From the Rule of Law and Lawyer Independence Advisory Committee

Concerns about whether judicial independence is properly understood: Examples from the Prime Minister's mandate letters

Following the last election, Prime Minister Justin Trudeau issued mandate letters to his ministers. The mandate letter to his Minister of Justice included *expectations* to:

- develop proposals for reform of Canada's system of judicial governance and discipline; and

- ensure mandatory training for judges in Canada on sexual assault law, including myths and stereotypes about victims and the effects of trial on victims' memory, and unconscious bias and cultural competency.

Both of these points are important issues on which the government may rightly desire to provide some guidance. Helping to instigate reform for the system of judicial governance and discipline in Canada may well be advisable given the prominence of the judiciary in society and the necessity to ensure that the public has confidence in its judges. Equally, having judges who understand medical, psychological and legal issues relating to sexual assault law (including those enumerated in the Prime Minister's mandate letter), is important in order to ensure that judges keep in mind both societal and legal expectations when it comes to their conduct on the Bench and their application of principles to the cases before them.

However, the directive nature of the Prime Minister's language in his letter – particularly on the education issue – is unfortunate and, at worst, can be harmful to the principles of judicial independence.

One of the great protections for the rule of law, and one of the fundamental principles of the *Act of Settlement* of 1701, was the separation of the judicial branch of government from the executive branch of government. It is perhaps now trite to say it, but the importance of separating judicial authority from executive power is a key protection for the rights and freedoms of all citizens in the country. Ensuring that arbiters of law are independent from those who wield the power in government means that independent analysis can be brought to the application of that state power to ensure that it is exercised in conformity with legal principles, rather than with political principles or other principles of expediency.

In a modern democracy like Canada, it is expected that both the executive and legislative branches of government understand the importance of the independence of the judiciary,

not just as a slogan but as a real principle underlying the Canadian constitutional firmament.

Despite this, the Prime Minister's mandate letter expects his Minister of Justice to take steps *to develop* proposals through which to discipline Canada's judges, and *to ensure* Canada's judges are educated on certain specific matters. This casts a chill over judicial independence by creating the spectre of executive direction in judicial discipline, and the prospect of executive interference in the education of the judiciary.

Judicial discipline is a matter on which the legislative branch of government has some limited role, as ultimately the removal of a judge is effected through an address by both Houses of Parliament. However, the prospect of efforts by the executive branch to reform judicial discipline needs to be carefully considered. There are examples in other countries around the world where legislation has been authorized to discipline judges for reaching decisions with which the government disagrees. There is, of course, no indication that the Canadian government is currently considering such steps or that the Prime Minister's mandate letter instigates a step down that road. Nevertheless, an expectation by the Prime Minister to the Minister of Justice to develop proposals for reform of Canada's system of discipline is concerning by the nature of its very directness. If the mandate letter is meant only to develop proposals *for discussion* with the courts on reform of the process of judicial discipline, one would be less concerned. However, that is not what the direction says and the language should therefore have been clearer.

Fortunately, our judiciary has been able to address this matter. The Chief Justice has recognized the need for reform of processes, and the recent Federal Court decision in *Smith v. Canada (Attorney General)* 2020 FC 629 has helped to contribute to the discussion. Bernise Carolino has stated that "The [Canadian Judicial Council] is collaborating with the Canadian Superior Court Judges Association and the Department of Justice in reforming judicial conduct review and in boosting public confidence in the judiciary,"[1] which is as it should be.

With regard to judicial training, it is not contested that education for judges on the type of social issues identified in the mandate letter would assist judges and could help to ensure that the courts are seen to be sensitive to difficult matters on which they have to adjudicate. Nevertheless, an expectation stated in a letter from the Prime Minister that his Minister of Justice will *ensure* mandatory training for the judicial branch of government on matters that amount to social issues ought to raise some concern. It is unlikely that a Canadian government would use such programs to educate the judiciary toward a certain point of view that was favourable to the government. However, the Prime Minister's expressed expectation to his Minister of Justice opens that possibility. The letter could

[1] *Canadian Lawyer* online, posted June 2, 2020.

have been worded in a way that would have the Minister *raise the issue for discussion* with the judges, and perhaps to ensure that the court itself takes steps to implement such education programs. Again, however, this is not what the letter says.

While there is no real indication that the federal government wishes to trample on judicial independence, the use of language such as that in the mandate letter suggests the possibility that government officials are not paying close enough attention to how their intentions are communicated with respect to fundamental constitutional principles. Were this a "one-off" example, it could be perhaps excused. However, it was clear from last year's report by Anne McLellan on her review of the roles of the Attorney General and Minister of Justice that "politicians and those who work with them are not likely to have had legal training … and that elected officials are not usually law professors and cannot be expected to understand the norms of the justice system …" She recommended education programs to ensure the understanding of the role that officials have in promoting and protecting the rule of law, amongst other outcomes. It should concern us that a former Attorney General has had to recommend the need for education on such fundamental principles. However, given the example from the mandate letter, education on the subject sounds like a necessary idea.

Judicial independence is a fundamental cornerstone of the rule of law. The rule of law suffers where those in power do not demonstrate proper attention to its underlying principles and protections. Government communications must reflect an understanding of the importance of judicial independence.