

## **Proposal for Judicial Reform**

Part 1. The role of Parliament – Legislate to create Peace, Order and Good Government. Provide Order through the legitimate checks on the Executive and Judiciary according to the doctrine of the separation of powers to ensure the correct balancing of interests to prevent abuse of power by any branch of government to properly represent the public interest in a democracy. This is Good Government. Without the proper balance tyranny results and Peace is unattainable.

Part 2. The Constitutional Requirements. The constitution states that Judges have authority during “good behavior” and can be removed only by Parliament. The rule of law and equality before the law is a constitutional and democratic requirement along with fair and impartial trials and fundamental justice.

Part 3. The Legislation of the Judges Act. Defines “good behavior” as ...

Part 4. The legitimacy of the judging of the judiciary.

Part 5. Proposal for reform

Part 6. Rebuilding Trust

### **Part 1. The Role of Parliament**

Parliament has the Authority through the Constitution, section 91 to Legislate to create Peace, Order and Good Government.

Legislation provides Order through the legitimate checks on the Executive and Judiciary according to the doctrine of the Separation of Powers to ensure the correct balancing of interests to prevent abuse of power by any branch of government to properly represent the Public interest in a Democracy. This is Good Government. Without the proper balance tyranny results and Peace is unattainable.

“Follow the golden rule. Doing unto others as you would have them do unto you is a determinant and test of trust.

Personal trust is measured...by generosity and the degree to which people believe they can count on someone else in times of trouble. We are happier when we know we live in a society in which people care for one another and show that caring through their generosity and being there with support when other fall on hard times.

The conclusion is clear: happy societies are trusting societies- both socially and institutionally – and trusting societies are happy societies.”

David Johnston

### **Part 2. The Constitutional Requirements regarding Judicial Conduct**

The Constitution s99 states that Judges have jurisdiction and authority during “good behavior” and can be removed only by Parliament. The Rule of Law and Equality before the Law are further Constitutional and Democratic requirements, along with Fair and Impartial trials and Fundamental Justice as guaranteed in the Charter of Rights, which must be satisfied prior to the removal of any rights, unless that removal can be demonstrated to be justified in a free and democratic country.

Section 99 “judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.”

### **Part 3. The Legislation of the Judges Act.**

## Removal from Office

### Justification

80 For the purposes of this Division, the removal from office of a judge is justified only if, for any of the following reasons, the judge's continuation in office would undermine public confidence in the impartiality, integrity or independence of the judge or of their office to such an extent that it would render the judge incapable of executing the functions of judicial office:

- (a) infirmity;
- (b) misconduct;
- (c) failure in the due execution of judicial office;
- (d) the judge is in a position that a reasonable, fair minded and informed observer would consider to be incompatible with the due execution of judicial office.

The test created by Judges for the examination of their conduct

"Is the conduct alleged so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?"

and with this provision in mind,

"Judicial independence exists for the benefit of the judged, not the judges. It is, therefore, to be assessed from the perspective of the reasonable observer and in light of the public interests it is meant to serve."

## **Part 4. The Legitimacy of the Judging of the Judiciary.**

The process could be simply resolved by acknowledging that in a Democracy the Judiciary are legitimately examined by the Public. It must be admitted that judicial conduct cannot be legitimately performed by Judges as "no-one can be a judge in their own cause". The conflict of interest and implicit bias without checks and balances is admitted in law as being illegitimate. "A reasonable apprehension of bias exists when a reasonable, well-informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the member, whether consciously or unconsciously, would not decide fairly."

The judging of judicial conduct does create precedent and defines the bounds of "good behavior" and so a rigorous system must be established. It should be a court process and not a "panel", unless the Ministry of Justice is moving away from the adversarial system in its administration of justice, judicial conduct must be judged equally, to that of citizens.

The Judiciary is such an important function in our democracy we must treat the process with the highest regard and with the protection of the public as the ultimate goal. We will create a system of accountability that will be the model for the world. This is what Canada stands for, what the people of Canada believe is our national aspirations. It is our opportunity to give something enormously powerful to Canadians that will create a better world.

In regards to Judicial Independence the principle exists to protect the public from undue influence being brought to bear on Judges by illegitimate means of the Executive, Parliament or other nefarious means. It does not exist to protect Judges from the legitimate and constitutional checks and balances of the principle of separation of powers.

According to convention it is the Minister of Justice that is supposed to present a request for

removal of a Judge to Parliament and can do so for his own legitimate reasons or through the recommendations of the statutory body, the Canadian Judicial Council. The council as currently manifested is an outdated system designed to insulate the Judiciary from improper influence by the Executive for the reasons of the separation of powers. The invention of a screening officer in the Judicial Council's regulations, is nowhere authorized by the Judges Act and has been used to remove legitimate complaints from scrutiny and the public has no means to examine the process as the Judicial Council is exempted from the Freedom of Information Act.

Currently the Judiciary claim that their discretion cannot be examined and they exclude it from the examination of conduct. However that is not the legal standard.

“there is no such thing as absolute and untrammelled discretion” R v Roncarelli [1959]

“fraud and corruption are always the exception” Constitutional Law by Peter Hogg

“we are judges. When we sit in judgment, we are subject to judgment.” A Judge in a Democracy by Aharon Barak, Chief Justice of the High Court of Israel

We must remember that we are here to protect the innocent, and empower the weak to protect against the powerful. That is the source of all legitimacy.

Perhaps it would be helpful to work backwards and take some examples of judicial conduct that we can agree are grounds for removal and check to see if the process would function as intended.

### **Part 5. Proposal for reform**

The current proposed “panel“ in bill c-9 does not promote equality under the law or a fair and impartial trial, so does not comply with the Charter

A Grand Jury would be a just solution.

The Jury would be created on a rotating basis of 3 groups of 4 citizens serving for one year and would take responsibility for the acceptance of judicial complaints, screening according to a defined and legal criteria, investigation, court process, decision, and a right to appeal that decision to Parliament as the final authority. During service, members of the Jury would be paid at the equal rate to that of Judges. To ensure the protection of the doctrine of separation of powers the judiciary, lawyers, public servants, and politicians (federal, provincial and municipal) would be not permitted to serve on the Grand Jury. A range of sanctions should be available and just as in the judging of citizens the Charter legal rights are protected, the presumption of innocence, fundamental justice and a right to a fair and impartial trial. The Grand Jury would make recommendations to Parliament which has the sole authority to complete the process.

The process is legitimate as it is procedurally and substantially legal and just and would create a more educated, involved and empowered citizens and therefore democratically a positive step to restore trust.

### **Part 6. Rebuilding Trust**

The eminent Canadian David Johnston has already written on the steps to create Trust:

Create a Trustworthy and Trusted Country

One. Recognize a present peril

Two. Trust is built, when we invite people to dance and not when we invite them merely to the dance.

Three. Apologize. Expressing regret is a necessary first step on a long journey to restore trust.

Four. Honour and cherish our teachers....fairness...empathy....humility.

Five. Be a knowledge diplomat. Sharing knowledge across academic disciplines, cultural barriers, and political borders is the surest way to promote peace, spread prosperity, and built trust among all the people of the world.

Six. Start Now. Each of us can begin strengthening trust and, with our actions, make our country better.

### **Further Inspiration to do the right thing.**

“Each of us take meaningful action now to make ourselves more worthy of trust, and to restore trust in the communities in which we live, the businesses and organization in which we work, and the public institutions in which we serve....each of us can carry out our foremost duty as citizens of this country – we can build a better Canada.”

Remembering that it is our duty to leave this world, a better place:

‘To children, who offer their trust instinctively and with full expectation of fairness’

David Johnston

“One of the most important challenges of our day – how to maintain trust in ourselves and our institutions.”

“Trust in most democracies is decreasing. Yet without trust our democracies cannot function effectively.”

“how we can restore trust, by making ourselves worthy of trust, by building trust around us and by creating a more trustworthy and trusted country.”

“We sometimes feel that our individual actions cannot make a meaningful and lasting difference in the complex world we inhabit”

“Every one of us, high or humble, can work to increase trust in ourselves, our society, and our country.”

Right Honourable Beverley McLachlin, Former Chief Justice of the Supreme Court of Canada.

“Man's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary.”

Reinhold Niebuhr

“Authority, unless justified, is inherently illegitimate and that the burden of proof is on those in authority. If this burden can't be met, the authority in question should be dismantled.”

Noam Chomsky

“A proper balance will not be achieved when national security is afforded full protection, as if there were no human rights. The balance and compromise are the price of democracy. Only a strong, safe, and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can have security...”A delicate and sensitive balance is necessary. That is the price of democracy. It is expensive but worthwhile. It strengthens the state. It gives it a reason to its fight”

Aharon Barak

“to make justice visible in the land, to destroy the wicked person and the evil-doer, that the

strong might not injure the weak.”  
The Code of Hammurabi 1754 BC

Parliament is in a very unique situation as there is a member of the public communicating directly with this democratic institution alleging breaches of the Constitution by the Executive and Judiciary and willing to contribute in the restoration of that breach to improve the public's trust in our democratic institutions. But the reality is that no-one really wants to hear from me because you would all feel better if I would just go away and let everyone pretend that everything is just fine and continue doing whatever we were doing for years and years. but everything is clearly not fine and the legal system has been informed, knowing these facts and ignoring them is a breach of their ethical duty to improve the legal system but worse than that lawyers in the Public Service are actively obstructing justice and refusing to respond to the enforcement procedure of the Charter, improperly protecting lawyers and judges. I am not going away. The remedy for a breach of the Charter is the restoration of that breach. If lawyers had complied with the Charter you would have in your hands a properly researched and written Judges Act to attempt to restore the public trust but instead you see more evidence of what the public experiences, denial and breaches of the public trust from our Country's most trusted advisors. The current legal advice of the government is that they are not bound to comply with the Charter and a refusal to justify their position. A claim that they are above the law.

Trevor Holsworth