable and inclusive institutions at all levels,"

Condemns attacks and threats on independence of judiciary: "*Condemning* the increasingly frequent attacks on the independence of judges, lawyers, prosecutors and court officials, in particular threats, intimidation and interference in the discharge of their professional functions,"

State duties to provide an independent judiciary and legal profession: "every State should provide an effective framework of remedies to redress human rights grievances... and, especially, an independent judiciary and legal profession consistent with applicable standards contained in relevant international instruments,"

⁷ *Ibid* at Art 2.

⁸ *Ibid* at Art 3.

⁹ *Ibid* at Arts 4, 5, 7.

¹⁰ *Ibid* at Art 6.

"Stressing the importance of ensuring **accountability, transparency and integrity** in the judiciary as an essential element of judicial independence and as a concept inherent to the rule of law..."

Independence of Judges secured by having tenure, adequate remuneration, and defined circumstances for removal: "the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement should be adequately secured by law, that the security of tenure of judges is an essential guarantee of the independence of the judiciary and that grounds for their removal must be explicit, with well-defined circumstances provided by law, involving reasons of incapacity or behaviour that renders them unfit to discharge their functions, and that procedures upon which the discipline, suspension or removal of a judge are based should comply with due process;"

Mentions Special Rapporteur on the independence of judges and lawyers:

"Reaffirming also the Human Rights Council resolutions in which the Council extended the mandate of the Special Rapporteur on the independence of judges and lawyers for a period of three years, and acknowledging the importance of the mandate holder's ability to cooperate closely, within the framework of the mandate, with the Office of the United Nations High Commissioner for Human Rights, including in the fields of advisory services and technical cooperation, in the effort to guarantee the independence of judges and lawyers,"¹¹

Canadian law on judicial independence:

Constitution Act, 1867:

Section 96: Appoints judges to the superior, district, and county courts by the federal government.

Section 99(1): Judges of superior courts hold office during good behaviour and may only be removed by the Governor General on address of the Senate and House of Commons.

Section 100: Guarantees that judges of the superior courts are to be paid by the federal government, ensuring financial security. Establishes the core principles of judicial independence: security of tenure, financial security, and administrative independence.

¹¹ *Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers: resolution / adopted by the Human Rights Council on 16 July 2020, UNHRC, 44th Sess, A/HRC/RES/44/9 (2020).*

Canadian Charter of Rights and Freedoms (Constitution Act, 1982):

Section 11(d): “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...”

*(Note only applies to criminal matters but somewhat adds to protection)

Canadian Judicial Council (CJC):

Note: The CJC is a body created by the Parliament to oversee matters regarding the judiciary. It is composed on appointed Chief Justices and Associate Chief Justices and is intended to protect judicial independence and guard against unwanted outside influence. It is responsible for judicial training and continuing judicial education, promoting judicial independence, providing ethical standards of judges,¹² and investigating complaints against federally appointed judges (and remedial measures including the removal of judges).¹³

The CJC website provides definitions and importance of judicial independence, however, the pronouncements made under CJC policy and guiding principles are not law. The guidelines are aspirational and advisory and are not legally enforceable rules that members of the public can rely on.¹⁴

Note on CJC and Judicial Review: In *Girouard v Canada (Attorney General)*, 2018 FC 865, Justice Noël ruled that the CJC is a "federal board, commission, or other tribunal" subject to judicial review. Additionally in this particular case, the judge found that members of the CJC were not acting within their role as judges but within the role of Chief Justices (i.e., they were exercising an administrative role relying on statutory authority and not the Constitution). Finally, the CJC does not have the status of a superior court despite Subsection 63(4) of the Judges Act that "deemed" the inquiry committee to have the powers of a superior court.¹⁵

CJC Complaint Process:

The CJC is a self-regulatory body that addresses public concerns over the conduct of judges and the manner in which judicial services were provided. Members of the public can file a complaint against a federally appointed judge through writing, email, or using the website complaint process.

After the complaint is made, it will be screened, passed on for review, and referred to review panels and/or hearing panels should remedial measures be necessary. The CJC

¹² Canadian Judicial Council, *Ethical Principles for Judges*, online: <https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>, retrieved 05-23-2025.

¹³ Canadian Judicial Council, *Mandate*, online: <<https://cjc-ccm.ca/en/about/our-mandate>>, retrieved on 05-23-2025.

¹⁴ *Ibid.*

¹⁵ *Girouard v. Canada (Attorney General)*, 2018 FC 865 (CanLII), [2019] 1 FCR 40.

also provides an internal appeals process through which the judge (against whom the complaint is made) or the presenting counsel may appeal after a hearing panel's decision. The judge may appeal the appeal panel's decision by seeking leave to appeal from the Supreme Court of Canada. The judge must write a report to the Minister should all other measures be exhausted. The Minister must respond publicly to the report.

The complaint process does not specify that any decisions made within the first few stages must be public. The complaint may be dismissed at the screening stage if it does not meet the screening criteria (accordance with section 90 of the Judges Act, see below). The complaint may also be dismissed at the review stage if it is "without merit." The CJC does not need to disclose reasons or transparent procedures as to how they arrived at their decision.¹⁶

Judges Act 90(1): Subject to subsection (2), a screening officer may dismiss a complaint if they are of the opinion that it...

- (a) is frivolous, vexatious or made for an improper purpose or is an abuse of process;
- (b) was not made for a reason referred to in paragraphs 80(a) to (d); or
- (c) does not meet the other screening criteria specified by the Council.¹⁷

In content, the CJC website directory on Judicial Independence provides that:

The judiciary shall remain independent and "free from any outside interest or influence."¹⁸ For the public to have confidence in the justice system, "Judges must be completely impervious to any outside influence, whether governmental, political, family, organizational or other."¹⁹

Guidance document provides that **judges must be free** but obliged to decide on their own, must be **set apart from someone else's influence**, and must be **insulated against improper influence** (direct or indirect).²⁰ Then goes on to discuss the importance of judicial independence for the benefit of all citizens, because fairness leads to trust, and also that judicial independence protects Constitutionally enshrined values.²¹

¹⁶ Canadian Judicial Council, *Filing a Complaint*, online: <<https://cjc-ccm.ca/en/resources-center/filing-complaint>>, retrieved on 05-23-2025.

¹⁷ Judges Act (R.S.C., 1985, c. J-1) at s.90(1).

¹⁸ Canadian Judicial Council, *Judicial Independence*, online: <<https://cjc-ccm.ca/en/what-we-do/judicial-independence>>, retrieved on 05-14-2025.

¹⁹ *Ibid.*

²⁰ Canadian Judicial Council, *Why is Judicial Independence Important to You* (May 2016), online: <<https://cjc-ccm.ca/sites/default/files/documents/2019/Why%20is%20Judicial%20Independence%20Important%20to%20You.pdf>>, retrieved on 05-14-2025.

²¹ *Ibid* at 2.

Provides two dimensions of judicial independence: (1) Adjudicative Independence of Individual Judges and (2) Institutional Independence of the Judiciary.²²

Provides attributes required of judicial independence:²³

- (1) Security of tenure: judges "entitled to serve on the Bench until the age of retirement" (75) unless removed for misconduct (or, for superior court judges, if both levels of government agree that a judge should be removed).
- (2) Financial security: "independent commissions are established at regular intervals to review the salaries and the benefits of judges."
- (3) Administrative and adjudicative independence: "courts must be able to operate in a manner that shields judges from outside influences." Judges are employed by the government but are not government employees, the government "must not have control over how judges perform their role or who hears a particular case."
*(references s.99 and s.100 of the Constitution Act, 1867).

Gives safeguards for judicial independence:²⁴

- (1) Court management belongs to the judiciary to protect it from governmental influence;
- (2) Salaries, benefits, and lifetime annuities determined by independent commissions;
- (3) Judicial appointments decided by independent advisory committees
- (4) Continuing education programs for judges;
- (5) Judicial conduct review by the CJC;
- (6) Judicial accountability ensuring that decisions are according to the law.

Supreme Court of Canada (SCC) definitions of judicial independence:

Judicial Independence: meaning that the judiciary makes decisions "**based only on fact and law, free of any influence from government or outside parties.**"

"Judicial independence is essential to the strength of Canada's democracy. It means that the judiciary can make decisions based only on fact and law, free of any influence from government or outside parties. The principle of judicial independence preserves the rule of law, protects our democratic values and fosters public confidence in our institutions."²⁵

Accord to strengthen the independence of the Supreme Court of Canada:

"recognizes and reinforces judicial independence by setting out provisions for the handling of funding requests, contracting authority and the appointment of the Court's senior administrative office-holders."

²² *Ibid* at 10.

²³ *Ibid* at 12–14.

²⁴ *Supra* note 20 at 15–17.

²⁵ Supreme Court of Canada, *Judicial Independence*, online: <<https://www.scc-csc.ca/about-apropos/work-travail/independence-independance/>>, retrieved on 05-16-2025.

Note: this Accord was signed in 2019 between Chief Justice of Canada and the Minister of Justice to strengthen the independence of the Supreme Court of Canada, **it is not law and is not legally enforceable** (see below excerpt on Section 2.2). The Accord refers to the need to comply with the terms of the Financial Administration Act and the Supreme Court of Canada Act. As per Section 8.1 detailing the matters to which this Accord applies (see below excerpt on Section 8.1), **the Accord adds nothing of substance to judicial independence.**

Section 1.2: "The Minister of Justice and the Chief Justice of Canada are committed to the independence of the judiciary, as guaranteed by the Constitution of Canada, so as to strengthen public confidence in the justice system and the rule of law...**This includes upholding the constitution, the rule of law, and respect for the independence of the courts.**"

Section 2.1: "The purpose of this Accord is to **recognize the independence of the Supreme Court of Canada by publicly describing the role of the Minister of Justice** in making recommendations to the Governor in Council under the Supreme Court Act."

Section 2.2: "This Accord reflects the intentions of the parties but is **not intended to be a legally enforceable contract** nor to create any rights or obligations which are legally enforceable."

Section 8.1: "This Accord takes effect on the date of its signature by the Minister of Justice and the Chief Justice of Canada. It applies to funding requests, contracts for legal services, appointments, reappointments and involuntary removals made on or after the date of signature. It is subject to review at the request of either the Minister of Justice or the Chief Justice of Canada."²⁶

The Judges Act²⁷ and Ethical Principles for Judges²⁸: sets out judges' duties to "devote themselves to their judicial duties and may not have other work outside of those duties," acknowledging that judicial independence is guaranteed under the Constitution, and defining judicial independence in three ways (see below).

"Security of tenure: Once appointed, a judge can serve until the age of 75. A judge can only be removed by Parliament for serious reasons.

Financial security: Every 4 years, an independent commission is established to review judges' compensation.

²⁶ Supreme Court of Canada, *Accord to strengthen the independence of the Supreme Court of Canada*, 22 July 2019, online: <<https://www.scc-csc.ca/about-apropos/work-travail/independence-independance/accord/>>, retrieved on 05-16-2025.

²⁷ *Supra* note 17.

²⁸ Canadian Judicial Council, *Ethical Principles for Judges*, 2019, online: <<https://cjc-ccm.ca/en/what-we-do/initiatives/ethical-principles-judges-0>>, retrieved on 05-16-2025.

Institutional administrative independence: At a minimum, judges must have control over hearing assignments, sittings of the court and court lists."²⁹

Canadian Jurisprudence on Judicial Independence:

Valente v. The Queen, [1985] 2 SCR 673:

SCC defines judicial independence comprised of 3 conditions: **(1) security of tenure, (2) financial security, and (3) institutional independence.**³⁰

"What should be considered as the essential conditions of judicial independence for purposes of s. 11(d) of the Charter --that is, those which may be reasonably perceived as such--is a difficult question. The concept of judicial independence has been an **evolving** one... Modern views on the subject of judicial independence are reflected in the **Deschênes report** to which reference has been made, and in the recent report of the Canadian Bar Association's Committee on *The Independence of the Judiciary in Canada*. "³¹

"It is generally agreed that judicial independence **involves both individual and institutional relationships:** the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government... The relationship between these two aspects of judicial independence is that **an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.** "³²

Ref re Remuneration of Judges of the Prov. Court of P.E.I., [1997] 3 SCR. 3:

Reaffirms Valente, holds that judicial compensation must be set by independent commissions. Confirms that judicial independence is a requirement of the unwritten constitutional principle and also flows from s. 11(d) of the Charter of Rights and Freedoms: the right to an independent and impartial tribunal.³³

Distinguishes somewhat from Valente: "Financial security must be understood as merely an aspect of judicial independence, which in turn is not an end in itself. **Judicial independence is valued because it serves important societal goals** — it is a means to secure those goals... One of these goals is the **maintenance of public confidence in the impartiality of the judiciary**, which is essential to the effectiveness of the court system. Independence contributes to the perception that

²⁹ *Supra* note 25.

³⁰ *Valente v. The Queen*, [1985] 2 SCR 673, 1985 CanLII 25 (SCC) at paras 27, 40–43, 47.

³¹ *Ibid* at para 24.

³² *Ibid* at para 20.

³³ *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, 1998 CanLII 797 (SCC) at paras 2–4.

justice will be done in individual cases. Another social goal served by judicial independence is the **maintenance of the rule of law...**"³⁴

The Queen v. Beauregard, [1986] 2 SCR 56:

Reaffirms *Valente*, agrees with aspect of financial security of federally appointed judges, agrees that judges have two-pronged roles in terms of judicial independence (see below). Holds that judicial independence is fundamental to our Constitution.³⁵

"...[C]ourts are not charged solely with the adjudication of individual cases... It is also the context for a second, different and equally important role, namely as **protector of the Constitution and the fundamental values embodied in it--rule of law, fundamental justice, equality, preservation of the democratic process.**"³⁶

"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..."³⁷

Other Canadian References:

Centre for Constitutional Studies:

"The judiciary is responsible for protecting our basic human rights contained in the Canadian Charter of Rights and Freedoms."³⁸ An independent judiciary is tied to the separation of powers and essential for upholding the rule of law.

Judicial Independence defined as having two dimensions and three characteristics:

"Two dimensions: individual and institutional. Individual independence means that individual judges decide cases without interference. Institutional independence means that courts are independent from other branches of government.

Three core characteristics – security of tenure, financial security, and administrative independence – are necessary for maintaining judicial independence."³⁹

BC Courts:

³⁴ *Ibid* at para 9–10.

³⁵ *The Queen v. Beauregard*, [1986] 2 SCR 56, (1986) 70 N.R. 1 (SCC).

³⁶ *Ibid* at para 24.

³⁷ *Ibid* at para 21.

³⁸

³⁹ Centre for Constitutional Studies, *Judicial Independence*, 4 July 2019, online: <<https://www.constitutionalstudies.ca/2019/07/judicial-independence/>>, retrieved on 05-20-2025.

Judicial independence is important for public confidence, because "those who come before the courts must be certain that decisions made by those courts are not subject to outside influence. Judicial independence means that judges are not subject to pressure and influence, and are free to make impartial decisions based solely on fact and law."⁴⁰

⁴⁰ BC Courts, *Judicial Independence (And What Everyone Should Know About It)*, 15 March 2012, online: <https://www.bccourts.ca/about_the_courts/Judicial%20Independence%20Final%20Release.pdf>, retrieved on 05-20-2025.