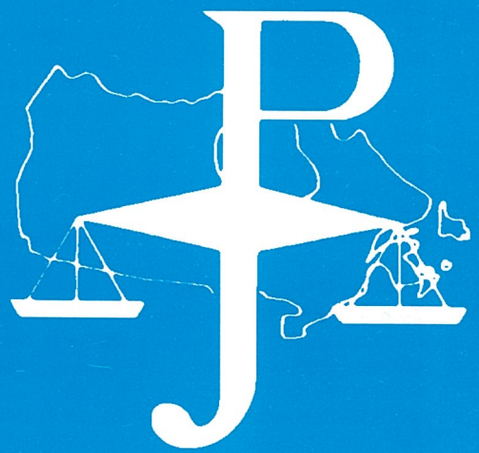

PROVINCIAL JUDGES

Journal

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THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES

The Canadian Association of Provincial Court Judges/ L'Association canadienne des juges des cours provinciales 1994-1995

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Hon. R. Allan Gould
Nanaimo
effective April 13, 1995
Hon. Rosemary M. Gallagher
Vancouver
effective April 18, 1995
Hon. Jodie F. Werier
Vancouver
effective April 24, 1995
Retirements/Retraites
Hon. G.H. Gilmour
Kelowna
effective June 30, 1995

ALBERTA
Appointments/Nominations
Hon. Michael G. Stevens-Guille
Edmonton
effective April 3, 1995
Hon. Sandra Hunt McDonald
Calgary
effective April 3, 1995
Hon. Heather A. Lamoureux
Calgary
effective April 17, 1995
Retirements/Retraites
Mr. Justice Lionel Locksley Jones
effective April 28, 1995
(appointed to the Alberta Court of Queen's Bench in Edmonton)

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Retirements
Hon. Robert Osborne
Hon. Michael Fitzpatrick
Hon. John Bennett
Hon. Maurice Charles
effective August 6, 1995
Hon. Derek Holder
effective June 13, 1995
Hon. Maurice Genest
effective May 31, 1995

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effective April 19, 1995
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effective April 19, 1995
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effective April 19, 1995

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effective May 3, 1995
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effective May 3, 1995
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effective May 3, 1995
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Val D'Or
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Hon. Jacques Tisseur
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effective January 23, 1995
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EDITOR'S NOTEBOOK/REMARQUES DU REDACTEUR

I spent some time recently poring over the minutes of meetings of the Association for the last year, as well as the committee reports which have been filed in that time with the Association. I also had access to speeches to and reports of various bodies, such as the Canadian Bar Association. As the recently appointed Editor of the Journal, I felt it was appropriate for me to inform myself about the issues of current concern to the membership.

I did not have to look far to realize that the issue of greatest present concern to judges in Canada is judicial independence. Most observers readily concede that judges should be independent to pursue their work, free of influence or interference. At times, it may appear that those making this concession are only paying lip-service to the incontestable and are not acting from a deeply-held conviction of the rightness of the proposition. Sometimes the reservations about the sincerity of such utterances are underscored by actions which clearly fly in the face of the principle under scrutiny here.

Regardless of the doubts and misgivings which may be engendered by words or actions, a corollary has been added to the concept of "judicial independence" which is almost invariably uttered in the same breath as the former words - judicial accountability.

I have struggled with the two concepts. In the first instance, I see in them a measure

J'ai passé assez de temps récemment à étudier de près le procès-verbal des réunions de l'Association de l'année dernière, aussi bien que les comptes-rendus du comité qui ont été classés durant cette période avec l'Association. J'ai aussi eu droit aux discours faits à divers organismes et aux rapports de ces mêmes bureaux telle que ceux de l'Association du barreau canadien. Venant tout juste d'être nommé le Rédacteur de ce journal, j'ai pensé que c'était convenable de m'informer à propos des sujets courants qui concernent les membres associés.

Il ne m'a pas fallu chercher trop loin avant de me rendre compte que la question qui concerne le plus les juges aux Canada en ce moment c'est l'indépendance judiciaire. La plupart des observateurs reconnaîssent facilement que les juges devraient être indépendants pour qu'ils puissent poursuivre leur travail libre d'influence ou d'intrusion. De temps en temps, il se peut que ceux qui fassent ces concessions ne disent que du bout des lèvres à l'incontestabilité et n'agissent pas selon les convictions bien enracinées de la justesse de la proposition. Quelquefois les réservations à propos de la sincérité de telles expressions sont mises en évidence par des actions qui battent manifestement en brèche le principe sous l'examen minitieux ici.

Sans se préoccuper des doutes et des pressentiments qui pourraient engendrer des mots ou des actions, on a ajouté un corollaire au concept de «l'indépendance judiciaire» qui est presque invariablement prononcée dans le même souffle que les mots précédents - la responsabilité judiciaire.

Canadian Association of Provincial Court Judges
COMPENSATION COMMITTEE
1995 Spring Report

1995 Remuneration

1995 C.A.P.C.J. Survey

	1993	1994	1995	INCREASE	%CHANGE	% Fed
BC	$118402.00	$118402.00	$118402.00	$0.00	0.00%	74.50%
AB	$113964.00	$113964.00	$113964.00	$0.00	0.00%	71.71%
SA	$92250.00	$94556.00	$94556.00	$0.00	0.00%	59.50%
MA	$90444.35	$90444.35	$94017.00	$3572.65	3.80%	59.16%
ON	$124250.00	$124250.00	$124250.00	$0.00	0.00%	78.18%
QU	$113491.00	$113492.00	$113491.00	$0.00	0.00%	71.41%
NB	$95560.00	$97474.00	$97474.00	$0.00	0.00%	61.33%
NS	$100058.00	$99037.00	$99037.00	$0.00	0.00%	62.32%
PEI	$102840.00	$98248.00	$97867.00	(381.00)	-0.39%	61.58%
NF	$90129.00	$90129.00	$90129.00	$0.00	0.00%	56.71%
YU	$112179.00	$112179.00	$112179.00	$0.00	0.00%	70.58%
NWT	$119613.00	$119613.00	$119613.00	$0.00	0.00%	75.26%
COU	$150929.00	$150929.00	$150929.00	$0.00		
*QB	$158929.00	$158929.00	$158929.00	$0.00		
SCC	$185258.00	$185258.00	$185258.00	$0.00		

* (includes $3,000.00 Special Assignment)

AVERAGE SALARY (Provincial Court)

$106098.36	$105982.28	$106248.25	$265.97

"The period from September 1994 to today's date has been such as to make me cautiously optimistic about the future. Some progress has been made, further progress is to be expected, and it is hoped that all setbacks are behind us. I hold out no hope of any dramatic changes in our collective situation, but anticipate a slow gradual improvement over the next 12 months as our respective governments overcome their individual economic problems. Here is the breakdown of the current situation as of April 1, 1995."

By the Honourable Douglas MacDonald, Calgary, Alberta, Chair of the Compensation Committee of the C.A.P.C.J.

A few dollars down the road (wishful thinking), we tell ourselves that it would be time to get reacquainted with our own kind. We are suffering from homesickness. We try LAW.NET; but where are my comrades, these bohemians of the future, these Internet surfers of the law...

We would need our own "DEEP SPACE NINE" station..

All the bohemians of the future who would like to discuss the future of bohemians may from now on connect me at the following e-mail address:

laliberte @ internex.net

The rest can try this number:

(514) 872-9266

Quelques dollars plus loin (si peu), on se dit qu'il serait temps de retrouver les siens. On a le mal du pays. On essaie LAW.NET; mais où sont-ils les miens, ces bohémiens de l'avenir, ces internautes du droit ...

Il nous faudrait notre propre station **<<DEEP SPACE NINE>>** ..

Pour tous les bohémiens de l'avenir qui voudraient discuter de l'avenir des bohémiens, on peut désormais me rejoindre à l'adresse électronique suivante:

laliberte @ internax.net

Pour les autres, on peut essayer le:

(514) 872-9266

ON THE LIGHTER SIDE

"Just like the doctor's office!"

It was a busy day in first appearance court and a "standing-room only" crowd was wedged into the tiny courtroom. The judge entered and assumed his place on the bench. Upon reviewing the docket he read out the first name, and a gentleman arose and walked towards the bar. As he did, a woman stood up in the back of the room and called out "Hey you!" Hearing the words shouted in his direction the judge looked in the direction of the caller, realizing as he did that the woman was trying to get his attention. Seeing the quizzical look on his face the woman called again, "Hey you!" At this, the judge spoke up and said "Ma'am, are you referring to me?" to which she replied, "Yes, I'm talking to you. Look here, I have the 10:00 o'clock appointment here". His Honour smiled and looked towards her and said, "Ma'am, everyone here has the 10:00 o'clock appointment." As she resumed her seat she quipped, "Oh! like the doctor's office, is it?"

of conflict. How can an independent person be at the same time accountable? I recognize the complexity of the issue. I know too the arguments of those urging accountability who maintain that judges are to be accountable for "extra-judicial" conduct, or conduct not becoming a "judge" or not befitting the office.

Where, however, is the line to be drawn? At what point can it be said that any conduct, any thought or opinion, is not material to what becomes a judge or befits the office. Who will decide?

At other times it strikes me that those who reluctantly concede that "judicial independence" is an underlying principle of our system of justice, feel compelled to insist on some sort of "peace offering" from the judges, for having conceded the threshold issue. At the moment, the **quid pro quo** passes under the guise of accountability. There is, however, a vagueness about the process and purpose of "rendering account" which is unsettling.

What follows in this Journal is a sampling of the opinion which I have examined in my reading on this topic. It is a curious and eclectic mix of opinion: from a law student who is now a Crown prosecutor; from the Chairperson of the CBA Standing Committee on Equality; and, from a lay person who bills himself a "Student of the Court".

Noticeable by its dearth is comment by judges on the topic. Frankly, short of written judgments from the courts, there is little, if any, material to be had from judges on this matter. It is a complex and multifarious subject. Do judges have a voice on this

J'ai lutté avec les deux concepts. En premier lieu, je vois là-dedans une certaine mesure de conflit. Comment une personne indépendante peut-il être en même temps responsable? Je reconnais la complexité de la question. Je connais aussi les discussions de ceux qui préconisent la responsabilité et qui maintiennent que les juges doit être responsables pour la conduite «extra-judiciaire», ou la conduite qui n'est pas digne d'un «juge» ou pas convenable au bureau.

Où, cependant, faut-il fixer les limites? A quel niveau peut-on dire que n'importe quelle conduite, n'importe quelle pensée ou opinion, n'est pas essentielle à ce que convient à un juge ou digne de son service. Qui décidera?

D'autres fois cela m'accable que ceux qui admettent appréhensiblement que «l'indépendance judiciaire» est un principe fondamental de notre système de justice, se sentent obliger à insister sur une «offrande de paix» quelconque des juges, commerésultat d'avoir concédé le seuil de la question. En ce moment, le quid pro quo passe sous l'apparence de responsabilité. Il y a, cependant un manque de précision à propos de la procédure et le but du «compte-rendu» tout ce qui est perturbateur.

Ce qui suit dans ce journal est un prélèvement de l'opinion que j'ai examiné dans mes lectures à ce sujet. C'est un mélange d'opinion curieux et éclectique: d'un étudiant en droit qui est maintenant procureur de la poursuite de la Couronne; du Président du Comité permanent CBA sur l'égalité; et, d'une personne profane qui se considère comme un «Etudiant de la Cour».

Evident par sa stérilité est le commentaire par les juges sur le sujet de discussion. Franchement, sauf les jugements rédigés de la cour, il y a peu, s'il

issue?

I believe that judges should have a voice and that the time is at hand to be heard. Our President, the Honourable Wesley Swail, has already taken up the cause on our behalf. In February of this year he addressed the Mid-Winter meeting of the Canadian Bar Association. I have taken the liberty of reproducing a portion of his speech from that occasion. It will be noted that he challenges the Bar to take up the issue of judicial independence. The concerns that he raises and the challenge he has issued apply to society at large as much as they do the Bar or Judiciary.

y en a, du matériel qu'on peut procurer des juges sur ce point. Il s'agit d'un sujet complexe et divers. Les juges, ont-ils voix au chapitre?

Je crois que les juges devraient avoir leurs mots à dire et que le temps est venu pour les écouter. Notre Président, L'Honorable Wesley Swail, a déjà repris la cause en notre. En février de cette année il s'est adressé à la réunion en plein hiver de l'Association du Barreau canadien. J'ai pris la liberté de reproduire une partie de son discours de cette occasion. On notera bien qu'il lance un défi au barreau de reprendre la question sur l'indépendance judiciaire. Les propos qu'ils soulèvent ainsi que le défi qu'il a lancé s'appliquent à la société en général aussi bien que au barreau ou à l'organisation judiciaire.

ON THE LIGHTER SIDE

"I can't read and I'm forgetful!"

An older gentleman was a storekeeper in an outport community in Newfoundland. He was charged under the provincial Retail Sales Tax Act with failing to remit his monthly tax returns. He pled "Not Guilty" and put forward two defences: 1. he could not read or write and did not know what the forms were when they arrived in the mail; and, 2. he was "forgetful" and when he put the forms away until somebody came by to help him read them, he would forget where he had put them. His Honour, in a friendly way, informed the accused that his arguments did not constitute "defences" to the charges and convicted him accordingly. He levied the minimum fines and asked the accused how much time he needed to pay them. The accused, non-plussed by the convictions, reached into his pocket and retrieved his wallet, saying as he did so, "I'd better pay them now, Your Honour, or I might forget them."

The Internet or the Bohemian of the Future
L'internaute ou le Bohémien de L'avenir

by the Honourable Denis Laliberte / par L'Honourable Denis Laliberté
Montreal Municipal Court Judge
Juge de Cour Municipale de la Ville de Montréal

I too, possess the shortcomings common to my generation: I loved speed! But I have another flaw besides: I am a judge. And what a devil can a judge indulge himself in? A gleaming Harley Davidson "fat boy", a Miami Vice style "cigarette boat", or a Bombardier "Mach Z" ski-doo? None of this... for the time being!

But rather, an AST 486 DX-2/50; with a 12 megabyte capacity / Random Access Memory and a hard disk with an 850 megabyte capacity. Added to that a modem, a video card, a sound card and the relevant software (NETSCAPE;i-PHONE; PAINT SHOP PRO, etc). You will obtain something which is beyond the scope of your needs. But justifiably... much pleasure can be obtained from this. And you can fly at top speed on the Information Superhighway, without the worry of being judged or convicted for speeding.

One goes from the Louvre to the National Assembly or to the White House in a few seconds (barely, 4 or 5, seconds (most of the time).

We discuss our experimentations in this infinitely disparate world with other surfers of the Internet encountered by chance.

Moi aussi, j'ai les défauts de mon âge: j'aime la vitesse! Mais en plus, j'ai un autre défaut: je suis juge. Et que diable un juge peut-il se permettre? Une rutilante <<fat boy>> d'Harley Davidson, un <<cigarette boat>> à la Miami Vice ou un ski-doo <<Mach Z>> de Bombardier? Rien de tout cela, ... pour L'instant!

Mais plutôt, un 486 DX-2/50 d'AST; avec 12 meg/RAM et un disque dur de 850 meg. Ajoutez-y une carte modem, une carte vidéo, une carte de son et les logiciels pertinetns (NESTSCAPE; i-PHONE; PAINT SHOP PRO, etc). Vous obtenez quelque chose de trop puissant pour vos besoins. Mais justement, ... tout le plaisir est là. Et vous pouvez filer à toute allure sur l'autoroute de l'information, sans crainte d'être jugé ni condamné pour excès de vitesse.

On passe du Louvre à l'Assemblée nationale ou à la Maison-Blanche en quelques secondes (à peine 4 à 5 secondes, la plupart du temps).

On discute avec les autres internautes rencontrés au hasard de nos tâtonnements dans cet univers infiniment disparate.

on to explain how these "cultural inspirations" which guide a person's thinking have been combined with sudden losses from contact with our European descendants and us: the loss of individual freedom of choice; the loss of internal esteem system; the loss of the family; the loss of certainty; the loss of threat of starvation; the loss of an integrated existence and the loss of traditional mechanism for coping.

The scholarship of Mr. Ross' book must be judged on the basis of his dogged determination to get an answer for phenomenon he experienced which by the general population is usually misinterpreted and miscast and the genius of his method is to mirror the respect, accommodation and patience of the very people he is writing about.

This is a very clear voice, passionate and rich in insight and you will enjoy the mental gymnastics he requires you to undergo.

JUDICIAL INDEPENDENCE, A FUNDAMENTAL PRINCIPLE OF CANADIAN CONSTITUTIONAL LAW
L'INDÉPENDANCE JUDICIAIRE, UN PRINCIPE FONDAMENTAL DU DROIT CONSTITUTIONNEL DU CANADA

By/Par D.F. Molloy*

Judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.[1]

The above statement made by Chief Justice Dickson in the case of **The Queen v. Beauregard** indicates clearly that the principle of judicial independence is fundamental to Canadian constitutional law. The **Beauregard** case is one of three cases that have been decided by the Supreme Court of Canada since 1985 that have dealt with the issue of what is required in Canada for adherence to the principle of judicial independence.[2] These decisions have sparked a renewed interest in the issue and have necessitated that the role which the courts play in our society be re-examined in light of the constitutional developments that have occurred in Canada since 1867 (especially post-1982) and the needs, both present and future, of Canadian society. The following discussion firstly details the expansion of the role of the courts in Canada

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Il nous faut de l'indépendance judiciaire pour la résolution juste et équitable des conflits dans les causes particulières. Il s'agit aussi de l'âme de constitutionalisme dans les sociétés démocratiques.[1]

La déclaration susmentionné faite par le juge en chef Dickson dans l'affaire de **la Reine contre Beauregard** spécifie clairement que le principe de l'indépendance judiciaire fait partie intégrale du droit constitutionnel du Canada. L'affaire **Beauregard** représente une des trois causes qui ont été statuées par la Cour suprême du Canada depuis 1985 et qui ont traitées la question de ce qui constitue l'adhésion au principe de l'inépendance judiciaire au Canada.[2] Ces jugements ont éveillé un intérêt accru dans le sujet et ils ont nécessité un nouvel examen du rôle joué par les cours dans notre société à la lumière des développements constitutionnels qui se sont produits au Canada depuis 1867 (surtout d'après 1982) et les besoins, aussi bien ceux du présent que ceux de l'avenir, de la société canadienne. La discussion qui suit d'abord expose en détail l'expension du

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since 1867 and illustrates why, as a consequence of attaining this role, it is fundamental that the Canadian judiciary be truly independent. Secondly, the current safeguards in place to guarantee that the judiciary remain independent are examined to determine whether Canadian judges and the courts they preside over are sufficiently independent to properly perform their function in society. Finally, some reservations are expressed as to whether the repercussions of our current conception of judicial independence will be detrimental to the future needs of Canadian society.

The **Constitution Act, 1867**, while establishing a system of government for Canada based on the federal principle, also provided for the adminstration and constitution of the courts of law which would administer justice in the new Dominion. Section 129 of the Act provides as follows:

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if Union had not been made; subject nevertheless... to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority

rôle des cours au Canada depuis 1867 et illustre pourquoi, en conséquence de la réalisation de ce rôle, il est fondamental que l'organisation judiciaire canadienne soit totalement indépendante. Ensuite, les sauvegardes mises en place en ce moment pour garantir que l'organisation judiciaire reste indépendante sont examinées pour établir si les juges canadiens et les canadiens et les cours qu'ils président sont suffisamment indépendantes pour remplir correctement leur fonction dans la société. Enfin, quelques réservations sont exprimées concernant la question de si ou non les répercussions de notre conception actuelle de l'indépendance judiciaire nuiront aux besoins de l'avenir de la société canadienne.

La Loi de 1867 sur la Constitution, en établissant un système de gouvernement pour le Canada basé sur le principe fédéral, a aussi prévu l'administration et la constitution des tribunaux judiciaires qui dispenseraient la justice dans la nouvelle Confédération. L'article 129 de la Loi stipule comme suit:

129. Sauf comme autrement prévu par cet article, toutes les lois qui sont en vigueur au Canada, en Nouvelle-Ecosse, ou au Nouveau-Brunswick au moment de la Confédération, et toutes les cours de la juridiction civile et criminelle, et toutes les commissions, pouvoirs, et autorités légaux, et tous les officiers, ceux de justice, ceux d'administration et ceux de ministère, qui existent à cet égard au moment de la Confédération, continueront en Ontario, au Québec, en Nouvelle-Ecosse, et au Nouveau-Brunswick respectivement, comme si on n'a pas fait la Confédération; susceptible néanmoins... d'abrogation d'abolition, et de modification par le Parlement du Canada, ou par la législature de la province respective, selon l'autorité

DANCING WITH A GHOST
Exploring Indian Reality

By RUPERT ROSS

Markham, Ontario: Butterworths, 1992
pp. x 187 ($15.95 soft cover)

Book Review by Jim Igloliorte*

We so believe in the righteousness of our criminal justice system as being the only proper vehicle for defending individual rights and settling human misconduct that we rarely heed clear voices telling us that our adversarial process might be at odds with the legitimate ethical commandments of a people who have a different world -- view from ours.

Such is the appeal Rupert Ross makes in his little book to our narrow vision about what justice means, particularly for people who follow different "cultural imperatives" from ours.

In this decidedly personal "exploration" I can do no better than to quote Mr. Ross on one of the many themes his text is about. He says "... until you understand that your own culture dictates how you translate everything you see and hear, you will never be able to see or hear things in any other way."

Ross' book is composed of "explorations" he admits are not scholarly but anecdotal. However, the reader will quickly identify that it took some powerful reasoning to piece together what he describes as pieces of a puzzle. These pieces fitted together only after much thought about his experiences and contact with Ojibwa people in Northern Ontario both from his 11 years as a summer fishing guide and after 1977 as a Crown Attorney making regular court circuits to these remote northern communities.

He begins by examining the internalized commandments of the Indian culture including: the ethic of non-interference; the ethic that anger not be shown; the ethic respecting praise and gratitude; the conservation-withdrawal tactic; and the notion that the time must be right.

With this backdrop of essential insights into aboriginal thinking he goes

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Across the field there was a murder.
I am hearing the evidence.
Boys like you, accused.

Strong, confident, treasured
By those who love them,
Like I love you.

Be the next car.
Turn into the driveway.
I am listening for your music.

When you come home
I will tell you that I love you,
Even if you are 17, and freakishly tall.

I will reheat your supper,
And you will pick out the artichokes.
Probably you won't talk.

Or maybe you will,
And you will make me laugh
And this sadness will vanish.

***This poem was written by the Honourable E. Dennis Schmidt, Associate Chief Judge of the Provincial Court of British Columbia. He is also Editor of PCJ News, which is published by the Provincial Judges' Association of British Columbia.**

of the Parliament or of that Legislature under this Act. (Emphasis added)

The other sections of the Act referred to in section 129 are ss. 92(14), 96, 97, 98, 99, 100 and 101. For present purposes, however, suffice it to say that section 129 "continued the courts previously in existence in the federating provinces into the new Dominion,"[3] together with their corresponding jurisdiction and functions.

It quickly became apparent that the courts of Dominion were going to play a vital role in the struggle for power between the federal and provincial governments. As with all federal constitutions which rely on power-distributing sections, whose language is of necessity vague and general, to divide legislative authority between the central government and the component "states", the **Constitution Act**, 1867 left much room for debate and controversy over which level of government had authority to legislate in relation to various areas of subject matter. As a result, the responsibility fell to the courts to interpret the **Constitution** whenever one level of government charged the other with action outside of the scope of the legislative authority conferred upon it by the **Constitution.** Thus in this role as arbiter of constitutional disputes between the provinces and the federal government, it was and still is essential that the courts be independent from both levels of government so that neither can exert any influence on the courts in their decisions on these questions of utmost constitutional significance.

This role continues to be an important aspect of the court's function in our society

du Parlement ou de ce corps législatif en vertu de cet article. (Accentuation ajoutée)

Les autres articles de Loi on fait référence dans l'article 129 sont ss. 92(14), 96, 97, 98, 99,100, and 101. Dans l'état actuel des choses, cependant, qu'il suffise de dire que l'article 129 <<a continué les cours qui existaient jadis dans les provinces fédératrices afin de les faire faire partie de la nouvelle Confédération,>>[3] conjointement avec leurs juridictions et fonctions.

Il est devenu rapidement évident que les cours de la Confédération allaient jouer un rôle vital dans la lutte pour le pouvoir entre le gouvernement fédéral et provincial. Comme dans le cas de toutes les constitutions fédérales qui comptent sur les sections chargées de la répartition du pouvoir, dont le langage est de (toute) nécessité imprécise et générale, pour partager l'autorité législative entre le gouvernement central et les <<états>> constituants, la **Loi de 1867 sur la Constitution** a laissé beaucoup de liberté pour le débat et la controverse sur quel niveau du gouvernement avait l'autorité de légiférer relativement à plusieurs domaines de matière. En conséquence, la responsabilité est tombée en mains de la cour pour l'interprétation de la **Constitution** chaque fois qu'un niveau de gouvernement a inculpé l'autre d'agir en dépassant les limites de l'autorité législative conférée là-dessus par la **Constitution**. Par conséquent, dans ce rôle comme médiateur des conflits constitutionnels entre lesprovinces et le gouvernement fédéral, il était autrefois et il est toujours essentiel que les cours soient indépendantes des deux niveaux de gouvernement pour que ni l'un ni l'autre puisse exercer aucune influence sur les cours quant leurs décisions sur ces questions de la signification constitutionnelle la plus grande.

with its federal system of government. It in and of itself is sufficient to necessitate the independence of the judiciary, for in arbitrating the disputes between the federal and provincial governments, the court is also defending the **Constitution** by demanding that the governments not act outside the limits of their constitutional authority. This governmental limitation is something every citizen in the country has an interest in seeing upheld inasmuch as we all have the right to expect constitutional behaviour on the part of government.[4]

While the citizens of Canada have always had the right to expect constitutional behaviour by government of the kind referred to above (i.e., adherence to the provisions of the **Constitution Act, 1867**), our rights have been further increased in this regard by the enactment of the **Charter of Rights and Freedoms.** It is this development, which has expanded the role of the courts beyond that described above, which now further stresses the need for judicial independence. The **Charter** guarantees certain civil liberties and it is the function of the court to protect the same liberties from encroachment by the state. As such the **Charter** represents an additional limitation on governmental authority for the courts will declare laws which violate **Charter** rights to be of no force and effect (see section 52(1), **Constitution Act,** 1982). It has been said by one constitutional authority that the enactment of the **Charter** was a conscious decision to increase the scope of judicial review.[5] Whether this is correct is immaterial as the necessity of judicial independence in the making of **"Charter"** decisions is so blatantly obvious as to not require further discussion.

Ce rôle continue d'être un aspect important de la fonction de la cour dans notre société avec son système fédéral de gouvernement. Intrinsiquement, il suffit à nécessiter de l'indépendance judiciaire, car en arbitrant les conflits entre le gouvernement fédéral et provincial, la cour défend aussi la **Constitution** en demandant que les gouvernements n'agissent pas au-delà des limites de leur autorité constitutionnelle. Cette restriction gouvernementale est quelque chose que chaque citoyen du pays s'intéresse à faire maintenir en ce sens que nous avons tous le droit d'attendre que le gouvernement agisse d'une façon constitutionnelle.[4]

Bien que les citoyens du Canada aient toujours eu le droit d'attendre le comportement constitutionnel de la part du gouvernement du genre dont on fait référence plus haut (i.e., l'adhésion aux dispositions de la **Loi de 1867 sur la Constitution**), nos droits ont été accru davantage à cet égard par l'adoption de la **Charte de droits et de libertés**. Il s'agit de ce développement qui a étendu le rôle des cours au-delà de ce qui est décrit ci-dessus, qui maintenant souligne davantage le besoin de l'indépendance judiciaire. La **Charte** garantit certaines libertés civiques et il s'agit de la fonction de la cour de sauvegarder les mêmes libertés de l'empiètement de l'état. A ce titre, la **Chartre** représente une limitation additionnelle de l'autorité gouvernementale car la cour déclarera les lois qui bafoueront les droits de la **Chartre** d'être inefficaces et inopérants (voir l'article 52 (1), la **Loi de 1982 sur la Constitution**). Une des autorités constitutionnelles a dit que l'adoption de la **Charte** a été une décision délibérée pour élargir l'étendue de la révision judiciaire.[5] L'exactitude de

IN A LITERARY VEIN

STEVE

by The Honourable E. Dennis Schmidt*

I stand at the window,
Curtain pulled back just enough
To watch for headlights.

I have checked for golf clubs,
Tennis rackets, hockey gear,
Everything is in its place.

Except you, and the car.
I don't know where you are.
Supper is cold. I feel a chill.

How did you get so big?
Taller than me. When I embrace you
Your muscles are hard.

I feel safe with you.
You could save me from the rapids,
As I once did you.

When you were four
I brought home a new motorcycle.
You were afraid for me.

Like I am now for you.
Where are you?
Why have you not called.

could rightly be included in the general category of Crown servants. For that is to say that our conditions of service are the same as those of policemen, private soldiers, or third-class clerks in a Government Department; which, as I have shown, is not so.

Now, the salaries paid by the Crown to its servants are matters which may be debated, and ultimately determined, by the House of Commons, and, since the House of Lords may not interfere with a money Bill, it may not question a decision of the Commons concerning the salary of a Crown servant. If, then, the proceedings of 1931 were admitted to have validity, we should have to say that a judge's office can only be taken away by the action of both Houses of Parliament, but his salary may be taken away by one House acting alone. Which is absurd. For if the Commons can reduce his salary by twenty per cent they can reduce it by a hundred per cent, which is tantamount to dismissal. And if they can reduce it because they apprehend a national emergency they can reduce it because they dislike him. Moreover, they can influence, or attempt to influence, his judgment by a mere threat to reduce his salary. In short, the House of Commons is in control of His Majesty's judges; and the same Constitution which with one hand gives them complete independence with the other hand snatches it away. But the Constitution cannot be thought to contain any part which is in gross contradiction to another part of it. I hold, therefore, that the reduction of our salaries, though loyally submitted to in the dangerous stress of the time, was an act having an unconstitutional flavour and should be rescinded. I am told that it would be impossible to restore our salaries without restoring the full pay of policemen. One answer to that is that judges are not policemen; another answer is that policemen should be properly treated too.

The same argument of course applies to the deduction of income-tax, super-tax, and all the tax family. For what is to prevent the Commons from levying a tax of twenty shillings in the pound on the salaries of judges? Since the Parliament Act, nothing. But what then becomes of the independence of the judiciary? Our salaries were fixed in the year 1825 or thereabouts at five thousand pounds (which then was wealth), and they were free of income-tax until the seventies. Today, Sir Humphrey, we receive, after deductions, about three thousand pounds, the earnings of a rising junior. It is not enough. The State cannot expect to secure a permanent supply of good and incorruptible judges for the price of a rising junior. *Justice should be cheap but judges expensive.* We used to speak of a man rising to the Bench; the day is not far distant when no really competent lawyer will consent to descend so low. You yourself, Sir Humphrey, would cackle in my face if I suggested that you and I should change places. What a situation! In short, old bubbler, the affairs of your little platinum pal do not interest me. The Court will now rise in protest.

Sir Humphrey: But, milord, it is only half-past two!

The Judge: The Court will rise.

The Court rose.

The above described functions of the court which require judicial independence for their proper performance are concisely summarized by Chief Justice Dickson's judgement in the **Beauregard** case where he identified the primary roles of the court as consisting of the following:

(1) adjudication of discrete, individual cases;

(2) "... protector of the Constitution and the fundamental values embodied in it -- rule of law, fundamental justice, equality, preservation of the democratic process to name the most important.[6]

After identifying independence as a prerequisite to the just performance of the court's functions in society, the question becomes whether in fact the courts are sufficiently independent. Independence in this context is taken to mean the relationship between the courts (including the judicial officers of which they are comprised) and others, especially the executive branch of government.

The determination of whether Canadian courts are sufficiently independent cannot be resolved by a single line of inquiry due to the fact that the combined effect of the various provisions of the **Constitution** dealing with the courts was to create three distinct court systems:

(i) provincially-created courts composed of federally-appointed judges (i.e. the Court of Queen's Bench and the Court of Appeal);

cela est insignifiante puisque la nécessité de l'indépendance judiciaire dans la formulation des décisions de la **Charte** est tellement manifeste d'une manière flagrante de ne pas exiger plus de discussion.

Les fonctions de la cour décrites ci-dessus qui exigent l'indépendance judiciaire pour leur exécution adéquate sont résumées avec concision par la décision de juge en chef Dickson dans l'affaire **Beauregard** où il a identifié les rôles principaux de la cour qui consistent en ce qui suit:

(1) le jugement des affaires discrètes et individuelles

(2) << ... le protecteur de la Constitution et les valeurs fondamentales qui s'incarnent là-dedans-- la primauté du droit, la justice fondamentale, l'égalité, et le maintien de la procédure démocratique, pour citer ce qui est le plus important>>[6]

Après avoir établi l'indépendance comme une condition préalable pour l'exécution juste des fonctions de la cour dans la société, la question devient si, en fait, les cours sont suffisamment indépendantes. Dans ce contexte, on accepte que l'indépendance signifie le rapport entre les cours (y compris les officiers de justice dont celle-ci sont composées) et d'autres, en particulier l'organe exécutif du gouvernement.

La détermination de si ou non les cours canadiennes sont suffisamment indépendantes ne peut pas être résolue par une seule voie d'enquête attribuable au fait que le résultat combiné des stipulations différentes de la **Constitution** qui fait entente avec la cour était de créer trois systèmes de cours distinctes:

(ii) provincially-created courts composed of provincially-appointed judges, justices of the peace and magistrates (i.e., the Provincial Court); and

(iii) federally-created courts composed of federally-appointed judges (ie., the Supreme Court and the Federal Court).[7]

For the purposes of this paper the basis for the assessment of judicial independence will be the type of guarantees to independence which a court has, i.e., constitutional guarantees versus "ordinary" statutory guarantees. In the category of courts with a constitutional guarantee of independence I include one court only, that being the superior courts of the Provinces, excluding the district and county courts. The district and county courts are excluded for the purposes of the analysis of independence because they are excluded from section 99 of the **Constitution Act, 1867** which guarantees that superior court judges shall hold office during good behaviour. Admittedly this does give rise to conceptual difficulties by virtue of the fact that the district and county courts are included in sections 96 and 100 of the **Constitution Act, 1867** which establish federal appointment of judges and security of remuneration respectively. Regardless, the district and county courts are included with all the other Canadians courts which have only "ordinary" statutory guarantees of independence.

Turning now to ask whether the superior courts of the Provinces are sufficiently independent, the question arises thus: if independence is taken to mean

(i) les cours provincialement créées qui sont composées de juges nommés à la Cour fédéral (i.e. la Cour de la Reine et la Cour d'appel.

(ii) les cours provincialement créées qui sont composées de juges provincialement nommés, de justices de la paix et de magistrats (i.e., la Cour Provincial);

(iii) les cours fédéralement créées qui sont composées de juges fédéralement nommés (ie., la cour suprême et la Cour fédéral.[7]

Pour les besoins de cet article la base de l'évaluation de l'indépendance judiciaire sera le genre de garanties de l'indépendance que possède la cour, i.e., les garanties constitutionnelles contre les garanties <<ordinaires>> et statutaires. Dans la catégorie qui comprend les cours avec une garantie d'indépendance constitutionnelle, je n'y inclus qu'une, étant les cours supérieures des provinces, laissant les Cours de district et les cours de comté. On exclut les Cours de comté pour les besoins de l'analyse de l'indépendance parce qu'elles ne font pas partie de l'article 99 de la **Loi de 1867 sur la Constitution**, qui garantie que les juges de la cour supérieure devront tenir leurs fonctions pendant qu'ils se conduisent comme il faut. Del'aveu général cela engendre des difficultées conceptuelles en vertu du fait que les Cours de district et celles de comté sont incluses dans les articles 96 et 100 de la **Loi de 1867 sur la Constitution** qui établit la nomination fédérale des juges et la sécurité de rémunération, on inclus les Cours de district et celles de comté avec toutes autres cours canadiennes qui ne possèdent que des garanties <<ordinaires>> et statutaires de l'indépendance.

insufficient to keep one of His Majesty's judges reasonably supplied with good clean underlinen, to say nothing of his abundant progeny. For that grotesque figure, Sir Humphrey, I doubt if you could persuade this golden-haired hen of yours to sing one silly song --

Sir Humphrey: Really, milord --

The Judge: Don't splutter, Sir Humphrey. And, by the way, sit down. I'm off. I'm enjoying myself. This may go on for some time.

Sir Humphrey resumed his seat.

Continuing in a more normal manner, his Lordship said:

I pass now to the constitutional aspect of the matter. The wisdom of our ancestors has devised many ingenious safeguards to secure that His Majesty's judges shall be independent of all corrupting or intimidating influences, whether proceeding from the Throne, from Parliament, or the Executive. We are His Majesty's judges -- not Parliament's judges, Sir Humphrey, not the Cabinet's judges, not the People's judges, not even, in the accepted constitutional sense, the 'Crown's' judges, but His Majesty's. And not even His Majesty has the same unfettered control over his judges as he has over others of his servants. His Majesty's civil servants, His Majesty's soldiers and sailors hold office during His Majesty's pleasure, and can in law be dismissed at a moment's notice. So, Sir Humphrey, before the Act of Settlement (12 & 13 Wm. III, c. 2) could we. But by that Act, and by section 5 of the Judicature Act, 1875, it was sagaciously provided that the judges hold their office during good behaviour; and from that office they can only be removed by His Majesty upon receipt of an address from both Houses of Parliament. Both Houses, Sir Humphrey -- -- mark that. Thus neither the Monarch in person, nor his Ministers by the exercise of their powers of advice to him, nor the dominant political party by a vote of the House of Commons, nor even the great Electorate by an unmistakable expression of opinion at the polls can diminish by a single hour the tenure of office of one of His Majesty's judges. Secure alike from the intrigues of courtiers, the malice of Ministers, the spleen of parties and the windy passions of the mob, nothing but our own demise or misbehaviour can threaten us. And that misbehaviour must be so notorious that not only the volatile and jealous Commons but the sagacious Lords themselves can be persuaded to present to the Throne a reluctant petition that we be dismissed.

It is not for nothing, Sir Humphrey, that those who have to hold the scales of justice evenly have been provided with a firm, unshakable base on which to perform that delicate operation. Thus only can we discharge our duties without fear or favour, affection or ill-will. Yet in the year 1931 all these constitutional thingummies, Sir Humphrey --

Sir Humphrey: I beg your Lordship's pardon?

The Judge: Thingummies -- were recklessly thrown aside. In that year it was decided by the Executive that all the Crown's servants -- that is, all those who draw salaries or wages from the public funds -- should have those payments reduced by certain percentages. That may have been a wise decision or not. What was clearly erroneous, unconstitutional, and too absolutely fish-brained for words was the assumption that His Majesty's judges

For this edition of the Journal I shall leave the last word on one aspect of the attack on judicial independence - salary cutbacks - to Mr. Justice Wool. He was unable to resist the temptation to vent his frustration with the salary cutbacks introduced by the British government in 1931. To the great vexation of His Lordship, these measures were applied indiscriminately, as much to judges, as to public servants. What follows is the report of this case as it appeared in a volume entitled "Uncommon Law" by A.P. Herbert, published in 1935 by Methuen. I shall leave it to the perspicacious reader to determine whether this is fact or fiction. Editor.

WILLOW V. CAPITAL PICTURES CORPORATION

Much comment was provoked in legal circles yesterday by what was described as an 'unconventional outburst' of the learned judge during the hearing of this action.

Miss Gene Willow, it will be remembered, is claiming damages from the defendant corporation for breach of an agreement under which she was to receive one thousand pounds a week during the making of the film ***Mermaids***. Because of the alleged reluctance or refusal of the plaintiff to enter the water at certain temperatures, the making of the film took fifteen weeks instead of five, as anticipated.

At the moment of his Lordship's intervention Sir Humphrey Codd was giving the jury a vivid picture of the plaintiff's sufferings. 'Imagine,' he said, 'the position of my unfortunate client --'

The Judge: Stuff and nonsense!

Sir Humphrey: I beg your Lordship's pardon?

The Judge: I said 'Stuff and nonsense!' Sir Humphrey, and I say it again, with a satisfaction that I am unable to conceal. This case wearies me --

Sir Humphrey: May it please your Lordship --

The Judge: It does *not* please my Lordship. Do you know how much I am paid for sitting up here and listening to all this bilge?

Sir Humphrey: 'Bilge', milord?

The Judge: Bilge, Sir Humphrey. Drivel, drivel, bilge and drivel. Dregs. Ullage. Cabbage-water --

Sir Humphrey: With profound submission, milord --

The Judge: A pittance, Sir Humphrey -- a pittance, less twenty per cent. A calculated affront -- less twenty per cent. I sit here all day attending to the tedious affairs of other people. The time has come, Sir Humphrey, to call attention to my own. This blonde cow of yours --

Sir Humphrey: Milord, the plaintiff's case --

The Judge: Fritter the plaintiff's case! I say, this blonde cow of yours comes here complaining because she has only got five thousand pounds for five weeks' work. Wants another ten thousand pounds. I get five thousand pounds for working *all the year* -- less twenty per cent cut; less twenty-five per cent income-tax; less super-tax at the Lord knows what rate! Employ that rather egg-shaped dome of yours, Sir Humphrey, and you will perceive that the answer to that sum is a figure quite

independence of the court in its relations with others, what form is this independence to take? The answer to this question is found in the English **Act of Settlement, 1701**. The **Act of Settlement** was Britain's answer to an approximately 200-year struggle to achieve judicial independence.[8] Prior to the enactment of the **Act** the British Crown exerted improper influence on the judiciary by either dismissing or reducing the salary of judges who rendered decisions unfavourable to the Crown. This was made possible due to the fact that judges held office at the King's pleasure and judicial salaries were paid out of the royal revenue. The **Act** of Settlement remedied this problem by granting superior court judges security of tenure, in the form of office during good behaviour with removal only by address of both Houses of Parliament, and security of remuneration, thereby eliminating the means by which the Crown improperly exerted influence on judges and consequently their decisions.[9] Since that time security of tenure and remuneration have been regarded as the requisite elements of judicial independence.

Therefore, for the superior courts of the Provinces to be judicially independent they must have security of tenure and remuneration. An examination of sections 99 and 100 of the **Constitution Act, 1867** reveals that the superior courts of the Provinces have nothing less than constitutional guarantees of security of tenure, section 99, and security of remuneration, section 100. These sections, then, must be combined with section 96 of the **Act** which stipulates that the judges of the superior courts of the Provinces must be appointed by the federal government. The "enforcement" of section 96 thereby

Considérons maintenant la question de si ou non les cours supérieures des provinces sont suffisamment indépendantes, le problème se présente ainsi: si on considère l'indépendance comme étant l'indépendance de la cour dans ces relations avec les autres, quelle forme cette indépendance devrait-elle prendre? La réponse à cette question se trouve dans la **Loi de 1701 sur la colonisation anglaise**. La **Loi sur la colonisation** était la solution de la Grande-Bretagne à une lutte d'approximativement deux cent ans pour achever l'indépendance judiciaire.[8] Avant l'adoption de la **Loi**, la Couronne britannique a exercé une malséante sur l'organisation judiciaire par le moyen de l'exclusion ou la réduction des salaires des juges qui ont prononcé des verdicts défavorables à la Couronne. Cela a été attribuable du fait que les juges tenaient leurs fonctions aussi longtemps qu'il plaira à sa Majesté et on a déboursé les salaires judiciaires du revenu royal. La Loi de la colonisation a remédié à ce problème en accordant les juges de la cour supérieure une sécurité de charge pendant qu'ils se comportent bien, avec la possibilité de licenciement seulement par le moyen de l'adresse de la chambre des communes et le sénat, et la sécurité de rémunération, de cette façon éliminant les moyens par lesquels la Couronne a déployé l'influence sur les juges d'une manière inconvenante et par conséquent sur leurs décisions.[9] Depuis ce temps-là, on considère la sécurité de ténuité et de rémunération comme des conditions requises pour l'indépendance judiciaire.

Donc, afin que la cour supérieure des provinces soit judiciairement indépendante de manière pondérée ils doivent avoir la sécurité d'emploi et de rémunération. Une vérification des articles 99 et 100 de la **Loi de 1867 sur la Constitution** dévoile que la cour supérieure des provinces ont rien de moins que les garanties constitutionnelles

preserves the jurisdiction of the Provincial superior courts by preventing the provinces from vesting provincial administrative tribunals with superior court jurisdiction. Section 96 as such may be viewed as the corollary of sections 99 and 100 which provide a constitutional guarantee of independence in that section 96 provides a constitutional guarantee of jurisdiction.[10] The validity of this view is evident in many of the constitutional decisions of the Privy Council dealing with these same sections, including the following statement of Lord Blanesburgh in which he refers to Sections 96, 99 and 100 as

> **...the means adopted by the framers of the statute to secure the impartiality and the independence of the Provincial judiciary.**[11]

Without a doubt, then, it can be concluded that, owing to the constitutional protection which they are afforded, the superior courts of the Provinces have a sufficient degree of independence for the purposes of performing their judicial functions.

What is to be said for the remainder of the Canadian courts which are not guaranteed their independence by the **Constitution**? Basically these courts must look to "ordinary" statutes for security of tenure and remuneration. Generally the judges of these courts must rely on either the federal **Judges Act** or the **Provincial Court Act** (or like statute) of the various provinces, depending upon whether they were appointed by the federal or provincial government respectively, to provide the judicial independence which their roles demand.

de la sécurité d'occupation, aux termes de l'article 99, et sécurité de rémunération, aux termes de l'article 100. Ces articles, alors, doivent être associés avec l'article 96 de la **Loi** qui stipule que les juges de la cour supérieure des provinces doivent être nommer par le gouvernement fédéral. «L'application» de l'article 96 sauvegarde ainsi la compétence de la cour supérieure des provinces en les empêchant deconférer aux tribunaux provinciaux administratifs la compétence d'attribution de la cour supérieure. L'article 96 peut être considéré tel que le corollaire des articles 99 et 100 qui stipulent une garantie de l'indépendance constitutionnelle de sorte que l'article 96 prévoit une garantie constitutionnelle de la compétence d'attribution.[10] La validité de ce point de vue est évident sur plusieurs décisions constitutionnelles du conseil privé qui traitent ces mêmes articles, y compris la déclaration suivante de Lord Blanesburgh dans laquelle il se rapporte aux articles 96,99 et 100 comme

> **...les moyens adoptés par les encadreurs de la loi pour assurer l'objectivité et l'indépendance de l'organisation judiciaire des provinces.**[11]

Sans aucun doute, alors, on peut conclure que, grâce à la protection constitutionnelle qui leur est fournie les cours supérieures des provinces ont une certaine indépendance pour les besoins de l'exécution de leurs fonctions judiciaires.

Qu'est-ce qu'on peut dire du reste des Cours canadiennes auxquelles l'indépendance n'est pas assurée par la **Constitution**? Fondamentalement il faut que ces cours comptent sur les lois <<ordinaires>> pour la sécurité de ténuité et de rémunération. En général les juges de ces cours doivent dépendre soit sur la **Loi fédérale sur les juges** ou la Loi sur la **Cour provinciale** (ou une loi) comparable des

situations and legislation in the various provinces, it will have to be a very wide-ranging decision, too.

At the present time, it appears quite possible that the **Campbell** decision of Mr. Justice MacDonald in the Alberta's Court of Queen's Bench may possibly be one of the first cases to get to the Supreme Court of Canada. As you are probably aware, Mr. Justice MacDonald, in a 220 page decision, has made a resounding statement in favour of judicial independence. It is the view of the Provincial Judges in Alberta that this case merits an intervention not only by the CAPCJ, but also by the C.B.A. As the Honourable Judge Gerald LeGrandeur, President of the Alberta Provincial Judges' Association, says:

> **"In fact I would strongly invite, if not urge the participation by way of intervention of the C.B.A., through its Provincial branches or directly by the national in any and all of these courts."**

I leave it to you to determine how far you can go in this area. I am very mindful of the financial limitations we all have to face these days, but I do suggest to you that speaking out in a positive way on behalf of an independent bench is a very important issue for the C.B.A. If the independence of the judiciary can be infringed by Provincial Governments, is not the independence of the bar in jeopardy also?

As you are no doubt aware, Provincial Judges in Alberta, Saskatchewan and Manitoba have sued their respective governments. Beyond this, lawsuits have been initiated by individual accused, challenging the independence of the provincial courts in Alberta, Saskatchewan, and Prince Edward Island. In Prince Edward Island, the provincial government has now filed a second reference in the Court of Appeal, addressing questions related to judicial independence. In Alberta and Prince Edward Island, superior courts have given decisions in which there have been findings of infringements of the judicial independence of Provincial Judges by the government.

Needless to say, a situation where Provincial Judges as a group are suing their respective governments is virtually unprecedented in Canada. Although the provincial courts are operating effectively everywhere in Canada (with the possible exception of P.E.I. where there are, I understand, about 70 actions by accused persons in abeyance, awaiting decisions from a superior court), it is probably not an exaggeration to say that the administration of justice in Canada is in serious jeopardy.

I don't intend to get into the details of these actions here this morning, but I will say to you that the most outrageous conduct by a Provincial Government complained of in these suits, is probably set out in the statement of claim issued by the Provincial Judges in Saskatchewan. Here it is alleged that the Provincial Minister of Justice entered into a written agreement with the Judges for there to be constituted a binding remuneration tribunal for Provincial Judges. An Act of the Legislature created this tribunal. The tribunal held hearings and directed that the Judges' salaries be increased. The Minister of Justice asked the tribunal to reconsider. It refused, and the government then passed another Act cancelling the tribunal, cancelling its award, and stripping the Judges of the right to sue the government for its (the government's) actions.

I should make it clear that the C.B.A. has been quick to recognize and respond to the concerns of the Provincial Judges in all four provinces. I can tell you that the vigorous response of your President to the situation in Manitoba -- she wrote strong letters to both the Premier of Manitoba and the Minister of Justice, and provided a press release -- was very much appreciated by the Provincial Judges in Manitoba. I'm sure the Provincial Judges in Alberta, Saskatchewan and P.E.I. feel the same way.

As you can appreciate, the very serious issues raised by these cases are not likely to be settled very quickly. In all likelihood, a decision of the Supreme Court of Canada will be required. Because of the wide variety of issues covered by these cases (ranging from remuneration tribunals, through wage roll-backs, and on to forced closure of courts), and the many and varied fact

These statutes for the most part do guarantee the judges concerned that they shall hold office during good behaviour and be removable only for cause relating to incapacity to perform their judicial functions. In essence their tenure is secure against interference by the executive branch of government in an arbitrary manner. The statutes also guarantee the judges security of remuneration in that they prevent the executive branch of government from arbitrarily interfering with judicial salaries and pensions.

Evidently, then, these judges enjoy the same type of independence as the superior court judges of the Provinces; however, the latter enjoy the added security of having the provisions securing their independence entrenched in the **Constitution Act, 1867**. Does this mean that the independence of the remainder of the Canadian judiciary is inadequate? The answer depends upon whether the minimum acceptable standard of judicial independence is a constitutional guarantee, which today we know not to be the case because of the Supreme Court's decision in **The Queen v. Valente.**[12]

In **Valente**, the Supreme Court had to decide what was the minimum acceptable standard of judicial independence for the purposes of section 11(d) of the **Charter of Rights and Freedoms.** Mr. Justice LeDain, speaking for the majority, enunciated a two-pronged test of judicial independence. The first component of the test involves a determination of whether the judges of a court have the requisite individual independence, which itself is composed of security of tenure and financial security. The Court held that where an ordinary statute (in this case the Ontario **Provincial Courts Act**) prevents the executive branch of

diverses provinces, dépendant de si ou non ils ont été désigné par le gouvernement fédéral ou provincial respectivement, pour fournir l'indépendance judiciaire que leurs rôles exigent.

Pour la plupart, ces lois garantissent les jugent en question qu'ils devraient garder le pouvoir pendant un bon comportement et qu'ils devraient être remplaçable seulement pour des raisons reliées à l'incapacité de déployer leurs fonctions judiciaires. Par l'essence leur profession est assurée contre l'intrusion dans une manière arbitraire par l'organe exécutif du gouvernement. En outre, les Lois assurent aux juges la sécurité de rémunération de sorte qu'elles empêchent l'organe exécutif du gouvernement de s'immiscer arbitrairement dans des salaires judiciaires et des pensions.

Evidemment, donc, ces juges profitent du même genre d'indépendance que les juges de la cour supérieure des provinces; cependant, ceux-ci apprécient la sécurité supplémentaire d'avoirl'assurance des dispositions qui protègent leur indépendance implantée dans la **Loi de 1867 sur la Constitution**. Peut-on dire que l'indépendance du reste de l'organisation judiciaire canadienne est inadéquate? La réponse dépend de si ou non le niveau minimum acceptable de l'indépendance judiciaire est une garantie constitutionnelle, que l'on connaît aujourd'hui à ne plus être le cas parce que la décision de la Cour suprême est dans **La Reine contre Valente.**[12]

Dans l'affaire **Valente**, la cour suprême a dû décidé le degré minimum acceptable de l'indépendance judiciaire aux fins de l'article 11(d) de la **Charte de droits et de la libertés**. Monsieur le Juge LeDain, parlant au nom de la majorité, a énoncé un test à deux dents pour l'indépendance judiciaire. Le premier constituant de l'examen entraîne une détermination de si

government or other appointing authority from interfering with judicial tenure, salary and pensions in an arbitrary or discretionary manner, the statute provides the judges with a sufficient degree of judicial independence. The second component of the **Valente** test involves a determination of whether the tribunal itself has the requisite institutional independence. For a tribunal to be sufficiently independent on an institutional basis the Court held that there must be judicial control over administrative decisions that bear directly and immediately on the exercise of the judicial function.

The judgement in **Valente** thus confirms that the class of Canadian courts which do rely on ordinary statutes to provide protection from interference by the other branches of government do in fact meet the minimum required standard of judicial independence. Constitutional guarantees, while desirable, are not essential. A consideration which must be kept in mind and which does not seem to have been explicitly emphasized by the Court in **Valente** is that while these "ordinary" statutes are theoretically subject to amendment or repeal, practically it is unlikely such would ever be done because they are declaratory of basic constitutional principles and traditions.

The conclusion to be drawn, then, from the entire foregoing discussion and analysis is that our courts play a fundamental role in our society which requires that they be independent. This judicial independence which is required for constitutional purposes is secured in Canada by various means which include constitutional and other ordinary statutory guarantees of independence for the judiciary. To this it must be added that judges themselves can

ou non les juges de la cour aillent l'indépendance individuelle requise, qui se compose de la sécurité financière et celle de ténuité. La cour soutient qu'au cas où une loi ordinaire (dans ce cas la **Loi de la cour provincial** de l'Ontario) empêcherait à l'organe exécutif du gouvernement ou tout autre forme d'autorité qui a le droit de faire la désignation de l'intrusion dans la ténuité judiciaire, les salaires et les pensions dans une manière arbitraire ou discrétionnaire, la Loi pourvoit les juges d'un niveau suffisant d'indépendance judiciaire. Le deuxième constituant de l'examen **Valente** nécessite une détermination de si ou non le tribunal même que possède l'indépendance institutionnelle requise. Pour qu'un tribunal puisse être suffisamment indépendant sur une base institutionnelle la cour maintient qu'il doit y avoir le contrôle judiciaire sur les décisions administratives qui intéressent directement et immédiatement l'exécution de la fonction judiciaire.

Le jugement dans l'affaire **Valente** confirme donc que la classe des cours canadiennes qui se fient aux lois ordinaires pour fournir la protection contre l'intrusion par les autres organes du gouvernement remplissent en fait le critère minimum requis de l'indépendance judiciaire. Les garanties constitutionnelles, quoique souhaitables, ne sont pas indispensables. Une considération qui doit être gardée en tête et qui ne semble pas avoir été mis en valeur explicitement par la cour dans l'affaire **Valente** c'est pendant que ces lois «ordinaires» sont théoriquement susceptibles de modification et d'abrogation, d'une manière pratique ne risque guère d'arriver parce qu'elles déclarent des principes constitutionnelles de base et de traditions.

On peut conclure, donc, de la discussion entière précédente etde l'analyse que notre système de cours joue un rôle fondamental dans notre société qui exige qu'elles soient indépendantes cette indépendance judiciaire qui est nécessité par

SPEECH DELIVERED BY THE HONOURABLE JUDGE WESLEY H. SWAIL PRESIDENT OF CAPCJ

CBA MID WINTER MEETING

February 27, 1995

Thank you, President Tom, for the Introduction, and for your invitation to be here today to address council.

A couple of weeks ago, a friend played for me a recording of Peter Cook and Dudley Moore on stage. Peter Cook was playing the part of an English coal miner, and he told Dudley Moore that he had always wanted to be a Judge. Unfortunately, he was never able to master Latin, and accordingly, decided to become a coal miner. He observed to Dudley Moore that one of the real benefits of being a Judge was that when you got old, weak, and forgetful, that you wouldn't have to quit your job the way a coal miner would. In fact, he said it was "quite the reverse". He seemed to have the idea that Judges were often old and possibly a little senile.

I'm sure that such a mistaken idea was a result of Peter Cook's unfamiliarity with Judges and the judicial role. The situation I am in with you here today is, of course, much different. I'm sure you are all well aware of what Provincial Judges do, and in good part with regard to your own jurisdictions, who the Provincial Judges are.

Il se peut cependant, que vous ne soyez pas familier avec l'Association Canadienne des Juges des Cours Provinciales. Essentiellement, notre Association est une fédération de toutes les associations de juge des provinces et territoires au Canada. De cette façon, a'ACJCP représente effectivement tous les juges des cours provinciales ou territoriales au Canada.

Les objectifs de l'ACJCP traite de plusieurs affaires tel que: l'éducation juridique, agir commen resource consultative pour le Ministère fédéral de la justice dans le domaine du droit criminel; trier l'information et les affaires d'intérêt pour les juges des Cours Provinciales et (je cite les buts et objectifs de notre constitution):

"Prendre toutes les dispositions requises ou utiles afin de rehausser le prestige des juges et des cours qu'ils président et de protéger leur indépendance."

It is with regard to issues of judicial independence that I wish to address you this morning.

can oppose them. Neither is acceptable."

"The politicians say: 'If you go public, we're going to win. We've defined the issue as money and you won't be able to convince the public it's anything else.'"

The judge, who spoke on condition he not be identified, agreed sadly with that assessment. "I don't believe we can convince the public it's not money."

In Alberta, judges have been grouped with public sector employees, such as teachers, for the purpose of five per cent wage cut.

A Calgary Youth Court Judge protested by refusing to work. Premier Ralph Klein suggested that he be fired if he did not return to work. So much for independence...

A Liberal M.H.A. being tried in an Alberta Provincial Court on an impaired driving charge, agreed that he would not get a fair trial because -- as the premier's remarks demonstrated -- the courts are not independent of government. The judge hearing the case agreed to ask the Alberta Court of Queen's Bench, the federal court, to rule on the independence issue.

So ... in the future we could have judges sitting on both sides of the bar in the court. It will be interesting but said if that happens. The underpinnings of democracy are at stake.

See you in court.

and should play a role in deterring the other branches of government from attempting to exert improper influence on the judiciary. Judges can, by making public any apparent attempts to interfere with judicial independence, enlist the support of public disapproval, thereby deterring recurrence of such actions.[13]

Before concluding, the following caveat needs to be expressed. While it is crucial that we as a society strive to ensure that the principle of judicial independence is adhered to, we must remain cognizant of the fact that (to use a cliche) too much of a good thing can be just as bad as not enough. Caution is required to make sure that we do not elevate either the judiciary or the principle itself to a level that is inconsistent with or detrimental to society's needs.

In this regard we must demand that the judiciary remain accountable for improper conduct on its part; without such accountability public confidence in the justice system would be adversely affected. The importance of this consideration has been expressly stated by Mr. Justice Cory:

> **The aim and goal of all aspects of judicial independence is to preserve and foster public confidence in the administration of justice. Without public confidence the courts cannot effectively fulfill their role in society.**[14]

As for the principle of judicial independence itself, it too must be kept in check. That it can in certain situations achieve an unhealthy status is evidence in the current constitutional dilemma we are facing in relation to the creation of provincial administrative tribunals. As

les besoins de la constitution est mise en sûreté au Canada par des moyens variés qui impliquent les autres garanties statutaires ordinaires de l'indépendance pour l'organisation judiciaire. Ajoutons à cela que les juges eux-mêmes peuvent et devraient contribuer à dissuader des autres organes du gouvernement de la tentative d'exercer de l'influence indue l'organisation judiciaire. Les juges peuvent, par le moyen de rendre public chaque tentative évidente à contrecarrer de l'indépendance judiciaire, s'assurer le concours de la désapprobation du publique, de cette façon décourageant la réapparition de telles actions.[13]

Avant de conclure, il faut exprimer l'avertissement suivant. Bien qu'il soit critique, que nous autres comme une société s'efforçons d'assurer qu'on adhère au principe de l'indépendance judiciaire, il faut que nous restions instruits du fait que (pour nous servir d'une banalité) l'abus des bonnes choses peut-être aussi néfaste que pas assez. Il faut avoir la prudence pour être certain que nous ne mettions pas sur un piédestal ni l'organisation judiciaire ni le principe lui-même à un niveau qui est en contradiction avec ou nocif aux besoins de la société.

A cet égard nous devond exiger que l'organisation judiciaire demeure responsable pour une conduite déplacée venant de sa part; le manque d'une telle responsabilité entraînerait un effet défavorable sur la confiance du publique dans le système judiciaire. L'importance de cette considération a été expressément affirmée par Monsieur le juge Cory:

> **Le but et l'objectivité de tous les aspects de l'indépendance judiciaire est la protection et la faveur de la confiance du publique dans l'administration de la justice. Sans l'assurance du publique les cours ne peuvent pas remplir d'une manière effective leur fonction dans la société.**[14]

government becomes more pervasive and society more complex, the need for innovative administrative solutions to new social and governmental problems becomes increasingly greater. Unfortunately the "judicature" sections of the **Constitutional Act**, 1867, sections 96 and 100, and the guarantee of judicial independence associated with them, have been used to strike down too many provincial administrative tribunals. The situation is such that political compromise in the form of constitutional amendment is necessary in a form that will preserve the independence of the judiciary while allowing more leeway to the provinces in creating administrative tribunals. If such amendments are not forthcoming, then the courts will have to grapple with the problem and work out a compromise that has as its objectives "modernizing" the **Constitution** so that it is consistent with today's needs. That this is possible is evident from the following statement of Chief Justice Dickson:

> **The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people.**[15]

1. **R. v. Beauregard**, [1986] 2 **S.C.R.** 56.

2. **R. v. Valente** [1985] 2 **S.C.R.** 673; **MacKeigan v. Hickman** (1989), 61 **D.L.R.** (4th) 688; and **Beauregard**, supra, note 1.

3. **Beauregard,** supra, note 1 at 72.

4. **Thorson v. Attorney-General of Canada (No. 2)**, [1975] 1 **S.C.R.** 138.

Quant au principe de l'indépendance judiciaire lui-même, il faut le surveiller. Qu'il se peut dans certaines situations atteigne une situation nuisible est l'évidence dans le dilemme constitutionnel actuel qui nous fait face en ce qui concerne la genèse des tribunaux administratifs provinciaux. A mesure que le gouvernement commence à se faire sentir un peu partout et la société devient plus complexe, le besoin d'innovatives solutionsadministratives qui s'adressent aux nouveaux problèmes sociaux et gouvernementaux devient de plus en plus urgent. Malheureusement, les articles de «l'organisation judiciaire» qui se trouvent dans la **Loi de 1867 sur la Constitution**, articles 96 et 100, et la garantie de l'indépendance judiciaire qui associe à eux, ont été utilisés pour terrasser trop de tribunaux administratifs provinciaux. La situation est telle que le compremis politique sous forme d'une modification constitutionnelle est nécessaire dans un format qui gardera l'indépendance de l'organisation judiciaire d'action aux provinces dans la création des tribunaux administratifs. Si de telles modifications ne sont pas à venir, la cour devra donc se colleter avec le problème et aboutir à un compremis qui a comme but la «modernisation» de la **Constitution** pour qu'elle soit compatible avec les besoins d'aujourd'hui. Que cela soit possible ressort de la déclaration qui suit faite par le juge en chef Dickson:

> **La constitution du Canada n'est pas vérouilée pour toute é t e r n i t é dans un cercueil agée de 119 ans. Elle vie et respire et est capable de s'élargir pour marcher de pair avec le développement du pays et de ses gens.**

1. **R.v. Beauregard**, [1986] 2 R.C.S. 56.

2. **R.v. Valente** [1985] 2 R.C.S.673; Mackeigan v. Hickman (1989), 61

How do judges get their jobs? Who appoints them? Can the body that appoints them dismiss them? Does all this have a bearing on independence?

In Canada, judges are appointed from the ranks of experienced lawyers, Superior Court judges are appointed by the government of Canada and provincial court judges by the provinces. Governments have regrettably, allowed political considerations to influence judicial appointments, but there are welcome signs that this practice is diminishing, though it has not been eliminated. It is surely indefensible for a government to appoint a person to a bench on any basis except merit.

This whole matter of impartiality and independence has taken on public significance lately.

A recent Globe and Mail story opened with, "A showdown has begun between Canada's judges and politicians, and the judges say they have no hope of winning except in the courts."

The powder to fire the bullet to start the war is, how much should, judges be paid, and who should set these salaries? If judges are put in the position where they must periodically approach politicians with "please sirs, may we have a raise?" then they just sold or gave away their independence.

Politicians, even at the cabinet level, have occasionally run afoul of the law and ended up in court. The judge, over whose salary the politician has control, is now asked to forget salary matters and be impartial. Maybe the judge has recently been given a substantial raise. In his deliberations, is he expected to be thankful to the politician? Maybe the judge recently had his salary rolled back, as in Alberta and Saskatchewan. Would this affect his impartiality toward the person who controls his welfare package?

This is a burning issue right across the country, and has actually become public in Alberta, Saskatchewan, and Quebec. The problem appears to be one of money, but it is really one of survival of the system.

In Saskatchewan, years of acrimony between judges and government have led to a bitter impasse. A government-appointed commission said in 1991 that provincial court judges deserved a raise of $104,000 from $90,000 annually retroactive to 1990.

The P.C. government of the day refused. Later an N.D.P. government appointed a new permanent commission and agreed its findings on pay would be binding.

But the commission's first recommendation was a 24 per cent pay increase over three years. The government's response passed recently in the legislature, was to disband the commission. Now the judges' lawyer has vowed to take the government to court, both on contract and constitutional grounds.

"When the government doesn't follow its own law in relation to your tenure as a judge, then you are in conflict with the government," said a senior Saskatchewan judge. "And then, if you are in conflict with the government, you can do one of two things. You can please them by accommodating to what they tell you or you

HOW IMPARTIAL ARE JUDGES?

By Ronald Southcott*

How impartial are judges?

How closely is impartiality tied to independence?

Even to hear the questions should send shivers down your spine. Next to knowledge as a requirement, impartiality should be the prime, number one, chief, unquestionable adjective by which a judge can be described.

We are not talking about your international figure skating judges or judges in boxing. We all have opinions about their impartiality. We are talking about Her/His Honour and My Lord/Lady who dispense justice daily in our local courts.

My friend, Mr. Webster, defines impartiality as, "to be without pre-judgment, not favouring one side more than the other." Sounds reasonable to me. If I were in the defining business, that's how I would call it as well.

Judges are human and humans are imperfect. Therefore a leap of logic concludes that judges are imperfect. Imperfection is a curse from which we all suffer.

When you become a member of a profession, you try to decrease your human imperfections as they relate to what you do. A doctor who prefers not to treat babies will do his best when a baby is presented to him as a patient. A teacher who prefers to teach Grade 4 would not turn down a job teaching Grade 6. Some judges prefer not to deal with family violence matters, but if such a case is presented then it is dealt with in the professional manner described by Mr. Webster; as not favouring one side more than the other.

A large ingredient in being impartial is being independent. You can't run a large business successfully without the involvement and cooperation of a dedicated staff. You can't be an elected politician unless you get a majority vote. You can't be a judge unless you are appointed.

A rich person depends on money. A business person depends on staff. A politician depends on voters. A judge depends on ...

If a judge, in her/his profession is dependent on anyone, then impartiality is compromised. Again, Mr. Webster defines independent as "being free from the authority, control or influence of others".

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5. P.W. Hogg, **Constitutional Law of Canada**, 2nd ed. (Toronto: Carswell, 1985) at 99.

6. **Beauregard,** supra, note 1 at 69-70.

7. Manitoba Law Reform Commission, **Report on the Independence of Provincial Judges** (Winnipeg: Queen's Printer, 1989).

8. S. Shetreet, **Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary** (Amsterdam: North-Hollan Publishing, 1976).

9. **Ibid.**

10. P.M. Russell, "Constitutional Reform of the Judiciary" (1968) 7 **Alberta Law Review** 103.

11. **O. Martineau and Sons Ltd. v. City of Montreal**, [1932] A.C. 415 at 426.

12. **Valente**, supra, note 2.

13 I. Greene, "The Doctrine of Judicial Independence Developed by the Supreme Court of Canada" (1988) 26(1) **Osgoode Hall Law Journal** 178.

14. **MacKeigan**, supra, note 2 at 707.

15. **Beauregard,** supra, note 1 at 81.

D.L.R.(4th) 688; and Beauregard, supra, note 1.

3. **Beauregard**, supra, note 1 à 72.

4. **Thorson contre le procureur général du Canada**. (No. 2), [1975] 1 **R.C.S.** 138.

5. P.W. Hogg, **Le droit constitutionnel du Canada**, 2ième ed. (Toronto: Carswell, 1985) à 99.

6. **Beauregard**, supra, note 1 à 69-70.

7. La commission/Le mandat de la réforme du droit du Manitoba, **Un rapport sur l'indépendance des juges provinciaux.**

8. S. Shetreet, **Les juges passant en justice: Une étude sur la nomination et la responsabilité de l'organisation judiciaire anglaise.**

9. **Ibid.**

10. P.M. Russell, «La réforme constitutionnelle de l'organisation judiciaire» (1968) 7 **La Revue de la Loi sur L'alberta** 103.

11. **O. Martineau et Fils Limitée. contre Ville de Montréal**, [1932] A.C. 415 à 426.

12. **Valente**, supra, note 2.

13. I. Greene,«La doctrine de l'indépendance judiciaire conçue par la Cour suprême du Canada» (1988) 26(1) **Le Journal De Droit** 178.

14. **MacKeigan**, supra, note 2 à 707

15. **Beauregard**, supra, note 1 à 81.

JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

By Cecilia L. Johnstone, Q.C.*

The Standing Committee on Equality appreciates the intensity of the debate on these important issues pertaining to the judiciary. It is our hope that this edition of **Touchstone** will clarify these issues and address the concerns that have been expressed during discussion about the intent of the Wilson Report in the context of recommendations which propose changes in methods of judicial discipline. Our goal has been to respect the legitimate concerns expressed by those who realize the risks involved, to identify what elements of the existing process require change, and to suggest reforms that address the need for change without detracting from the fundamentally important principles essential for an independent and impartial judiciary. In discussing possible improvements, the Standing Committee wishes to stress the importance of the bar working with judges to improve the Canadian system of justice. Improvements in the equality, diversity and accountability of all areas of the justice system motivated the **Wilson Report**, and continue to motivate the Standing Committee on Equality of the Canadian Bar Association. This is a challenge that we, as self-regulating professionals, must assume with integrity and openness.

Some have suggested that the recommendations of Chapter 10 of **Touchstones for Change** are unconstitutional. However, the actual constitutional provision that is allegedly being violated is unclear, and it seems that perhaps it is tradition, rather than the constitution, that is challenged by those recommendations. The Canadian tradition has been to entrust judges to do the right thing, providing only one recourse of removal from the bench if that trust proves to have been misplaced. In most cases, our confidence in the Canadian judiciary has been well-founded.

Still, there are stories of rare occurrences of judicial misconduct. Many of these stories are eventually publicized. In some instances, the conduct was notorious in the region for several years before action was taken, but no member of the local bar was willing to take on the tasks associated with making a complaint. At other times, an investigation has found objectionable conduct, but did not find the conduct to be objectionable enough to warrant removal from the bench. These isolated occurrences cast aspersions on all judges, and diminish the public's respect for the justice system as a whole. They also demonstrate the need for a more open and accessible complaints process and a wider range of sanctions.

This edition of **Touchstone** has shown that for each opponent to change in the area of judicial discipline as an intrusion on judicial independence, there is a proponent, who finds on constitutional breach in setting standards for judicial conduct similar to those governing other self-regulating professionals. This tension within the legal community on the issue demonstrates that this question is not one with an easily attainable "correct" answer.

Several Supreme Court justices have recognized and named the various essential elements in the relationship of the judiciary with the public. First, we must have an independent judiciary. This independence does not necessarily conform to an established recipe, but must contain certain ingredients, including job security with removal only for sufficient cause, financial security, and the independence of the tribunal in regard to administrative matters impacting upon the judicial function. The independence sought for the judiciary is the freedom to make the right decision, without concern for external or internal pressures on the judge or the judiciary. This independence has both an individualized and an institutionalized component.

Next, we need accountability to the public for judicial statements or acts that fall outside the realm of acceptable conduct. The vast majority of judges will have already internalized their duty to behave in a way commanding public respect. However, if even occasionally a judge behaves in a way that does not meet the expected standards, it results in the unnecessary undermining of the entire system in the eyes of the public, particularly if it appears that there is no method in place to deal fairly and effectively with such conduct. It is necessary to have an objective and just method of ensuring accountability. An accessible, open complaints process through which complainants would be protected from retaliation, will enhance public confidence in all judges and in the credibility of the justice system as a whole.

The right balance of judicial independence and accountability will produce the most essential element in the relationship between the judiciary and the public. A judge who is free from external or internal pressures to decide cases in a certain manner, but who is also cognizant of the limits placed on judicial comments and behaviour by the **Charter**, will achieve the goal of being and appearing to be, impartial. For example, those appearing before a court are unlikely to feel that their case is being heard by a neutral and fair-minded adjudicator if discriminatory remarks are made towards one disadvantaged group or another. The requirement of impartiality does not bean that a judge is viewed as having no opinions, rather, a member of the judiciary is as likely as any other informed person to have formulated personal views. However, the legitimate expectation is that a judge can effectively set aside personal views on any topic to be able to give an open mind to the law and the facts presented in any case before the court.

The requirements of independence and accountability are too often presented as parts of a zero-sum equation, where one is sacrificed at the expense of the other. We propose viewing them in a new way, as two necessary elements which must be balanced to allow for the desired goal of impartial adjudication. Although we must move carefully to ensure that all necessary elements are preserved, there is a need for a broader range of sanctions that stop short of removal for all Canadian judges, and for an open complaints process that includes public participation. The challenge is to find the appropriate balance of judicial independence and accountability to allow for impartial decision-making.

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