

**Address to Rotary Club of St. John's**

**By**

**Honourable J. Derek Green**

**Chief Justice of Newfoundland and Labrador**

**January 21, 2016**

Mr. President, members of Rotary and guests ...

Once again, I thank you for inviting me to address the Rotary Club of St. John's on matters pertaining to the administration of justice in the province. The opportunity for the chief justice to speak periodically about the operations of the courts provides a measure of accountability for an aspect of our governmental structure that is to some extent shrouded in mystery as far as the general public is concerned.

This is the seventh time I have had the pleasure of addressing you. As I reflected on some of the subject-matter of my previous addresses, I realized that I have covered quite a variety of topics: from the separation of the courts from other branches of government, aspects of our unique legal history and biographical sketches of former chief justices, the problems of court administration and the challenges of providing meaningful access to justice to our citizens, to name some of the topics.

Of course, one continuing theme of all my talks has related to the progress (or more correctly, lack of progress) with respect to the provision of new courthouse facilities in St. John's to replace the outdated, inefficient and inadequate courthouses we have on Duckworth Street.

No talk of mine would be complete without at least a passing reference to this continuing blight on the justice system. When I spoke to you last year, I actually felt optimistic about the courthouse issue. In late 2014 the then premier announced that government was proceeding with the planning of a new court complex for St. John's. But then, shortly after, my hopes were once again dashed to the ground. In the 2015 Budget delivered in April, the then Minister of Finance, facing a deteriorating fiscal situation, declared that the courthouse planning project would be deferred for three years. And now, of course, since the change of government, the situation, if anything, appears to have worsened and we are once again left wondering when the oldest operating courthouse in a capital city in Canada (with the exception only of Osgoode Hall in Toronto, which is perhaps a special case) will ever be replaced in the foreseeable future.

Regardless of how bad the fiscal situation is, however, we still have to recognize and deal with the impact inadequate courthouses may have on the safety of those working in or citizens accessing, those facilities, and on the functionality and efficiency of a system which must provide safe, timely and fair access to justice, These are continuing realities which do not go away just because the fiscal situation may be terrible. There still has to be a continuing discussion about the existing problems and how they are to be solved, possibly through creative means by accessing federal infrastructure money or utilizing public-private partnerships or at least devising some sort of temporary responses. The courthouse discussion cannot be shut down and forgotten about simply because it is difficult to find money in the short term. Financial shortfalls may trump actual construction in the short term but they cannot be allowed to trump continuing dialogue and the imperative to find solutions to an ever-worsening situation.

That's all I propose to say about courthouses for the moment – at least for another year.

I have, instead, chosen to speak to you today about a subject that judges don't like to talk about very much: the issue of judicial misconduct and the discipline of judges. You may have heard or read in the news in recent months about complaints that have been made against judges and steps that are being taken by a body called the Canadian Judicial Council to conduct inquiries into those complaints. For example, you may have heard about a complaint against a judge in Alberta who made certain allegedly inappropriate comments to and about a female complainant in a sexual assault case. There were calls by a number of members of the public and by some law professors for his removal from the bench. And just recently, the Attorney General of Alberta specifically asked that preliminary steps in the investigation process be by-passed so that the matter could proceed directly to a public inquiry hearing. Obviously, I cannot speak about this particular case but because the whole judicial conduct investigation process is a bit mysterious to those not directly involved in it, I believe it would be useful to speak generally about the process so that it may become better understood by members of the public.

Judges are in a unique position when it comes to discipline. Clearly, they have to be accountable for what they do but their special position with respect to the maintenance of the rule of law requires that different approaches be taken with respect to how that accountability is to be achieved.

Two ways in which that accountability is promoted, of course, is by the operation of the open courts principle (virtually everything done in the court must be done in open court so that the public, if it chooses, can see and evaluate what is being done) and, secondly, by the operation of the requirement that judges must give reasons for their decisions (thereby holding up their reasoning process to scrutiny). But, these methods of accountability are not generally regarded as enough. What happens if the judge engages in serious misconduct. How is that to be addressed?

Before delving into the specifics of the complaints process for federally appointed judges, however, I want to tell a little story about my experiences when representing the Canadian

judiciary in judicial reform projects internationally. On a number of occasions, I have travelled with small groups of judges and court administrators to developing countries who have sought input and advice on how to improve their court systems. It has been a tremendous learning experience. One thing one learns very early in these experiences is that the problems they often have with their judiciary are of a different order of magnitude than what we have in Canada. Their main concerns are with outright corruption in the nature of bribery, intimidation and blackmail as well as government interference in the decision-making process. And that brings me to my story. On one mission, I co-chaired, along with my host chief justice, a meeting of judges from the local court to discuss the concept of judicial independence as it was understood in Canada. After making a presentation (all subject to translation) on the subject, we engaged in a very vigorous exchange with the local judges where they asked questions seeking more detail about the separation of the courts from the other organs of government, the freedom the judges in Canada felt they had to decide their cases as they saw fit and the means necessary to ensue this degree of independence. There were a lot of almost excited interchanges amongst the local judges. These exchanges were not translated but it appeared they were enthusiastically embracing some of the ideas we were explaining. I thought to myself that we were making great progress, perhaps a real breakthrough. One judge, however, stood out. Unlike all the others she sat at the table ramrod straight, staring straight ahead with no smile or warmth of expression on her face whatsoever. After a while of this animated discussion, all of a sudden she slammed her hand down hard on the table and uttered what could only be regarded as words of anger (although the exact words were not translated). Thereafter, the room fell silent and nothing more was said by the local judges. The meeting soon wrapped up. We discovered afterwards that the angry judge was the “political officer” on the court. Her job was to monitor the other judges for political fidelity. It was obvious she felt that the discussion had got out of hand and that the ideas being discussed were too heretical to be allowed to continue.

This incident reinforced for me how, quite apart from the corrupting influences of such things as bribery, blackmail and intimidation, a court system can be susceptible of influence in a variety of ways. Where it is understood that judges are susceptible to external influences by litigants, or third parties or by the state, citizens will lose confidence in the system as a means of delivering fair and impartial justice. When that happens there is a danger that social order will break down. That is why western companies wanting to do business in developing countries are anxious to receive assurances that the local court system is impartial, independent and not corrupt, so that if they have a dispute with a local partner they can have a reasonable expectation that their rights will be fairly dealt with according to the law and the circumstances of the individual case and not on the basis of some external influences.

The same is true for us in Canada. Although we may not think about it much, we in fact operate on the assumption that our system is fair and impartial. To achieve that, we have the notion of judicial independence which is regarded as a fundamental tenet of our constitutional order. We have protections built in to insulate judges from undue and improper influence so that

we can have a modicum of assurance that judges will be free to decide each case on the basis of the law and their perceptions of the fairness of each case, and only those considerations.

There are a number of aspects of judicial independence which I won't touch on today. But one aspect is the notion of security of tenure. If a judge cannot be removed from office by the government of the day simply because they don't like his decision, there is a greater likelihood that the judge will feel free to do the right thing in each case. Furthermore, the populace generally, will feel more confident in the fairness of the system if they believe that the judges will not be motivated to make decisions while looking over their shoulders to see whether the people who appointed them might try to take their jobs away if they don't like the results of their decisions.

That is why judicial tenure is embedded in our constitution. Section 99 of the Constitution Act provides that superior court judges are appointed until age 75 and hold office "during good behavior." That means that they cannot be removed from office unless they commit serious misconduct. Furthermore, removal can only come about following a joint address of the Senate and House of Commons who must pass a resolution that the judge be removed.

Since 1971, the process of determining the facts surrounding a complaint about the conduct of a judge and determining whether that conduct might be sufficient to warrant removal from office has been assigned to a statutory body called the Canadian Judicial Council. This body, which is chaired by the Chief Justice of Canada, the Hon. Beverley McLachlin, consists of all of the chief justices and associate chief justices of the superior courts in Canada as well as the federally-constituted courts. Newfoundland and Labrador is currently represented on the Council by myself and Chief Justice Whalen of the Trial Division of the Supreme Court.

The Judges Act provides that if, following investigation, the Council is of the opinion that a judge has become incapacitated or disabled from the due execution of his or her office by reason of: (i) age or infirmity; (ii) misconduct; (iii) failure in the due execution of office; or (iv) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office, the Council may recommend in a report to the Minister of Justice that the judge be removed from office. If the Minister accepts the report he or she will then prepare the necessary resolution to be placed before both Houses of Parliament to bring about removal.

Before we get to the stage of the Council recommending removal, however, there are a lot of other preliminary steps to be undertaken to deal with every complaint that is received. Incidentally, about 150 complaints are received per year across Canada. They range all the way from an allegation that the judge was rude to a litigant in court to allegations of very serious misconduct. A complaint must be made in writing addressed to the CJC but it may be anonymous. Each complaint is reviewed by the Executive Director of the Council (who is a senior lawyer) who has the authority to screen out complaints that are trivial, vexatious, abusive of the process or not applicable to judicial conduct. Many of the complaints are screened out at

this stage. A common reason for doing so is because the complaint is with the correctness of the judge's decision. If a litigant thinks the judge made an error of law or assessed the facts wrong, their remedy is to appeal to a higher court, not complain about conduct, even though they may think the judge is a bonehead for reaching the decision he or she did. Of course, sometimes, in the case of egregious and persistent and repetitive errors, courts of appeal may make comments about the performance of the judge and that may thereafter lead to a complaint being considered by the Council.

If the Executive Director thinks the complaint warrants further consideration, he must refer the matter on to a member of the Judicial Conduct Committee of the Council. The JCC member may seek further information, seek comments from the judge, or appoint an investigator. Even if the Executive Director does not think the conduct is serious enough that it might warrant removal from the bench, he may provide a written assessment commenting on the judge's conduct and may institute remedial measures such as further training and education if he feels they are warranted.

On the other hand, if he thinks the conduct is serious enough that it might warrant removal from the bench, he must refer the case to a Judicial Conduct Review Panel consisting of five persons, three of whom are members of the CJC, one is another judge and one is a member of the public. This Panel reviews the matter in further detail and decides whether a public inquiry should be held. In doing so, the Panel will define the issues that the Inquiry Committee must consider.

Throughout this whole process, the judge must be kept informed, be given full opportunities to respond to the allegations made and is entitled to the full rights of fair treatment.

If the Panel decides that an Inquiry Committee should be constituted, a hearing will be held where the allegations against the judge will be explored in detail and the judge will have an opportunity to challenge the allegations and to present other evidence in support of his or her position. The Inquiry Committee must consist of an uneven number of persons with a majority being members of the CJC and the rest being appointed by the Minister of Justice. The hearing must be held in public unless the Committee decides that the interests of the administration of justice require otherwise.

The Inquiry Committee must make a report and recommendation to the whole Council stating whether the judge should be removed from the bench. The test<sup>1</sup> which the Committee is required to apply is the following:

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<sup>1</sup> See *Report of the Inquiry Committee Respecting certain Judges of the Nova Scotia Court of Appeal* (1990); *Re Therrien*, 2001 SCC 35, [2001] 2 S.C.R.3 at paragraph 137.

Is the conduct alleged so manifestly and profoundly destructive of the concept of the 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.

Its findings on factual matters will be given great deference but the Council has the ultimate authority to determine what recommendation should be made to the Minister of Justice. A meeting of the Council (consisting of only those members who had not previously been involved in the matter at a previous stage) must therefore be held to determine what should be sent on to the Minister.

You can see from this that it can be a long, arduous and expensive process. It is designed to make sure that judicial tenure is not undermined. In the end, however, the focus is on whether **public confidence** in the impartiality, independence and integrity – the three “Is” – of the judge is undermined. This is as it should be, because, as I explained earlier, that is the basis of our judicial system. Without public confidence in the system, respect for the rule of law will deteriorate.

Public confidence in the independence, impartiality and integrity of our judges is important because we expect them to adhere to high standards in their professional and personal lives. It is against that standard that they are judged. In one case (*Therrien*), the Supreme Court of Canada explained the situation as follows:

[108] The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the rights it embodies. ... Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose conditions on him or her.

[109] ... the judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but **they are asked to embody them....**

[110] Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. ...

**[111] The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function ...**

That leads to a paradox when considering when to remove a judge. On the one hand, public confidence is maintained by the assurance that judges cannot be too easily removed from office, so as to ensure that they are free to decide cases according to law and fairness without improper and external influences, especially from the state. But, on the other hand, public confidence will also be fostered by knowing that when a judge does fail to meet the high standards of conduct that we expect from the judiciary, he or she can and will be removed from office. The public has a vital interest in having a judicial system that is above reproach and is one that reflects impartiality, independence and integrity.

Thus, both judicial independence (in the sense of security of tenure), and removal of judges to ensure accountability are both intended to foster public confidence in the system. Ensuring public confidence is, paradoxically, both the reason for protecting judges and the reason for removing them. But, they pull in opposite directions when deciding whether a judge should be removed from office in a given case. In the end, considerations underlying these two concepts must be balanced against each other.

This is why judicial conduct cases often engender considerable controversy and debate.

Fortunately, few cases lead to a recommendation for removal from office. Interestingly, there has never been a case where Parliament has actually passed a resolution removing a judge. That is because in the rare cases where the Council has made a recommendation for removal, the judge has always seen the writing on the wall and resigned before that last step has been taken.

I hope that, from this brief discussion of this difficult area of how to deal with complaints about judicial conduct, you will not only have a better understanding of the difficult issues involved but also will leave this room with a renewed confidence in the integrity of our system of justice.

Thank you.