

JUDICIAL INDEPENDENCE IN CANADA

Submitted by Justice Ian Binnie
on behalf of the Supreme Court of Canada*

“The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.”

– Chief Justice Brian Dickson, Supreme Court of Canada (1984-1990)¹

INTRODUCTION

This paper is submitted to the World Conference on Constitutional Justice on behalf of the Supreme Court of Canada in anticipation of its Second Congress to be held in Rio de Janeiro January 16-18, 2011. The topic of the Congress is “*Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies.*” The Venice Commission has identified a number of issues that will be addressed at the Congress, namely the independence of the constitutional court as an institution, the constitutional independence of individual judges, and the operating procedures of courts. This submission addresses each of issues from the Canadian perspective and in particular that of the Supreme Court of Canada.

* I would like to acknowledge the help of my law clerks Michael Marin and James Wishart in putting together this submission.

¹ *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at para. 30 [*Beauregard*].

The Supreme Court's independence as an institution and that of its judges is undoubted and has led to strong public confidence in the administration of justice. We recognize that the purpose of judicial independence is to serve the public, not the judges.

In the following pages, we provide some background information on the Canadian court system and the relationship between Canada's highest Court and the other branches of government.

It must be said, first of all, that while judicial independence in Canada benefits from a variety of institutional and legal safeguards, the strongest barrier to improper influences is a legal and political culture in which the public simply will not tolerate actual or perceived transgressions. In some cases government Ministers have been obliged to resign because of actions or statements that gave the slightest "appearance" of a failure to respect the principle of judicial independence. In a recent instance a Minister was compelled to resign when it emerged that he had called a judge to ask when a decision in a certain matter was expected to issue.

At a more formal level, the Supreme Court was created by a federal statute, but since 1982 changes to its composition are subject to onerous constitutional amending requirements. The Court has always lacked complete *formal* regulatory, administrative and financial autonomy, but in practice such autonomy exists. In light of our constitutional history, it is not plausible to envisage a Canadian government willing to pay the political price of abusing its formal power in these areas. Investigations and complaints about judicial conduct are overseen by the independent Canadian Judicial Council, which is composed entirely of members of the judiciary.

Concerning the second topic, the courts have full autonomy with respect to their procedures; all adjudicative functions are controlled by the judges.

The appointment of judges to the Supreme Court (and other superior courts) is made at the discretion of the federal executive but steps have been taken in recent years to make the process more independent and transparent. There is public confidence that individuals are appointed on the basis of merit and that they are not beholden to the government that appointed them. It is generally acknowledged that Canadian Supreme Court judges are difficult to categorize in terms of political ideology or to predict how they will vote in a given case. While judicial remuneration is also set by the federal Parliament, an independent Judicial Remuneration and Compensation Commission helps ensure that these decisions are depoliticized and transparent.

Supreme Court judges earn a comfortable living and this is seen as enhancing their independence, as does their security of tenure until age 75. The federal *Judges' Act* and the Canadian Judicial Council's ethical guidelines for judges also promote individual independence by restricting extra-judicial activities that may undermine public confidence in a judge's impartiality.

Supreme Court judges enjoy immunity from civil liability stemming from actions taken in the execution of their office.

I. Overview of Canada's Court System

All Canadian courts (and those tribunals authorized to settle issues of law) may deal with any constitutional matters raised by the parties. There is no single constitutional court.

The bedrock of Canada's judicial system is the system of provincial superior courts, which have general jurisdiction over all civil and criminal cases.² The superior courts reflect Canada's federal structure. The governments of the provinces are responsible for the administrative support of these courts but the federal government is responsible for the appointment and remuneration of superior court judges.³ The superior courts administer all provincial, federal, and constitutional laws.⁴ Many constitutional challenges begin in the provincial superior courts, but, as stated, even statutory courts, and some administrative tribunals and arbitrators are competent to decide constitutional matters in the first instance.⁵

The Supreme Court of Canada stands at the apex of the Canadian judicial system, and exercises "appellate, civil and criminal jurisdiction within and throughout Canada".⁶ This means

² *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at para. 37.

³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5., ss. 92(14), 96, and 100 [*Constitution Act, 1867*].

⁴ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 7-3 [Hogg].

⁵ See e.g. *Mills v. The Queen*, [1986] 1 S.C.R. 863 at p. 953 (*per* McIntyre J.) and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at para. 67 (*per* McLachlin C.J.).

⁶ *Supreme Court Act*, R.S.C., 1985, c. S-26, s. 35.

that the Supreme Court hears appeals from every region of the country whether dealing with civil, criminal or administrative matters. This broad jurisdiction is based on s. 101 of the *Constitution Act, 1867*, which authorizes Parliament to create a “general court of appeal for Canada”.⁷ Subject to its advisory (or reference) jurisdiction discussed below, the Court does not consider in advance the constitutionality of proposed legislation; instead the Court addresses constitutional issues in the context of appeals from lower court decisions on challenges to the constitutionality of laws or state conduct after legislation is enacted.

II. The Canadian View of Judicial Independence

In Canada, judicial independence has been characterized as an unwritten constitutional principle, but it is possible to point to at least four constitutional sources.⁸ First, the fact that Canada is a federation, with a constitutional division of powers between the federal and provincial governments, necessitates that the courts serve as independent “umpires” of jurisdictional disputes involving the two levels of government.⁹ The courts can only fulfill this role if they are truly independent of the federal and provincial governments. Second, the *Canadian Charter of Rights and Freedoms*, Canada’s constitutional bill of rights, which was enacted in 1982, conferred upon the courts an expanded role in defending civil liberties and

⁷ *Constitution Act, 1867*, *supra* note 3.

⁸ *Reference re Remuneration of Judges of the Provincial Court*, [1997] 3 S.C.R. 3 at para. 83 [*Remuneration Reference*].

⁹ *Beauregard*, *supra* note 1 at para. 27.

freedoms against government intrusion.¹⁰ Third, the preamble of the *Constitution Act, 1867* states that Canada is to have a Constitution “similar in Principle to that of the United Kingdom”.¹¹ The principle of judicial independence, which has been a fixture of the Constitution of the United Kingdom since at least the *Act of Settlement of 1701*, was thereby incorporated into the Canadian Constitution.¹² In addition, s. 129 of the *Constitution Act, 1867* prescribes the continuance of all courts existing in the federating provinces at the time of Confederation, and concomitantly their practices and traditions, including judicial independence.¹³ Fourth, three of the “judicature provisions” in the *Constitution Act, 1867* reinforce judicial independence in Canada. Section 96 provides that the Governor General shall appoint the judges of the superior, district, and county courts in each province. This has been interpreted as a prohibition against creating “inferior” courts to undermine the “historical jurisdiction” of the named courts by the provinces (or indeed by the federal Parliament). Section 99 guarantees security of tenure by providing that “the Judges of the Superior Courts shall hold office during good behaviour.” Finally, Section 100 ensures financial security by requiring the federal Parliament to pay the salaries and pensions of superior, district and county court judges.¹⁴

¹⁰ *Ibid.* at para. 28. For a detailed discussion of the historical origins of judicial independence in England and Canada, see W.R. Lederman, “The Independence of the Judiciary” (1954), 34 *Can. Bar Rev.* 769, 1139.

¹¹ *Constitution Act, 1867*, *supra* note 3.

¹² *Beauregard*, *supra* note 1 at para. 29.

¹³ *Ibid.*

¹⁴ The Privy Council recognized these three sections as integral to judicial independence in Canada in *Toronto Corporation v. York Corporation*, [1938] A.C. 415 at p. 426.

In its jurisprudence the Supreme Court of Canada has identified the following requirements for judicial independence. Firstly, “[t]he essence of security of tenure...is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.”¹⁵ (It has also been affirmed explicitly that the holding of office during pleasure is inconsistent with judicial independence because it gives the executive discretion to remove a judge from office without justification.¹⁶) Secondly, “[t]he essence of [financial] security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.”¹⁷ As discussed below, financial security in Canada has been interpreted as requiring the participation of independent commissions in the fixing of judicial salaries.

With respect to administrative independence, the minimum requirement in Canada is “judicial control over...assignment of judges, sittings of the court, and court lists...as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions....”¹⁸ However, there are limits. The focus is on “judicial control over the administrative decisions that bear directly and immediately on the exercise of judicial

¹⁵ *Valente v. The Queen*, [1985] 2 S.C.R. 673 at para. 31 [*Valente*]. The principles outlined in *Valente* are considered to be the minimum requirements for judicial independence in Canada. The degree of security of tenure required by the Constitution depends on the role of each court. For example, the highest degree of security of tenure is afforded the superior courts because of their constitutional status and general jurisdiction, whereas a lower degree is afforded to the “inferior” provincial courts, whose judges are appointed by the provinces, which are creatures of statute. See *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 31-32 [*Ell*].

¹⁶ *Ibid.* para. 37.

¹⁷ *Ibid.* para. 40.

¹⁸ *Ibid.* para. 49.

function.”¹⁹ The courts do not control decisions about administrative support (e.g. the salary of office personnel or the adequacy of computer support). Adjudicative independence is concerned with the ability of the courts to perform their basic judicial function²⁰ and to avoid government conduct which may “interfere, or be reasonably seen to interfere, with the courts’ adjudicative role, or with the essential conditions of judicial independence.”²¹

Before looking at these requirements in more detail, it should be noted that judicial independence is seen in Canada as having both an individual and institutional dimension. The purpose of the institutional dimension is to “depoliticize” the relationship between the judiciary and the other branches of government.²² Both the individual judge and the court to which he or she belongs must be independent and be seen to be independent. The core requirements of judicial independence protect both dimensions.²³

Who is to judge the adequacy of these safeguards? The judges decide (*ex necessitate*) but the standard applicable to judicial independence is an objective one, i.e. whether a reasonable person familiar with the structure of the tribunal in question would conclude that it enjoys the requirements of judicial independence.²⁴

¹⁹ *Ibid.* para. 52.

²⁰ See *e.g. Babcock v. Canada (Attorney General)*, [2002] 2 S.C.R. 3 and *British Columbia v. Imperial Tobacco Ltd.*, [2005] 2 S.C.R. 473 [*Imperial Tobacco*].

²¹ *Ibid.*, *Imperial Tobacco* at para. 54.

²² *Ibid.* at para. 131.

²³ *Remuneration Reference*, *supra* note 8 at para. 120.

²⁴ *R. v. Généreux*, [1992] 1 S.C.R. 259 at pp. 296-297.

III. The Institutional Independence of the Supreme Court of Canada

A. The Constitutional Status of the Court

As mentioned above, the Supreme Court of Canada was created in 1875 by statute pursuant to Parliament's authority under s. 101 of the *Constitution Act, 1867* to establish a "general court of appeal for Canada". For most of the Court's history, from its founding in 1875 until 1982, it had no independent constitutional status and Parliament could theoretically have abolished the Court. (Historically, the Judicial Committee of the Privy Council in England exercised final appellate jurisdiction over criminal matters until 1933 and over civil matters until 1949.²⁵)

As part of major amendments to the Canadian Constitution in 1982, changes relating to the Supreme Court were made subject to onerous amending requirements. Any change to the composition of the Court would now require the consent of both Houses of the federal Parliament as well as the unanimous agreement of the Legislative Assemblies of each province.²⁶ In addition, any other constitutional change related to the Court requires the consent of both Houses of the federal Parliament as well as the Legislative Assemblies of at least two-thirds of

²⁵ See Hogg, *supra* note 4 at p. 8-2

²⁶ *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 41(d) [*Constitution Act, 1982*].

the provinces representing at least 50 percent of the population of all the provinces.²⁷ Since it is very unlikely any significant change to the Supreme Court would garner the necessary support, the institution and its independence are, for all practical purposes, permanently entrenched.

B. The Court’s Regulatory, Administrative, and Financial Autonomy

The *Supreme Court Act* is the Court’s enabling legislation and is the basis for its regulatory, administrative, and financial autonomy.²⁸ With respect to regulatory autonomy, s. 97 of the *Act* gives judges the authority to make rules and orders related to matters of procedure or those not covered by the *Act*. This power is subject to certain limitations. The rules must be consistent with the *Act*, otherwise they are of no force and effect.²⁹ Furthermore, copies of all rules and orders must be laid before Parliament within 15 days of their making.³⁰ Finally, s. 1 of the Rules made pursuant to this authority suggests that the “Act or any other Act of Parliament” may modify them.³¹

Despite the fact that the Supreme Court’s rule-making power is technically subject to the acquiescence of Parliament, in practice the legislative branch never interferes with the rules

²⁷ *Ibid.*, ss. 38(1) and 42(d).

²⁸ *Supreme Court Act*, *supra* note 6.

²⁹ *Ibid.*, s. 97(3).

³⁰ *Ibid.*, s. 97(4).

³¹ *Rules of the Supreme Court of Canada*, S.O.R./2002-156, s. 1 [*Supreme Court Rules*].

promulgated by the Court. Such interference would be vigorously opposed by the legal community because the ability of the Court to control its own procedures is seen as a crucial element of judicial independence. As a result, any attempt on the part of the legislature to block a new rule that the judges deem necessary for the proper functioning of the Court would be politically unpalatable.

The administration of the Supreme Court is overseen by the Registrar, an office created by s. 12 of the *Supreme Court Act*. The Registrar is appointed by the Governor in Council (i.e. the executive branch of the federal government), during pleasure. His or her salary is also set by the executive.³² Furthermore, the Registrar is a member of the federal public service and the position is generally considered equivalent that of a Deputy Minister, the highest rank in the bureaucracy.³³ The Registrar reports to the Chief Justice of Canada.³⁴ The Registrar does not answer to a member of the executive, such as the Minister of Justice.³⁵ The *Act* also outlines the Registrar's responsibilities, which include the management of Court employees, the library, and the publication of Court judgements.³⁶ In addition, the Registrar may be assigned other duties by the judges through rules and orders made pursuant to the *Act*.³⁷

³² *Supreme Court Act*, *supra* note 4, ss. 12-13. The Registrar is also the "Deputy Head" of the Court pursuant to the federal *Judges' Act*, R.S.C. 1985, c. J-1, s. 75(2) [*Judges' Act*].

³³ *Ibid.*, *Supreme Court Act*, s. 13.

³⁴ *Ibid.*, s. 15.

³⁵ Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at p. 178 [Friedland].

³⁶ *Ibid.*, ss. 15-17; see also *Judges' Act*, *supra* note 32, s. 75(1).

³⁷ *Ibid.*, s. 18

The administrative employees of the Supreme Court are also members of the federal public service. While on the surface this may appear at odds with the independence of the Court as an institution, there are strong practical reasons for this arrangement. Subjecting the Court to the well-established practices of the public service relating to, for example, employment, accounting, audits, bidding, and purchasing is simply more efficient.³⁸ This approach is also desirable because it promotes mobility of employees and allows the Court to hire from the large pool of qualified workers in the public service.³⁹ Most importantly, practical experience shows that these benefits do not come at the price of the Court's administrative independence. The federal government has been sensitive to the unique needs of the Court and has made adjustments to the normal policies that apply to public servants.⁴⁰ While there is support within the Canadian judiciary for a greater degree of administrative autonomy in all courts,⁴¹ the current model applicable to the Supreme Court is generally well-accepted as guaranteeing its adjudicative independence.

Just as the Court's lack of administrative autonomy in law has not in practice undermined its independence, the same is true for the Court's financial arrangements. The Court, through the Registrar, must make a budget submission to the Treasury Board of the Federal Government. It is the government, not the Court, that is answerable to taxpayers for the expenditure of public

³⁸ Friedland, *supra* note 35 at p. 180.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ See Canadian Judicial Council, *Alternative Models of Court Administration* (Ottawa: Canadian Judicial Council, 2006) at p. 11.

monies. However, in practice, the government has never used its financial authority to attempt to influence the adjudicative work of the Court.⁴²

Therefore, while the Supreme Court has neither an independent budget nor total administrative autonomy, this does not in practice compromise its independence. The social and political culture would not tolerate any infringement.

In summary, in Canada, a clear line is respected between the adjudicative functions of the Court, which are entirely controlled by the judges, and the supporting administration, which is the job of public servants. To our knowledge, there has never been an instance where the federal government's disagreement with the Court's judgements has led to budgetary or other restrictions or refusal to fill vacancies. Such abuse, at any level of court, would precipitate a public outcry.

C. Disciplinary Independence

The disciplinary procedures applicable to Supreme Court judges are the same as those applicable for all federally appointed judges in Canada. Pursuant to the federal *Judges' Act*, the Canadian Judicial Council is responsible for overseeing inquiries and the investigation of

⁴² Friedland, *supra* note 35 at p. 180. See also Fabien G  linas, "Judicial Independence in Canada: A Critical Overview" in Anja Seibert-Fohr, ed., *Judicial Independence in Transition – Strengthening the Rule of Law in the OSCE Region* (Heidelberg: Springer, *forthcoming*), online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577842 [G  linas].

complaints into the conduct of judges.⁴³ The Council is composed of the Chief Justice of Canada, who also serves as its chairperson, the chief justices and associate chief justices of each provincial superior court, the senior judges of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories, and the Nunavut Court of Justice, and the Chief Justice of the Court Martial Appeal Court of Canada.⁴⁴ Therefore, the Council is exclusively composed of members of the judiciary.

Upon the request of the Minister of Justice or an Attorney General of a province, the Council is required to conduct an inquiry into whether a judge should be removed from office based the grounds listed in the Act.⁴⁵ The government has no role in the inquiry itself, which is organized by the judges. The grounds for removal are age or infirmity, misconduct, failure in the due execution of office, or being in a position incompatible with the due execution of office.⁴⁶ The Council may establish an inquiry committee, which may be composed of members of the Council as well as lawyers of at least ten years' experience, for the purpose of conducting the inquiry.⁴⁷ If an inquiry committee is struck, it will hold hearings (usually in public) and report its findings to the full Council. The Council will then follow a two-step analysis: (1) whether one or more of the grounds for removal is present, and if so (2) whether a recommendation for removal

⁴³ *Judges' Act*, *supra* note 32, s. 60(1)(c).

⁴⁴ *Ibid.*, s. 59.

⁴⁵ *Ibid.*, s. 63.

⁴⁶ *Ibid.*, s. 65(2).

⁴⁷ *Ibid.*, s. 63(3).

is warranted in the circumstances.⁴⁸ In arriving at its decision, the Council's overriding concern is public confidence in the impugned judge's ability to discharge his or her duties.⁴⁹ The Council then submits its recommendation to the Minister of Justice, who then tables it in the House of Commons and Senate.⁵⁰ Ultimately, the decision to remove a federally appointed judge, including a Supreme Court judge, requires a resolution of both Houses of Parliament.⁵¹ To date, the Canadian Judicial Council has only recommended the removal of two judges, neither of which were members of the Supreme Court.⁵² In both cases, the judges resigned before Parliament voted on their removal.⁵³

The Canadian Judicial Council is also empowered to hear complaints from members of public about federally appointed judges, which could also result in removal from office.⁵⁴ A complaint is initiated in writing and considered by the Chair or Vice-Chair of the Judicial

⁴⁸ Report of the Canadian Judicial Council to the Minister of Justice in the Matter of the Honourable Paul Cosgrove, 30 March 2009, at para. 15, online: http://www.cjc.ccm.gc.ca/cmslib/general/Report_to_Minister_Justice_Cosgrove.pdf [Cosgrove].

⁴⁹ *Ibid.* at p. 64.

⁵⁰ *Judges' Act*, *supra* note 32, s. 65(1).

⁵¹ *Constitution Act, 1867*, *supra* note 3, s. 99; *Supreme Court Act*, *supra* note 6, s. 9(1).

⁵² See *Cosgrove*, *supra* note 48 and Report of the Canadian Judicial Council to the Minister of Justice in the Matter of the Honourable Jean Bienvenue, June 1996, at para. 15, online: http://www.cjc.ccm.gc.ca/cmslib/general/Report_to_Minister_Justice_Cosgrove.pdf

⁵³ Gélinas, *supra* note 42 at p. 17. Despite being unprecedented, it is believed that removal would require a majority vote of both the Senate and House of Commons. Furthermore, while such a vote would undoubtedly follow an inquiry by the Canadian Judicial Council, Parliament could technically remove a judge on its own by virtue of its power under s. 99 of the Constitution Act, 1867. Friedland, *supra* note 35 at pp. 77-78.

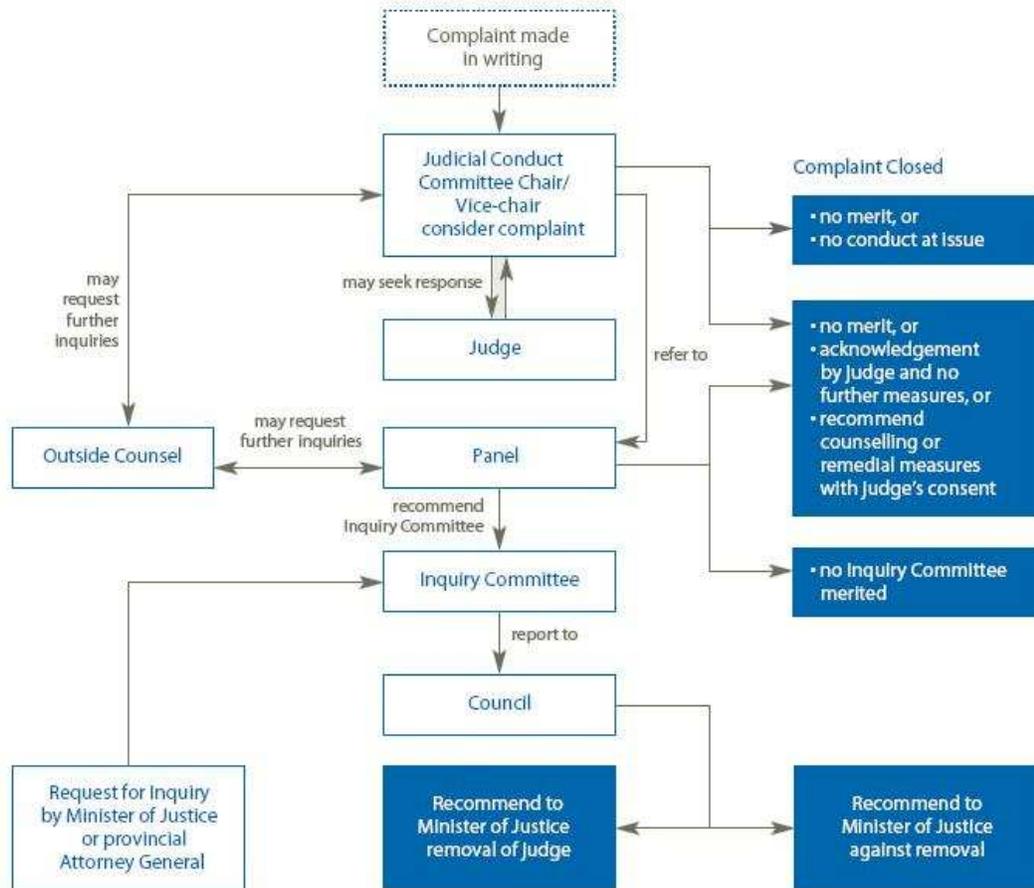
⁵⁴ *Judges' Act*, *supra* note 32, s. 60(1)(c).

Conduct Committee.⁵⁵ He or she may either dismiss the complaint for lack of merit, seek a response from the judge, request further inquiries by outside counsel, or refer the matter to a panel of five Council members for review. The panel may then dismiss the complaint, request further inquiries from outside counsel, recommend remedial measures such as counselling, or recommend an inquiry committee be struck. If the latter course is followed, the removal procedures outlined in the preceding paragraph ensue. The complaint process is depicted in the figure below.⁵⁶

⁵⁵ Canadian Judicial Council, *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges*, 27 September 2002, online: http://www.cjc-ccm.gc.ca/cmslib/general/conduct_complaint_procedures_en_fr.pdf.

⁵⁶ Canadian Judicial Council, Council Complaint Procedure, online: http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_complaintprocedure_en.asp.

COMPLAINT PROCESS



D. The Court's Relationship with the Media

Since the advent of the *Canadian Charter of Rights and Freedoms*, the Supreme Court has come under increased public scrutiny. Through the *Charter*, the Supreme Court plays a more prominent role in controversial issues than it did previously, and not surprisingly media coverage

has intensified as a result.⁵⁷ Traditionally the media focussed on proceedings in criminal matters, especially sentencing. Today as might be expected, the media debates the extent to which the judiciary can legitimately resolve issues that have a social or political dimension (such as same sex marriage, abortion or euthanasia) without usurping the domain of the elected representatives sitting in Parliament or the provincial legislatures. The Court's view is that if its constitutional jurisdiction is properly invoked it will decide an issue regardless of the political controversy. It should be noted however that s. 33 of the *Constitution Act, 1982* authorizes Parliament or the provincial legislatures to "override" a decision of the Court in relation to most *Charter* provisions for renewable periods of five years. In practice s. 33 is almost never used because its exercise is politically unpopular.

Cognizant of its increasingly high profile and the importance of educating the public on its role, Canadian judges often speak at conferences and occasionally give media interviews for the purposes of public education.⁵⁸ Furthermore, the administrative arm of the Court ensures that journalists receive notice of and are properly briefed on upcoming hearings and judgments. In addition, all hearings are broadcast on cable television and, since February 2009, they are available via webcast on the Court's website. Such an increased public profile was endorsed by the Canadian Judicial Council in 1999, which encouraged all Canadian courts to place more emphasis on communicating with the public.⁵⁹

⁵⁷ See Sauvageau *et al.*, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006) at p. 15.

⁵⁸ *Ibid.* at p. 12.

⁵⁹ *The Judicial Role in Public Information* (Ottawa: Canadian Judicial Council, September 1999) at p. 16.

By taking a more active approach to communicating with the media and the broader public, the Supreme Court aims to promote public understanding of its role in the political system and its judgments. This in turn is expected to contribute to public confidence in the Court as an institution, which is an important safeguard of judicial independence.⁶⁰ Generally speaking, this approach has led to a respectful relationship between the Supreme Court and the media. The media are quick to criticize particular decisions of the Court with which they disagree but, at the same time, denounce any attempt to undermine the independence of the institution.

IV. The Independence of Individual Judges

A. The Appointment Process and Qualifications for Supreme Court Judges

The Supreme Court consists of the Chief Justice of Canada and eight other judges. In order to qualify for appointment, the candidate must either have been a judge of a provincial superior court or a lawyer with at least ten years' experience.⁶¹ The *Supreme Court Act* also requires that at least three judges must come from the province of Quebec (which is a civil law jurisdiction).⁶² In addition to the statutory requirements, there is a longstanding practice of ensuring regional diversity on the Court. Specifically, apart from the Quebec component, the tradition is to have one judge from Atlantic Canada, three from Ontario, and two from the West.

⁶⁰ See *Ell*, *supra* note 15 at para. 36.

⁶¹ *Supreme Court Act*, *supra* note 6, s. 5.

⁶² *Ibid.*, s. 6.

There is also increasing emphasis on the appointment of judges who are functionally bilingual because the Court hears appeals in both English and French, Canada's two official languages.⁶³ Aside from these official and unofficial qualifications, the Governor in Council (federal executive) is free to make appointments to the Court.⁶⁴ In practice, both the Prime Minister and the Minister of Justice are involved in the selection of Supreme Court judges.⁶⁵ Traditionally, the executive consults with the chief justices and attorneys general of the provinces as well as senior members of the legal profession.⁶⁶ Unlike the United States, the executive's appointment of a judge need not be ratified by Parliament.

In 2005, the federal Minister of Justice instituted informal changes to the Supreme Court appointment process that were designed to make it more transparent and consultative. Traditionally, after speaking to the various stakeholders identified above, the Minister of Justice would assess the merits of potential candidates based on professional ability, personal characteristics, and diversity.⁶⁷ The Minister of Justice then discussed the potential appointees with the Prime Minister, who (after consultation with other members of the Federal Cabinet)

⁶³ On March 31, 2010, the House of Commons passed a bill that would require all Supreme Court judges to understand both official languages. The bill is now before the Senate. Bill C-232, *An Act to Amend the Supreme Court Act (understanding the official languages)*, 3rd Sess., 40th Parl., 2010.

⁶⁴ *Supreme Court Act*, *supra* note 6, s. 4(2).

⁶⁵ Hogg, *supra* note 4 at p. 8-7.

⁶⁶ Karen Eltis & Fabien Gélinas, "Judicial Independence and the Politics of Depoliticization" (working paper, March 23, 2009) online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366242.

⁶⁷ Canada (Department of Justice), Proposal for the Reform of the Supreme Court of Canada Appointment Process, tabled on April 7, 2005 with the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, at 5-6, online: <http://www.justice.gc.ca/eng/dept-min/pub/scc-csc/scc-csc.pdf>. See also Jacob Ziegel, "A New Era in the Selection of Supreme Court Judges?" 44:3 *Osgoode Hall L.J.* 547.

recommended one candidate to the Governor in Council.⁶⁸ More recently, federal policy favours establishment of an advisory committee which considers the candidates indentified through the Minister’s consultations with the various stakeholders and provides the Minister with a shortlist of names.⁶⁹ The advisory committee is composed of representatives from the federal Parliament, the judiciary, the provinces, legal organizations, and the general public.⁷⁰ The Minister then advises the Prime Minister, who is then expected to recommend the appointment of someone from the shortlist in almost all instances.⁷¹ This process was followed in 2006 for the appointment of Mr. Justice Rothstein, with the addition of his televised interview by a parliamentary committee. However, in 2008, with a general election pending, the government simply did its own consultation and appointed Mr. Justice Cromwell without a Committee Hearing, which suggests the non-binding nature of these “changes.”⁷²

While in the course of the Supreme Court’s 135 year history there have surely been some controversial appointments, Canadians are generally satisfied that qualified people are appointed, citizens are comforted by the fact that it is very difficult to identify judges by political ideology or predict how they will decide a given case.

⁶⁸ *Ibid.* at p. 6.

⁶⁹ *Ibid.* at p. 10.

⁷⁰ *Ibid.* at pp. 13-16.

⁷¹ *Ibid.*

⁷² Prime Minister’s Office, News Release, “Prime Minister Harper announces appointment of Thomas Cromwell to Supreme Court of Canada” (22 December 2008), online: <http://www.pm.gc.ca/eng/media.asp?category=1&id=2362>.

B. Tenure and Remuneration of Judges

Pursuant to the federal *Supreme Court Act*, Supreme Court judges hold office during good behaviour. Their remuneration, like that of other federally appointed judges, is established by the *Judges' Act*. Section 9 sets the salary for the Chief Justice and the eight other justices, which pursuant to s. 25 is automatically adjusted on an annual basis to reflect salary fluctuations in the economy as a whole. Furthermore, every four years the Judicial Compensation and Benefits Commission must submit a report to the Minister of Justice regarding the adequacy of judicial remuneration.⁷³ The Minister of Justice must then table the Commission's report in the House of Commons, but there is no requirement that Parliament adopt its recommendations.⁷⁴ The *Judges' Act* lists several factors that the Commission must consider in conducting its inquiry.⁷⁵

In addition to an annual salary, Supreme Court judges also receive an allowance for incidental and representational expenses, life insurance, health and dental care, life insurance, accidental death benefits, and a pension.⁷⁶ Presently, the Chief Justice of Canada is paid an annual salary of \$CAN 348,800 and the eight puisne judges receive \$CAN 322,900.⁷⁷

⁷³ *Judges' Act*, *supra* note 32, s. 26(2).

⁷⁴ *Ibid.*, s. 26(6).

⁷⁵ *Ibid.*, s. 26(1.1).

⁷⁶ *Ibid.*, ss. 27(1) and (6), 41.2, 41.3, 41.4, 42.

⁷⁷ Supreme Court of Canada, Frequently Asked Questions, online: <http://www.scc-csc.gc.ca/faq/faq/index-eng.asp#f11>.

The remuneration of judges in Canadian courts has led to litigation, particularly in the case of provincial courts, which are created by provincial statutes and have no constitutional status. In the 1990s general economic difficulties caused a number of Canadian provinces to reduce the salaries of provincial court judges. Some accused persons and one provincial judges' association argued that these reductions violated the constitutional guarantee of judicial independence. At issue was whether the principle of financial security permitted the legislative and executive branches to reduce judges' salaries and if so under what circumstances. On appeal, the Supreme Court was called upon to establish a framework for decision-making on the remuneration of provincial court judges consistent with preserving their financial security.⁷⁸

The Court made three key findings, the principles of which underpin the statutory provisions discussed above that regulate the salaries of Supreme Court judges. First, judicial salaries can be reduced, increased, or frozen, but not without recourse to an independent, effective and objective commission.⁷⁹ The effectiveness criterion dictates that governments are prohibited from making decisions with respect to judicial salaries before receiving the commission's report. Furthermore, governments must formally and promptly respond to the commission's report, and justify any decision not to accept its recommendations.⁸⁰ The standard of justification is not an onerous one – “simple rationality” – which requires that the government articulate a legitimate reason for its rejection.⁸¹ Second, there are to be no negotiations on

⁷⁸ *Remuneration Reference*, *supra* note 8.

⁷⁹ *Ibid.* at para. 147.

⁸⁰ *Ibid.* at para. 179-180.

⁸¹ *Ibid.* at para. 183.

judicial remuneration between the judiciary and the executive or legislature.⁸² This prohibition is based on the view that such negotiations are inherently political and that they would put the courts in a conflict of interest because the Crown is often a party before them.⁸³ Third, judicial salaries may not fall below a minimum level.⁸⁴ While the court did not set a minimum, it explained that if salaries are too low, there is a risk, whether real or perceived, that judges will adjudicate a certain way in order to secure higher salaries from the executive or legislature or be manipulated by offers of benefits from litigants. (Traditionally, judicial corruption has not been a problem in Canada. There have only been a handful of known instances, all of which were promptly denounced and severely dealt with).

In 2005, the Supreme Court again addressed the remuneration of provincial court judges, this time in the context of litigation stemming from the rejection by several provinces of commission reports calling for increased salaries for judges.⁸⁵ The Court re-iterated that commission reports are non-binding and the government can reject their recommendations as long as it articulates a rational basis for doing so.⁸⁶

⁸² *Ibid.* at para. 186.

⁸³ *Ibid.* at paras. 186-187

⁸⁴ *Ibid.* at para. 192.

⁸⁵ *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General)*, [2005] 2 S.C.R. 286 [*Provincial Court Judges Assn.*].

⁸⁶ *Ibid.* at para. 21.

The procedure mandated by the Supreme Court for provincial court judges also applies to its federal judges through s. 26 of the federal *Judges' Act*. Supreme Court judges are reasonably well paid and certainly earn enough to live comfortably. There is broad acceptance within the judiciary, as well as among members of the public generally, that ultimately it is the elected representatives of the people who are in charge of the public purse, not the judges, and therefore salary decisions require considerable deference to government.

Extra-Judicial Activities and Immunity

The overriding concern is that judges not compromise (or appear to compromise) their impartiality through their extra-judicial activities.⁸⁷ Accordingly, judges are expected to exercise rectitude when it comes to their charitable, business, and political activities.

With respect to a judge's charitable involvement, the Canadian Judicial Council recommends that judges avoid any activities that risk jeopardizing the perception of impartiality or may lead to an excessive number of recusals.⁸⁸ While judges may serve as directors of civil and charitable organizations, they are discouraged from being involved in fundraising activities on behalf of these organizations.⁸⁹ Judges in Canada are prohibited from serving as directors of

⁸⁷ Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at p. 32 [*Ethical Principles for Judges*].

⁸⁸ *Ibid.* at p. 34.

⁸⁹ *Ibid.* at 36. Such direct involvement may compromise impartiality because lawyers or litigants may contribute in the hope of currying favour with the soliciting judge. It also publicly identifies the judge with the objectives of the organization.

commercial enterprises or from engaging in any form of extra-judicial employment.⁹⁰ The restrictions on extra-judicial activity of a political nature are strict – judges are prohibited from engaging in partisan political activities while in office. They do not hold memberships in political parties, attend political gatherings, contribute to campaigns, participate in political discussions in public, or sign petitions.⁹¹ Furthermore, although spouses and other members of a judge’s family are entitled to participate in politics, they should be mindful of the impact that their political activities could have on the perception of the judge’s impartiality.⁹² Finally, judges are expected to disqualify themselves when they believe that a reasonable, fair-minded, and informed person would have a rational apprehension that the judge would be in a conflict of interest.⁹³

There is an additional point related to extra-judicial activity that is specific to Supreme Court judges. By virtue of their office, Supreme Court judges are Deputy Governors General and as such may be called upon to give royal assent to bills passed by Parliament, signing official documents, or receiving credentials of newly appointed High Commissioners and Ambassadors.⁹⁴ On the surface this “vice regal role” would seem to be incompatible with judicial functions because related matters might one day come before the Court. This risk is highest in

⁹⁰ *Judges’ Act*, *supra* note 32, s. 55.

⁹¹ *Ethical Principles for Judges*, *supra* note 87 at p. 29.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ See *Letters Patent Constituting the Office of the Governor General and Commander-in-Chief of Canada*, C. Gaz. 1947. Vol. LXXXI, No. 12.

giving royal assent to bills. For this reason, the Supreme Court has adopted a practice of declining to assent to a bill the validity of which could be challenged before it.

A further bulwark of judicial independence is that judges enjoy immunity from civil liability for actions taken in the performance of their judicial duties. The source of this immunity is the common law, rather than the Constitution or legislation.⁹⁵ (While several statutes pertaining to provincial court judges address immunity, the two federal statutes governing Supreme Court judges do not explicitly do so.)⁹⁶ This common law immunity only applies to civil suits, not criminal charges.⁹⁷ In all likelihood, a serious criminal charge would cause a judge to resign in order not to compromise the integrity of the court on which he or she sits.

V. Operating Procedures of the Supreme Court

A. References from the Governor-in-Council

Pursuant to s. 53 of the *Supreme Court Act*, the federal government may refer important questions of law or fact for the opinion of the Court. The scope of the potential questions is very broad, but in practice they relate to the interpretation of the Constitution, the constitutionality or

⁹⁵ See e.g. *Shaw v. Trudel* (1988), 53 D.L.R. (4th) 481 (C.A. Man.). After an extensive review of the 19th century English cases, the Court of Appeal held that provincial court judges are immune from civil liability for actions taken in execution of their judicial functions. See also *Morier v. Rivard*, [1985] 2 S.C.R. 716.

⁹⁶ See e.g. *Courts of Justice Act*, R.S.O. 1990, c.43, s. 82; *Quebec Magistrate's Privileges Act*, R.S.Q. c. P-24, s. 1; *Nova Scotia Provincial Court Act*, R.S.N.S. 1989, c. 238, s. 4A; *New Brunswick Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 3.1; *Newfoundland and Labrador Provincial Court Act*, S.N.L. 1991, c. 15, s. 32.

⁹⁷ See *McC v. Mullan*, [1984] 3 All E.R. 908 (H.L.).

interpretation of federal or provincial legislation, or the powers of the federal and provincial governments.⁹⁸ Such questions can pertain to matters affecting the provincial governments. By the text of the statute, the Court is required to “consider and answer” all questions referred to it,⁹⁹ however in practice the Court has declined from time-to-time to answer questions on the grounds that they are moot, not legal in nature, too vague, not accompanied by sufficient information, or simply regarded by the judges as inappropriate.¹⁰⁰

The fact that the Supreme Court has been free to refuse to answer certain questions is evidence of its independence from the federal executive. In a recent and highly anticipated reference concerning same-sex marriage, the Court declined to answer whether the traditional definition of marriage (opposite sex couples) is consistent with the *Charter*. The Court declared that answering the question would serve no legal purpose because the government had already committed itself to introducing legislation legalizing same-sex marriage.¹⁰¹ The Court noted that thousands of same-sex couples had already gone through a ceremony of marriage on the basis of final decisions rendered by multiple provincial courts of appeal. The Chief Justice of Canada has suggested that the Court’s power to refuse to answer questions that it deems inappropriate serves to protect it from politically-oriented references.¹⁰²

⁹⁸ *Supreme Court Act*, *supra* note 6, s. 53(1).

⁹⁹ *Ibid.*, s. 53(4).

¹⁰⁰ Hogg, *supra* note 4 at p. 8-19.

¹⁰¹ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 65.

¹⁰² The Right Honourable Beverley McLachlin, Chief Justice of Canada, “The *Charter* 25 Years Later: The Good, the Bad and the Challenges” (2007) 45 *Osgoode Hall L.J.* 367 at 368-369 [McLachlin].

The frequency of references has declined over the years.¹⁰³ This may be attributed at least in part to the increased frequency of constitutional challenges by private parties based on more liberal rules of standing and the growth of well-financed special interest groups.¹⁰⁴ Both the government and the Court generally prefer to have constitutional issues considered in the context of ordinary litigation because the facts often bring issues to light that may not be foreseeable through a bare reference concerning proposed legislation.

B. The Supreme Court's Procedure and its Effect on Independence

As stated above, the procedural practices of the Court are governed by rules laid down in the *Supreme Court Act* and by its Judges.¹⁰⁵ Part IV of the *Supreme Court Rules* addresses general issues, including representation of parties, withdrawal of representation, addition and substitution of parties, filing and service of documents, and requirements for documents filed with the Court.¹⁰⁶ Every appeal is conducted in an oral hearing and written judgments are rendered simultaneously in both French and English. The court hears about 70-80 appeals in a year. There is a backlog.

¹⁰³ See Barry L. Strayer, *The Canadian Constitution and the Courts*, 3rd ed. (Toronto: Butterworths, 1998), ch. 9.

¹⁰⁴ *Ibid.*

¹⁰⁵ See Section III.B. *supra*.

¹⁰⁶ *Supreme Court Rules*, *supra* note 31, ss. 14-24.

An appeal to the Supreme Court is usually initiated through an application for leave to appeal, the requirements of which are outlined in Parts V and VI of the *Rules*. The court receives about 700 leave applications each year. They are usually processed within 3 months.

The *Supreme Court Act* states that the Court is to hear appeals that are of “public importance” or raise an important “issue of law or...mixed law and fact” that in its opinion it ought to decide.¹⁰⁷ The Court, therefore, enjoys considerable discretion when it comes to deciding which appeals to hear, and this strengthens its independence. The Court is more likely to grant leave to appeal in cases raising constitutional or civil liberties issues, those involving federal or provincial legislation of broad application, and those concerning important common law issues.¹⁰⁸ Leave will generally be granted where the provincial courts of appeal are in disagreement on an important legal issue. Exceptionally, the federal *Criminal Code* provides in limited instances for appeals as of right, most notably cases where a judge of the provincial court of appeal has dissented on a question of law.¹⁰⁹

Despite its broad discretion on applications for leave to appeal, the Supreme Court does not consider the constitutionality of legislation *ultra pepita* or after the withdrawal of a claim. If a statute comes before the Court without a constitutional challenge, and it appears that one could have been asserted, the most the Court will do is note in its reasons for judgement that no

¹⁰⁷ *Supreme Court Act*, *supra* note 6, s. 40(1).

¹⁰⁸ Hogg, *supra* note 4 at p. 8-14.

¹⁰⁹ R.S.C. 1985, c. C-46, ss. 691(1)(a), 692(3)(a), 693(1)(a).

constitutional issue was raised by the parties and therefore no constitutional issue has been decided in the case.

Once an application for leave has been granted and notice of appeal has been served, the parties make both written and oral submissions.¹¹⁰ The procedure for hearings is dictated by the *Rules of the Supreme Court*.¹¹¹ The rules governing scheduling and the order and length of presentations are set by the judges.¹¹² The Rules also address motions and post-hearing issues, such as re-considerations and re-hearings, orders and judgements, and fees and costs.¹¹³ Therefore, Supreme Court judges in Canada have virtually total control of the procedures that impact on their adjudicative functions. There is no involvement of either the legislative or executive branches on the question of which appeals are heard or how they are decided. The oral and adversarial nature of litigation before the Supreme Court increases the transparency of its procedure (especially the televising of proceedings) and allows public scrutiny of its activities. This too enhances the public perception of the Court's independence.

C. The Degree of Deference Shown to Other Branches of Government

The “margin of appreciation” or deference accorded to the executive and legislative branches by the Supreme Court varies with the subject matter. In a criminal case, where the state

¹¹⁰ However, the Court may allow the appeal based on the application for leave alone if it obvious that an oral hearing is not warranted and the issues raised are sufficiently important: *Supreme Court Act*, *supra* note 6 at s. 43(1).

¹¹¹ *Supreme Court Rules*, *supra* note 6, s. 71.

¹¹² *Ibid.*, ss. 70-71.

¹¹³ *Ibid.*, ss. 47-63, 73-82.

is the “singular adversary” of the accused, the Court will strictly enforce what it regards to be the constitutional requirements, even if this imposes significant financial burdens on the state.¹¹⁴ In the context of social legislation, however, the Court has shown considerably more deference to government.¹¹⁵ It is recognized that in the area of social policy there is generally no uniquely “correct” solution. In a few instances, the Court has imposed positive obligations on government. For example, it held that the government’s failure to provide sign language interpretation for the deaf in hospitals constituted discrimination on the basis of physical disability in violation of s. 15(1) of the *Charter*.¹¹⁶ Nevertheless, in general the Court is quite deferential to the legislature’s constitutional role and expertise in terms of the allocation of financial resources. For example, in *Newfoundland (Treasury Board) v. N.A.P.E.*, the provincial legislature passed an austerity act to address an unprecedented financial crisis.¹¹⁷ One result of this measure was that women hospital workers, who had been promised pay equity three years earlier, saw their raises postponed in part and they continued to be paid substantially less than their male counterparts. The union representing the women challenged the constitutionality of the legislation, alleging that it was discriminatory. The Court held that while the legislation did violate s. 15(1) by discriminating on

¹¹⁴ For example, in *R. v. Askov*, [1990] 2 S.C.R. 1199, the Supreme Court held that a delay of two years after a preliminary hearing violated the accused’s right to trial within a reasonable time pursuant to s. 11(b) of the *Charter*. The Court held that “The right guaranteed by s. 11(b) is of such fundamental importance to the individual and of such significance to the community as a whole that the lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials” (*per Cory J.* at 1224). See also *R. v. Morin*, [1992] 1 S.C.R. 771.

¹¹⁵ See *e.g. Gosselin v. Quebec*, [2002] 4 S.C.R. 429, where a majority of the Court upheld a social assistance scheme that provided differential benefits based on age and participation in education or work experience programs. The majority rejected arguments that the scheme violated ss. 7 and 15 of the *Charter*, which respectively protect an individual’s right to security of person and equality.

¹¹⁶ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. The Court recognized that, while subject to the principle of reasonable accommodation, “discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public...” (at paras. 78-79).

¹¹⁷ [2004] 3 S.C.R. 381 [*N.A.P.E.*].

the basis of sex, the violation was justified by the severe financial crisis faced by government that was already closing hospital wards and school classrooms.¹¹⁸ The Court has also shown deference to the provincial governments on the issue of remuneration of provincial court judges.¹¹⁹ Finally, the Court in general has declined to encroach on executive prerogatives, such as foreign relations.¹²⁰

The text of the *Charter* itself contains several provisions that protect against judicial overreaching.¹²¹ Section 1 of the *Charter* permits the government to attempt to justify what would otherwise be a violation of an individual's constitutional right. The government is required to demonstrate (1) a sufficiently important legislative objective; (2) a rational connection between the substance of the limitation and its objective; (3) that the legislation minimally impairs the right or freedom in question; (4) proportionality between the effects of the legislation and its purported objectives; and (5) that the adverse effects of the legislation do not outweigh its benefits.¹²²

¹¹⁸ The rights and freedoms guaranteed by the *Charter* are subject to Section 1, which will tolerate a violation that is "reasonable" and that "can be demonstrably justified in a free and democratic society." See *ibid.* at para. 53 for the standard applicable to s. 1.

¹¹⁹ *Provincial Court Judges*, *supra* note 88. The Court held that provincial governments are not constitutionally required to follow the recommendations of independent judicial compensation commissions.

¹²⁰ See *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44.

¹²¹ McLachlin, *supra* note 107 at pp. 373 n.20.

¹²² See *N.A.P.E.*, *supra* note 122 at para. 53; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 at para. 138 (*per* McLachlin C.J. and LeBel J.); and *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 69-71.

Section 33, commonly called the “notwithstanding clause”, also limits the power of the courts. Under this provision, the federal Parliament and provincial legislatures can override a judicial decision that a statute violates the *Charter*.¹²³ The only requirement is that Parliament or the provincial legislature pass an act declaring the legislation valid in spite of the constitutional violation every five years.¹²⁴ In theory, the notwithstanding clause could be used indefinitely.

However, as stated earlier, resort to s. 33 has proven to be politically very unpopular and is almost never used.

CONCLUSION

Judicial independence is a fundamental constitutional principle in Canada. Our Constitution requires that judges at all levels enjoy security of tenure, financial security, administrative independence, and adjudicative autonomy. We believe that the Supreme Court of Canada and its judges enjoy a very high level of independence despite the fact that certain matters such as administration, finance, and appointments are ultimately the responsibility of the federal government. The principal bulwark to outside interference, however, is the deep-rooted acceptance of the need for judicial independence in Canadian society. At all times, the Court’s judges feel free to decide the cases before them on their merits, without influence from government or anyone else.

¹²³ However, the Notwithstanding Clause only applies to ss. 2, 7, and 15 of the *Charter*. Thus it cannot save legislation that violates other provisions of the *Charter*.

¹²⁴ *Charter*, ss. 33(3)-(5).