

JUDICIAL INDEPENDENCE

E.P. ROSSITER,
ASSOCIATE CHIEF JUSTICE
TAX COURT OF CANADA

TAX COURT OF CANADA

■ 1. The Court:

- A) Court make up
- B) Nature of Court:
 - (i) Trial Court of first instance
 - (ii) Jurisdiction
- C) Appointment Process:
 - (i) Puisne judges
 - (ii) Chief Justice and Associate Chief Justice

- 2. Judicial Advisory Committee (JAC)
 - A) JAC make up and appointments
 - B) JAC Process
 - (i) Application requirements
 - (ii) Application consideration process
 - (iii) Decision on Application
 - (iv) Communication to Applicant
 - C) Eligibility list for appointment

■ 3. Judicial Independence

• A) Statutory

- (i) *Act of Settlement*, 1701
- (ii) *Act of Union* 1834,
- (iii) *Constitution Act*, 1867 (ss. 96-100)
- (iv) *Constitution Act*, 1982

• B) Common Law

- (i) *Valente v. R.*, [1985] 2 SCR 673
- (ii) *Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3
- (iii) *Bodner v. R.*, [2005] SCC 44

■ 4. Fundamental Attributes of Judicial Independence

- A) Security of tenure
- B) Financial Security
- C) Institutional or administrative independence

5. Canadian Judicial Council

Tax Court of Canada

■ 1. The Court

• A: Court make up:

- 22 judges and supernumerary judges
 - Chief Justice
 - Associate Chief Justice
 - 20 puisne judges
 - Supernumerary judges
- Remuneration \$291,000 puisne judges
- \$316,000 Chief Justice & Associate Chief Justice
- Term – until 75 years of age
- Retirement – Rule of 80 after 15 years service
- Pension – 66 2/3% of salary

■ B. Nature of Court

- (i) Trial court of first instance
- (ii) Jurisdiction: Income Tax, Goods & Services Tax, miscellaneous
- (iii) Itinerant Court – 67 cities, primarily (65%) Halifax, Montreal, Toronto, Calgary, Edmonton, Vancouver, Winnipeg
- (iv) Sit approximately 10 months annually

■ C. Appointment Process:

- (i) Puisne Judges – Eligibility list (JAC); Governor General in Council on recommendation of Minister of Justice and Attorney General
- (ii) Chief Justice and Associate Chief Justice; Governor General in Council on recommendation of Prime Minister

- 2. Judicial Advisory Committee (JAC)
 - A) JAC Make up and appointment
 - (i) chair
 - (ii) four members - experience
 - - regionality
 - B) JAC Process
 - (i) Applicant requirements
 - ten years at the bar
 - Application (form)
 - References
 - (ii) Application consideration process
 - Meeting frequency
 - Number of applications
 - Due diligence inquiry
 - Applicant review/discussion
 - JAC decision and communication
 - C) Eligibility list for appointment

- 3. Judicial Independence
 - A) Statutory
 - (i) *Act of Settlement*, 1701
 - (ii) *Act of Union*, 1834 (office during good behaviour)
 - (iii) *Constitution Act*, 1867 ss. 96-100
 - (iv) *Constitution Act*, 1982
 - B) Common Law
 - (i) *Valente v. R.*, [1985] 2 SCR 673 (criminal)
 - Conditions of Judicial independence
 - Security of tenure
 - Financial security
 - Institutional independence

- Security of tenure – only removal for cause and subject to independent review wherein judge has full opportunity to be heard
- Financial security – right to salary and pension established by law and not subject to arbitrary interference by executive in a manner that could affect judicial independence
- Institutional independence – decisions that bear directly and immediately on the exercise of judicial function
 - Assignment of judges
 - Sittings of the court
 - Development of court lists
 - Allocation of courtrooms
 - Direction of administrative staff engaged in carrying out these functions

- (ii) *Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 and *Bodner v. R.*, 2005 SCC 44
 - Apply *Valente* principles to all courts not just criminal
 - Core principals can have both individual and institutional dimensions
 - Financial security – three components
 - Salaries could be reduced, increased or frozen but only after consideration by an independent commission
 - Specific commission process
 - Judiciary can never engage in negotiations over remuneration with other branches of government
 - Judicial remuneration cannot be reduced beyond a minimum level required to ensure public confidence in independence of judiciary
 - Commission process for judicial recommendation must be independent, objective and effective
 - Results can be rejected by Government on basis of “simple rationality”

■ 4. Fundamental Attributes of Judicial Independence

A. Security of Tenure:

- Hold office during good behaviour
- Can only be removed for cause
- Only removed by Governor General or Address of the Senate and House of Commons
- Mandatory retirement age 75

- Manner/Process of Removal:
 - Complaint to Canadian Judicial Council
 - Assessment by Chair of Council Discipline Committee
 - Investigation
 - Inquiry
- Manner of removal
 - For age
 - Infirmary
 - Guilty of misconduct
 - Failed in due execution of his/her office
 - In a position incompatible with the due execution of his/her office
- Report submitted to Minister of Justice

■ B. Financial Security:

- *Judges Act* establish base salary
- Automatic cost of living adjustment applied annually
- Pension 66 2/3% of salary
- Quad Commission
 - Chair
 - Appointee by Government
 - Appointee by Judges
 - Hearings quad
 - Report to Minister of Justice
 - Minister of Justice – 6 months to respond
- (2012 – recommendation – 0% accepted except appeal court increase rejected)
- (2008 – recommended – 7% reduced to 0%)
- (2004 – recommended – 10% but reduced to 7%)

- C. Administrative Independence:
 - Administrative independence requires that courts have control over the administrative decisions that bear directly and immediately on the exercise of their judicial function. In particular, courts must control the assignment of judges, sittings of the court and court lists, allocation of court rooms and the direction of administrative staff engaged in carrying out these functions.
 - Courts Administration Service

- 5. Canadian Judicial Council
 - 1. Make up
 - 2. Primary function
 - Judicial education
 - Judicial discipline