

## CHAPTER THIRTEEN

---

# The Role of the Judiciary

I. Introduction and Overview of This Chapter .....	13:1
II. The Court Structure .....	13:3
III. The Separation of Powers and the Section 96 Courts .....	13:6
A. Section 96 and the Adjudicative Function .....	13:7
B. Section 96 Constraints on Parliament .....	13:20
C. Section 96 and the Entitlement to Review and Appeal .....	13:25
D. Section 96 and Access to Justice .....	13:28
IV. The Independence of the Judiciary .....	13:34
V. The Judicial Appointment Process .....	13:51
A. Introduction .....	13:51
B. The Provincial Appointments Process .....	13:52
C. The Federal Appointments Process .....	13:52
1. Appointment of Superior Court and Federal Court Judges .....	13:52
2. Appointments to the Supreme Court of Canada .....	13:53
VI. Judicial Security of Tenure .....	13:66

### I. INTRODUCTION AND OVERVIEW OF THIS CHAPTER

The Canadian judiciary's constitutional role, institutional structure, and juridical function derive from constitutional principles originating in the United Kingdom before Confederation. These principles are reflected in the text of the Canadian constitutional instruments as well as in legislation and judicial rulings.

The key principles that apply to the judiciary are the rule of law (over political, partisan, or private preferences); the independence of the judiciary (from the legislature and the executive); and the separation of powers and functions (as among the judiciary, the legislatures, and the executive). These principles stand in a symbiotic relationship with other constitutional principles, such as parliamentary supremacy, federalism, and democratic governance. (For a review of these foundational principles, refer back to *Reference re Secession of Quebec*, [1998] 2 SCR 217, excerpted in Chapter 1, Introduction.)

At Confederation, the continuing force of these principles was affirmed in three ways. First, the preamble of the *Constitution Act, 1867* made reference to these principles when it characterized the constitution that the Act established as "similar in principle to that of the United Kingdom." Second, s 129 provided for the continuation of the pre-Confederation court system, which was based on the primacy of the superior courts of inherent jurisdiction. These courts are the descendants of the courts of common law jurisdiction in the United

Kingdom. Third, the Act set out, in ss 96 to 101, and s 92(14), the institutional arrangements necessary for the courts to function under our federal structure of government.

In 1982, more constitutional structure was added. Section 52 of the *Constitution Act, 1982* confirmed that the Constitution of Canada is the supreme law of Canada, rendering any inconsistent law of no force or effect, and set out a non-comprehensive listing of some of the instruments that make up the written Constitution of Canada.

The Charter added more constitutional structure to the judicial role. Its preamble reaffirmed the principle of the rule of law. Section 11(d) set out a right to have the determination of one's guilt or innocence in a criminal or penal proceeding determined in a fair and public hearing by an independent and impartial tribunal. In addition, s 24 empowered anyone whose Charter rights or freedoms were infringed or denied to apply to a "court of competent jurisdiction" to seek an "appropriate and just" remedy.

The constitutional principles that infuse the constitutional text have deep historical roots within the British legal system, which has a flexible, evolving, unwritten constitution, as opposed to one encapsulated in a comprehensive constitutional instrument having the status of supreme law and subject to alteration by a special amending procedure. The organic nature of this constitutional tradition accommodated the transition of a hereditary, absolute monarchy into a modern parliamentary democracy dedicated to the rule of law, the separation of powers, and the independence of the judiciary.

The application of these British constitutional principles to the Canadian political and legal system required considerable adjustments. On the one hand, it was necessary to accommodate the ongoing authority of the British Parliament, executive, and the Judicial Committee of the Privy Council over Canada within the structure of governance of the British Empire. On the other hand, it was necessary to establish the judicial institutions and functions required by Canada's federal system of government. Federal governance required an overarching legal framework for the division of powers secured, in most instances, by judicial enforcement. The complexity of the judicature provisions of the *Constitution Act, 1867* reflected these two imperatives.

The structure given to the Canadian judiciary in 1867 presupposed the retention of the Judicial Committee of the Privy Council as the highest appellate court for provincial, federal, and constitutional law. A judicial system having one apex appellate court for all types of law is customarily part of a unitary system of government, not a federation. Accordingly, the *Constitution Act, 1867* added federal features to this unitary substructure.

The federal features of the Canadian judicial arrangements encompass two separate court systems, each with intermediate appeal courts, for the two levels of government. On the provincial level, ss 92(4) and (16) of the *Constitution Act, 1867* empower the provincial legislatures to create (and the provincial executive to appoint judges to) "inferior," statutory provincial courts situated within each of the provinces, and to vest them with civil and criminal jurisdiction. On the federal level, s 101 of the Act empowers Parliament to create its own statutory courts, with national jurisdiction, "for the better administration of the laws of Canada."

In a fully federal system, there would be separate appeal courts for each of the provincial and federal judicial systems, with each having final jurisdiction over appeals relating to that level's laws. In Canada, in contrast, there is a mixture of jurisdiction in the trial and appellate courts. So, for example, provincial statutory inferior courts have jurisdiction to hear matters under the *Criminal Code*, federal law enacted pursuant to s 91(27) of the *Constitution Act, 1867*.

In addition to making provision for the creation and appointment of judges to the separate courts systems at the provincial and federal levels, consistent with Canada's federal system of governance, s 129 of the *Constitution Act, 1867* retained the existing superior common law courts that had been operating in the colonies before Confederation, with the federal government having the power to appoint judges to those courts by virtue of s 96 of the Act.

At the top of this judicial structure, one apex court has appeal jurisdiction over all types of law—provincial, federal, and constitutional—in cases received from both provincially and federally established courts. Until 1949, this apex court was the Privy Council. The Supreme Court of Canada did not become part of the judicial system until 1875, when the Parliament created it under s 101 as a “general court of appeal for Canada.” The court originally operated as the pan-Canadian appeal court, situated above the provincial appellate courts and below the Privy Council in the judicial hierarchy. In 1949, when the Privy Council’s jurisdiction over Canadian appeals ended, the Supreme Court took over the role of apex appeal court for all Canadian law.

In 1975, the Supreme Court acquired the authority to determine, for the most part, which appeals it would receive, based on the standards of public importance, or the importance of an issue of law or of mixed law and fact. One result of this change was that the court’s docket came to include more public law cases, especially Charter cases after 1982. In addition, the court also deliberates on a significant number of reference cases, mostly constitutional cases of paramount importance, that reach the court either directly from the federal Cabinet or on appeal from references sent to the provincial appellate courts by the provincial executive. (Reference cases are discussed in Chapter 2, Judicial Review and Constitutional Interpretation.)

Section II of this chapter reviews the basic structure of the Canadian judicial system and the role of the judiciary, which has changed considerably since Confederation. It begins by setting out the unitary and federal elements that make up the institutional structure of the judicial system in Canada. Section III turns to the Supreme Court’s interpretation and application of the constitutional provisions—especially s 96 of the *Constitution Act, 1867*—designed to preserve the historical role of the superior courts within the British legal tradition. This role was to provide dispute resolution by independent judges for claims based on common law and statute and to oversee the legality of the exercise of public authority. More recently, the Supreme Court has extended the s 96 safeguards in three ways: first, as against the federal government; second, as a guarantee of superior court supervisory review over administrative tribunals on questions of jurisdiction and constitutionality; and, third, as an assurance of access to justice.

Sections IV, V, and VI then consider a number of concrete manifestations of the constitutional principles that relate to the institutional structure and juridical functions of the judiciary, such as the apolitical modality for judges’ remuneration, modes of appointment of judges to the various courts, the constitutional status of the Supreme Court, and judicial security of tenure.

## II. THE COURT STRUCTURE

The Canadian court structure is founded on the special independence accorded to the superior courts of each province and territory, which include both a trial and appellate level. The judges of these courts, as the descendants of the British common law courts, enjoy

security of tenure and remuneration to ensure their impartiality and commitment to the rule of law, free from political pressure or manipulation. The Canadian legal system expressly provides for the independence of these judges through the preamble of the *Constitution Act, 1867*, which characterizes Canada's constitution order as "similar in principle" to the British Constitution and, more particularly, in the specific, enforceable, judicature provisions, s 129 and ss 96 to 100.

The superior courts possess a number of distinctive features. They are the only courts that possess inherent jurisdiction. This originally meant that they enjoyed plenary jurisdiction, unless expressly removed by statute. However, as discussed in more detail below, in Section III, the courts have strengthened the restriction on removing jurisdiction from these courts by imposing restrictions on the capacity of provincial legislatures to transfer certain types of jurisdiction to statutory bodies—that is, the provincial "inferior" courts or administrative tribunals. These restraints were derived from the *Constitution Act, 1867*, s 96, on the basis of historical and functional categories, and originally applied only to the provinces. More recently, the Supreme Court of Canada has recognized a "core" jurisdiction that cannot be removed from these courts and applied these restraints to the federal government as well.

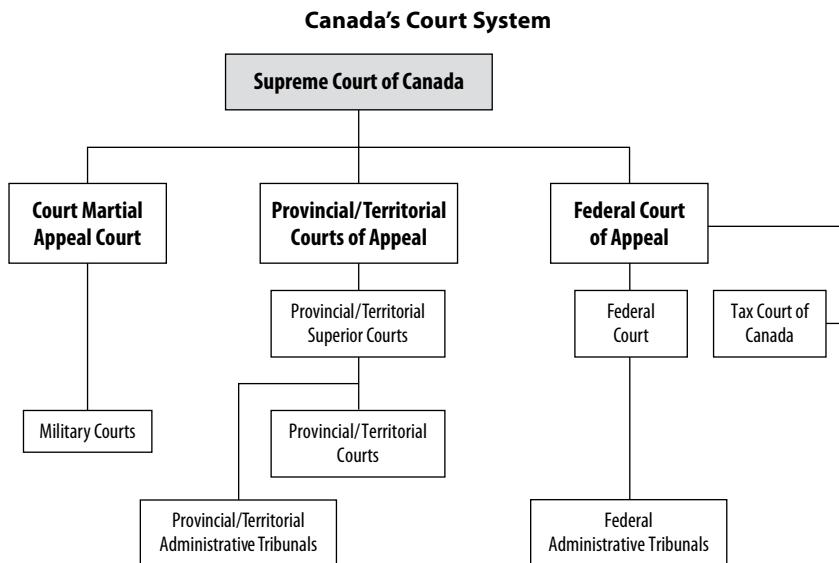
The superior courts have historically had the role of overseeing the work of inferior courts and administrative tribunals to ensure that they conform to legal precepts within their statutory mandate. It is also common for appeals to lie from the statutory bodies to the superior court, either the trial division or the appellate level, under statutory directive. As will be shown in Section III, the courts have also rigidified the hierarchical status that the superior courts enjoy over these statutory bodies.

As noted above, the superior and statutory courts are structured differently under the *Constitution Act, 1867*. For the statutory courts, the level of government, federal or provincial, that establishes the court is also responsible for appointing its judges and setting the terms for remuneration and security of tenure. The superior courts have a more federal set of arrangements. As provided for by s 92(14) of the *Constitution Act, 1867*, the provinces establish and finance the administration of these courts, while under s 96, the federal government appoints, remunerates, and safeguards the security of tenure of the judges.

The Supreme Court of Canada, established under s 101 of the *Constitution Act, 1867*, is now composed of nine judges. It operates under the *Supreme Court Act*, RSC 1985, CS-26, which empowers the governor general to appoint judges to the court. By convention, these appointments are based on the recommendation of the minister of justice and, for the chief justice, the prime minister. There is no stipulated process for the selection of the candidates or formal statement of the criteria for appointment. In recent years, different governments have tried out different modes of appointment to provide more parliamentary input. More detail on the appointment process to the court is set out below in Section V.

The Federal Court, also established under s 101 of the *Constitution Act, 1867*, operates under the *Federal Courts Act*, RSC 1985, c F-7, with jurisdiction over matters arising under federal law, such as copyright, patents, and trademarks; tax; admiralty; citizenship; aeronautics; and interprovincial undertakings. The Federal Court also has the authority of judicial review over federal officials and agencies exercising administrative authority under federal statute.

The Federal Court has both a trial division, called the Federal Court, and an appellate division, called the Federal Court of Appeal. The jurisdiction of the Federal Court is statutory and is restricted to cases in which federal law is applicable—that is, where Parliament has



legislated on the subject matter. It has concurrent jurisdiction with the provincial superior courts to adjudicate constitutional cases.

Under s 92(14) of the *Constitution Act, 1867*, the provinces have jurisdiction over the “Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction” as well as “procedure in civil matters in those courts.” Pursuant to s 129 of the 1867 Act, the provinces and territories have continued to maintain the superior trial courts (under a number of names—for example, Court of Queen’s Bench, Supreme Court, Superior Court, or Court of Justice) as well as an appellate level court (named the Court of Appeal or Appeal Division). These courts oversee trials and appellate review in criminal law and divorce cases, which are under federal jurisdiction, civil cases under provincial law, and constitutional cases.

The *Constitution Act, 1867*, in ss 96 to 100, secures the special status of the provincial superior courts. Section 96 provides that the governor general has the authority to appoint these judges. (The text refers to the “Superior, District and County Courts,” but only the superior courts are in operation today.) Section 98 stipulates that eligibility for appointment includes membership in the bar of the province of appointment. Section 99 ensures the security of tenure of these judges—they hold office during good behaviour, until retirement at age 75, and their removal from office requires action by the governor general upon address of the Senate and House of Commons. Section 100 provides a different kind of security, financial security, by stipulating that the salaries, allowances, and pensions of these judges must be “fixed and provided by the Parliament of Canada.”

The federal government’s responsibility for the appointment, payment, and security of tenure of these judges addressed a number of concerns. This arrangement insulated these judges from provincial political pressure. It also ensured that the federal government would have confidence in the expertise and professional qualifications of the judges responsible for the interpretation and application of federal law—for example, criminal law, as well as the adjudication of federal–provincial disputes under the Constitution.

There is one remaining component of the judicial structure to consider—the provincial and territorial court systems, which operate solely under the authority of the provinces and territories. These courts are called “inferior” courts to distinguish them from the provincial superior courts. The provinces and territories appoint and pay the judges of these courts and also set the terms for their tenure—for provinces, the appointment power is set out in s 92(4) of the *Constitution Act, 1867*. These courts derive their jurisdiction solely from statute, either provincial or federal. They have jurisdiction over both civil and criminal matters and are often divided into specialized divisions—for example, criminal court and family court. In criminal law their jurisdiction includes all but the most serious criminal offences and they conduct preliminary hearings for prosecutions to be tried in the superior courts. As noted above, these statutory courts have no inherent jurisdiction and their judgments are subject to statutory appeal or judicial review in the superior courts. In addition to the inferior courts, the provinces and territories have also established small claims and youth courts.

The structure given to the judiciary in the *Constitution Act, 1867* presented a number of challenges. First, the new court system had to be constrained to respect the constitutional principles relating to the judiciary within the British tradition, at a time when there were few trained and experienced lawyers and judges. Second, the highest appellate court was an imperial court whose judges had little knowledge of the peculiarities and challenges of Canadian life. Third, the judiciary had to operate both within the unitary structure of the Empire and Canada’s federal structure of government. Fourth, the 1867 arrangement had to accommodate significant historical change. One change was the transition to Canadian legal independence. Others were the development of the provinces into large, complex economic enterprises and the transition to the public responsibilities of the modern welfare state at both levels of government. The next section of this chapter provides an introduction to these challenges.

### III. THE SEPARATION OF POWERS AND THE SECTION 96 COURTS

The text of s 96 of the *Constitution Act, 1867* allocates the power to appoint provincial superior court judges to the federal executive. The extensive litigation conducted under this section has little to do with the appointment of these judges. Rather, the focus is on the continuity of the special historical function of the superior courts in the British tradition, which emphasized the independence and professional qualifications of the judges adjudicating claims to legal entitlement based in the common law, statute, and public law.

The elements making up this special independent status are the federal role in judicial appointment and the provision of security of tenure and financial security to the appointees, on the one hand, and the provincial establishment and administration of the courts, on the other. These elements were put in place to ensure that the adjudication afforded by these judges would be expert, reflective of extensive professional experience, and integrated within a long-term professional commitment. This combination of elements gave assurance that the highest level of professional proficiency and political independence would be applied to the highest level of judicial responsibility.

## A. Section 96 and the Adjudicative Function

### NOTE: JOHN EAST IRON WORKS

In *Labour Relations Board of Saskatchewan v John East Iron Works Ltd*, [1949] AC 134, the Privy Council addressed a challenge to the exercise by a provincially appointed tribunal of powers traditionally allocated to the superior courts. Under the *Trade Union Act*, 1944, the province of Saskatchewan established a Labour Relations Board with the power to require, pursuant to s 5(e), “an employer to reinstate any employee discharged contrary to the provisions of this Act and to pay such employee the monetary loss suffered by reason of such discharge.” When John East Iron Works Ltd terminated the employment of six of its employees, the United Steelworkers of America filed a complaint with the Labour Relations Board arguing that the company had engaged in an unfair labour practice and seeking reinstatement and compensation for the workers. The board issued orders requiring reinstatement and compensation for five of the employees. The Court of Appeal for Saskatchewan quashed these orders. The board then successfully appealed this decision to the Privy Council.

Lord Simonds posed two questions: (1) did the appellant board exercise a judicial power, and (2) if so, was it for that reason acting as a tribunal analogous to a superior, district, or county court?

In respect to the judicial nature of the function under review, Lord Simonds noted that although the relief granted related to the individual employee, as in a typical judicial dispute, it was possible for other persons to seek adjudication of the claim without the employee’s assent and even against his wishes “for the solution of some far-reaching industrial conflict.” Thus the issue could be described in two ways: institutionally, as a *lis* determined by the exercise of judicial power between two parties, or historically, as a function quite different from the subject matter deliberated on by superior, county, or district courts in Upper Canada in 1867.

Lord Simonds emphasized that the issue for determination did not relate to the employee’s contractual rights, but rather to the means by which to secure the legislature’s policy of collective bargaining “as a road to industrial peace.” The underlying “conception of industrial relations” did not exist in 1867, but, if it had, its administration might well have been provided by a representative and expert tribunal system, rather than by judges of the superior or other courts. Lord Simonds also stipulated that while, as a general rule, it might be acceptable to immunize the decisions of a specialized tribunal from review by an ordinary court, this immunity had limitations.

---

The factors identified by Lord Simonds in 1944 have become the basic elements of analysis in s 96 litigation—the continuity of the historical role of the superior courts; the contrast between the modes of adjudication afforded for claims based on the common law and claims to entitlements embedded in legislated policy regimes; the different kind of expertise required of the adjudicator in these different contexts; and the importance of supervision of legality by the superior courts.

Over time, other considerations were added. The restrictions imposed on the work of statutory tribunals, originally applied to provincial tribunals, were extended to federal tribunals as well. When the historical test turned out to be unsatisfactory, the judges moved to

consideration of the “core” powers of the superior courts, with attention to the constitutional principles underlying s 96, asking, for example, whether the exclusive assignment to inferior courts and tribunals of functions traditionally exercised by the superior courts undermined the independence of the judiciary and the separation of powers.

The Supreme Court of Canada’s advisory opinion in *Re Residential Tenancies Act*, excerpted below, adapted Lord Simonds’s tests to a proposed legislative regime regulating residential tenancies. The court deliberated on a challenge to the powers to be vested in the Residential Tenancy Commission by the Ontario *Residential Tenancies Act*, 1979. The Act was designed to increase the entitlements of tenants at a time when there were few vacant apartments available. The commission’s powers included the authority to require landlords and tenants to comply with obligations imposed under the Act and to evict tenants.

The Ontario Cabinet initiated a reference case to the Ontario Court of Appeal to obtain an advisory opinion as to the constitutionality of the Act before bringing it into operation. The Ontario Court of Appeal concluded that the Act evaded the strictures set down by s 96. The attorney general of Ontario appealed that judgment to the Supreme Court of Canada.

Dickson J (as he then was), speaking for the court, noted that there were multiple interveners participating in the reference case, including the attorney general of Canada, organizations representative of tenants and of landlords, as well as community-based clinics and property management associations. He also made reference to the green paper that set out the government’s policy objectives, which included the need to provide a means other than courts for landlords to exercise their right to obtain an order evicting tenants; the need for an informal system in which complainants could represent themselves; and the desire to combine administrative and judicial functions, including mediation and adjudication.

He then considered and refined the various s 96 tests into a more systematic formulation, which came to be called “the *Residential Tenancies test*.”

### Re Residential Tenancies Act

[1981] 1 SCR 714

DICKSON J (Laskin CJ and Martland, Ritchie, Estey, McIntyre, and Lamer JJ concurring):

The *Residential Tenancies Act*, 1979 … set up a new tribunal, the Residential Tenancy Commission, to oversee and enforce the obligations of landlords and tenants in Ontario. The tribunal is given wide-ranging powers and functions. Some of these are purely administrative in nature, for example, the Commission is charged with the obligation of informing members of the public as to their rights under the legislation. But by far the most significant role to be played is in the resolution of disputes between landlords and tenants. The mechanism for dispute resolution is triggered “upon application” by either the landlord or the tenant. In one or two circumstances the process is put in motion by application by a third party, e.g., a neighbouring tenant.

• • •

… [T]he Courts have applied an increasingly broad test of constitutional validity in upholding the establishment of administrative tribunals within provincial jurisdiction. … [I]t is now open to the Provinces to invest administrative bodies with “judicial functions” as part of a broader policy scheme. …

The teaching of *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] AC 134, *Tomko v. Labour Relations Board (Nova Scotia)*, [1977] 1 SCR 112, and *City of Mississauga v. Regional Municipality of Peel*, [1979] 2 SCR 244 is that one must look to the “institutional setting” in order to determine whether a particular power or jurisdiction can validly be conferred on a provincial body.

The Privy Council in *John East*, *supra*, suggested that the application of s. 96 required a determination as to whether or not the powers being exercised were judicial or administrative and if judicial, whether or not the administrative body was “broadly analogous” to a Superior, District or County Court. *Tomko* added a further dimension. An administrative tribunal may be clothed with power formerly exercised by s. 96 Courts, so long as that power is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If, however, the impugned power forms a dominant aspect of the function of the tribunal, such that the tribunal itself must be considered to be acting “like a Court,” then the conferral of the power is *ultra vires*.

The jurisprudence since *John East* leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation. This temporary segregation, or isolation, of the impugned power is not for the purpose of turning back the clock .... It is rather the first step in a three step process.

If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 Courts, that is the end of the matter. As Rand J noted in *A.E. Dupont et al. v. Inglis et al.*, [1958] SCR 535 at p. 542: “Judicial power, not of that type [that is, that exercised by s. 96 Courts at Confederation], such as that exercised by inferior Courts, can be conferred on a Provincial tribunal whatever its primary character.” If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 Courts at Confederation, then one must proceed to the second step of the inquiry.

Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. .... Thus the question of whether any particular function is “judicial” is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a “judicial capacity.” To borrow the terminology of Professor Ronald Dworkin, the judicial task involves questions of “principle,” that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of “policy” involving competing views of the collective good of the community as a whole: see Dworkin, *Taking Rights Seriously* (1977), at 82-90 (Duckworth).

If, after examining the institutional context, it becomes apparent that the power is not being exercised as a “judicial power” then the inquiry need go no further for the power, within its institutional context, no longer conforms to a power or jurisdiction exercisable by a s. 96 Court and the provincial scheme is valid. On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the

third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. The phrase—"it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears"—is the central core of the judgment in *Tomko*. ... *Tomko* leads to the following result: it is possible for administrative tribunals to exercise powers and jurisdiction which once were exercised by the s. 96 Courts. It will all depend on the context of the exercise of the power. It may be that the impugned "judicial powers" are merely subsidiary or ancillary to general administrative functions assigned to the tribunal (*John East, Tomko*) or the powers may be necessarily incidental to the achievement of a broader policy goal of the Legislature (*Mississauga*). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (*Farrah*) so that the tribunal can be said to be operating "like a s. 96 Court."

• • •

Implicit throughout the argument advanced on behalf of the Attorney-General of Ontario is the assumption that the Court system is too formal, too cumbersome, too expensive and therefore unable to respond properly to the social needs which the *Residential Tenancies Act*, 1979 is intended to meet. All statutes respond to social needs. The Courts are not unfamiliar with equity and the concepts of fairness, justice, convenience, reasonableness. Since the enactment in 1976 of the legislation assuring "security of tenure" the County Court Judges of Ontario have been dealing with matters arising out of that legislation, apparently with reasonable dispatch, as both landlords and tenants in the present proceedings have spoken clearly against transfer of jurisdiction in respect of eviction and compliance orders from the Courts to a special commission. It is perhaps also of interest that there is no suggestion in the material filed with us that the Law Reform Commission favoured removal from the Courts of the historic functions performed for over 100 years by the Courts. ...

[Dickson J applied the first, historical, test to the statutory provisions that empowered the commission to make an eviction and compliance order. He noted that "prior to 1867 in Upper Canada the only tribunals which could make ejection orders were the Court of Queen's Bench, the Court of Common Pleas, and the County Court in limited situations, and that only the Court of Chancery could make orders of specific performance or issue mandatory or prohibitory injunction orders. The settlement of disputes between landlords and tenants, including the termination of tenancies and eviction of tenants, had thus always been within the exclusive jurisdiction of the Superior, District and County Court judges both before and after Confederation."]

In considering the second stage of the test, the chief justice pointed out that the power to order a remedy would "be exercised in the context of a *lis* between parties ... [and] the task of the Commission will be to determine the respective rights and obligations of the parties according to the terms of the legislation." To this end, the commission was required to analyze the law, apply the law to the facts, make a decision and issue an order. Dickson J concluded that "[i]n substance the tribunal is exercising judicial powers roughly in the same way as they are exercised by the courts." Other processes all reflected judicial procedures. Thus the commission's judicial powers, when examined in their institutional setting, remained "essentially" judicial powers.

With respect to the third stage of the test, Dickson J stated that “the central function of the Commission is that of resolving disputes, in the final resort by a judicial form of hearing between landlords and tenants.” The power to mediate was of secondary importance, available only on application by one of the parties, and other powers are either “ancillary” or “bear no relation” to the core power of adjudication.

Accordingly, the impugned provisions were held to be inconsistent with the strictures set down by s 96 and the appeal was dismissed.]

*Appeal dismissed.*

## NOTES

1. The *Residential Tenancies* test has become the basic methodological tool for determining compliance with s 96, with refinements added in later cases. As you read cases that apply and develop this test, extracted below, consider whether the test provides a sufficiently precise tool to differentiate between the adjudicative function allocated to superior courts, on the one hand, and the powers allocated to inferior courts and administrative tribunals, on the other. Consider whether each step of the test is applied consistently and whether the separate steps are sufficiently differentiated. Also consider whether the second and third stages of the test are suitable to apply to inferior courts.

Peter Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough, Ont: Carswell, 2007) (loose-leaf) at 7-49, takes the view that while the test

is no doubt a sound synthesis of the prior case law ... it is not satisfactory as constitutional-law doctrine. Each of the three steps is vague and disputable in many situations, and small differences between the provinces in their history or institutional arrangements can spell the difference between the validity and invalidity of apparently similar administrative tribunals.

For another critical assessment see Robin Elliot, “Rethinking Section 96: From a Question of Power to a Question of Rights” in Denis N Magnusson & DA Soberman, eds, *Canadian Constitutional Dilemmas Revisited* (Kingston, Ont: Institute of Intergovernmental Relations, 1997).

2. In *Re Attorney General of Quebec and Grondin*, [1983] 2 SCR 364, the Supreme Court of Canada rejected a challenge to powers allocated to a Quebec tribunal, the Régie du logement, with respect to residential tenancies. The court reached this result on the basis of the historical record in this case, despite the similarity in functions to those considered in *Re Residential Tenancies Act*. This record established that jurisdiction over relations between lessors and lessees in Quebec at Confederation was exercised by inferior courts as well as superior courts.

---

In *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal*, which follows, Wilson J addressed a number of concerns arising from the application of the historical test. In particular, she analyzed whether it was acceptable that the historical evaluation rendered divergent results in different provinces given that one of the reasons for s 96 was to standardize the superior court system across the country.

**Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (NS)**[1989] 1 SCR 238

WILSON J (Dickson CJ and McIntyre and Lamer JJ concurring):

The respondent Sobeys Stores Limited (“Sobeys”) operates a chain of grocery supermarkets in the Atlantic provinces. The appellant Clifford Yeomans was continuously employed by Sobeys ... [for ten years] when he was dismissed for alleged unsatisfactory performance. ...

Yeomans complained to the Director of Labour Standards for Nova Scotia that he had been dismissed “without just cause” within the meaning of s. 67A of the Code [*Labour Standards Code*, SNS 1972, c. 10]. On May 22, 1984 the Director ordered that Yeomans be reinstated and that Sobeys pay him \$21,242 in lost wages stemming from the unjust dismissal. This decision was upheld by the Labour Standards Tribunal. Sobeys’ [direct] appeal to the Appeal Division of the Nova Scotia Supreme Court was allowed. The court held that ss. (2) and (3) of s. 67A of the Code were unconstitutional because they conferred a s. 96 power on a provincially appointed tribunal. ...

[Section 67A of the Code stated that an employee discharged or suspended without just cause may complain to the director and, if dissatisfied with the director’s decision, may complain to the tribunal. It further provided:]

- 24(1) The Tribunal in determining any matter under this Act
  - (a) shall decide whether or not a party has contravened this Act; and
  - (b) shall make an Order in writing.
- (2) Where the Tribunal decides that a party has contravened a provision of this Act the Tribunal may order the contravening party to
  - (a) do any act or thing that, in the opinion of the Tribunal, constitutes full compliance with the provision; and
  - (b) rectify an injury caused to the person injured or to make compensation therefor.

Appeals from Tribunal decisions are permitted by s. 18(2):

- 18(2) Any party to an order or decision of the Tribunal may, within thirty days of the mailing of the order or decision, appeal to the Appeal Division of the Supreme Court on a question of law or jurisdiction.

[Wilson J began her analysis by asking whether the Labour Standards Tribunal’s jurisdiction over unjust dismissal was in broad conformity with the powers of s 96 courts at the time of Confederation. In the course of this analysis she considered three problems. The first was the specificity of the characterization of the function.]

In argument before this Court both the Attorney General for Nova Scotia (appellant) and the respondent Sobeys initially characterized the jurisdiction under s. 67A as jurisdiction in relation to the equitable remedy of specific performance of employment contracts. Each argued that such a characterization would be determinative in his favour, the appellant because traditionally the courts did not grant such a remedy and the respondent

because the remedy, whether actually granted or not, was equitable and therefore clearly part of the exclusive jurisdiction of superior courts at Confederation. This was not, however, the only characterization offered to the Court. When the argument progressed to the second and third stages of the *Residential Tenancies* test [Re *Residential Tenancies Act*, [1981] 1 SCR 714], the same parties suggested broader characterizations such as “unjust dismissal,” “employer–employee relations” and “labour standards.” Counsel for the other appellant, Yeomans, argued consistently throughout that the jurisdiction was over “master–servant relations.” [Hart JA, in the Appeal Division, characterized s. 67A as a provision relating to “unjust dismissal.”]

• • •

... The purposes of s. 96 require a strict, that is to say a narrow, approach to characterization at the first stage. Given what I have to say below on concurrent superior/inferior court jurisdiction at Confederation, any other approach would potentially open the door to large accretions of jurisdiction and thereby defeat the purposes of the constitutional provision. I would therefore reject as too broad characterizations of the s. 67A jurisdiction as being in relation to employer/employee relations or labour standards.

Having rejected broad characterizations, the court is given a choice between two possible narrow ones, jurisdiction over reinstatement or jurisdiction over unjust dismissal. ...

I would ... resolve the issue by reference to the language and purpose of the *Residential Tenancies* test. At the first stage the search is for “broad conformity” with the powers of s. 96 courts at Confederation. It is a search for analogous, not precisely the same, jurisdiction. Even if I were to accept the appellant’s contention that the remedy of reinstatement was outside the purview of s. 96 courts. ... I do not think that should be determinative in s. 96 cases. To do so would be to freeze the jurisdiction of those courts at 1867 by a technical analysis of remedies. It is, in my view, the type of dispute that must guide us and not the particular remedy sought. The question of new remedies for traditional causes of action is better suited to the second and third steps of the *Residential Tenancies* test which are specifically designed to allow the courts to consider new approaches to old problems, approaches which are more responsive to changing social conditions. Thus, the jurisdiction in this case should, in my view, be characterized as jurisdiction in relation to unjust dismissal.

The fact that the different stages of the *Residential Tenancies* test serve different purposes also, in my view, militates against any “broadening” of the characterization as the analysis progresses from one stage to another. The characterization chosen is irrelevant to a consideration at stage two of whether the Tribunal is functioning judicially or not. A broad characterization at the third stage would be equally unnecessary because this aspect of the test requires the courts to view the particular power or jurisdiction within a broad context. Thus, in this case, for example, a broadening of the characterization to “labour standards” would require the court to assess whether such a power or jurisdiction is “so integrated with the valid regulatory regime” (*Residential Tenancies*, p. 736) of labour standards legislation as to take on a different character. The inquiry would have become a tautological one and the *Residential Tenancies* test would be deprived of its essential purpose.

[Wilson J next considered whether the superior court jurisdiction at the time of Confederation must be an exclusive jurisdiction.]

... [A] certain gloss must be added to the *Residential Tenancies* test. At the first step, the threshold question is whether at Confederation superior courts exercised an exclusive jurisdiction. This test accords with the general principle that inferior court jurisdiction need not be frozen at its pre-Confederation level: see *Re Cour de Magistrat de Quebec*, [1965] SCR 772. If the jurisdiction was exclusive to superior courts, then the inquiry must pass on to the second and third stages of the test. If the jurisdiction was shared, the legislation under challenge may, in some circumstances, be held valid by the historical test.

How much concurrent jurisdiction is necessary for the purposes of the test? It would obviously largely defeat the purpose of s. 96 if a finding of one small aspect of jurisdiction, limited, for example, by subject matter, geography or monetary amount, in an inferior court were sufficient to permit legislatures to oust the jurisdiction of today's superior courts. However, the dangers of this are not as great as they might at first sight appear, given what I have said earlier about the need to characterize the power or jurisdiction relatively narrowly for the purposes of the historical test. ....

In all cases, however, the inquiry should be directed to the question whether or not the work of the inferior courts at the time of Confederation was broadly co-extensive with that of the superior courts. Only if this standard is met will the history of shared jurisdiction validate the contemporary scheme under the historical test.

[Wilson J then considered the geographic scope of the historical inquiry.]

... It seems to me that this issue should be resolved by answering a somewhat broader question—does pre-confederation jurisdiction refer to pre-1867 jurisdiction or to jurisdiction in a particular province immediately prior to that province joining confederation? If the former approach is adopted, the courts must consider only the four original confederating provinces (Quebec, Ontario, Nova Scotia and New Brunswick) irrespective of which present-day province is involved in the litigation. If the latter approach is adopted, the test will involve perhaps only one colony, perhaps as many as eight, and a potential chronological span of as many as 72 years, from 1867 to 1949. I note that on all of these points past decisions of this Court have been somewhat inconsistent. ....

In resolving this issue I take as my starting point this Court's decision in *Residential Tenancies*. In describing the historical test Dickson J had this to say at pp. 729 and 734:

• • •

... the test must now be formulated in three steps. The first involves consideration, *in the light of the historical conditions existing in 1867*, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. [Emphasis added.]

Although it might be argued that the references to 1867 [in the *Residential Tenancies* case] ... were the result of the fact that [that case] emanated from Ontario, I think the better view is that they were intended to refer generally to the original bargain made in 1867. ....

I would ... note two further points. Firstly, the judgment of this Court in *Reference re Section 6 of [B.C.] Family Relations Act*, [1982] 1 SCR 62, 131 DLR (3d) ... provides clear evidence that the Court at that time thought it necessary to look at jurisdiction at 1867 when the confederation bargain was made. Secondly, in his discussion of the purposes of s. 96

Dickson J made it clear that he saw the provision as one intimately related to the division of powers and to the need to maintain a guaranteed core of superior court jurisdiction. ...

... When new provinces joined confederation they accepted the existing constitutional arrangements in ss. 91 and 92 and must, in my view, be taken to have done the same with s. 96.

[T]he *Residential Tenancies* test of 1867 jurisdiction should be expanded somewhat to include examination of the general historical conditions in all four original confederating provinces. I say this for two reasons. The first is a practical one. While it might make sense to examine only Ontario in an Ontario case (as was done in *Residential Tenancies*) or Quebec in a Quebec case ... there would be no reason to choose one or the other in deciding a case emanating from Alberta, Prince Edward Island or elsewhere.

The second and more important reason is that implicit in what I have said above is the principle that s. 96 should apply in the same way across the country. The “strong constitutional basis for national unity, through a unitary judicial system” (*Residential Tenancies*, p. 728) would indeed be undermined by inconsistent results derived from a jurisprudence developed province by province. ...

I do not wish to suggest that there must be uniformity of result for all s. 96 challenges to provincial initiatives in a given area. It is entirely possible that different results may emerge from analyzing contemporary schemes in light of the second and third stages of the *Residential Tenancies* test. I am suggesting only that consistency at the level of the historical analysis would seem to be desirable and that it is best achieved by measuring each s. 96 challenge against the same historical yardstick. The test at this stage should be national, not provincial.

[In case of a tie, as there was in this case, Wilson J stated that the court should “examine jurisdiction in the United Kingdom at the time of Confederation.” She held that “jurisdiction over unjust dismissal in the UK in 1867 was the preserve of courts equivalent to Canada’s superior, district and county courts. It is, accordingly, not a power or jurisdiction which may be conferred on provincially appointed tribunals today.”]

Wilson J then went on to the second stage of the test, to examine the judicial function of the Labour Standards Tribunal. After considering the various submissions, she concluded that “the tribunal [was] acting sufficiently like a court that it [could] not pass this stage of the test.” It was not until she examined the institutional setting within which the judicial function was being exercised that she concluded: “[A]lthough the Labour Standards Tribunal exercises a jurisdiction broadly conformable to that of s. 96 courts at the time of Confederation, and although in doing so it performs a judicial function, it does so as a necessarily incidental aspect of the broader social policy goal of providing minimum standards of protection for non-unionized employees.”

La Forest J concurred in the result, but disagreed with Justice Wilson’s reasoning. He addressed the policy question first and came to the conclusion that the Labour Standards Tribunal was part of a legislative package whose “underlying social and economic philosophy ... could not be in sharper contrast to that which existed at Confederation.” This meant that the Tribunal passed the first stage in the *Residential Tenancies* test for reasons not dissimilar to those followed by the Privy Council in *John East*.]

*Appeal allowed.*

A methodological disagreement similar to that between Wilson and La Forest JJ in *Sobeys* arose in *Reference re Young Offenders Act (PEI)*, [1991] 1 SCR 252. Although the court unanimously determined that the creation of (provincial) youth courts with jurisdiction to try young offenders did not contravene s 96, it provided three conflicting sets of reasons supporting this result. There was consensus in characterizing the Youth Court's jurisdiction as novel, and therefore not protected by s 96. Five of the justices reached this result based on the application of the first stage of the *Residential Tenancies* test (although they disagreed among themselves on another matter), while two relied on the third stage.

As Wilson J recognized in *Sobeys*, the stage at which one reaches a decision can be determined by the characterization of the judicial function under examination. This was evident in *John East*, where the characterization of the legislation as relating to labour unions, which did not exist in 1867, rather than to individual contracts of employment, which did, appeared to be dispositive.

Judges have had difficulty in coming to agreement when differentiating between historical and novel jurisdiction, as the case that follows illustrates.

### Reference re Amendments to the Residential Tenancies Act (NS) [1996] 1 SCR 186

McLACHLIN J (La Forest, L'Heureux-Dubé, Iacobucci, and Major JJ concurring):

[70] The impugned provisions of the *Residential Tenancies Act*, RSNS 1989, c. 401 ... provide a mechanism for the resolution of first- and second-level residential tenancy disputes. The legislation gives the provincially appointed Director of Residential Tenancies and his delegates the power to investigate, mediate and adjudicate disputes between landlords and their residential tenants. It empowers the Director to make orders for compliance, termination, repair and possession. The Director's order may be appealed to the Board, and an order of the Board may be appealed, with leave, to the Appeal Division of the Supreme Court of Nova Scotia on questions of law or jurisdiction. If there is no appeal, an order is deemed to be an order of the Board, which in turn may be entered as an order of the court under s. 21 of the Act.

[71] The jurisdiction of the Director and Board is exclusive. All residential tenancy disputes must be determined by the procedure specified in the Act and, except for formally entering orders and its limited appellate jurisdiction, the superior court has no power to determine them.

[After surveying the situation in each of the four original provinces, McLachlin J concluded: "In every former colony inferior courts exercised a significant concurrent jurisdiction at or about the time of Confederation. It follows that the Nova Scotia House of Assembly's conferral of jurisdiction over residential tenancies on a provincially appointed tribunal does not violate s. 96 of the *Constitution Act, 1867*."

Lamer CJ, supported by Sopinka and Cory JJ, came to the opposite conclusion, based on their characterization of the administrative arrangements as a "novel jurisdiction." Although landlord-tenant law was not novel, the concept of a "residential tenancy" was a modern phenomenon related to urban life. The Act had, in effect, "carved out a distinct branch of landlord-tenant law and developed a complete code to govern the residential

tenancy relationship” as a matter of social policy, rather than “land law or the law of contract and tort.” The director’s role was to oversee “a high volume of repetitive and narrowly defined matters of limited complexity [that were] amply suited to resolution by lay persons applying the rules with fairness and common sense.” This function did not lie within the “core powers” of s 96 courts, but rather displayed “the hallmarks of the cases entertained by many pre-Confederation inferior courts.”

Although it was not necessary to her disposition of the appeal, McLachlin J, in reasons that enjoyed the support of a majority of the court, deliberated on and rejected the characterization of the powers in question as a novel jurisdiction. In her assessment, the legislation offered “simply a reorganization for administrative reasons of a jurisdiction which has been exercised by superior and inferior tribunals in Canada since before Confederation.”]

[96] The adjudicative aspects of the legislation in this case are fundamentally similar to those in *Re Residential Tenancies Act* and *Re Attorney General of Quebec and Grondin*, [1983] 2 SCR 364, 4 DLR (4th) 605 .... If anything, the Act provides a less comprehensive code than the Ontario scheme at issue in *Re Residential Tenancies Act*, which combined administrative provisions for rent review and an advisory bureau with those setting out the judicial functions of the Residential Tenancy Commission.

[97] The legislation here at issue codifies the existing law and establishes an impartial dispute resolution mechanism for landlords and tenants. Both the Director and the Board decide disputes between the parties. The parties present evidence and make submissions. Appeals are allowed and orders can be enforced by the parties as orders of the court. This is exactly the sort of work courts have traditionally done in relation to residential tenancy disputes. One looks in vain for the additional powers that may serve to make new soup of this old broth. Unlike the Director of Labour in *Sobeys*, the Director here does not have “carriage of the action” before the Board. The Director does not enforce standards or advocate on behalf of a group that the legislation protects. The Act proclaims no new policy aims to guide the Director or Board in interpreting and enforcing the Act. Nor does it consolidate and unify a disparate assemblage of statutes in order to present a comprehensive and principled new scheme of protection. Indeed, the 1992 amendments removed the Board’s previous authority under s. 18(4) of the Act to “provide and disseminate information concerning rental practices, rights and remedies” and to “give advice and direction to landlords and tenants in disputes”: *An Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act*, s. 8(2).

[98] Lamer CJC in *Reference Re Young Offenders Act* and La Forest J in *Sobeys* identified organizing principles and philosophies in the respective legislative schemes under consideration in those cases which were distinctly different from the conceptual basis for the powers exercised by the courts at the time of Confederation. A rehabilitative regime designed specifically for young offenders can be seen as novel in comparison with the criminal law of the 19th century, which emphasized punishment scaled to the crime regardless of the miscreant’s age [rather than rehabilitation]. Similarly, a labour relations code calculated to extend many of the benefits of collective bargaining to unorganized workers might be construed as creating an innovative jurisdiction, a finding consistent with the conclusion of the Privy Council in *John East*. By contrast, the legislation here at issue evinces no new defining social purpose capable of transforming traditional s. 96 powers into something so new and different that they defy the search for pre-Confederation antecedents.

[99] The Chief Justice bases his case for novel jurisdiction on the premise that the concept of residential tenancy is “largely a phenomenon of *modern* and *urban* society” .... However, while there is little doubt that the process of urbanization has increased the number of residential tenants living in cities, the number of people renting premises as a percentage of the total population appears to have remained relatively constant over the years. Indeed, the respondent cites census figures which show that the proportion of renters actually declined by 4 percent from 1921 to 1991.

[100] More importantly, it is difficult, with respect, to see how the increased urbanization of residential tenancy suffices to transform the subject matter of the jurisdiction. One might make the same argument with respect to crime. There was much less crime at the time of Confederation. Moreover, crime today, unlike then, is largely an urban phenomenon. Does this mean that the powers courts exercise in modern criminal trials are not analogous to the powers courts exercised in criminal trials before 1867? Moreover, the significance of the distinction between urban and agricultural residential leases is difficult to grasp. The legislation applies to both, and bears no evidence of being directed at a peculiarly urban problem. Residential leases may be properly contrasted with commercial leases, but not with rural leases, which often were and are concerned with residential premises. As well, it is clear that residential tenancy disputes arose with enough frequency in urban areas before Confederation to warrant empowering strictly urban courts, like the Halifax City Court, to deal with such disputes. ... While neither the common law nor statute singled out residential tenancies in 1867, that does not mean they did not exist, or that disputes were not resolved by the ordinary application of the law.

[101] The Chief Justice also suggests that the consolidation of residential tenancy remedies in legislation somehow changes the essential subject matter: “[T]he purpose of the Nova Scotia statute—to provide a complete and comprehensive code to govern residential tenancies—“would have sounded strange to the ears of the legislature of 1867.” ... So, one might venture, would the notion of a criminal code have sounded strange to 1867 ears; criminal codes were first introduced at the turn of the century and still sound strange to some English ears. Codifying law cannot by definition create a new jurisdiction, since codification necessarily presumes the jurisdiction previously existed. Covering an existing body of law with a new statutory wrapper does not make it novel.

[102] The Chief Justice suggests that the jurisdiction is novel because it moves away from the contractual and leasehold bases of landlord–tenant law, arguing that the legislation at issue “represented a shift towards the policy view that the law respecting residential tenancies should be neither leasehold nor contractual but rather should involve a distinct, comprehensive statutory code governing the residential tenancies relationship.” ... But, as Dickson J cautioned in *Re Residential Tenancies Act*, “[M]ere alteration in rules cannot change the substance of things or prevent the drawing of analogies” (p. 738 SCR). The fact that “different considerations” might guide the Director and Board in the discharge of their adjudicative functions, and the rules governing those responsibilities may have been “altered somewhat since 1867,” cannot detract from the inescapable conclusion that the powers at issue “are not merely analogous to those (pre-1867) powers but are the same powers” (p. 737 SCR).

[103] Moreover, the Act does not fundamentally change the leasehold and contractual nature of residential tenancies. The Act does not substitute fundamentally new statutory duties for the principles of contract and property law. The lease still governs the rights

and obligations of the parties. The lease is a contract. This contract defines and assigns the rights and obligations of the lessor and lessee, owner and fix-term occupant, two *personae* well known to property law. Disputes are still resolved by interpreting the lease and applying it to the evidence. The legislation simply ensures that certain terms which may or may not have been consensually reached by the parties to the lease are included as a matter of statute. Standardized statutory terms themselves have become well known to property and contract law.

[104] It may also be noted that the vast majority of the terms imposed by the legislation here at issue would have been express or implied in leases of the 19th century: for example, the landlord is held responsible for keeping the premises in a “good state of repair,” and the tenant is obliged to maintain the ordinary cleanliness of the interior. Some terms reflect relatively recent innovations of the common law—for example, the obligation to mitigate upon abandonment—but do not represent a doctrinal transmogrification; their incorporation simply mirrors incremental adjustments to the common law of leases. While the fact that the parties cannot contract out of these statutory conditions may represent an attempt to redress the imbalance of power inhering in the landlord–tenant relationship, this does not change the fact that the medium by which this is done is the traditional law of contract and lease. The relationship of landlord to residential tenant continues to be based on property law and the law of contract and tort, whether it is expressed through the common law or in statutes.

[105] Finally, the Chief Justice alludes to the policy goals of the legislation as a basis for inferring novel jurisdiction. Again, the imposition of a few new obligations cannot suffice to create a new jurisdiction; it is difficult to think of a legislative scheme or statute that does not do this. Nor is the fact that the legislation apparently seeks to address a perceived social priority sufficient to create a new jurisdiction; again, most legislative schemes do so. What is required to create a new jurisdiction is a unifying concept or goal, and a sufficiently novel philosophy to belie any analogy with the powers previously exercised by superior courts. The legislation at issue here does not, in my respectful view, meet this test.

[106] I have treated the issue of novel jurisdiction at some length out of a concern that too liberal an application of this concept may trivialize the three-part test for conferring superior court powers on provincially or federally appointed bodies. The factors cited in this case in support of the novel jurisdiction argument have the potential to permit any transfer of s. 96 powers to inferior tribunals. Virtually all types of disputes regulated by the superior courts at the time of confederation can be argued to have become modernized or urbanized. There are few social problems which came before the courts at the time of Confederation which have not been subjected to legislation effecting changes in the property law or contract law by which alone they were once regulated. The subdivision and amalgamation of subjects through codification in more comprehensive legislation, and the proclamation of new goals and priorities, are the routine stuff of every legislative and parliamentary agenda, year after year. If these are the criteria for novel jurisdiction, there must be little that cannot be removed from the s. 96 courts with impunity.

[107] On a theoretical level, reliance on arguments of legislative policy in support of novel jurisdiction may be seen as conflating the first and third steps of the three-part test for infringement of s. 96. As noted, the purpose of the first two steps is to identify whether the law is one which has the potential to deprive the superior courts of the powers the

Fathers of Confederation intended them to have. In keeping with this limited purpose, the issue at step one is best confined to an objective comparison of the nature of the powers conferred on the inferior tribunal and the powers exercised by superior courts at the time of Confederation to see if these powers are analogous. If they are, and if they are also shown to be judicial in nature as required by step two, the reviewing court passes to the third stage of the analysis to determine whether the analogous judicial power is transformed by the new legislative and administrative context in such a way that it is no longer a s. 96 power, but rather a power that is ancillary or necessarily incidental to the new scheme or legislative goal: *Re Residential Tenancies Act, supra*. To conclude at the outset that the administrative scheme or legislative goal makes the jurisdiction novel is to decide the entire issue of constitutionality at the first stage, without ever asking whether the power is merely ancillary to the administrative scheme or necessarily incidental to an otherwise valid legislative goal. This is not to say that a jurisdiction which is truly novel, either in the sense that new powers are being exercised or that the legislation reflects an entirely new approach to traditional concerns, should not be validated as insufficiently analogous to the powers exercised by the superior courts before Confederation. It is to say that the three-part test that this Court has scrupulously followed for fifteen years is perfectly capable of ensuring the fulfillment of that objective. ...

[108] I conclude that the powers conferred on the Director of Residential Tenancies and the Residential Tenancies Board by the Act cannot violate s. 96 of the *Constitution Act, 1867* because they were not within the exclusive purview of the superior courts at the time of Confederation. Accordingly, I would allow the appeal and dismiss the cross-appeal. ...

*Appeal allowed.*

## B. Section 96 Constraints on Parliament

The s 96 cases examined so far have addressed restrictions on the assignment by provincial legislatures of functions to provincially appointed tribunals and, in some instances, to provincial inferior courts. In recent years, the Supreme Court has extended the s 96 restrictions to Parliament, stating that "Parliament can no more give away federal constitutional powers than a province can usurp them."

By extending the reach of s 96 to restrict Parliament, the court has affirmed the idea that the provincial superior courts possess a "core" or "inherent" jurisdiction beyond the reach of any legislative action. In some instances, the jurisdiction is characterized historically, as dating from Confederation. In other instances, it is characterized institutionally, as the "hallmark" or "essence" of superior court jurisdiction. These characterizations evoke the constitutional principle of the separation of powers, which requires a demarcation between judicial, legislative, and executive authority in order to preserve the rule of law and the independence of the judiciary.

The case law has typically addressed the permissibility of an assignment by Parliament of criminal law jurisdiction, under s 91(27) of the *Constitution Act, 1867*, to a court other than a superior court. In the *McEvoy, Reference re Young Offenders Act (PEI)*, and *MacMillan Bloedel* cases discussed in more detail below, the issue was the permissibility of the transfer by Parliament of traditional superior court jurisdiction over criminal trials to a provincial inferior

court. The idea was to create a “unified criminal court” that combined the criminal jurisdiction of the provincial inferior and superior courts. Such a court, its supporters argued, would abandon the hierarchical system of inferior and criminal courts, provide a more general approach to independence of the judiciary, streamline the complexity of the design of the judiciary set at Confederation, and provide an opportunity to rationalize criminal procedure.

**McEvoy v Attorney General of New Brunswick and**

**Attorney General of Canada**

[1983] 1 SCR 704

THE COURT (Laskin CJ and Ritchie, Dickson, Beetz, Estey, Chouinard, and Wilson JJ):

This is an appeal from a unanimous judgment of the New Brunswick Court of Appeal, delivered by Hughes CJNB, answering in the affirmative three questions put before that court on a reference by the provincial Lieutenant-Governor in Council pursuant to s. 23(1) of the *Judicature Act*, RSNB 1973, c. J-2, as amended. The questions ... [relate to the proposal to establish] a unified criminal court in New Brunswick.

[The questions asked:

1. Is it constitutionally permissible for Parliament to confer exclusive jurisdiction on a provincial inferior court to try all indictable offences under the *Criminal Code*?
2. Is it constitutionally permissible for Parliament to confer jurisdiction on a provincial inferior court to try all indictable offences under the *Criminal Code* if that jurisdiction is concurrently held by the provincial superior courts?
3. Is it constitutionally permissible for a provincial legislature to create an inferior court to exercise jurisdiction from Parliament to try all indictable offences under the *Criminal Code*, if that jurisdiction is exclusive? If that jurisdiction is concurrent with that exercised by the provincial superior courts?]

... The New Brunswick Court of Appeal answered all three questions in the affirmative.

In general terms the issue is whether s. 96 of the *Constitution Act, 1867* is a bar to a plan whereby the federal government and a provincial government would by conjoint action transfer the criminal jurisdiction of provincial superior courts to a new court to be called the “unified criminal court” the judges of which would be provincially appointed.

• • •

There is no doubt that jurisdiction to try indictable offences was part of the superior court’s jurisdiction in 1867; none of the parties suggests otherwise. Nor does anyone argue that inferior courts had concurrent jurisdiction to try indictable offences in 1867. Although this fact is not conclusive (see *Reference re Residential Tenancies Act*, [1981] 1 SCR 714, none of the other considerations which might save the scheme from the force of s. 96 apply here. The proposed court is obviously a judicial body; its judicial aspect does not change colour when considered in the factual setting in which the court will operate; nor will the court exercise administrative powers to which its adjudicative functions are incidental. The proposed body is clearly and only a criminal court.

• • •

... It has long been the rule that s. 96, although in terms an appointing power, must be addressed in functional terms lest its application be eroded. ... [A]s we view the matter, the result is to defeat the new statutory court because it will effectively be a s. 96 court.

Sections 96, 97, 98, 99 and 100 are couched in mandatory terms. They do not rest merely on federal statutory powers as does s. 91(27). ...

What is being contemplated here is not one or a few transfers of criminal law power, such as has already been accomplished under the *Criminal Code*, but a complete obliteration of superior court criminal law jurisdiction. Sections 96 to 100 do not distinguish between courts of civil jurisdiction and courts of criminal jurisdiction. They should not be read as permitting the Parliament of Canada through use of its criminal law power to destroy superior courts and to deprive the Governor-General of appointing power and to exclude members of the bar from preferment for superior court appointments.

Parliament can no more give away federal constitutional powers than a province can usurp them. ... Section 96 bars Parliament from altering the constitutional scheme envisaged by the judicature sections of the *Constitution Act, 1867* just as it does the provinces from doing so.

The traditional independence of English superior court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act, 1982* and cannot have less importance and force in the administration of criminal law than in the case of civil matters. Under the Canadian Constitution the superior courts are independent of both levels of government. The provinces constitute, maintain and organize the superior courts; the federal authority appoints the judges. The judicature sections of the *Constitution Act, 1867* guarantee the independence of the superior courts; they apply to Parliament as well as to the provincial Legislatures.

• • •

Nor is much gained for the proposed new provincial statutory court by providing for concurrent superior court jurisdiction. The theory behind the concurrency proposal is presumably that a provincial court with concurrent rather than exclusive powers would not oust the superior courts' jurisdiction, at least not to the same extent; since the superior courts' jurisdiction was not frozen as of 1867, it would be permissible to alter that jurisdiction so long as the essential core of the superior courts' jurisdiction remained; s. 96 would be no obstacle because the superior court would retain jurisdiction to try indictable offences. With respect, we think this overlooks the fact that what is being attempted here is the transformation by conjunct action of an inferior court into a superior court. Section 96 is, in our view, an insuperable obstacle to any such endeavour.

• • •

It is hardly necessary to say that the proposed provincial scheme is not saved by preserving civil jurisdiction for the provincial superior courts.

• • •

We would, therefore, allow the appeal and answer all three questions in the negative. There will be no order as to costs.

*Appeal allowed.*

Several questions remained unanswered after *McEvoy*. First, does s 96 prevent Parliament from transferring judicial functions from provincial superior courts to federal courts (also considered superior courts) established by Parliament under s 101? Second, is it only “whole-sale” transfers of superior court powers to inferior courts and tribunals, as in *McEvoy*, that are beyond Parliament’s competence? In other words, are “piecemeal,” or modest, transfers permissible? (These issues are discussed in Robin Elliot, “Case Comment, New Brunswick Unified Criminal Court Reference” (1984) 18 UBC L Rev 127.)

#### **NOTE: REFERENCE RE YOUNG OFFENDERS ACT (PEI)**

The practice of transferring portions of the jurisdiction to try criminal offences to lower courts was challenged in *Reference re Young Offenders Act (PEI)*, [1991] 1 SCR 252. The PEI Cabinet had, following the authority given to it by s 2 of the *Young Offenders Act*, SC 1980-81-82-83, c 110, designated its provincial inferior court as the Youth Court for the purposes of hearing all cases brought against a young person as defined by the Act. This transfer was held to be valid despite the partial transfer of what was formerly superior court jurisdiction to try criminal cases brought against young persons. *McEvoy* was distinguished on the basis of the novelty of a jurisdiction over offences allegedly committed by young persons—a jurisdiction that, in those terms, did not exist at Confederation.

Bur and Kehoe (Donald F Bur & Jeff K Kehoe, “Developments in Constitutional Law: The 1990-91 Term” (1992) 3 SCLR 403) object to characterizing the jurisdiction transferred to the Youth Court in terms of the current legislative policy (dealing with young persons involved with the criminal justice system) instead of the categories of historical court jurisdiction (serious crimes and less serious crimes). They take the position that it is impermissible for Parliament to empower provincial transfer of jurisdiction to try serious crimes even when committed by young persons. While properly drawing attention to the potentially determinative effect of adopting modern descriptions of jurisdiction, rather than holding to the categories of jurisdiction in place in 1867, they overlook, first, that s 96 jurisprudence specifically requires courts to give weight to novel policy objectives and, second, that the idea behind the *Young Offenders Act* is to not treat as seriously criminal the acts of young persons, even when seriously harmful.

In *Reference re Young Offenders Act*, the Supreme Court affirmed the provincial allocation of “exclusive jurisdiction” to the youth court to try young offenders. It stipulated that when a jurisdiction is characterized as “novel,” it is no longer appropriate to speak of its impermissible transfer from a superior court jurisdiction.

#### **NOTE: MACMILLAN BLOEDEL LTD v SIMPSON**

While the characterization of novelty precludes the possibility of an impermissible transfer, it appears to be possible for a novel jurisdiction to encroach on the core jurisdiction of a s 96 court. This situation arose in *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725. A young offender was charged with contempt for disobeying an injunction issued by a superior court. He was subsequently tried and convicted in a superior court. On appeal, the defence argued that because the contempt did not occur in the face of a superior court, the youth should have been tried in a youth court. The point at issue was not the power of Parliament to use its criminal law power to grant jurisdiction to provincial inferior courts, but its power

to make a grant of *exclusive jurisdiction* to such a court in the case of an offence traditionally within the jurisdiction of a superior court.

Chief Justice Lamer, writing for the majority, argued that there are certain core powers of the superior courts that cannot be transferred to other courts without a constitutional amendment. Since a grant of “*exclusive jurisdiction*” has the effect of placing the jurisdiction in question beyond the reach of the superior courts, it reduces their jurisdiction. This reduction of the core jurisdiction would require a constitutional amendment. In dissent, Justice McLachlin rejected the idea of a fixed set of immutable, non-transferrable superior court functions. She based her reasoning on the stipulation that “*a strict separation of judicial and legislative powers is not a feature of the Canadian Constitution*” (at para 52).

In *MacMillan Bloedel Ltd v Simpson*, Lamer CJ expanded on the idea of “the core or inherent jurisdiction of superior courts” in the following passages, with the support of four other justices:

[15] ... The superior courts have a core or inherent jurisdiction which ... cannot be removed from the superior courts by either level of government, without amending the Constitution. Without this core jurisdiction, s. 96 could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary. Furthermore, the power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself.

• • •

[37] ... In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.

• • •

[41] In light of its importance to the very existence of a superior court, no aspect of the contempt power may be removed from a superior court without infringing all those sections of our Constitution which refer to our existing judicial system as inherited from the British, including ss. 96-101, s. 129, and the principle of the rule of law recognized both in the preamble and in all our conventions of governance.

#### **NOTE: COOPER v CANADA (HUMAN RIGHTS COMMISSION); BELL v CANADA (HUMAN RIGHTS COMMISSION)**

More recently, in *Cooper v Canada (Human Rights Commission); Bell v Canada (Human Rights Commission)*, [1996] 3 SCR 854, Lamer CJ, concurring in the result but writing his own reasons, stated:

[10] One of the defining features of the Canadian Constitution, in my opinion, is the separation of powers. ...

There is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary. ...

[11] ... [T]he absence of a strict separation of powers does not mean that the Canadian Constitution does not recognize and sustain some notion of the separation of powers. This is most evident in the Court's jurisprudence on s. 96 of the *Constitution Act, 1867*. Although the wording of this provision suggests that it is solely concerned with the appointment of judges, through judicial interpretation—an important element of which has been the recognition that s. 96 must be read along with ss. 97-100 as part of an integrated whole—s. 96 has come to guarantee the core jurisdiction of the superior courts against legislative encroachment. As I recently noted in *MacMillan Bloedel v. Simpson*, [1995] 4 SCR 725, at 753:

*Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected.* [Emphasis added.]

As this passage makes clear, the existence of the courts is definitional to the Canadian understanding of constitutionalism.

In *Cooper*, Lamer CJ, who notably did not have the support of the court, would have used this concept of separation of powers to deny administrative tribunals the authority to adjudicate on Charter rights claims.

The position expressed by Lamer CJ is consistent with the idea, underlying the s 96 case law that the rule of law requires adjudication of certain types of disputes to be performed by judges in courts that enjoy full independence from the legislature and the executive. These disputes raise questions of the most basic of legal entitlements, with the clear historical examples being the common law rights and liberties relating to property, contract, and tort. These presuppositions support the restriction of Charter claims to superior courts.

The opposing position does not accord reduced stature for Charter rights. Rather, it emphasizes the importance of adjudicating these rights in the institutional context of the proceedings in which the claim arises. If that institutional context is an inferior court or an administrative tribunal, there are strong reasons to have the claim addressed there. It is more expeditious and less costly to have the Charter claim determined by the body that is most expert in the particular subject matter, even if the Charter expertise of the statutory adjudicator is not at the level that a superior court would provide. Disposition by the statutory adjudicator might resolve the dispute. If the dispute or the Charter claim requires further judicial consideration, there is access to judicial review or appeal to a superior court at the initiative of the losing party, based on the factual findings of the first instance adjudication.

### C. Section 96 and the Entitlement to Review and Appeal

The cases examined so far have focused on the constraints that s 96 imposes on the capacity of administrative tribunals and inferior courts to deliberate on first instance disputes. Section 96 also imposes constraints on the appellate and review functions of these statutory bodies as well as their capacity to render decisions that are not subject to appeal or review by the superior courts. These constraints reflect the traditional role of the superior courts to review the work of administrative tribunals and inferior courts for compliance with their statutory mandates.

The Supreme Court set down the basic structure of these constraints in *Crevier v AG (Québec) et al*, [1981] 2 SCR 220, excerpted below. Legislatures may create a two-stage structure

of proceedings—that is, a first instance process and an appeal process—within an administrative regime, if two considerations are satisfied. First, this arrangement must be integrated into the general policy initiative. Second, there must be no bar to judicial review of the decisions of the statutory bodies by the provincial superior courts. This stipulation rests on the characterization of the superior courts' authority to review the decisions of statutory tribunals and inferior courts as part of the irreducible core of the superior courts' jurisdiction. For federal tribunals, such review takes place within the Federal Court system.

Before turning to *Crevier*, it is important to consider *Attorney General (Que) et al v Farrah*, [1978] 2 SCR 638. The National Assembly of Quebec had enacted a two-tier regulatory regime to administer public and private transport—a Transport Commission and a Transport Tribunal. The primary role of the Transport Tribunal, which was made up of provincial judges, was to adjudicate appeals from the commission. The legislation prohibited judicial review to the provincial superior courts of commission and tribunal decisions. In *Farrah*, the Supreme Court unanimously declared this administrative structure unconstitutional.

The court determined that the tribunal was performing the function of an appellate court, given that its sole function was to hear appeals from decisions of the commission. Moreover, because the statute permitted no further appeals from the tribunal to any other judicial body, the work of the commission and the tribunal in combination constituted both original and final jurisdiction on all of the matters within their powers. This administrative arrangement breached the strictures of s 96 by vesting in provincial appointees judicial powers traditionally preserved to the provincial superior courts. Three years later in *Crevier*, with Laskin CJ, writing for a unanimous court, the ruling in *Farrah* was applied to a more elaborate Quebec administrative arrangement.

**Crevier v AG (Québec) et al**  
[1981] 2 SCR 220

[The *Professional Code* of Quebec governed 38 professional corporations, each of which was required to create a discipline committee with jurisdiction over every complaint brought under the Code. The discipline committee had a lawyer as its chair, with two members of the relevant profession as its other members. The Professions Tribunal, made up of six Provincial Court judges designated by the chief judge, received appeals from any decision of a discipline committee. It was empowered to confirm, alter, or quash any decision it reviewed.

The Code barred the application of art 33 of the *Code of Civil Procedure*, which provided that statutory bodies in Quebec “are subject to the superintending and reforming power of the Superior Court,” to proceedings under the Code.

Two members of the professional corporation for optometrists were charged with three Code offences. After conviction, one of them appealed to the Professions Tribunal, which decided that the discipline committee had acted beyond its authority in deciding that an offence had been committed. *Crevier*, on behalf of the optometrists' corporation, sought to have the decision of the Professions Tribunal set aside on the ground that its powers violated s 96 of the *Constitution Act, 1867*. His application succeeded in Quebec Superior Court, but the Quebec Court of Appeal upheld the decision of the Professions Tribunal.]

LASKIN CJ (Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, and Lamer JJ concurring):

The Court of Appeal majority viewed the preclusive words of s. 194 [which shielded the decision of the Professions Tribunal from review] as not touching the power and right of the Superior Court to issue a writ of evocation where there has been a want or excess of jurisdiction. Section 194 itself, however, does not recognize this supervisory authority of the Superior Court. If it did ... it would not be tainted as exercising a power belonging to a s. 96 court by an initial but reviewable conclusion that a Discipline Committee had exceeded its jurisdiction. That is not this case, having regard to the embracive terms of s. 194 of the *Professional Code*. Even if it were otherwise and the supervisory authority of the Superior Court on questions of jurisdiction was expressly preserved, it would still not be a complete answer to a contention that the Professions Tribunal is exercising powers more conformable to those belonging to a s. 96 court than those properly exercisable by a provincial administrative or quasi-judicial tribunal or even a provincial judicial tribunal.

• • •

Three issues arise from the reasons in the Court of Appeal. The first, which I think may be quickly disposed of ... [is that] the Professions Tribunal is given no function other than that of a general tribunal of appeal in respect of all professions covered by the *Professional Code* and it is, therefore, impossible to see its final appellate jurisdiction as part of an institutional arrangement by way of a regulatory scheme for the governance of the various professions. The Professions Tribunal is not so much integrated into any scheme as it is sitting on top of the various schemes and with an authority detached from them ....

• • •

The second issue ... concerns the effect upon s. 96 of a privative clause of a statute which purports to insulate a provincial adjudicative tribunal from any review of its decisions. Is it enough to deflect s. 96 if the privative clause is construed to preserve superior court supervision over questions of jurisdiction, and if (as in this case) such a construction is not open because of the wording of the privative clause, is the clause constitutionally valid? In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions ... such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court. ....

• • •

It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. ... I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.

• • •

... Where ... questions of law have been specifically covered in a privative enactment, this Court ... has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

The third issue ... relates to the impact of the *Farrah* [AG Quebec v Farrah, [1978] 2 SCR 636] case. ....

[W]hat the *Farrah* case decided was that to give a provincially-constituted statutory tribunal a jurisdiction in appeal on questions of law without limitation, and to reinforce this appellate authority by excluding any supervisory recourse to the Quebec Superior Court, was to create a s. 96 court. The present case is no different in principle, even though in ss. 162 and 175 of the *Professional Code*, dealing with the appellate authority of the Professions Tribunal, there is no mention of the word "law" or the word "jurisdiction." ... I see no significant distinction between the present case and the *Farrah* case in the fact that in the latter the authority granted to the appeal tribunal was "to the exclusion of any other court." In both cases there was a purported exclusion of the reviewing authority of any other court, whether by appeal or by evocation.

In the result, I would allow the appeal. ....

*Appeal dismissed.*

## D. Section 96 and Access to Justice

The Supreme Court has recently extended the s 96 strictures to constrain provincial legislation that impedes access to the superior courts for litigating disputes. In the case that follows, the court struck down court fees imposed to recoup some of the costs of the court system, even though an exemption was provided for the indigent. The invocation of the rule of law in this case sets the stage for this chapter's Section IV, below, which focuses on the way in which the court has relied on a number of constitutional principles, including the rule of law, to extend to statutory courts some of the protections of independence afforded by s 96 to superior courts.

**Trial Lawyers Association of British Columbia v British Columbia  
(Attorney General)**  
2014 SCC 59, [2014] 3 SCR 31

McLACHLIN CJ (LeBel, Abella, Moldaver, and Karakatsanis JJ concurring):

[1] The issue in this case is whether court hearing fees imposed by the Province of British Columbia that deny some people access to the courts are constitutional. ....

[2] ... Although the province can establish hearing fees under its power to administer justice under s. 92(14) of the *Constitution Act, 1867*, the exercise of that power must also

comply with s. 96 of the *Constitution Act, 1867*, which constitutionally protects the core jurisdiction of the superior courts. ... [T]he fees impermissibly infringe on that jurisdiction by, in effect, denying some people access to the courts.

• • •

[4] Ms. Vilardell [initiated a proceeding for custody of a child and an interest in the marital home against her common law spouse.] ... [T]o get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, Ms. Vilardell asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial, so he could address the question of ability to pay after hearing evidence respecting the parties' means, circumstances, and entitlement to property.

[5] The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some \$3,600—almost the net monthly income of the family .... Ms. Vilardell is not an “impoverished” person .... She was unemployed in the year leading up to the trial; the “family” income appears to have come mainly from her partner. .... [A]fter legal fees had depleted her savings, she could not afford the hearing fee.

• • •

[11] Rule 20-5(1) of the *Supreme Court Civil Rules* provides for an exemption from hearing fees:

If the court ... finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise impoverished, the court may order that no fee is payable ....

[12] In B.C., the party that sets a case down for trial (usually the plaintiff) is required to undertake to pay the hearing fee—regardless of whether the trial length is based on that party's estimate or the estimate of the other party or the court.

• • •

[21] Hearing fees fall squarely within the “administration of justice” [under s 92(14) of the *Constitution Act, 1867*] and may be used to defray some of the cost of administering the justice system, to encourage the efficient use of court resources, and to discourage frivolous or inappropriate use of the courts.

• • •

[24] ... [The province's] ... power to impose hearing fees must be consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96. ....

• • •

[26] ... [T]he interpretation of s. 92(14) must be consistent not only with other express terms of the Constitution, but with requirements that “flow by necessary implication from those terms”: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 66, *per* Major J. As this Court has recently stated, “the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. *The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another* must inform our interpretation, understanding, and application of the text”: *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 26 (emphasis added).

• • •

[29] [Sections 92(14) and 96] ... [t]aken together ... have been held to provide a constitutional basis for a unified judicial presence throughout the country: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 11 and 52. ...

[30] ... [N]either level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction: *MacMillan Bloedel*, at para. 37; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*Provincial Judges Reference*”), at para. 88.

[31] ... The question is ... whether legislating hearing fees that prevent people from accessing the courts infringes on the core jurisdiction of the superior courts.

[32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. ... [Such measures strike] at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. ...

• • •

[33] ... The cases decided under s. 96 have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body or with privative clauses that would bar judicial review .... . The thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts.

• • •

[37] ... The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts [*Imperial Tobacco* at para 66].

[38] While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice” (p. 230). ...

[39] The s. 96 judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel*, “[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself” (para. 37). The very rationale for the provision is said to be “the maintenance of the rule of law through the protection of the judicial role”: *Provincial Judges Reference*, at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.

[40] ... If people cannot challenge government actions in court, individuals cannot hold the state to account—the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state’s power to make and enforce laws and the courts’ responsibility to rule on citizen challenges

to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 68-9, *per* Newbury J.A.

• • •

[42] ... The right of the province to impose hearing fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. Rather, the Court is ensuring that the Constitution is respected.

• • •

[46] ... A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts.

• • •

[48] ... A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts—a tradition that goes back to the *Statute of Henry VII*, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees.

• • •

[51] The trial judge held that the primary purpose of the hearing fee scheme is to provide an incentive for efficient use of court time and a disincentive for lengthy and inefficient trials (para. 309). The secondary purpose of the scheme is to provide sufficient revenue to offset the costs of providing civil justice in Provincial Court Small Claims matters, Supreme Court civil claims, and Supreme Court family claims (paras. 302-7). To put it in other words, the Province's aim is to establish a revenue-neutral trial service.

[52] The trial judge, affirmed by the Court of Appeal, found that B.C.'s hearing fees go beyond these purposes and limit access to courts for litigants who are not indigent or impoverished (and therefore who do not fall under the exemption provision), but for whom the hearing fees are nonetheless unaffordable. This is supported by the evidence. ... [T]he effect of the fees is unconstitutional, because for many litigants, bringing a claim would require sacrificing reasonable expenses.

• • •

[55] ... Ms. Vilardell is not "impoverished," and is therefore not caught by the exemption provision. However, the fee for Ms. Vilardell's 10-day trial amounted to her family's net monthly income. This was on top of \$23,000 already spent on lawyer fees. She could not afford the fee. That the fee arbitrarily was imposed only on Ms. Vilardell and escalated with the length of the trial—even though she did not control the length of the trial—worsened her situation.

• • •

[58] I agree with the view of the trial judge that the plain meaning of the words "impoverished" and "indigent" does not cover people of modest means who are nonetheless prevented from having a trial because of the hearing fees ... .

• • •

[60] Other objections to the exemption provision can be raised. Litigants are required to come before the court, explain why they are indigent and beg the court to publicly acknowledge this status and excuse the payment of fees. This is arguably an affront to dignity and imposes a significant burden on the potential litigant of adducing proof of impoverishment—a burden she may be unable or unwilling to assume.

• • •

[62] Moreover, the plaintiff who is required to pay the hearing fee may not control the length or efficiency of the trial—the defendant may be responsible for prolonging the matter. The ability of the trial judge to make orders for costs against such a defendant does not address the real problem—before being able to set a matter down for trial the plaintiff must undertake to pay hearing fees that may escalate through no fault of her own. If she cannot afford the prospective fees, she may reasonably conclude that she cannot bring her dispute to the court.

[63] Most fundamentally, unlike cost awards, the imposition of the hearing fees at issue are not dependent on efficiency or the merit of one's claim. The hearing fees imposed by this scheme escalate to \$800 per day after 10 days of trial—the highest price tag in the country—with any relationship to the efficiency of the proceeding. These hearing fees do not promote efficient use of court time; at best they promote *less* use of court time.

[64] I conclude that the hearing fee scheme prevents access to the courts in a manner inconsistent with s. 96 of the *Constitution Act, 1867* and the underlying principle of the rule of law. It therefore falls outside the Province's jurisdiction under s. 92(14) to administer justice.

• • •

[68] The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the legislature or the Lieutenant Governor in Council to enact new provisions, should they choose to do so.

• • •

ROTHSTEIN J (dissenting):

[80] Courts do not have free range to micromanage the policy choices of governments acting within the sphere of their constitutional powers. ...

• • •

[82] ... In the absence of a violation of a clear constitutional provision, the judiciary should defer to the policy choices of the government and legislature. ...

[83] Section 92(14) of the *Constitution Act, 1867* entrusts the administration of justice in the provinces to provincial legislatures. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They are accountable to voters for the choices they make. In a constitutional democracy such as ours, courts must be wary of subverting democracy and its accountability mechanisms beneath an overly expansive vision of constitutionalism.

• • •

[87] This is not to deny that universal, free (or at least affordable) access to courts is a laudable goal; it is merely to say that s. 96 and the unwritten principle of the rule of law cannot be used to force provincial governments to expend funds or forego cost recovery to bring this goal to fruition.

• • •

[90] ... The cases cited by the majority speak of the inability of governments to remove “core or inherent jurisdiction,” as doing so “emasculates the court, making it something other than a superior court” ... . The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise. ...

[91] ... It is true that this Court has, on occasion, turned to unwritten principles to fill in “gaps in the express terms of the constitutional text” (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 104). But there are no such gaps in the text of s. 92(14). ...

[92] There is no express right of general access to superior courts for civil disputes in the text of the Constitution. Rather, the Constitution specifies the particular instances in which access to courts is guaranteed.

[93] ... So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. ...

[94] This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the *Charter*. Unlike *Charter* rights, rights read into s. 96 are absolute. They are not subject to s. 1 justification or the s. 33 notwithstanding clause. These provisions reflect a recognition that, in certain circumstances, governments will be permitted to enact legislation or take action that places limits on *Charter* rights.

• • •

[96] The majority proposes to invalidate those provincial laws relating to the administration of justice that, in their view, are contrary to the rule of law. The unwritten principle of the rule of law, as defined by this Court, consists of three elements:

- (1) “[T]he law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power” (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 748.)
- (2) The rule of law “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order” (*ibid.*, at p. 749); and
- (3) “[T]he exercise of all public power must find its ultimate source in a legal rule” (*Reference re Secession of Quebec*, at para. 71, quoting *Re: Remuneration of Judges*, at para. 10).

• • •

[98] ... The majority acknowledges that imposing hearing fees is a permissible exercise of the province’s jurisdiction according to the *written* constitutional text—that is, s. 92(14) (para. 23). But they ultimately conclude that the hearing fees fall outside the province’s jurisdiction in part because the fees are inconsistent with the *unwritten* principle of the rule of law (paras. 38-40). ... [T]he rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme.

• • •

[105] ... [T]he majority’s approach to determining whether hearing fees prevent litigants from accessing the courts overlooks some important contextual considerations. In

particular, the majority does not account for measures that offset the burden of hearing fees or eliminate them altogether. ...

•••

[107] In my view, the updated impoverishment exemption provides a measure of discretion to trial judges in determining its application. ...

•••

[109] Second, the financial burden of hearing fees, a disbursement, may be reapportioned through both interim and final costs awards (Rule 14-1 of the British Columbia *Supreme Court Civil Rules*). Judges may consider factors such as the success of a party, the reasonableness of the positions taken, the importance of the case, and whether one party was responsible for an excessively lengthy hearing.

[110] Third, and most importantly, judges have a key role to play in limiting hearing fees. Active judicial case management is critical to ensuring reasonable timelines in civil proceedings and efficient use of court resources, especially in the case of self-represented litigants. I agree with the trial judge that courts must be careful, in situations involving self-represented litigants, not to appear to refuse relevant evidence . . . . In this context, judges are entrusted with the obligation to manage the resources of the court in the interests of justice and, with respect to hearing fees, to have regard for the interests of the litigants.

•••

*Appeal allowed and cross-appeal dismissed.*

#### **IV. THE INDEPENDENCE OF THE JUDICIARY**

The institution of judicial review and its place in our constitutional structure was introduced in Chapter 2, Judicial Review and Constitutional Interpretation. The Supreme Court's analysis of the importance of the rule of law reflects the complexity of the Canadian constitutional order, which includes formal constitutional instruments having the status of supreme law, the inherited British framework of fundamental constitutional principles, and the role of the Supreme Court as guardian of the Constitution. The court's rulings on the independence of the judiciary were originally based on interpretation and extrapolation from constitutional text. Later rulings have an expanded scope. They apply constitutional principles for interpretive insights into the meaning of particular constitutional provisions and associated text as well as to fill gaps in the text. They also assist in delineating the coherence of the full constitutional framework.

This trend in the Supreme Court cases reflects developments in the United Kingdom and other constitutional democracies. This list of "generally accepted conditions" for judicial independence, based on the work of experts in international and comparative law, is set out in a recent book on judicial independence published in the United Kingdom:

- (a) Judges should enjoy guaranteed tenure until the expiry of their terms of office or a mandatory retirement age. Judges must only be removed earlier for reasons of incapacity or misconduct that renders them unfit for judicial office.
- (b) There should be a merit-based appointment process that ensures that persons selected as judges not only have an appropriate knowledge of and training in the law, but also

exhibit a willingness to decide disputes with an open and fair mind and according to law. Promotions must be made on merit.

- (c) There should be arrangements in place to ensure that judges receive fair and secure remuneration. Any changes to, and in particular reductions in, salaries and pensions should not be used as a means of influencing judicial decision-making.
- (d) The judicial system as a whole should receive adequate funds to enable judges to fulfil their functions.
- (e) There should be rules to protect the jurisdiction of the courts. Judges must have authority to decide matters of a judicial nature according to their own view of the relevant law and facts. They should also have exclusive authority to determine whether any particular issue submitted for judicial decision falls within their competence as defined by law.
- (f) Judges should have personal immunity against suit for improper acts or omissions in the exercise of their judicial functions.
- (g) There should be rules providing for the recusal and disqualification of individual judges from particular cases, as well as rules banning judges from activities deemed to be incompatible with judicial office.
- (h) The system for investigating judicial misconduct should ensure that complaints are not used improperly to influence how individual judges decide particular cases .
- (i) There should be an independent legal profession that remains vigilant in ensuring that the law and the legal system are free from political manipulation. Well-qualified persons from the legal profession should be selected for appointment to the bench.
- (j) There must be a general attitude of respect for the law and the legal system within politics.

See Graham Gee, Robert Hazell, Kate Malleson & Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015) at 9-10; see also *Tokyo Principles of the Independence of the Judiciary in the LAWASIA Region* (1982); UN General Assembly, *UN Basic Principles on the Independence of the Judiciary* (1985); Commonwealth (Latimer House) Principles on the Three Branches of Government (2003); Bangalore Principles of Judicial Independence (The Hague, 2002).

---

The Supreme Court's judgments on judicial independence should be regarded as having two dimensions. First, they entail an effort to map out a methodology for a comprehensive, coherent approach to judicial independence for a complex, historically rooted judicial system that lacks the detailed framework necessary to meet modern standards. Second, they involve an engagement in adjudicating particular cases, as they arise, that bring forward important questions regarding the function, organization, and regulation of the judiciary. After you read these judgments, consider how the court would approach some of the critical issues relating to the independence of the judiciary that arise in the readings on judicial appointment and security of tenure found below.

The court has had occasion to consider the question of independence of the judiciary in the context of challenges to perceived reduction in judicial remuneration in a number of cases. Section 100 of the *Constitution Act, 1867* stipulates that salaries and benefits be fixed

and provided by Parliament. The Supreme Court of Canada delineated the rational for this provision in *The Queen v Beauregard*, [1986] 2 SCR 56 at 75: "[T]he essence of judicial independence for superior court judges is complete freedom from arbitrary interference by both the executive and the legislature. Neither the executive nor the legislature can interfere with the financial security of superior court judges."

*Beauregard* involved a challenge to the validity of s 29.1 of the federal *Judges Act*, RSC 1970, c J-1, which required newly appointed superior court judges to contribute to the cost of their pensions. The change meant that new appointees received salaries that were lower than that of their predecessors. The Supreme Court ruled (at 80-81) that s 100 allocates to Parliament not only the jurisdiction to set salaries and benefits but also to modify these benefits for certain purposes. For the majority, Dickson CJ delineated the constraints imposed on these powers: "If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s. 100 of the *Constitution Act, 1867*" (at 77). The challenged provisions reviewed in *Beauregard* did not cross that line. Moreover, the remuneration package contained substantial salary and pension increases (at 78). Accordingly, there was no discernible reduction in judicial independence.

In a series of cases heard together and known as the *Ref re Remuneration of Provincial Judges* (or the *Provincial Judges Reference*), found below, the court considered the question of judicial remuneration in regard to provincially appointed judges in Prince Edward Island, Alberta, and Manitoba. The textual focus here was s 11(d) of the Charter, which guarantees to persons charged with a criminal or penal offence the presumption of innocence until found guilty in a fair trial by an independent and impartial tribunal. The narrow question raised was whether this guarantee constrained the power of the province to reduce the salary of the judges of their inferior provincial courts.

**Ref re Remuneration of Provincial Judges of the Prov Court of PEI;  
Ref re Independence and Impartiality of Judges of the Prov Court of PEI  
[1997] 3 SCR 3**

LAMER CJ (L'Heureux-Dubé, Sopinka, Gonthier, Cory, and Iacobucci JJ concurring):

[1] The four appeals handed down today ... raise a range of issues relating to the independence of provincial courts, but are united by a single issue: whether and how the guarantee of judicial independence in s. 11(d) of the *Canadian Charter of Rights and Freedoms* restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. Moreover, in my respectful opinion, they implicate the broader question of whether the constitutional home of judicial independence lies in the express provisions of the *Constitution Acts, 1867 to 1982*, or exterior to the sections of those documents.

...

[6] ... I feel compelled to comment on the unprecedented situation which these appeals represent. The independence of provincial court judges is now a live legal issue in no fewer than four of the ten provinces in the federation. These appeals have arisen from three of those provinces ... . In Alberta, three accused persons challenged the

constitutionality of their trials before provincial court judges; in Manitoba, the Provincial Judges Association proceeded by way of civil action; in P.E.I., the provincial cabinet brought two references. In British Columbia, the provincial court judges association has brought a civil suit on a similar issue. ...

[7] ... Litigation, and especially litigation before this Court, is a last resort for parties who cannot agree about their legal rights and responsibilities. It is a very serious business. In these cases, it is even more serious because litigation has ensued between two primary organs of our constitutional system—the executive and the judiciary—which both serve important and interdependent roles in the administration of justice.

[8] The task of the Court in these appeals is to explain the proper constitutional relationship between provincial court judges and provincial executives, and thereby assist in removing the strain on this relationship. The failure to do so would undermine “the web of institutional relationships ... which continue to form the backbone of our constitutional system” (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 3).

[9] ... [T]he purpose of the constitutional guarantee of financial security—found in s. 11(d) of the *Charter*, and also in the preamble to and s. 100 of the *Constitution Act, 1867*, is not to benefit the members of the courts which come within the scope of those provisions. ... Financial security must be understood as ... an aspect of judicial independence, which in turn is not an end in itself. Judicial independence is valued because it serves important societal goals—it is a means to secure those goals.

[10] One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.

• • •

[82] These appeals were all argued on the basis of s. 11(d), the *Charter*'s guarantee of judicial independence and impartiality. From its express terms, section 11(d) is a right of limited application—it only applies to persons accused of offences. Despite s. 11(d)'s limited scope, there is no doubt that the appeals can and should be resolved on the basis of that provision.

[83] ... Notwithstanding the presence of s. 11(d) of the *Charter*, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the [British] *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions of the *Constitution Acts, 1867 to 1982*, merely “elaborate that principle in the institutional apparatus which they create or contemplate”: *Switzman v. Elbling*, [1957] S.C.R. 285 at p. 306, *per* Rand J.

[84] ... Section 11(d) of the *Charter* ... protects the independence of a wide range of courts and tribunals which exercise jurisdiction over offences. Moreover ... ss. 96-100 of the *Constitution Act, 1867*, separately and in combination, have protected and continue to protect the independence of provincial superior courts ....

[85] ... [T]here are serious limitations to the view that the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence. The first and most serious problem is that the range of courts whose independence is protected by the written provisions of the Constitution contains large gaps. Sections 96-100, for example, only protect the independence of judges of the superior, district, and county courts, and even then, not in a uniform or consistent manner. Thus, while ss. 96 and 100 protect the core jurisdiction and the financial security, respectively, of all three types of courts (superior, district, and county), s. 99, on its terms, only protects the security of tenure of superior court judges. Moreover, ss. 96-100 do not apply to provincially appointed inferior courts, otherwise known as provincial courts.

[86] ... [B]y its express terms, s. 11(d) is limited in scope as well—it only extends the envelope of constitutional protection to bodies which exercise *jurisdiction over offences*. As a result, when those courts exercise civil jurisdiction, their independence would not seem to be guaranteed. The independence of provincial courts adjudicating in family law matters, for example, would not be constitutionally protected. The independence of superior courts, by contrast, when hearing exactly the same cases, would be constitutionally guaranteed.

[87] The second problem with reading s. 11(d) of the *Charter* and ss. 96-100 of the *Constitution Act, 1867* as an exhaustive code of judicial independence is that some of those provisions, by their terms, do not appear to speak to this objective. Section 100, for example, provides that Parliament shall fix and provide the salaries of superior, district, and county court judges. It is therefore, in an important sense, a subtraction from provincial jurisdiction over the administration of justice under s. 92(14). Moreover, read in the light of the *Act of Settlement* of 1701, it is a partial guarantee of financial security, inasmuch as it vests responsibility for setting judicial remuneration with Parliament, which must act through the public means of legislative enactment, not the executive. However, on its plain language, it only places Parliament under the obligation to provide salaries to the judges covered by that provision, which would in itself not safeguard the judiciary against political interference through economic manipulation. Nevertheless ... s. 100 also requires that Parliament must provide salaries that are adequate, and that changes or freezes to judicial remuneration be made only after recourse to a constitutionally mandated procedure.

[88] ... Section 96 seems to do no more than confer the power to appoint judges of the superior, district, and county courts. It is a staffing provision, and is once again a subtraction from the power of the provinces under s. 92(14). However, through a process of judicial interpretation, s. 96 has come to guarantee the core jurisdiction of the courts which come within the scope of that provision. In the past, this development has often been expressed as a logical inference from the express terms of s. 96. Assuming that the goal of s. 96 was the creation of “a unitary judicial system,” that goal would have been undermined “if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts”: *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714, at p. 728. However, as I recently confirmed, s. 96 restricts not only the legislative competence of provincial legislatures, but of Parliament as well: [*MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725]. The rationale for the provision has also shifted, away from the protection of national unity, to the maintenance of the rule of law through the protection of the judicial role.

[89] .... This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of *unwritten* understandings which are not found on the face of the document itself.

[90] The proposition that the Canadian Constitution embraces unwritten norms was recently confirmed by this Court in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319.

[91] The relevant part of [the majority reasons for judgment by McLachlin J] ... concerns the interpretation of s. 52(2) of the *Constitution Act, 1982*, which defines the "Constitution of Canada" in the following terms:

52. ...

(2) The Constitution of Canada *includes*

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b). [Emphasis added.]

... McLachlin J ... held that the use of the word "includes" indicated that the list of constitutional documents in s. 52(2) was not exhaustive.

[92] ... I agree with the general principle that the Constitution embraces unwritten, as well as written rules, largely on the basis of the wording of s. 52(2). Indeed, given that ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it is of no surprise that our Constitution should retain some aspect of this legacy.

[93] ... [T]he constitutional history of Canada can be understood, in part, as a process of evolution "which [has] culminated in the supremacy of a definitive written constitution." There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost importance to articulate what the source of those unwritten norms is.

[94] In my opinion, the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the *Constitution Act, 1867*. The relevant paragraph states in full:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

Although the preamble has been cited by this Court on many occasions, its legal effect has never been fully explained. On the one hand, although the preamble is clearly part of the Constitution, it is equally clear that it "has no enacting force" .... [S]trictly speaking, it is not a source of positive law ....

[95] But the preamble does have important legal effects .... Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language: *Driedger on the Construction of Statutes* (3rd ed.

1994), by R. Sullivan, at p. 261. The preamble to the *Constitution Act, 1867*, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J., the preamble articulates “the political theory which the Act embodies”: *Switzman, supra*, at p. 306. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. . . . [T]hose provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.

[96] . . . The preamble speaks of the desire of the founding provinces “to be federally united into One Dominion,” and thus, addresses the structure of the division of powers. Moreover, by its reference to “a Constitution similar in Principle to that of the United Kingdom,” the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged. To my mind, both of these aspects of the preamble explain many of the cases in which the Court has, through the normal process of constitutional interpretation, stated some fundamental rules of Canadian constitutional law which are not found in the express terms of the *Constitution Act, 1867*.

[Lamer CJ set out a number of examples in which the judiciary had extrapolated legal doctrines from unwritten constitutional principles from the preamble—namely, the doctrines of full faith and credit, paramountcy, suspended declarations of invalidity, the constitutional status of the privileges of provincial legislatures, the federal power to regulate political speech, and the implied limits on legislative sovereignty with respect to political speech.]

[104] These examples . . . illustrate the special legal effect of the preamble. The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.

[105] The same approach applies to the protection of judicial independence. . . .

[106] The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. . . . [T]hat Act was the “historical inspiration” for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

[107] . . . [T]he express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Even though s. 11(d) is found in the newer part of our Constitution, the *Charter*, it can be understood in this way, since the Constitution is to be read as a unified whole: *Reference re Roman Catholic Separate High Schools Funding*,

[1987] 1 S.C.R. 1148, at p. 1206. An analogy can be drawn between the express reference in the preamble of the *Constitution Act, 1982* to the rule of law and the implicit inclusion of that principle in the *Constitution Act, 1867: Reference re Manitoba Language Rights*, [[1985] 1 SCR 721], at p. 750. Section 11(d), far from indicating that judicial independence is constitutionally enshrined for provincial courts only when those courts exercise jurisdiction over offences, is proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear.

[108] I reinforce this conclusion by reference to the central place that courts hold within the Canadian system of government. In [*OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2] ... Beetz J. linked limitations on legislative sovereignty over political speech with “the existence of certain political institutions” as part of the “basic structure of our Constitution” (p. 57). However, political institutions are only one part of the basic structure of the Canadian Constitution. As this Court has said before, there are three branches of government—the legislature, the executive, and the judiciary .... Courts ... in other words, are equally “definitional to the Canadian understanding of constitutionalism” ... as are political institutions. It follows that the same constitutional imperative—the preservation of the basic structure ... extends protection to the judicial institutions of our constitutional system. By implication, the jurisdiction of the provinces over “courts,” as that term is used in s. 92(14) of the *Constitution Act, 1867*, contains within it an implied limitation that the independence of those courts cannot be undermined.

[109] In conclusion, the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. ...

• • •

[111] The starting point for my discussion is [*Valente v The Queen*, [1985] 2 SCR 673 (*Valente No 2*)], where in a unanimous judgment this Court laid down the interpretive framework for s. 11(d)’s guarantee of judicial independence and impartiality. Le Dain J., speaking for the Court, began by drawing a distinction between impartiality and independence. ... Impartiality was defined as “a *state of mind or attitude* of the tribunal in relation to the issues and the parties in a particular case” (*Valente* [(No. 2)], *supra*, at p. 685 (emphasis added)). It was tied to the traditional concern for the “absence of bias, actual or perceived.” Independence, by contrast, focussed on the *status* of the court or tribunal ... [T]he independence protected by s. 11(d) is the independence of the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the state.

[112] Le Dain J. went on in *Valente* [(No. 2)] to state that independence was premised on the existence of a set of “objective conditions or guarantees” (p. 685), whose absence would lead to a finding that a tribunal or court was not independent. The existence of objective guarantees, of course, follows from the fact that independence is status oriented; the objective guarantees *define* that status. However, he went on to supplement the requirement for objective conditions with what could be interpreted as a further requirement: that the court or tribunal be *reasonably perceived* as independent. The reason for this additional requirement was that the guarantee of judicial independence has the goal not

only of ensuring that justice is done in individual cases, but also of ensuring public confidence in the justice system. ... [T]he objective guarantees must be viewed as those guarantees that are necessary to ensure a reasonable perception of independence ....

[113] ... [The standard for the test of reasonable perception was correctly stated] ... by Howland C.J.O. in his judgment in the Ontario Court of Appeal in *R. v. Valente* (No. 2) (1983), 2 C.C.C. (3d) 417 (Ont. C.A.), at pp. 439-40:

The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically [would conclude that the tribunal or court was independent].

• • •

[115] The three core characteristics identified by Le Dain J. are *security of tenure*, *financial security*, and *administrative independence*. *Valente* laid down (at p. 697) two requirements for security of tenure for provincial court judges: those judges could only be removed for cause “related to the capacity to perform judicial functions,” and after a “judicial inquiry at which the judge affected is given a full opportunity to be heard.” Unlike the judicature provisions of the *Constitution Act, 1867*, which govern the removal of superior court judges, s. 11(d) of the *Charter* does not require an address by the legislature in order to dismiss a provincial court judge.

[116] Financial security was defined in these terms (at p. 706):

The essential point ... is that the right to salary of a provincial court judge is established by law, and there is no way in which the executive could interfere with that right in a manner to affect the independence of the *individual judge*. [Emphasis added.]

Once again, the Court drew a distinction between the requirements of s. 100 of the *Constitution Act, 1867* and s. 11(d); whereas the former provision requires that the salaries of superior court judges be set by Parliament directly, the latter allows salaries of provincial court judges to be set either by statute or through an order in council.

[117] Finally, the Court defined the administrative independence of the provincial court, as control by the courts “over the administrative decisions that bear directly and immediately on the exercise of the judicial function” (p. 712). These were defined (at p. 709) in narrow terms as

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. ....

[118] The three *core characteristics* of judicial independence—security of tenure, financial security, and administrative independence—should be contrasted with what I have termed the two *dimensions* of judicial independence ... the *individual independence* of a judge and the *institutional or collective independence* of the court or tribunal of which that judge is a member... The two different dimensions of judicial independence are related in the following way (*Valente* [(No. 2)], *supra*, at p. 687):

The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal

over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

• • •

[123] ... Individual independence was referred to as the “historical core” of judicial independence, and was defined as “the complete liberty of individual judges to hear and decide the cases that come before them” (p. 69). It is necessary for the fair and just adjudication of individual disputes. By contrast, the institutional independence of the judiciary was said to arise out of the position of the courts as organs of and protectors “of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important” (p. 70). Institutional independence enables the courts to fulfill that second and distinctly constitutional role.

[124] [Beauregard v Canada, [1986] 2 SCR 56] identified a number of sources for judicial independence which are constitutional in nature. As a result, these sources additionally ground the *institutional* independence of the courts. The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government. Institutional independence also inheres in adjudication under the *Charter*, because the rights protected by that document are rights against the state. As well, the Court pointed to the preamble and judicature provisions of the *Constitution Act, 1867*, as additional sources of judicial independence; I also consider those sources to ground the judiciary’s institutional independence. Taken together, it is clear that the institutional independence of the judiciary is “definitional to the Canadian understanding of constitutionalism” (*Cooper, supra*, at para. 11).

[125] ... [T]he institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government: see *Cooper, supra*, at para. 13. This is also clear from *Beauregard*, where this Court noted (at p. 73) that although judicial independence had historically developed as a bulwark against the abuse of executive power, it equally applied against “other potential intrusions, including any from the legislative branch” as a result of legislation.

[126] ... [T]he institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court judges. ... I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.

[127] This role is most evident when we examine the remedial powers of provincial courts with respect to the enforcement of the Constitution. Notwithstanding that provincial courts are statutory bodies, this Court has held that they can enforce the supremacy clause, s. 52 of the *Constitution Act, 1982*. ... Provincial courts, moreover, frequently employ the remedial powers conferred by ss. 24(1) and 24(2) of the *Charter*, because they are courts of competent jurisdiction for the purposes of those provisions .... Thus, provincial courts have the power to order stays of proceedings .... As well, provincial courts can exclude evidence obtained in violation of a *Charter* right .... They use ss. 24(1) and

24(2) because of their dominant role in the adjudication of criminal cases, where the need to resort to those remedial provisions most often arises.

[128] In addition to enforcing the rights in ss. 7-14 of the *Charter*, which predominantly operate in the criminal justice system, provincial courts also enforce the fundamental freedoms found in s. 2 of the *Charter* . . . As well, they police the federal division of powers, by interpreting the heads of jurisdiction found in ss. 91 and 92 of the *Constitution Act, 1867* . . . Finally, many decisions on the rights of Canada's aboriginal peoples, which are protected by s. 35(1) of the *Constitution Act, 1982*, are made by provincial courts . . .

[129] . . . [T]he increased role of provincial courts in enforcing the provisions and protecting the values of the Constitution is in part a function of a legislative policy of granting greater jurisdiction to these courts. Often, legislation of this nature denies litigants the choice of whether they must appear before a provincial court or a superior court. . . . [T]he constitutional response to the shifting jurisdictional boundaries of the courts is to guarantee that certain fundamental aspects of judicial independence be enjoyed not only by superior courts but by provincial courts as well. In other words, not only must provincial courts be guaranteed institutional independence, they must enjoy a certain *level* of institutional independence.

[130] . . . I do not wish to overlook the fact that judicial independence also operates to insulate the courts from interference by parties to litigation and the public generally . . . As Professor S. Shetreet has written ("Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (1985), 590, at p. 599):

Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions.

[131] . . . [W]hat is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be *depolitized*. As I explain below, in the context of institutional or collective financial security, this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse.

[132] I begin by stating these components in summary fashion:

[133] *First*, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions,

and for the sake of convenience, we will refer to the independent body required by s. 11(d) as a commission as well. Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision—if need be, in a court of law. ... [W]hen governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy.

[134] *Second*, under no circumstances is it permissible for the judiciary—not only collectively through representative organizations, but also as individuals—to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. ... [S]alary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence. When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, is a form of “horse-trading.” The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

[135] *Third*, and finally, any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.

[136] ... [T]hese appeals raise the issue of judges' salaries. However, the same principles are equally applicable to judges' pensions and other benefits.

[137] I also note that the components of the collective or institutional dimension of financial security need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances, for example, such as the outbreak of war or pending bankruptcy. In those situations, governments need not have prior recourse to a salary commission before reducing or freezing judges' salaries.

[138] These different components of the institutional financial security of the courts inhere, in my view, in a fundamental principle of the Canadian Constitution, the separation of powers. ... [I]n order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government.

[139] The separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies ... . However, there is also another aspect of the separation of powers—the notion that the principle requires that the different branches of government only interact, as much as possible, in particular ways. ... For example, there is a hierarchical relationship between the executive and the legislature, whereby the

executive must execute and implement the policies which have been enacted by the legislature in statutory form . . . In a system of responsible government, once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement those choices.

[140] What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be *depoliticized*. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.

[141] To be sure, the depoliticization of the relationships between the legislature and the executive on the one hand, and the judiciary on the other, is largely governed by convention . . . [which does] not have the force of law in Canada . . . However, to my mind, the depoliticization of these relationships is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as s. 11(d) of the *Charter*, must be interpreted in such a manner as to protect this principle.

[142] The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. Even the most casual observer of current affairs can attest to this. For example, the salary reductions for the judges in these appeals were usually part of a general salary reduction for all persons paid from the public purse designed to implement a goal of government policy, deficit reduction. The decision to reduce a government deficit, of course, is an inherently political decision. In turn, these salary cuts were often opposed by public sector unions who questioned the underlying goal of deficit reduction itself. The political nature of the salary reductions at issue here is underlined by the fact that they were achieved through legislation, not collective bargaining and contract negotiations.

[143] On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence—security of tenure, financial security, and administrative independence—are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.

• • •

[145] With respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. An unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication. . . We were alive to this danger in *Beauregard, supra*, when we held (at p. 77)

that salary changes which were enacted for an “improper or colourable purpose” were unconstitutional. . . .

[146] The challenge which faces the Court in these appeals is to ensure that the setting of judicial remuneration remains consistent—to the extent possible given that judicial salaries must ultimately be fixed by one of the political organs of the Constitution, the executive or the legislature, and that the setting of remuneration from the public purse is, as a result, inherently political—with the depoliticized relationship between the judiciary and the other branches of government. Our task, in other words, is to ensure compliance with one of the “structural requirements of the Canadian Constitution . . . . The three components of the institutional or collective dimension of financial security, to my mind, fulfill this goal.

[147] [First,] [a]s a general principle, s. 11(d) allows that the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, the imperative of protecting the courts from political interference through economic manipulation requires that an independent body—a judicial compensation commission—be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government. As well, in order to guard against the possibility that government inaction could be used as a means of economic manipulation by allowing judges’ real salaries to fall because of inflation, and also to protect against the possibility that judges’ salaries will drop below the adequate minimum required by judicial independence, the commission must convene if a fixed period of time (e.g., three to five years) has elapsed since its last report, in order to consider the adequacy of judges’ salaries in light of the cost of living and other relevant factors.

. . .

[186] [Second, while] [n]egotiations over remuneration are a central feature of the landscape of public sector labour relations . . . [and] [t]he evidence before this Court (anecdotal and otherwise) suggests that salary negotiations have been occurring between provincial court judges and provincial governments in a number of provinces . . . . However, from a constitutional standpoint, this is inappropriate, for two related reasons. . . . [N]egotiations for remuneration from the public purse are indelibly political. For the judiciary to engage in salary negotiations would undermine public confidence in the impartiality and independence of the judiciary, and thereby frustrate a major purpose of s. 11(d).

[187] . . . [In addition] negotiations are deeply problematic because the Crown is almost always a party to criminal prosecutions in provincial courts. Negotiations by the judges who try those cases put them in a conflict of interest, because they would be negotiating with a litigant. The appearance of independence would be lost, because salary negotiations bring with them a whole set of expectations about the behaviour of the parties to those negotiations which are imimical to judicial independence. The major expectation is of give and take between the parties. . . . [T]he reasonable person might conclude

that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive. ... This perception would be heightened if the salary negotiations, as is usually the case, were conducted behind closed doors, beyond the gaze of public scrutiny, and through it, public accountability. Conversely, there is the expectation that parties to a salary negotiation often engage in pressure tactics. As such, the reasonable person might expect that judges would adjudicate in such a manner so as to exert pressure on the Crown.

[188] ... Negotiation over remuneration and benefits involves a certain degree of “horse-trading” between the parties. Indeed, to negotiate is “to bargain with another respecting a transaction” (*Black’s Law Dictionary* (6th ed. 1991), at p. 1036). That kind of activity, however, must be contrasted with expressions of concern and representations by chief justices and chief judges of courts, or by representative organizations such as the Canadian Judicial Council, the Canadian Judges Conference, and the Canadian Association of Provincial Court Judges, on the adequacy of current levels of remuneration. Those representations merely provide information and cannot, as a result, be said to pose a danger to judicial independence.

[189] I recognize that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to other persons paid from the public purse, because they cannot lobby the executive and the legislature with respect to their level of remuneration. ... [T]he mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table. Moreover, a commission serves as an institutional sieve which protects the courts from political interference through economic manipulation, a danger which inheres in salary negotiations.

[190] ... The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.

• • •

[192] Finally, I turn to the question of whether the Constitution—through the vehicle of either s. 100 or s. 11(d)—imposes some substantive limits on the extent of salary reductions for the judiciary. ...

[193] I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants. Perhaps more importantly, in the context of s. 11(d), there is the perception that this could happen. ... I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the

judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public.

• • •

[196] Finally, I want to emphasize that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.

## NOTES

1. In the aftermath of this major reference case on the independence of the judiciary, the Supreme Court has had occasion to consider other claims to independence. The following cases illustrate the type of issues that the court has adjudicated.
  2. In *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 Quebec (Attorney General); Minc v Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 SCR 286, the Supreme Court considered the judicial independence of provincial inferior courts once again, in considering challenges to the rejection by four provincial governments of the recommendations rendered by their commissions on judicial salaries. The court elaborated on the standard of rationality required for such rejections, indicating the need for "legitimate," "complete," and "meaningful" reasons, based on the facts, and rendered "in good faith." Three of the provinces met that standard; one did not. If a reviewing court determined that a province had failed to meet the rationality standard, the court determined that the appropriate remedy was to send the matter for reconsideration, rather than issue a mandatory order.
  3. In *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781, the Supreme Court considered whether it was necessary for a provincial administrative tribunal to enjoy independence in order to carry out its adjudicative function, which included the imposition of penalties for infraction of a licensing regime. McLachlin CJ noted (at paras 23-24) that while administrative tribunals make quasi-judicial rulings, they do not enjoy express constitutional protection of their independence because they are part of the executive branch of government charged with the role of implementing government policy. Accordingly, it falls to Parliament and the legislatures to provide for their composition and structure, including the provision for elements of independence as deemed warranted.
  4. In *Federation of Law Societies*, discussed below, the independence of the bar was at issue.

### **NOTE: CANADA (ATTORNEY GENERAL) v FEDERATION OF LAW SOCIETIES OF CANADA**

In *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401, the court considered the importance of the independence of the bar to the rule of law.

Federal legislation imposed duties on financial intermediaries, including lawyers, to keep records that included verification of the identity of the persons on whose behalf they payed or received money. The purpose of the legislation was to deter and identify money laundering and terrorist financing. An agency endowed with search and seizure powers as well as the authority to impose fines and penalties provided enforcement.

The Federation of Law Societies challenged the application of the regulatory regime to lawyers as a violation of s 7 of the Charter. The Supreme Court determined that the statute should be read down so as to exclude its application to legal counsel and law firms. Cromwell J, for the majority of the court, concluded that the lack of protection for solicitor-client privilege infringed ss 7 and 8 of the Charter and, in particular, determined that the interference with a lawyer's duty of commitment to the client's cause constituted a breach of the principles of fundamental justice. He reached this conclusion by referring to the importance of the relationship between lawyer and client within the legal system, quoting with approval the following passage from *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307 at para 98:

The independence of the Bar *from the state* in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, *be free from state interference, in the political sense, with the delivery of services to the individual citizens* in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. [Emphasis added; pp. 335-36.]

Cromwell J then continued:

[101] Various international bodies have also broadly affirmed the fundamental importance of preventing state interference with legal representation. The *Basic Principles on the Role of Lawyers* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders state that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled ... requires that all persons have effective access to legal services provided by an independent legal profession": U.N. Doc. A/CONF.144/28/Rev.1 (1991), at p. 119. Similarly, the Council of Bars and Law Societies of Europe's *Charter of Core Principles of the European Legal Profession* emphasizes lawyers' "freedom ... to pursue the client's case," including it as the first of 10 "core principles" (p. 5 (online)). The International Bar Association's *International Principles on Conduct for the Legal Profession*, adopted in 2011, also emphasize committed client representation as the first principle governing lawyers' conduct: "A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation" (p. 5 (online)).

• • •

[113] The information gathering and record retention provisions of this scheme serve important public purposes. They help to ensure that lawyers take significant steps so that when they act as financial intermediaries, they are not assisting money laundering or terrorist financing. The scheme also serves the purpose of requiring lawyers to be able to demonstrate to the competent authorities that this is the case. In order to pursue these objectives, Parliament is entitled, within proper limits ... to impose obligations beyond those which the legal profession considers essential to effective and ethical representation. Lawyers have a duty to give and clients are entitled to receive committed legal representation as well as to have their privileged

communications with their lawyer protected. Clients are not, however, entitled to make unwitting accomplices of their lawyers let alone enlist them in the service of their unlawful ends.

## V. THE JUDICIAL APPOINTMENT PROCESS

### A. Introduction

In the British tradition, the sovereign possessed both the power to administer justice and to appoint judges. The adjudicative function devolved to judges having specialized legal expertise, an arrangement that eventually precluded the monarch from exercising judicial authority. The power of judicial appointment remained in the hands of the executive and was allocated in Canada to the governor general and the lieutenant governors of the provinces, under both constitutional and statutory directives. In practice, the appointments are made on the advice of the federal and provincial executive.

The constitutional directives set down in 1867 empowered the governor general to appoint the superior court judges under s 96 of the *Constitution Act, 1867*. The same mode of appointment is established for the s 101 courts by statute. Section 5.2 of the *Federal Courts Act* authorizes the governor in council—that is, the federal Cabinet, to appoint judges to the Federal Court and Federal Court of Appeal. Section 4(2) of the *Supreme Court Act* directs the governor general in council to appoint judges to that court.

Based on this constitutional substructure, the mode of appointment to the judiciary initially followed the British tradition of informal consultation by the executive with leading lawyers and highly placed politicians. There was no formal procedure or published criteria for these appointments, often described as amounting to a “tap on the shoulder” of the successful candidate. These appointments were often patronage appointments, motivated to reward successful or unsuccessful politicians and those who had supported the ruling party or its leaders in some other way. This approach generated considerable lobbying in the profession and political circles. Nonetheless, the importance of the rule of law prevailed sufficiently to ensure that many appointees possessed strong ability, superior professional expertise, and dedication to the rule of law and the public interest.

In the past 50 or so years, constitutional democracies have moved to create stable, merit-driven, formalized processes for appointments to replace the secretive, executive prerogative. The new approach includes a formal application or nomination process requiring full resumes. It also makes arrangements for expert, professional, and lay scrutiny of candidates by committees or commissions through consultation. These bodies make their evaluations according to a formalized list of criteria, including ability, professional experience, and expertise, as well as personal attributes and community engagement. They also seek to diversify the judiciary so that its members reflect the public interviews of the most deserving candidates. While most of the process is conducted in private with strong confidentiality standards, the work of the committee is shared with the public through websites that set out general information and frequent reports.

This modern mode of appointment is understood to mark respect for the rule of law and the independence of the judiciary. It also acknowledges the important role of the judiciary within a constitutional democracy by providing a degree of accountability and transparency.

## B. The Provincial Appointments Process

The provinces have led the way in this type of modernization in Canada. There is no single template. The basic arrangement is to prepare a short list based on formal applications, initiated by the candidate at his or her own initiative or by the suggestion of others. Sometimes the process is set up to generate a pool of vetted candidates for consideration for appointment as vacancies arise. Another approach is a search process dedicated to filling a particular vacancy when it materializes.

The vetting process includes inquiries into professional qualifications, including years of practice and indicia of good standing in one's professional and personal life. A judicial selection committee, made up of members of the judiciary, lawyers, and lay people, consults widely with reference to the chosen criteria to select candidates to interview and later rank as recommended or qualified, or not. At this stage, the attorney general considers the recommendations and makes the nominee known to Cabinet, which then notifies the lieutenant governor to proceed with the appointment.

## C. The Federal Appointments Process

The federal appointments process has not been formalized and modernized to the same extent as have the provincial processes. Under the leadership of Prime Minister Harper, from 2006 to 2015, the system set aside some of the progressive changes adopted by previous governments to emphasize merit and increase transparency and accountability, in effect reverting to the old pattern of executive prerogative based on political considerations.

### 1. Appointment of Superior Court and Federal Court Judges

Turning first to appointments of superior court judges (under s 96 of the *Constitution Act, 1867*) and Federal Court judges, until 1988, the customary pattern was for the minister of justice to receive private recommendations and consult with regional ministers before making his selection. The new arrangement required formal applications to the Office of the Commissioner for Judicial Affairs for candidates putting themselves forward, as well as for those nominated by others. This office performed the initial screening of qualifications and merit.

Judicial appointments advisory committees spread out across the country would then provide a more intensive examination of the candidates. As of 2006, these professionally dominated committees were composed of representatives of the chief justice of the province or senior judge of the territory, the attorney general of the province or territory, the law society, the Canadian Bar Association, and three representatives of the federal minister of justice to represent the public, one of whom would be a lawyer. The members of these committees served for a term of three years, with the possibility of one renewal.

The task of these committees was to rate the candidates on a three-point scale—not recommended, recommended, or highly recommended. The designation would remain active for a two-year period, constituting a pool for filling vacancies in that period. An applicant could reapply if not appointed within that time frame. Although the ministers of justice were not bound to appoint from the list provided, it is generally understood that they did so. However, in making their selections for appointment, they did not rely completely on the committee's recommendations. Rather, they engaged in another stage of consultations with

members of the judiciary and the profession as well as regional or provincial colleagues and the general public.

At the end of these proceedings, the minister of justice would recommend his nominee to the federal Cabinet for the final decision. The prime minister made recommendations for the positions of chief justice of the provincial or territorial superior courts and all Supreme Court of Canada appointees.

As prime minister, Harper made three controversial changes to this committee structure in 2006. First, an additional seat was designated for a police representative. Second, the judicial representative's vote was removed, unless there was a tie. Third, the "highly recommended" designation was abandoned. These changes shifted the balance of the committee, in that the government's representatives enjoyed a majority of votes. The changes precipitated charges that the government had turned the clock back to the days of political, rather than merit-based, appointments.

## **2. Appointments to the Supreme Court of Canada**

Appointment to the Supreme Court is based on a process undertaken to fill each vacancy as it arises, in part because the seats on the court are allocated on a geographical basis, but also to address any identified needs for specific legal expertise or experience. The *Supreme Court Act* designates three seats for Quebec. By convention, Ontario has three seats, the Atlantic provinces two, and the Western provinces one. There are also professional qualifications set out in the Act, which are introduced below in conjunction with the Supreme Court advisory opinion relating to the validity of Justice Nadon's appointment.

The traditional practice has been that the prime minister selects Supreme Court justices on the advice of the minister of justice. From 1875 to 1949, the period in which the Supreme Court operated subject to appeal to the Privy Council, most of the appointees had held electoral office, including a good number who had sat in Cabinet. Some were active politicians at the time of appointment; others were unsuccessful politicians. Peter Russell describes the appointment process as "not exactly a talent hunt," perhaps because the Supreme Court bench was considered to be subject to federal government control and because its judgments were subject to reversal by the Privy Council on appeal: see Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Scarborough, Ont: McGraw-Hill Ryerson, 1987) at 337.

After 1949, appointees were more likely to have had careers in legal practice, including judicial experience. In 1967, Minister of Justice Pierre Trudeau approved the establishment by the Canadian Bar Association of a committee to examine the qualifications of persons under consideration for appointment. The large committee did not meet with the candidates and, given the short time frame specified for its work, often obtained information informally. In 1974, Justice Minister Lang appointed a special adviser to develop a list of qualified candidates, based on a list of attributes that included sympathy, generosity, charity, even temperament, integrity, ability to listen, as well as an impeccable personal life, legal ability and experience, religious and ethnic origin, specialized abilities, public service, age, and sex.

Until 2004 that process operated behind closed doors, without public knowledge of its structure or the criteria applied. Appearing before a committee of Parliament in 2003, Justice Minister Irwin Cotler characterized the process as "relatively unknown," rather than secretive

or partisan. He then described a process that commenced with the identification of candidates from the province or region of the vacancy put forward by lawyers, legal academics, and members of the judiciary. Representatives of the minister of justice would then enter into extensive consultation on the merits of the candidates with senior judges, attorneys general, and officials of Canadian Bar Association and law societies of the relevant provinces. The focus was on professional qualifications, capacity, personal characteristics, and diversity. For candidates already on the bench seeking promotion, the screening included examination of the quality of their judgments. The minister of justice would then discuss the leading candidates with the prime minister, who would select a preferred candidate to present to Cabinet. The public announcement would be made after the governor general had made the appointment.

In recent years, changes to this process have introduced the involvement of members of Parliament. This process began in 2004, when the Liberal government faced the need to move quickly to fill two vacancies on the Supreme Court from Ontario, following the unexpected resignations of Justices Arbour and Iacobucci. It appointed an Interim Ad Hoc Committee on the Appointment of Supreme Court Judges, composed of members of Parliament, a representative of the Canadian Judicial Council, and a representative of the Law Society of Upper Canada. At the end of the evaluation process described above, the committee privately reviewed the qualifications of the two candidates considered the most suitable in order to advise the prime minister. After the prime minister had made his selection, the process culminated in an unprecedented televised hearing in which the minister of justice explained the process and delineated the prime minister's nominees' qualifications, and then answered the committee's questions. The governor general's appointment of the two nominees—Justices Abella and Charron—followed this hearing.

In 2005, then Justice Minister Irwin Cotler announced a new, merit-driven, confidential process for Supreme Court appointments. It included formal consultation with the attorneys general of the relevant provinces or territories and other members of the legal community to develop a "long short list," five to eight candidates, to be reduced to three candidates by an advisory committee, which would conduct its own consultation process. The minister of justice would then recommend one nominee to the prime minister and later appear before the Justice Standing Committee to explain the selection of the person appointed.

An election intervened, which produced a new Conservative minority government headed by Mr. Harper. He accepted the previous government's short list of three candidates and chose its preferred candidate, but did not proceed with the further steps in the process adopted by the previous minister of justice. Instead, he appointed an Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada, composed of parliamentarians, which interviewed the nominee, Justice Rothstein, in a televised hearing. This novel step increased parliamentary engagement and attracted strong public interest.

Some commentators favour greater parliamentary involvement, such as just described, to maintain a proper balance between the power of the judiciary and the power of Parliament and to provide a modicum of accountability and transparency. Critics are wary of the introduction of the ideological questioning and political machinations that epitomize the Senate hearings into appointments to the US Supreme Court. They also question whether political involvement works to undermine merit-based criteria for appointment. For example, they suggest that the best candidates may not agree to be exposed to public

review before the appointment is made or to undergo evaluation in a situation where confidentiality may not be fully preserved.

The hearing held just before Justice Rothstein's appointment did not end this debate for a number of reasons. The committee, composed of MPs, was ad hoc. The parliamentarians did not have the benefit of parliamentary privilege and, perhaps for that reason, their questioning was superficial and restrained. Justice Rothstein's judicial record did not raise any particular "red flags" for those concerned about so-called activist judicial decision-making. The MPs were not experts, had little time to prepare for the hearing, and played no role in the actual appointment.

Mr. Harper's plans to further modify the process were stymied by the need to fill the vacancy in the Atlantic provinces' seat prompted by Justice Bastarache's retirement in 2008. The minister of justice proceeded to enlarge the parliamentary involvement in the appointment. He prepared a list of candidates to be reviewed by a new body, the Supreme Court Selection Panel, composed of five members of Parliament—two government members and one each from the other parties. This panel was to produce a short list of three for consideration by the prime minister and minister of justice, whose selected nominee would appear before an ad hoc parliamentary committee to be questioned.

In the midst of a period of very intense political contestation, Prime Minister Harper chose to revert to the older mode of executive appointment. He appointed Justice Cromwell without the advisory panel's recommendation or the televised parliamentary hearing. He also took the unusual step of making the appointment while Parliament was prorogued. (For commentary on the exercise of the appointment power when the government is in restricted "caretaker" mode, see Michael Plaxton, "The Caretaker Convention and Supreme Court Appointments" (2016) 72 SCLR (2d) 449.)

In 2011, Justices Binnie and Charron each announced their intention to retire, producing two Ontario vacancies. The appointments of Justices Moldaver and Karakatsanis included these steps: the compilation of a list of candidates in the Department of Justice, deliberation by the ad hoc parliamentary Supreme Court Selection Panel to narrow down the list to six names, the prime minister's selection of the preferred candidates on the advice of the minister of justice, and a public hearing in which the nominees answered questions from the members of an hoc committee of Parliament in a public televised hearing. This was also the process followed for the appointment of Justice Wagner in 2012.

In September of 2013, Mr. Harper announced the appointment of Justice Nadon, a justice of the Federal Court of Appeal, to a Quebec seat on the Supreme Court, to replace Justice Fish. The appointment raised the issue of whether the *Supreme Court Act* precluded the appointment of a sitting Federal Court judge to one of the three Supreme Court seats allocated to Quebec jurists. Section 6 of the Act stipulates that three of the nine judges of the Supreme Court should be appointed "from among the judges of the Court of Appeal, or of the Superior Court of the Province of Quebec or *from among the advocates of that Province*" (emphasis added). Justice Nadon was not at the time of his appointment a member of the *barreau du Québec*, although he had been a member of the Quebec bar for more than 10 years prior to his appointment to the Federal Court. At issue was whether s 6 required current membership in the Quebec bar. The government had sought a legal opinion on this issue prior to announcing the appointment. The opinion, provided by retired Supreme Court Justice Binnie and supported by retired Justice Charron and constitutional expert Peter Hogg, affirmed Justice Nadon's eligibility for appointment. In October, an ad hoc meeting of

MPs, with 48 hours' notice, had the opportunity to question Justice Nadon in a televised session. The governor general then made the appointment.

Proceedings challenging the nomination were immediately commenced in Federal Court by a Toronto lawyer. The federal government meanwhile quickly introduced amendments to the *Supreme Court Act*, adding two declaratory provisions. Of most relevance is s 6.1, which provided that, for the purpose of s 6 of the Act, an appointee to the Supreme Court was from among the advocates of the province of Québec if, *at any time*, he or she was an advocate of at least ten years standing at the bar of that province. (The amendments were included as part of an omnibus budget bill and were subsequently passed.) Immediately after the amendments were introduced, the governor in council referred two questions to the Supreme Court. The first question asked whether a person who was, at any time, an advocate of at least ten years standing at the *barreau du Québec* qualified for appointment under s 6 of the Act as being "from among the advocates of that Province." The second question asked whether Parliament could enact legislation to make such a person eligible for appointment in the event that he or she did not qualify under the statute in its unamended form, thus engaging the issue of the validity of s 6.1.

By a 6–1 majority, the Supreme Court answered the questions in the negative. The court's reasons in the reference decision were multifaceted. The court engaged in the statutory interpretation of both the original provisions in the *Supreme Court Act* as to eligibility for appointment to one of the three Quebec seats on the Supreme Court and the new declaratory provisions. Review of these declaratory provisions precipitated analysis of the 1982 constitutional amending formula, as applied to Supreme Court appointments and, by extension, the status of the Supreme Court as both a statutory and constitutional institution. The court's ruling has been described as the first time a common law court invalidated a judicial appointment.

### Reference re Supreme Court Act, ss 5 and 6

[2014 SCC 21, \[2014\] 1 SCR 433](#)

(most footnotes omitted; some integrated into text)

McLACHLIN CJ (LeBel, Abella, Cromwell, Karakatsanis, and Wagner JJ concurring):

#### *I. Introduction*

[1] [Section 6 of the] *Supreme Court Act* provides that three of the nine judges of the Supreme Court of Canada must be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province" ....

[2] The first [question in this Reference] is whether a person who was at any time an advocate of at least 10 years standing at the Barreau du Québec [in the past] qualifies for appointment under s. 6 as being "from among the advocates of that Province." If the answer to the first question is no, the second question arises. It is whether Parliament can enact legislation to make such a person eligible for appointment to one of the three Quebec seats on the Court. The answer to these questions—which on their face raise

issues of statutory interpretation—engage more fundamental issues about the composition of the Court and its place in Canada's legal and constitutional order.

• • •

### ***III. Background***

[9] On September 30, 2013, the Prime Minister of Canada announced the nomination of Justice Marc Nadon, a supernumerary judge of the Federal Court of Appeal, to the Supreme Court of Canada. On October 3, 2013, by Order in Council P.C. 2013-1050, Justice Nadon was named a judge of the Supreme Court of Canada, replacing Justice Morris Fish as one of the three judges appointed from Quebec pursuant to s. 6 of the *Supreme Court Act*. He was sworn in as a member of the Court on the morning of October 7, 2013.

[10] The same day, the appointment was challenged by an application before the Federal Court of Canada . . . . Justice Nadon decided not to participate in any matters before the Court.

[11] On October 22, 2013, the Governor General in Council referred the two questions ... to this Court for hearing and consideration pursuant to s. 53 of the *Supreme Court Act*. On the same day, Bill C-4, *Economic Action Plan 2013 Act*, No. 2, was introduced in the House of Commons. Clauses 471 and 472 of Bill C-4 proposed to amend the *Supreme Court Act* by adding ss. 5.1 and 6.1. These provisions were subsequently passed and received Royal Assent on December 12, 2013: S.C. 2013, c. 40. The new s. 6.1 seeks to make it clear that a former member of the Quebec bar is eligible for appointment under s. 6.

[12] Sections 5, 5.1, 6 and 6.1 of the Act now read as follows:

5. Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

5.1 For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province.

6. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

6.1 For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province.

### ***VI. Question 1***

#### **A. The Issue**

(1) *Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the Supreme Court Act?*

[13] Section 5 of the *Supreme Court Act* sets out the general eligibility requirements for appointment to the Supreme Court of Canada by creating four groups of people who are eligible for appointment: (1) current judges of a superior court of a province, including

courts of appeal, (2) former judges of such a court, (3) current barristers or advocates of at least 10 years standing at the bar of a province, and (4) former barristers or advocates of at least 10 years standing.

[14] Section 6 of the Act sets out the specific eligibility requirements for appointment to the Supreme Court as a judge for the province of Quebec. The provision expressly identifies two categories of people who are eligible for appointment: (1) judges of the Court of Appeal and Superior Court of Quebec, and (2) members of the Quebec bar.

[15] The question in this reference is whether the second category in s. 6 of the Act encompasses both current *and* former members of the Quebec bar, or whether it limits eligibility to current members of the bar. Justice Nadon does not belong to the first category—he was not a judge of the Court of Appeal or of the Superior Court of Quebec—and was not a current member of the Quebec bar at the time of his appointment. He is, however, a former member of the Quebec bar of more than 10 years standing. His eligibility for appointment thus turns on the scope of the second category—i.e. on whether a person is eligible for appointment to the Supreme Court of Canada under s. 6 of the Act on the basis of former membership of the Quebec bar.

[16] The Attorney General of Canada submits that s. 5 sets out the general eligibility criteria and allows both former and current members of the bar to be appointed to the Supreme Court. In his view, s. 6 does not restrict or otherwise substantively modify these criteria; rather, it functions to ensure that judges appointed for Quebec fulfil the general eligibility requirements in the province of Quebec.

[17] In our view, s. 6 narrows the pool from the four groups of people who are eligible under s. 5 to two groups who are eligible under s. 6. By specifying that three judges shall be selected from among the members of a specific list of institutions, s. 6 requires that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of these institutions.

[18] We come to this conclusion for four main reasons. First, the plain meaning of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. Second, this interpretation gives effect to important differences in the wording of ss. 5 and 6. Third, this interpretation of s. 6 advances its dual purpose of ensuring that the Court has civil law expertise and that Quebec's legal traditions and social values are represented on the Court *and* that Quebec's confidence in the Court be maintained. Finally, this interpretation is consistent with the broader scheme of the *Supreme Court Act* for the appointment of *ad hoc* judges.

### **B. General Principles of Interpretation**

[19] The *Supreme Court Act* was enacted in 1875 as an ordinary statute under the authority of s. 101 of the *Constitution Act, 1867* (S.C. 1875, c. 11). ... Parliament's authority to amend the Act is now limited by the Constitution. Sections 5 and 6 of the *Supreme Court Act* reflect an essential feature of the Supreme Court of Canada—its composition—which is constitutionally protected under Part V of the *Constitution Act, 1982*. As such, they must be interpreted in a broad and purposive manner and understood in their proper linguistic, philosophic and historical context: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

### C. Legislative History of Sections 5 and 6

[20] The eligibility requirements for appointments from Quebec are the result of the historic bargain that gave birth to the Court in 1875. Sections 5 and 6 in the current Act descend from the original eligibility provision found in s. 4 of the 1875 Act. It is therefore useful to review the legislative history of the eligibility provisions. As we shall discuss, only the 1886 amendment to the Act substantively changed the general eligibility requirements for appointment to the Court under what is now s. 5. There have been no substantive changes to the criteria for appointments from Quebec since the Act was introduced in 1875.

• • •

### E. Section 6

• • •

[36] The Attorney General of Canada argues that ss. 5 and 6 must be read together as complementary provisions, so that the requirement of at least 10 years standing at the bar applies to appointments from Quebec. Since s. 6 makes no reference to how many years an appointee must have been at the bar, reading it without s. 5 would lead to the absurd result that a highly inexperienced lawyer would be eligible for appointment to the Court, the Attorney General says.

[37] We agree that ss. 5 and 6 must be read together. We also agree that the requirement of at least 10 years standing at the bar applies to appointments from Quebec. We disagree, however, with the Attorney General's ultimate conclusion that reading these provisions together in a complementary way permits the appointment of *former* advocates of at least 10 years standing to the Quebec seats on the Court. Section 6 does not displace the general requirements under s. 5 that apply to all appointments to the Supreme Court. Rather, it makes additional specifications in respect of the three judges from Quebec. One of these is that they must currently be a member of the Quebec bar.

[38] We reach this conclusion based on the plain meaning and purpose of s. 6, and the surrounding statutory context.

#### (1) The Plain Meaning of Section 6

• • •

[45] ... [O]n a plain reading, s. 5 creates four groups of people eligible for appointment: current and former judges of a superior court and current and former barristers or advocates of at least 10 years standing at the bar. But s. 6 imposes a requirement that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of the listed Quebec institutions. Thus, s. 6 narrows eligibility to only two groups for Quebec appointments: current judges of the Court of Appeal or Superior Court of Quebec and current advocates of at least 10 years standing at the bar of Quebec.

#### (2) The Purpose of Section 6

[46] This textual analysis is consistent with the underlying purpose of s. 6. The Attorney General of Canada submits that the purpose of s. 6 is simply to ensure that three

members of this Court are trained and experienced in Quebec civil law and that this purpose is satisfied by appointing either current or former Quebec advocates, both of whom would have civil law training and experience.

[47] ... [A] review of the legislative history reveals an additional and broader purpose.

[48] Section 6 reflects the historical compromise that led to the creation of the Supreme Court. Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation ... , the protection of Quebec through a minimum number of Quebec judges was central to the creation of this Court. A purposive interpretation of s. 6 must be informed by and not undermine that compromise.

[49] The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada. This broader purpose was succinctly described by Professor Russell in terms that are well supported by the historical record:

... [T]he antipathy to having the Civil Code of Lower Canada interpreted by judges from an alien legal tradition was not based merely on a concern for legal purity or accuracy. It stemmed more often from the more fundamental premise that Quebec's civil-law system was an essential ingredient of its distinctive culture and therefore it required, as a matter of *right*, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture. [Emphasis in original.]

(Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (1969), at p. 8)

[50] At the time of Confederation, Quebec was reluctant to accede to the creation of a Supreme Court because of its concern that the Court would be incapable of adequately dealing with questions of the Quebec civil law ....

[51] The bill creating the Supreme Court was passed only after amendments were made responding specifically to Quebec's concerns. Most significantly, the amended bill that became the *Supreme Court Act* provided that two of the six judges "shall be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec": s. 4 of the 1875 Act.

[52] In debating the proposed establishment of the Supreme Court in 1875, members of Parliament on both sides of the House of Commons were conscious of the particular situation of Quebec and the need to ensure civil law expertise on the Court.

• • •

[55] Government and opposition members alike saw the two seats (one third) for Quebec judges as a means of ensuring not only the functioning, but also the legitimacy of the Supreme Court as a federal and bijural institution.

[56] Viewed in this light, the purpose of s. 6 is clearly different from the purpose of s. 5. Section 5 establishes a broad pool of eligible candidates; s. 6 is more restrictive. Its exclusion of candidates otherwise eligible under s. 5 was intended by Parliament as a means of attaining the twofold purpose of (i) ensuring civil law expertise and the representation

of Quebec's legal traditions and social values on the Court, and (ii) enhancing the confidence of Quebec in the Court. Requiring the appointment of current members of civil law institutions was intended to ensure not only that those judges were qualified to represent Quebec on the Court, but that they were perceived by Quebecers as being so qualified.

• • •

[58] ... Parliament could have adopted different criteria to achieve the twofold objectives of s. 6—for instance by requiring a qualitative assessment of a candidate's expertise in Quebec's civil law and legal traditions—but instead it chose to advance the provision's objectives by specifying objective criteria for appointment to one of the Quebec seats on the Court. In the final analysis, lawmakers must draw lines. The criteria chosen by Parliament might not achieve perfection, but they do serve to advance the provision's purpose ....

[59] We earlier concluded that a textual interpretation of s. 6 excludes former advocates from appointment to the Court. We come to the same conclusion on purposive grounds. The underlying purpose of the general eligibility provision, s. 5, is to articulate minimum general requirements for the appointment of all Supreme Court judges. In contrast, the underlying purpose of s. 6 is to enshrine the historical compromise that led to the creation of the Court by narrowing the eligibility for the Quebec seats. Its function is to limit the Governor in Council's otherwise broad discretion to appoint judges, in order to ensure expertise in civil law and that Quebec's legal traditions and social values are reflected in the judges on the Supreme Court, and to enhance the confidence of the people of Quebec in the Court.

[60] In reaching this conclusion, we do not overlook or in any way minimize the civil law expertise of judges of the Federal Court and Federal Court of Appeal. ... The role of Quebec judges on the federal courts is a vital one. Nevertheless, s. 6 makes clear that judges of the federal courts are not, by virtue of being judges of those courts, eligible for appointment to the Quebec seats on this Court. The question is not whether civilian members of the federal courts would make excellent judges of the Supreme Court of Canada, but whether they are eligible for appointment under s. 6 on the basis of being former rather than current advocates of the Province of Quebec. We conclude that they are not.

[61] Some of the submissions before us relied heavily on the context provided by constitutional negotiations following the patriation of the Constitution in 1982, particularly on Quebec's agreement to proposed constitutional reforms that would have explicitly rendered Federal Court and Federal Court of Appeal judges eligible for appointment to one of the Quebec seats on the Court. The Charlottetown Accord went furthest by stipulating that it was entrenching the current *Supreme Court Act* requirement of "nine members, of whom three must have been admitted to the bar of Quebec (civil law bar)" (*Consensus Report on the Constitution: Charlottetown* (1992), at p. 8). This showed, it was argued, that these eligibility requirements were acceptable to Quebec.

[62] We do not find this argument compelling. The Meech Lake and Charlottetown negotiations over the eligibility requirements for the Court took place in the context of wider negotiations over federal–provincial issues, including greater provincial involvement in Supreme Court appointments. In the case of Quebec, the proposed changes would have diminished the significance of s. 6 as the sole safeguard of Quebec's interests on the Supreme Court by requiring the Governor General in Council to make an appointment from a list of names submitted by Quebec. In this context, we should be wary of drawing

any inference that there was a consensus interpretation of s. 6 different from the one that we adopt.

[The second half of the majority decision, dealing with question 2 and the validity of the government's attempt to revise the eligibility criteria for the Quebec seats on the court through the addition of s 6.1 to the *Supreme Court Act*, can be found in Chapter 26, Amending the Constitution (Section IV.C). It is that portion of the judgment that discusses the evolution of the court, its constitutional status, and the application of the amending formula in Part V of the *Constitution Act, 1982* to changes to the court. Justice Moldaver dissented. He read the eligibility criteria in s 5 to be applicable to all appointments, including those filling a Quebec seat on the court. Accordingly, current and former members of the Quebec bar having at least ten years standing, as well as current and former judges of the Quebec superior courts, would meet the eligibility requirements for a Quebec seat. He also read ss 5 and 6 together. While s 5 provides both current and former members of a provincial bar, with a minimum ten years' standing, as well as current and former judges of a superior court of a province, eligibility for appointment, s 6 provides an additional proviso to s 5, which relates to the three Quebec seats—demonstration of their affiliation with one of the three designated Quebec institutions (the Barreau du Québec, the Quebec Court of Appeal, and the Superior Court of Quebec).

Justice Moldaver rejected the claim that the sections rendered ineligible former advocates of at least ten years' standing at the Quebec bar, on the ground that the object of s 6 is, and always has been, to ensure that a specified number of the court's judges would have civilian legal training and would represent Quebec. He considered an additional requirement of current membership at the Quebec bar as unconnected to this objective. In his view, the words "from among," in s 6, had no temporal significance given the context. Rather, these words referred to those eligible under s 5. This reading also had the advantage of avoiding the absurd possibility that an individual having one day's standing at the Quebec bar would be eligible for a Quebec seat if the two sections were not linked as he suggested. It did not forward the objective of the sections to read s 6 as requiring a former advocate of at least ten years' standing at the Quebec bar, or a former judge of the Quebec Court of Appeal or Superior Court, to rejoin the Quebec bar for one day in order to be considered for appointment.]

#### **NOTE: THE AFTERMATH OF THE SUPREME COURT ACT REFERENCE**

An extensive discussion of the court's interpretation of the amending formula in the *Supreme Court Act Reference* can be found in Chapter 26, Amending the Constitution.

With respect to the specific issue of the eligibility for appointment to the Quebec seats on the court, the precedential importance of the Supreme Court's decision in the *Supreme Court Act Reference* is unclear for two reasons. One is that it appears that the rules applicable to membership in the Quebec bar no longer preclude membership for all judges. The *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 now provides that the judicial office on certain courts is incompatible with legal practice, but does not refer to the federal courts or the Supreme Court of Canada in that respect.

Another reason lies in a recent judgment of the Supreme Court of Canada in *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 22, [2015] 2 SCR 179. Here, the

Supreme Court of Canada upheld the Quebec Court of Appeal in a case challenging the appointment of Justice Robert Mainville, a Federal Court judge, to the Quebec Court of Appeal. The appointment in this case was governed by s 98 of the *Constitution Act, 1867*, which states that appointment to the “courts of Quebec” must be made “from the Bar of that Province.” The question for determination, as in the reference case relating to Justice Nadon, was whether the connection to the “Bar of Quebec” had to be current. The Quebec government initiated a reference to the Quebec Court of Appeal seeking a ruling on the constitutionality of the appointment, its argument being that, following the Nadon reference, s 98 should be interpreted in the same way as s 6 of the *Constitution Act, 1867*—that is, to require contemporaneous membership in the *barreau du Québec* at the time of appointment—thus rendering judges of the federal courts ineligible for appointment to the superior courts of Quebec. The Quebec Court of Appeal found in favour of Justice Mainville’s appointment, concluding that s 98 arose in different statutory and historical context from s 6 and that its interpretation should not be governed by the *Supreme Court Act Reference*. Understanding the purpose of s 98 as ensuring that judges of the superior courts would be legally trained and trained in local law, the Quebec Court of Appeal interpreted the section to require only that a person appointed to one of the courts of Quebec have been admitted to the *barreau du Québec* or be such a member when appointed. The court noted that a contrary interpretation would have cast doubts on the validity of the common practice of promoting Quebec trial court judges to the Quebec Court of Appeal. In very brief reasons, the Supreme Court of Canada upheld the decision. The implication of this result is that it would have been possible to appoint Justice Nadon to the Supreme Court in a two-step process that provided him a short-term appointment to the Quebec Court of Appeal, to satisfy the strictures of ss 5 and 6 of the *Supreme Court Act*.

There were other repercussions relating to the process of appointment to the Supreme Court of Canada after the invalidation of Justice Nadon’s appointment, one of them being a public rift between Prime Minister Harper and Chief Justice McLachlin that reflected, in part, Harper’s long-standing dissatisfaction with the Supreme Court as an activist body insufficiently deferential to Parliament. Shortly after the release of the court’s decision, allegations were made (later proven unfounded) that the chief justice of Canada had lobbied against the appointment of Justice Nadon. (She had merely raised the issue of Justice Nadon’s eligibility for appointment under s 6 of the *Supreme Court Act* after she had met with the parliamentary screening committee consulting on the long shortlist of candidates for appointment to the Supreme Court.) The fuller facts, when they became available, precipitated strong support for the chief justice.

As well, additional detail relating to the Nadon appointment came to light. It was reported that the list shown to the chief justice consisted of six names, four of which were judges on the Federal Court or Federal Court of Appeal. The final list of three later produced by the parliamentary committee included Mr. Nadon; Justice Trudel, a Federal Court of Appeal judge with a low profile; and Justice Bich of the Quebec Court of Appeal, who had extensive academic and judicial experience, a reputation for strong, analytic judgments, and the support of the Quebec legal community.

The publication of the inner workings of the parliamentary screening committee constituted a breach of the undertakings as to confidentiality of its members. Mr. Harper reacted to this breach by reverting to a process in which the executive had full control over the process, without parliamentary involvement. The next three Supreme Court appointments—Justices

Gaston, Côté, and Brown—were announced after the appointment had been made, with very little information provided for the selection.

In August 2016, a recently elected Liberal government announced a new process for appointments to the Supreme Court of Canada. One precipitating factor was the need to fill the vacancy resulting from Justice Cromwell's unexpected early retirement. Another was the commitment to address long-standing calls for a stable, merit-driven process offering transparency, accountability, and public engagement as well as avoiding extended periods of time in which the court must operate without its full complement of judges.

The new process formalizes the creation of the applicant pool. Qualified applicants must complete a detailed questionnaire and provide consent for the release of information from the Law Society of the applicant's province and a general background check. The questionnaire requires a comprehensive review of the applicant's qualifications, including personal information; a list of six references; statutory qualifications; education; professional history (including legal and non-legal work, pro bono activity, honours and awards, and a list of judgments and other publications); a dossier of five judgments or other legal writing—as well the reason for their selection—as a basis for assessing skills; an account of the applicant's disposition of five significant cases or matters while in legal practice or on the bench; a list of all Supreme Court of Canada cases in which the applicant participated as counsel or that were later heard on appeal in the Supreme Court; information pertaining to personal suitability and integrity (including details of any disciplinary proceeding by a law society, bankruptcy, default in paying a family support or a tax obligation, or any other matter that "could reflect negatively on oneself or the judiciary"); and a description of any serious physical or mental health problem. The questionnaire also calls for a number of brief essays on the following topics: the role of the judiciary in Canada's legal system; experience-based insights into the variety, diversity, and unique perspectives of Canadians; the role of a judge in a constitutional democracy; the audience for Supreme Court of Canada judgments; and the role of Supreme Court justices in reconciling the need to provide guidance on important legal questions, on the one hand, with the mandate to do justice to the parties to the case, on the other. Copies of these forms can be accessed at <<http://www.fja-cmf.gc.ca/scc-csc/form-formulaire-eng.html>>. The application package is submitted to Office of the Commissioner for Federal Judicial Affairs.

After initial screening by the Federal Judicial Affairs Office, the applications are sent to a new seven-member body called the Independent Advisory Board for the Supreme Court of Canada Judicial Appointments. The members of this body hold at pleasure appointments, as special advisers to the prime minister, for a renewable five-year period. The two most striking characteristics of the advisory board are that most of its members have professional qualifications and that some of the members may be drawn from the public. One professional place is designated for a retired judge nominated by the Canadian Judicial Council. The other three are designated for nominees of leading professional bodies—the Canadian Bar Association, the Federation of Law Societies of Canada, and the Council for Canadian Law Deans. The governor general designates one advisory board member to act as chairperson. The minister of justice nominates the three other members, only one of whom may be a lawyer.

The advisory board has a number of functions. It is empowered to enlarge the applicant pool by encouraging qualified applicants to apply. It also consults with the chief justice of the Supreme Court of Canada and other key stakeholders. The advisory board's work

culminates in the recommendation of a non-binding short list of three to five nominees to the prime minister, accompanied by statements setting out each candidate's compliance with the long-standing statutory criteria as well as other criteria specified in the new arrangements for appointment.

The government has indicated its preference for candidates who are functionally bilingual—that is, able to read legal submissions; understand oral submissions; and converse with counsel during oral argument and with other judges of the court, in both English and French. (Satisfaction of this level of bilingualism is to be determined by the Office of the Commissioner for Federal Judicial Affairs on the basis of established and objective criteria.) Other criteria are reflected in the government's stated objectives in regard to the composition of the court, which include gender balance and respect for the diversity of Canadian society, with reference to Indigenous peoples; disabled persons; and members of linguistic, ethnic, and other minority communities, such as those defined by gender identity or sexual orientation.

The minister of justice has the opportunity to consult on the shortlist of candidates with the chief justice of Canada, the provincial and territorial attorneys general of the relevant province(s), the relevant Cabinet ministers and opposition justice critics, as well as the members of the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs. On the basis of these consultations, the minister of justice will advise the prime minister. The prime minister may ask the advisory board for more names.

After the prime minister selects his nominee, and before the governor general is asked to make the appointment, members of Parliament will have the opportunity to participate in a formal public process that presents the nominee to them and to the Canadian public. First, the minister of justice and the chairperson of the advisory board participate in a meeting of the House of Commons Standing Committee on Justice and Human Rights, in which they set out the nominee's satisfaction of the statutory requirements and other relevant attributes for the appointment. The nominee will then participate in a moderated question and answer session with this committee, together with the Senate Committee on Legal and Constitutional Affairs and representatives from the Bloc Québécois and the Green Party.

The final public element in the process requires the advisory board to submit a report describing its fulfillment of its responsibilities, including its expenditures, statistics on the applications received, and any recommendations for improving the appointment process. This report will be made public. For further documentation pertaining to the new process, see <<http://pm.gc.ca/eng/news/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial-appointments-process>>.

Reaction to the new process has been positive in regard to its transparency, accountability, and merit orientation. The main concern raised is that the addition of the bilingualism and diversity considerations may undermine the conventional practice of allocating seats on the court geographically. Based on the geographical model, the appointee replacing Justice Cromwell would be drawn from eligible jurists from the Atlantic provinces. Based on the linguistic and diversity criteria, the nominee is more likely to come from outside this region.

Consider the particular ways in which the aspirations of the new process have been translated into the details of the application process, the composition and responsibilities of the advisory board, the role of the minister of justice, the parliamentary proceedings and the advisory board's report. Does the combination of statutory, linguistic, and diversity criteria

create an overly complex set of considerations? Do these considerations depart from or more deeply fulfill the purposes of the geographic considerations established by convention? Is the attempt to preclude strong partisan pressure adequate? Is it excessive?

## VI. JUDICIAL SECURITY OF TENURE

Section 99 of the *Constitution Act, 1867* originally provided that the tenure of federally appointed judges was for life, conditional only on “good behaviour.” This standard was an improvement on the pre-Confederation colonial arrangement, by which judges held tenure at the “pleasure” of the executive. Section 99, in effect, brought the Canadian superior courts into line with the independence afforded the superior courts in the United Kingdom. A constitutional amendment later provided a retirement age of 75.

Section 99 also allocated the authority to apply this standard by vesting in the governor general the power to terminate a judicial appointment, based on an “Address of the Senate and House of Commons.” The s 99 termination power has never been applied.

The need for an administrative structure for processing allegations against sitting judges became apparent in the 1960s, after an inquiry into the question of whether to remove Ontario Supreme Court Justice Leo Landreville from the bench. The first stage of inquiry was conducted under the *Inquiries Act*. A second stage was conducted by a subcommittee of members of Parliament. The recommendation was for removal. Justice Landreville later challenged the legitimacy of the inquiry process in court. Ten years later, the Federal Court ruled that the inquiry had exceeded its mandate.

The federal *Judges Act*, RSC 1985, c J-1 now provides a formal administrative structure for investigating complaints against superior court judges to displace the prior ad hoc approach. The Canadian Judicial Council (CJC), set up in 1971, oversees the process. The chief justice of Canada acts as chair of the council, which is made up of the chief justices and associate chief justices of the superior courts and federal courts. The council’s responsibilities are twofold. First, it examines allegations of misconduct to determine if they warrant investigation. Second, it provides a public inquiry for serious and well-founded allegations to provide a basis for a recommendation to the minister of justice on the question of removal. The decision to seek removal of a judge by Parliament lies with the minister, not the CJC. The public inquiry process was designed to insure judicial accountability, without undermining the constitutional principle of judicial independence, through a process that is fair, efficient, and transparent.

Complaints may be submitted by anyone—lawyers, parties to a particular case, or members of the public. Most complaints are dismissed informally, on the basis that they are not relevant or are trivial, vexatious, or not in the public interest. An inquiry committee is set up if the matter is sufficiently serious to warrant a judge’s removal.

Under s 63(1), the council is obliged, at the request of the minister of justice or a provincial attorney general, to commence an inquiry to determine whether a judge should be removed from office. In *Cosgrove v Canadian Judicial Council*, [2007] 4 FCR 714, s 63(1) was challenged as infringing judicial independence. The Federal Court of Appeal held that s 63(1) was constitutional. An application for leave to appeal to the Supreme Court of Canada was dismissed.

The criteria for recommendations for removal from office include a determination that a judge has become permanently incapacitated or disabled—that is, unable to carry out the

duties of the office due to age, illness, or misconduct; has failed to carry out these duties; or was situated in a position incompatible with these duties. The general concern is whether conduct falling within these categories has undermined public confidence in the judge's ability to execute the judicial role. Since 1971, the CJC has recommended removal of a judge in three instances, prompting resignations by the judges under review.

A high-profile public inquiry on the removal from office of Justice Lori Douglas, the associate chief justice of the Family Division of the Manitoba Court of Queen's Bench, has intensified calls for changes to the CJC's administrative structure and procedure and prompted some changes to established procedures. After four years of contestation about the CJC's procedures and 4.5 million dollars in public expense, Justice Douglas ended the proceedings by announcing that she would retire if certain conditions were met.

The CJC responded to the criticisms related to the Douglas inquiry with an overture to the public to provide suggestions for improvement to its process. Some changes have been made, but they do not seem to address concerns expressed by leading commentators about the need for a stronger commitment to transparency, accountability, and fair process.

