New Questions about an Old Concept: The Supreme Court of Canada’s Judicial Independence Decisions
Author(s): Peter McCormick
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Institutions matter, and so does institutional change. Every political institution, from a legislative committee to the Supreme Court of Canada, can be thought of as a forum permitting specific sets of actors to have specific types of influence over specific aspects of public policy, with each institution’s discourse and procedures organizing around a specific set of interests, values and principles. The interplay of all the political institutions within a political system (and between those belonging to different political systems) is the basic stuff of politics.

Yet although the relationships may be stable, they are never static. Each institution is subject to several different types of change: in the credentials or the priorities of its personnel, in its internal arrangements, in its formal powers, in the clientele gaining and seeking entrance, and in its formal and informal relationships to other institutions. Because interaction is pervasive, the impact of changes is never confined to the single institution.

My purpose is to consider one very important institution—the Canadian court system—and to do so through the prism of one specific concept, namely judicial independence. It goes without saying that in this, the age of the Charter, the courts are an important part of our political system. But it may not be as widely appreciated that the judiciary is in the midst of a major reshaping that encompasses all the dimensions of change suggested above, and that an expanding concept of judicial independence is at the centre of that process. Judicial independence is, of course, not a new idea—the English invented it in 1701, and we adopted the concept as our own in 1867—but recently its contours have become hotly contested, and its evolution continues. I will establish the background of the concept, describe the recent changes, and suggest why they matter and where they are taking us.
The recent developments concerning judicial independence are important because the critical new political reality of the early twenty-first century is the global phenomenon of judicial power, which has (at a minimum) three critical dimensions. The first is the new, expanded scope of the matters over which judges are prepared to challenge the legislative and executive branches. At one time, we would have seen this judicial role as grounded in the protection of a federal division of legislative authority, with “rights stuff” as a secondary and derivative development (Shapiro, 2002), but today it clearly takes the form of a “rights revolution” which does not always await the formal invitation of a constitutional entrenchment (Epp, 1998). Tomorrow, it could arguably reach beyond issues of human rights to grapple with the most fundamental questions of political identity and purpose (Hirschl, 2004). The second development is the new style of judicial decision making which emerged as contextualism replaces formalism, meaning that judges no longer confine themselves to a neutral, technical and replicable extraction of meaning from a printed document, but seek instead to provide an evolving purposive interpretation driven by a broad and liberal reading of open-ended texts. The third development, to lapse into metaphor, is the thickness of the walls of the judicial fortress, in other words, the extent to which an evolving and expanding notion of judicial independence protects judges from any negative consequences brought about by political actors with differing priorities.

Judicial independence in Canada: traditional style

For a full century after Confederation, two observations would have drawn widespread agreement. The first was that “of course” judicial independence was part of Canadian law and practice, and an important part at that; and the second was that Canadian judges were as independent, and as deserving of independence, as the judges of comparable countries. Both statements were undoubtedly true, and are still true today, but they really do not take us very far. What we need are different questions, such as: What does it mean to say that Canadian judges are “independent”? What does independence look like in practice? What sets of people are independent, and are they all equally independent and in the same way, and what are the implications of that status? What can they do, and what are they expected to do, and what do they think they are entitled or obligated to do as a result? Who is prevented by judicial independence from doing what, and what procedures and mechanisms exist to ensure that this really happens? What values does judicial independence serve, and how can we be sure that the alleged consequences actually flow from the institutional inputs? These are the questions that reveal how the concept is evolv-
Abstract. In the age of the Charter, courts are an important part of the policy process, and judicial independence is the concept that structures the interactions between courts and other institutions. Historically, judicial independence in Canada was modelled on (and little different from) that of England; but politically-led reforms in the 1970s, and a string of more than a dozen Supreme Court decisions centred on the 1997 Remuneration Reference, are transforming the concept. At the same time, a parallel string of cases extends more limited but essentially similar guarantees to some other administrative bodies. Together, these developments represent an important and enduring change in the Canadian political landscape.

Résumé. À l’ère de la Charte, les tribunaux sont un élément important de l’élaboration des politiques publiques, et l’indépendance judiciaire est le fondement des interactions entre les tribunaux et les autres institutions. Par le passé, l’indépendance judiciaire au Canada épousait le modèle britannique (et s’en éloignait assez peu); cependant, des réformes politiquement inspirées dans les années 1970 et une série de plus d’une douzaine de jugements de la Cour suprême centrés sur le renvoi de 1997 relatif à la rémunération sont en train de transformer ce concept. En même temps, une série de cas parallèles accorde des garanties plus limitées mais très similaires à d’autres corps administratifs. Ces changements se conjuguent pour modifier considérablement et de façon permanente le paysage politique canadien.

ing; that have different answers today than they would have had ten years ago; and that allow us to identify the issues and interests at play.

For one hundred years, Canadian judicial independence was based on the English model, although it is important to note that the English notion was "under-theorized" and practical. As Shapiro observes, "[p]articularly among American and English authorities, 'judicial independence' has been less a rigorously defined concept than a generalization of Anglo-American experience" (1981). The concept was to be understood historically, instead of being intellectually constructed from first principles. Stevens describes it as "primarily a matter of constitutional rhetoric" rather than a specific bundle of concepts or rules (2001). The English prototype was created by the Act of Settlement of 1701, itself essentially a consolidation of the triumph of Parliament over the monarchy. Yet the Act did not simply remove judges from the authority of the King in order to subordinate them to that of Parliament. Instead, it created an administrative limbo where judges were accountable to nobody, except in the most exceptional circumstances.

Figure 1
Judicial Independence: English style

<table>
<thead>
<tr>
<th>Basic elements</th>
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<tr>
<td><strong>First</strong>: judges hold office on good behaviour and are (almost) impossible to remove, and then only for cause</td>
</tr>
<tr>
<td><strong>Second</strong>: salaries set by Parliament (for all judges on same bench, not for individual judges)</td>
</tr>
<tr>
<td><strong>Third</strong>: judges not answerable to government or bureaucracy for judicial matters</td>
</tr>
<tr>
<td><strong>Fourth</strong>: judges drawn from/part of aggressively independent legal profession (implied)</td>
</tr>
<tr>
<td><strong>Fifth</strong>: judicial discretion limited by &quot;formalism&quot; as guiding principle (implied)</td>
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The Act of Settlement essentially consisted of three elements. First, it established that judges held office on good behaviour for life, not “at pleasure” or for limited terms. It did this by stipulating that judges could be removed only for cause, and only by a difficult and unusual process—specifically, joint address by both houses of Parliament, which constituted a form of impeachment. Mary Volcansek suggests that judges are not really subordinated to the will of Parliament, because the language of the Act is not to be taken literally; the real message is that the process to remove judges is so unusual that it is can hardly be put into practice (1996).

Second, the Act established that judicial salaries are to be “set by Parliament” (that is to say, for a class consisting of all judges on the same court); that government cannot stop those salaries for any judge or set of judges; and (possibly) that those salaries can be increased from time to time but cannot be reduced (or can only be reduced for the class and only in very special circumstances).

Third, the Act established that judges were not directly accountable to, or directly supervised by, either politicians or bureaucrats.

Shapiro suggests that there is actually a fourth principle, a hidden premise without which the rest of the package does not make sense. This is that the judges are drawn from, and in some sense remain linked to, an aggressively independent legal profession (Shapiro, 1981). It is this triple anchoring in the autonomous legal profession—first, in the acquisition and routine practice of a particular set of values; second, in the acceptance by, and the enjoyment of a good standing within, the profession; and third, in the continuing pursuit of professional respect and reputation—that makes judicial independence something other than a gratuitous grant of arbitrary power.

One might add a fifth factor as well: judicial independence worked in practice because the judicial role was internally and voluntarily constrained. Although judges exercised a degree of creativity, since the entire body of English common law is a constantly evolving judicial creation, they did so in ways that did not directly challenge the supremacy of Parliament. The dominant rule of judicial decision making was formalism: judges applied, but did not modify, the rules, and the words of the text were determinative of the result (Schauer, 1988). Only in the closing decades of the twentieth century has English practice moved away from formalism to encompass a more deliberately and consciously creative role for judges (Stevens, 2001).

With respect to judicial independence, from the outset Canada established a direct and deliberate copy of the English experience; sections 96 through 100 of the Constitution Act, 1867 closely parallel the relevant terms of the Act of Settlement (Lederman, 1956a; Lederman, 1956b). Judges of provincial superior courts are appointed from the
appropriate provincial bar and are employed by the government of Canada, serving, on good behaviour, for life (more recently, a mandatory retirement age was introduced, but that does not affect the basic principle) and removable only for cause and by a joint resolution of both houses of Parliament. Their salaries are to be established by Parliament, which means that all judges on the same level of court (say, all provincial appeal court judges, or all provincial superior court trial judges) receive the same salary regardless of length of service or anything else.

It is important here to note the omissions, the matters that are not addressed. Judicial independence applies only to the English superior courts and to Canada’s provincial superior courts (and perhaps also to the Supreme Court and the Exchequer Court) (Lederman 1956a; Lederman 1956b). The high-volume lower courts are invisible; Stevens notes that “the vast bulk of the full-time judiciary in England ... have no protection under the *Act of Settlement*” (2001), and although Lederman goes into great detail considering whether the Supreme Court is a superior court, he has not a word to say about the magistrates’ courts. There is nothing about how to decide who becomes a judge (except that one must first be a lawyer), or which judge should be elevated to a higher court. There is no provision for disciplining judges for behaviour that does not justify the all-but-impossible removal from office. There is nothing about the managing of relations between judges and government, or between judges and court staff; and nothing about the setting or administration of the budget, or even the setting (as opposed to just not reducing) of judicial salaries. In retrospect, these are glaring omissions that invite serious difficulties.

**Judicial independence in Canada: the 1970s and 1980s**

The 1970s was an unusual decade. In federal politics, of course, it was the Trudeau decade, and in provincial politics a wave of reformist, socially progressive, province-building governments swept into office. Never in Canadian politics have so many provinces changed governments in such a short period of time, and although the party labels varied, they were remarkably similar in their policy orientation and in their political agenda (McCormick, 1995).

Surprisingly high on everyone’s agenda was the reform of the judicial system. The Canadian court system in 1967 differed little from 1867; the only real innovation was the family courts developed in the early decades of the twentieth century (Chunn, 1992). But by the end of the 1970s, the court system had been transformed from top to bottom. The changes at the top involved the complete restructuring of the Supreme Court of Canada; Prime Minister Trudeau and Justice Minister Turner...
accomplished nothing less than a revolution in the credentials of the typical Supreme Court justice, and with it a comparably revolutionary transformation of the way they went about their business. Compared with their forerunners, these new judges were more likely to have had more judicial experience (and that experience was more likely to have been on a provincial court of appeal), were less likely to have been directly involved in politics but more likely to have done non-elected government service, were more likely to have undertaken graduate study in law, and were more likely to have taught in a university law school, making them, in sum, "the most learned and scholarly group of justices ever to join the Supreme Court" (Snell and Vaughan, 1985). They introduced a new style of judicial decision making that rejected formalism. The term the Court itself uses for the new style is "contextualism" (Manulife Bank of Canada v. Conlin, 1996) and it implies a willingness to consider specific litigation in a broader and more consequentialist way, with the purest form being the "broad and purposive" approach to the Charter laid down in Hunter v. Southam. Subsequent appointments to the Court have followed the same general pattern.

But the provinces made major changes to the court system as well. The most important was the "judicialization of the magistracy" (Russell, 1987), as magistrates' courts were replaced with fully professionalized provincial courts. Judicialization also involved the recognition of judicial independence, and the provinces adopted two institutional measures to give the new court a greater degree of formal independence. First, they created judicial councils (typically staffed by judges serving ex officio, with representation from the provincial law society and some lay members), which screened judicial appointments and investigated complaints against judges (McCormick, 1986). Procedures varied, but judges could not be dismissed from office except for cause after a judicial proceeding. Second, they created the office of Chief Judge of Provincial Court, an institutional buffer between the government and the individual trial judges. To be sure, these changes were statutory rather than constitutionally entrenched, but they are significant nonetheless. And, it bears repeating, the process of reform was politically driven, undertaken spontaneously by a variety of provincial and federal political parties.

This wave of reforms was neatly consolidated during the following decade. In 1982, the Constitution was amended to include the Canadian Charter of Rights and Freedoms, which specifically guarantees a person's right to "an open and public trial before an independent and impartial tribunal." It did not take long for the question to arise whether the institutional arrangements for the new provincial courts met the new constitutional requirements. Le Dain gave the answer in Valente. Writing for a unanimous court, he traced the history of the concept, identified three
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key elements of judicial independence (security of tenure; financial security; and institutional independence on matters bearing directly on the exercise of the judicial function), and found existing practices generally satisfactory save for minor adjustments. Essentially, the decision read the politically-driven reforms of the 1970s back into the Constitution itself; it validated and constitutionalized the previous decade's changes, linking the Judicial Council to the security of tenure and the Chief Judge to the requirement of institutional independence.

By the mid-1980s, we had taken the older understanding of the judicial independence of the high courts and expanded it to apply to all courts. We had developed institutional mechanisms to make these understandings effective in practice. And then we read the changes into the Constitution, so that they were as firmly entrenched as the rules on the superior courts. The English, from whom we got our ideas, still debate how much independence the lower courts ought to have, and remain "cloudy" about what exactly independence means, but Canada has vaulted past them, extending and improving and institutionalizing the old understandings.

At this point, you would think, we could have concluded the judicial independence project. Not by a long shot.

Judicial independence in Canada: the 1990s and beyond

The second big shift took place in the 1990s, very much judicially driven and led from the top. In two decades, the Supreme Court has handed down a full baker's dozen of major decisions focused directly on the issue of judicial independence and its institutional requirements, a surprisingly extensive set. I will follow the sequence case by case, emphasizing major developments. To date, eight different judges have delivered decisions on the subject, seven have written dissents, and three have written separate concurrences. Lamer is the leading contributor (the Remuneration Reference would establish this, even without Lamer's other pair), followed by Gonthier (also with three decisions), but what we are seeing is clearly debate rather than soliloquy. It is striking that only one of the first seven decisions, but five of the last six, have been unanimous, suggesting the emergence of an increasingly firm institutional position.

Even this count understates the attention the Court has devoted to the matter, because additional significant decisions have dealt with other institutions such as administrative tribunals; later, I will describe these cases somewhat more summarily. Combined, the two sets show a court that is sketching a solid doctrine of the institutional needs of effective decision-making on important issues, and in the process fundamentally transforming the political landscape.
As already indicated, the first case (Valente) is essentially a “consolidating” decision. It validated the politically driven reforms of the 1970s by reading them back into the Constitution, specifically in s.11(d) of the recently entrenched Charter. LeDain, for a unanimous Court, stated the basic institutional requirements of an independent court, and the picture looked very much like the new provincial court structures and procedures of the 1970s. It is, of course, no small thing that the new arrangements acquired a constitutional rather than just a statutory status, and this makes Valente the most important judicial independence decision before the Remuneration Reference, but it is important to notice the sequence: political initiative first, judicial validation second. We are witnessing consolidation rather than innovation.

Valente was followed by a string that I will call the “little detail” decisions. Beauregard dealt with judicial pensions. This core question was addressed very briefly, but the case remains worth reading for Dickson’s extended gloss on Valente. MacKeigan v. Hickman responded to an executive-directed public enquiry into the Donald Marshall affair, and answered the questions of whether judges have to give any accounting to government other than their written reasons for judgment (they do not), and whether they are accountable to anyone for their actions (they are, but only to the judicial councils discussed above). Lippé deals with the independence of part-time judges, and is interesting for Lamer’s first formulation of the idea that independence is to be valued not in itself but for a higher purpose that it serves. Généreux raised the problem of courts martial, involving judges who are simultaneously part of the hierarchical rank structure of the military, with regular performance reviews by superior officers. The Court found existing arrangements inadequate, but emphasized that not all tribunals have to be independent to the same extent or in the same way (although only for L’Heureux-Dubé did this principle extend far enough to save the status quo). Ruffo, the last in the string, dealt with some details of the interaction between chief judges and judicial councils, again validating existing practices.

None of these issues is a small matter, not on its own and even less so as part of a package. Essentially, though, the judgements simply
follow up on Valente, agreeing with the finding that the changes of the 1970s were well-grounded but in need of minor revisions. This is still consolidation, not innovation. Even the required revisions to existing practices are more modest than one might have anticipated. Lippé, for example, concludes by approving of part-time judges, finding reassurance in the simple fact that they took an oath of office, a surprisingly limp conclusion to very robust abstract arguments; Généreux finds room for officer-judges. Both decisions could easily have gone the other way, or could at least have suggested far more demanding requirements for meeting independence standards.

This being so, the next case comes as a major surprise. Reference re Remuneration of Provincial Judges is the blockbuster, the judicial independence decision sans pareil. It is an enormous decision not only for its sheer size (it was at the time the longest set of reasons the Court ever delivered, and even today it is second only to Gosselin), or for its leap from what seemed to be the well-established tone and logical starting points of judicial independence decisions, but also for the potentially wide sweep of its future implications. Surprisingly for such a controversial and innovative decision of great magnitude, there was only a single dissent, by La Forest writing alone.

**FIGURE 3**

Remuneration Reference 1997: novel elements

<table>
<thead>
<tr>
<th>First:</th>
<th>a new grounding: “an unwritten constitutional principle” exterior to any specific section</th>
</tr>
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<tbody>
<tr>
<td>Second:</td>
<td>a new location: the preamble (“similar in principle to that of the United Kingdom”)</td>
</tr>
<tr>
<td>Third:</td>
<td>a new judicial function: “protectors of the Constitution”</td>
</tr>
<tr>
<td>Fourth:</td>
<td>a new dimension: a constrained role for chief judges</td>
</tr>
<tr>
<td>Fifth:</td>
<td>a new basic principle: no relationship involving even the appearance of negotiation</td>
</tr>
<tr>
<td>Sixth:</td>
<td>a new institutional structure: Judicial Salary Commission</td>
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The immediate context of the Remuneration Reference was the austerity measures imposed by provincial governments in the early 1990s. These typically involved salary rollbacks for all provincial public employees, sometimes through the imposition of unpaid holidays (such as “Filion Fridays” in Manitoba, or “Rae Days” in Ontario). The salary cuts affected provincial judges, imposed on them (as on others) by direct fiat and not as the result of negotiated agreements. In three provinces these reductions led to court challenges, brought forth by a number of criminals accused in Prince Edward Island and Alberta alleging that the courts consequently lacked the independence required under the Charter, as well as a direct challenge from the Provincial Judges Association in Manitoba. This was supplemented in PEI by a reference question,
directed to the provincial court of appeal, which gave the case the name by which it is commonly identified. The Supreme Court of Canada combined all these cases into a single decision. The core issue was the reduction of salaries, although other issues (such as a judicial removal process in PEI, the composition of the Alberta Judicial Council, and pressure allegedly applied to the judges in Alberta and Manitoba) were dealt with as well.

Examining the constitutional foundations of judicial independence, Chief Justice Lamer found it untenable to suggest that the Constitution contains explicit provisions defining judicial independence so as to be exhaustive of the concept—neither ss. 96 through 100, nor s.11(d) of the Charter, nor both of them in combination, can meet such a requirement. The true basis of judicial independence must be elsewhere, as an “unwritten constitutional principle” fundamental to our constitutional heritage but “exterior to any specific section” of the Constitution.

If the grounding of judicial independence is not in any specific operative section of the Constitution, where is it? The Chief Justice said the principle is “recognized and affirmed by the preamble to the Constitution Act, 1867.” Although as a general principle of legal interpretation, a preamble “has no enacting force” and “is not a source of positive law,” he still found it to have “important legal effects.” And although the English principle of judicial independence in 1867 (or, for that matter, today) did not extend beyond the “judges of the English superior courts,” he saw it applying more broadly in Canada because “our Constitution has evolved over time,” an assertion sturdy enough to carry the conclusion that “judicial independence has grown into a principle that now extends to all courts, not just the superior courts of this country.” One important implication: the independence of the “inferior” courts is no longer grounded in the Charter (where it could be politically contained by the notwithstanding clause). Surprisingly, having established this ambitious foundation, he notes that all the arguments before the Court were framed as Charter questions, and it is therefore in these terms that they should be answered.

The role of the courts is described in powerful language. The courts are not just the resolvers of disputes, or the referees of federalism—the functions that political scientists have long tended to identify. Instead, the courts are “protectors of the constitution” and of the rights of citizens within the constitutional framework. The Charter is important in this respect, not because of s.11(d), but because it is through the courts that citizens seek the identification and vindication of their rights, an argument that applies not only to the s.96 courts, whose independence always had a specific constitutional locus, but to the provincial courts as well.

Another theme is the constrained role of a chief judge of a provincial court, a rather intriguing development. This position was an important institutional innovation of the 1970s, but there was always a degree
of ambivalence attached to it: it was a functional buffer between government and the trial judges, but at the same time the administrative discretion of the chief judge could translate into undue pressure on judges. The comment in Remuneration Reference is quite strong; although rejecting the suggestion that the Chief Judge of Manitoba had in fact consented to the government’s decisions, Lamer concluded that his consent would have made no difference, because institutional independence belongs not to the chief judge but to the entire court.

With regard to the central issue of the several cases mentioned, namely the reduction of judicial salaries, Chief Justice Lamer declared an important new principle: the relationship between the court and the government cannot involve any degree of negotiation, or even the appearance of negotiation. There must be no reason for anyone to worry that the judges might be induced to bargain away something inappropriate, like promising to crack down on drunk drivers if their pension plan contributions are increased, because this would undermine public confidence in the judiciary. In the immediate case, this is linked only to the salary issue, but it clearly applies more broadly.

Finally, the decision calls for a new structure: the Judicial Compensation Commission. (More precisely, since there had been a Triennial Commission process for establishing judicial compensation and benefits for federally appointed judges since 1981, Lamer’s innovation is to read this into the constitution and to extend the requirement to all Canadian judges and all Canadian courts.) Lamer identifies the “imperative” of interposing a body between the judiciary and the executive for determining salaries and sets down “guidelines” for its structure. This body must be independent, meaning that its members must enjoy security of tenure, and must be appointed in a multilateral way. It must be objective, responding to “objective criteria, not political expediencies,” after deliberating on submissions from both government and judges and giving reasons. And it must be effective, meaning that government can neither freeze nor reduce judicial salaries without going through the commission process; that the commission must meet at regular intervals to prevent salaries being eroded through inflation; and that although the government is not bound by the commission report it must reply with reasons that it is prepared to defend before a court. This is the minimum means for protecting the courts from “political interference through economic manipulation.”

Some considered these recommendations to be rather audacious. As one critic put it: “To summarize, the Court employed the following strategies to avoid the three obvious and fatal objections to its misuse of the Preamble: a self-contradiction, a vague reference to ‘evolution’ combined with a plainly false analogy, and an evasion” (Goldsworthy, 2000). The judicial independence journey takes us to the preamble, back into
history, across the ocean to England, and then back to modern Canada again—yet in the process, we have extended independence to the entire judiciary (which England has never done), retreated from the plain language of “salary set by Parliament,” and found an absolute constitutional requirement for new institutions of a sort that England has never contemplated. Along the way, we also discovered a commitment to the separation of powers, and to the courts as a separate branch of government, even though “(i)n England, the judges are not a separate or coequal branch of government” because “the concept of parliamentary supremacy assures that separate branches of government do not exist” (Stevens, 2001). All this rests on an asserted “constitutional evolution” that stretches to cover whatever is required of it. Innovation is almost too mild a word for it.

But audacity is only a problem when it fails, and in the Remuneration Reference it did not, as demonstrated by the fact that years later it still stands as the solid foundation to all subsequent judicial independence decisions. Instead, it is better seen as a new beginning, a Magna Carta of Canadian judges, and the jumping-off point for an increasingly elaborate structure.

The Supreme Court has followed up on the Remuneration Reference with a string of decisions. Tobias3 picks up on the question of the role of the chief justice of a trial court, and further emphasizes the very limited power involved; the chief justice is only “first among equals” and not in a position of authority over the puisne judges. Therrien2 and Moreau-Berube,3 both dealing with the removal of a provincial judge from office, give an expansive reading of the stature and the importance of Judicial Councils. 974649 Ontario held that justices of the peace enjoyed judicial independence, a finding confirmed but qualified in Ell,4 which also emphasized the role of the Judicial Council in the court reform process. Mackin (the only divided decision in the follow-up string) found that it violated judicial independence for a provincial government to cancel an arrangement regarding supernumerary judges. And we may soon see another important decision in the case of Bodner v. Alberta5 (still accumulating applications from interveners at the time of writing this paper), which raises the question of the relationship between judicial independence and the setting of court budgets.

The new agenda of judicial independence

The traditional approach to judicial independence highlighted security of tenure, financial security and administrative independence. In the 1970s, new institutions (judicial councils, chief judges) were developed to reinforce these principles in a practical and visible way. Today, however, there are new items on the agenda, some actual, some pending, some possible.
The first item on the new agenda, obviously, has been *judicial salaries*. This issue was definitively settled by *Remuneration Reference*; salaries are handled by Judicial Compensation Commissions. In principle, they could recommend salary cuts as well as increases, although it has not worked out that way. In principle as well, their recommendations are not binding, although to reject them governments have to go to court and their success rate has been dismal. Effectively, the setting of judicial salaries is now completely out of the hands of government, outside any generalized wage policies. Although there are still skirmishes around the margins—*Bodner* is an example—the commissions seem firmly established and effective.

Another item is likely to be *court facilities*. Historically, the provision and maintenance of court facilities has been a political decision, possibly after consultation but always with the final decision resting with cabinet. Some recent episodes suggest this is becoming problematic. In April 2002, the BC government announced the closing of several provincial courthouses to consolidate the delivery of services and to reduce expenditure; the Chief Judge of Provincial Court publicly objected and filed suit to block the move. The outcome was a meeting between the government and the judges which postponed implementation of the consolidation plan and issued a remarkable document describing how such decisions would be handled in the future.6 There was a similar skirmish in Alberta a year earlier, when the building which housed the Alberta Court of Appeal in Calgary had to be evacuated for health reasons.7 The Premier’s unsympathetic response led the judges to threaten legal action,8 with the Chief Justice insisting “(i)t is the responsibility of the provincial government to provide safe, healthy and functional premises.”9 Neither episode was decided through litigation, but either could have been.

Closely related is the matter of *court budgets* and *court administration*. The Supreme Court will have a chance to address this issue in *Bodner*, and even if it passes on the matter this time the question will surely arise again. It is most unlikely that the outcome will simply be that judges...
will set their own budgets—the Supreme Court clearly prefers pluralist structures—but the “no relationship involving negotiation” rule precludes the courts’ essentially supplicant role in the current budgeting process. Similarly, it is problematic that judges preside over the courtroom but otherwise have little or no role in administering the courts. There are very few countries where the judges do not play such a role, and Canadian judges are well aware that they are the outliers in this respect. Both the Canadian Association of Provincial Court Judges and the Canadian Judicial Council have recently undertaken projects looking into the question of judicial governance, a clear indication of real dissatisfaction with the status quo.

A somewhat surprising element is the question of the powers of chief judges. On my reading of the cases, the Supreme Court has taken a very constrained—even a jaundiced—view of the roles and powers of the chief judge, emphasizing that judicial independence also means freedom from other judges. This “collegializing of the judiciary” means an erosion of the intra-bench hierarchy; in many provinces the chief judge now serves a non-renewable fixed term, and in several provinces the judges themselves have some say in the process of selecting a new chief. It is not clear how far this will go, but the obvious beneficiaries are the trial judges.

The Supreme Court adopts quite a different tone when it comes to talking about the status and powers of judicial councils. In Moreau-Berubé, the Court went so far as to suggest that “(j)udicial councils may be viewed as unique not only amongst administrative tribunals but even amongst professional disciplinary bodies,” to such an extent that “a high degree of deference should be afforded to its decisions.” Ell has drawn attention to the fact that judicial councils are appropriately involved in a range of functions that goes beyond screening appointments and investigating complaints against judges. This is a strong vote of confidence, and therefore something of a hint for the future.

Finally, and perhaps reaching a bit, there is the question of the judicial career—that is to say, judicial appointments and promotions. It is anomalous that one becomes an independent judge through the mildly constrained but essentially arbitrary decision of a politician, and it is an open secret that party political connections often play a part in this decision (Ziegel, 1987). Elevations (to a chief justiceship, or to a higher court) are still more problematic, because ambitious judges might worry that a particular decision or a string of decisions could affect their prospects; recent studies of England (Salzberger and Fenn, 1999) and of Japan (Ramsseyer and Rasmusen, 2003) suggest they have reason to worry. In other countries within the common law tradition, appointment procedures have recently become an issue. In England, for example, the Economist recently editorialized that “the independence of the judiciary depends on the way judges are selected.” It is not far-fetched to think that, one day, the ques-
tion might arise as to whether it is appropriate that the appointment process is partly political rather than purely professional in this country, with the answer found within an evolving concept of judicial independence.

Who else might be independent?

The court system on its own does not exhaust the question of decision-maker independence and its institutional requirements. The Supreme Court's recent jurisprudence has considered the independence issue as it relates to a wider variety of institutions: labour relations boards (Consolidated-Bathurst, Ellis-Don), social affairs commissions (Tremblay), administrative tribunals (Domtar), liquor licensing boards (2747-3174 Quebec Inc.), public utilities boards (Wells), ad hoc arbitration boards (C.U.P.E. v. Ontario), and human rights tribunals (Canadian Telephone Employees). These decisions draw heavily on the judicial independence cases, even though the body in question is not a court and the members are not lawyers, and they often apply the term "judicial independence" to these other settings. In Consolidated-Bathurst, for example, Gonthier writes a section entitled "the judicial independence of panel members in a full board setting." The logic is simple: some kinds of decisions are so important that the decision maker must be independent in order to be able to act fairly. We can therefore derive a principle of "the protection of independence in public decision making," and under a "purposive approach," this calls for some of the same protections as judicial decision making (the quotations are from Wells).

One recent case prevents me from extrapolating too freely from this string of decisions. In Ocean Port, the Chief Justice for a unanimous court emphasizes the "fundamental distinction between administrative tribunals and courts" (Ocean Port). Courts require judicial independence to "demarcate the fundamental division between the courts and the executive." But administrative tribunals necessarily lack this constitutional distinction; on the contrary, they are created by the government precisely for the purpose of implementing government policy. Where it was the clear intention of the legislature to establish procedures that restrict the independence of tribunal members, "there is no room to import common law notions of independence." The principles of judicial independence that apply to courts do not automatically apply to administrative tribunals, even when those tribunals exercise adjudicative or quasi-adjudicative functions. "While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not."

At first glance, this seems to represent a substantial retreat from the eight cases described above. Perhaps the shadow of judicial independence is not going to spread as far as it seemed. But a pair of even more
recent decisions places this conclusion in doubt as well. In Paul the Supreme Court said that British Columbia could validly legislate to give the Forest Appeals Commission the authority to hear and decide questions relating to aboriginal title and rights; and in Martin the Court held that the Workers Compensation Appeals Tribunal could make findings regarding constitutionality under the Charter (for a broader discussion, see McKinnon, 2001). But it seems to me that these are precisely the kinds of matters that can only be decided fairly and appropriately by a decision maker enjoying some degree of formalized independence, which places us back where we started.

There is a way to understand these two strands without suggesting that the Supreme Court is simply flipping back and forth on the matter. It may be that the Court is sending Canadian governments two subtly inter-locking messages. On the one hand, if a government wishes to do so, it can establish administrative tribunals whose structure and procedures limit, and even severely limit, the independence of its members, but in such a case the legislative intent must be crystal clear, and the government must be constrained in the powers assigned to the tribunal (that is to say, the kinds of matters that they can decide.) On the other hand, if a government wishes to do so, it can establish administrative tribunals empowered to rule on matters as significant as findings of constitutionality (under the Charter, or on aboriginal rights, or under the federal/provincial division of powers), but in such a case, there must still be legislative clarity as well as appropriate structures and procedures to provide for an adequate degree of decision-maker independence.

Precisely where the boundary lies between these two principles, how they trade off, what sort of matters require independence, and what kind of independence is required under different circumstances—all of these issues are going to take some time to work out. But because independence adheres to the function, not to the title (R. v. 974649 Ontario), we are on notice that the concept of judicial independence is going to reach beyond the court system, and that administrative schemes will be examined to ensure that they meet the right leg of the double test described above. And this in turn makes it all the more important to follow the unfolding story of judicial independence as the Court follows through on the string of “pure” judicial independence cases, because this will give us some idea to what degree and to what extent the doctrine is going to reach outside of the judicial sphere.

The new political context

Today, we inhabit quite a different judicial and political world from that of the 1970s and 1980s. The theory and the practice of judicial indepen-
Precedence has moved away from traditional territory (English-style, embodied in ss.96-100), and even away from a grounding in the Charter, and is now identified as a fundamental constitutional principle that is defended in much stronger terms ("protector of the Constitution"). Unlike the 1970s, both the theoretical foundations and the practical reforms that follow from them are not being driven by the agendas of politically accountable officials, but rather by the judges themselves. Also, unlike 30 years ago, relations today between governments and their respective courts are strained and angry. Almost a decade ago, Schmeiser and McConnell spoke of "a time of unparalleled conflict between Canadian Provincial Court systems and the governments which established them" (Schmeiser and McConnell, 1996); nothing has happened since to invalidate the description. Lastly, in contrast to the 1970s, the current reform process is drawing on ideas and arguments from other jurisdictions and other systems (especially models found outside of England and the United States). Why is the situation so different today?

There are two important respects in which the social and political landscape has changed, pushing and pulling the courts into a reconfigured relationship with government.

The first is the political environment itself. Government budgets were steadily expanding during the province-building enthusiasm of the 1970s, but the climate has changed since then. With governments working hard to contain or reduce expenditures and taxes, there is increased competition within government for adequate shares of a constrained budget. As Kate Malleson observes of England, "the court system has joined other areas of public life in the arena in which hard fought battles over funding levels and priorities are played out" (1999). The courts are not particularly good at this infighting, and not very effective as vote-getters compared with big-ticket items like medicare and public education, but they have become expensive enough to be a target. Further, the new style of governance (business plans, benchmarks, key performance indicators, productivity measures) is highly un congenial to the way that judges understand their obligations. For example, in 2002 the government of New South Wales announced a business plan describing the family courts as contracting to provide "x thousand" moderately difficult decisions and "y thousand" very difficult decisions per year, with a dollar value imputed for each set of cases (see Spigelman, 2000). In more general terms, the Australian courts have become very sensitive to the way in which even the collection and reporting of caseload figures can provide a powerful lever for government influence and pressure (Spigelman, 2001).

The second way in which the current climate differs from that found 30 years ago relates more to the courts themselves and their approach to their growing responsibilities. The role of the courts has expanded, as
“people increasingly turn to the judiciary, hoping it can solve pressing social problems” (Barak, 2002), to such an extent that we can now talk about “a profound shift in power away from legislatures and toward courts and other legal institutions” (John Ferejohn, 2002). We in Canada generally attribute this to the Charter, but the phenomenon is truly global, and the broader literature typically identifies it as an aspect of the modern administrative state (Guarnieri and Pederzoli, 2002). Today, there are few policy areas in which the courts are not (or could not be) called upon to review government choices, often very critically. This situation is aggravated by the new style of judging, combining creativity, contextualism and purposive interpretation, which often frustrates or embarrasses governments. As Paul Weiler wrote of the new style, even before the Charter it often appeared to him that “the Court is holding legislation valid or invalid on the basis of standards which it is making up as it goes along” (Weiler, 1974).

**Beyond the weakest branch**

It is from the Americans that we get the strongest and the most fully articulated notion of the separation of powers—a term that provides one of the critically important themes running through recent Canadian jurisprudence, referred to in 16 cases over the last 20 years. However, in American usage, the term “separation of powers” is simply one side of the coin, and the obverse is “checks and balances.” The point is not just that political authority is divided between the branches of government, but that each branch has the capacity to check, and suffers the frustration of being checked by, the others. It was the argument of the Federalist Papers that the result of this interplay was to leave the court system as the “weakest branch,” because it had the least resources to work with, and thus the greatest dependence on the other two branches to put its will into practice.

This creates what is at first glance a curious tendency in American descriptions of judicial independence. They are committed to the principle of independence, at least for the federal courts—their Article III is also modelled on England’s *Act of Settlement*—and they proudly describe the constitutional principles and practices that guarantee the independence of their judges. But, invariably, they immediately point out the very real constraints under which the courts operate (see for example Fiss, 2003). The president appoints federal judges with the consent of the Senate, and Congress can impeach federal judges, although in fact they have almost never done so (Abraham, 2001). The president and Congress can discourage the judiciary by controlling its budget, and some scholars suggest a correlation between the willing-
ness of the courts to “push the envelope” and the proximity of the next budget cycle (Rose-Ackerman, 1992; Toma, 1996). Congress is specifically given the power to alter the jurisdiction of the federal courts, although it has not used the power very recently or very effectively (Gunther, 1984). It has even been suggested that Congress has the power to pass legislation altering the way the Supreme Court treats precedent in its decisions (Paulsen, 2000), although this claim is not undisputed (Fallon, 2000). The American literature is best summed up by the phrase “independent judges in a dependent judiciary,” a term that Ferejohn likes so much that he has used it in the title of two completely separate articles (Ferejohn, 1999; Ferejohn and Kramer, 2002). This ambivalence—on the one hand, powerful courts; on the other hand, effective checks on those courts—is what the American concept of separation of powers is all about.

When the Supreme Court of Canada talks about the separation of powers in the context of judicial independence, however, it has something quite different in mind. It never connects the idea to “checks and balances,” a phrase it has never used in any decision. Indeed, the whole idea of checks and balances is unacceptable, because it would put the Court in a situation of appearing to negotiate, vulnerable to the temptation of altering its behaviour on the explicit assurance or the implicit expectation that another actor would respond. Despite its apparent parallel to American usage, “separation of powers” talk in Canada is stronger, more doctrinaire, more unqualified—its obverse is not “checks and balances,” but rather “protector of the Constitution.”

This places Canada in unexplored territory. Other systems have adopted a variety of techniques for “squaring the circle,” in other words, accommodating independent judges to a democratic order. The Americans have done so through a system of checks and balances. The English have done so by leaving judicial independence as a vague slogan that is honoured in practice without being formally spelled out, and which in any event affects only the higher courts. The continental European countries have done so by creating their judiciary as a merit-based professionalized bureaucracy, self-governed by councils dominated by senior judges from the higher courts. But Canada is unique in taking the poetically cryptic terminology of the preamble to the Constitution, and then, through the process of judicial explication, deriving a string of “explicit provisions” that are “exhaustive of the matter.”

To return to my opening comments: political institutions are the means by which interests and actors impact public policy, which is (crudely) the vector sum of all these influences. Changes to any institution affect not only the final policy output, but also the way that other interacting institutions operate; the bigger the institution, and the bigger the changes, the wider these ripple effects. We have in the last decade
seen a dramatic process of change to one very large and important institution, the court system, and one of the important levers of this change has been the still-evolving concept of judicial independence. Compared with a few decades ago, the court system in general and the Supreme Court in particular have redefined the judicial role (contextualism replacing formalism) at the same time as they have been the recipients (both through the Charter and through the demands of a modern administrative state) of a vastly expanded range of issues over which they are expected to adjudicate. They have gained institutional protections for their independence, and expanded these to include a measure of financial protection unlike that enjoyed by any other sector of our society. If I have read the momentum of the case law correctly, they are about to extend a similar immunity to other aspects of their immediate working environment. They enjoy more power over more matters, which they apply with more discretion, and in circumstances of greater insulation and immunity from negative feedback, than ever before. This carries profound implications for the future of Canadian politics; judicial power has not yet achieved its full size.

Such statements are not meant to be apocalyptic; they simply describe the new topography of Canadian politics. There are similar trends toward influential judicatures in other countries (Tate and Vallinder, 1995), although arguably not with quite the same open-ended potentialities. It is not a question of turning back the clock, which cannot be done in any event; “one inescapable conclusion ... is that there is no going back to a condition of judicial quietism” (Williams, 2001). It is certainly not a question of resorting to populist definitionalism, and simply concluding that democratic societies cannot endure judicial power because judges are not elected. Too many democratic societies have recently developed strong forms of judicial power for this to be a fully satisfactory response.

The challenge, of course, is to find the balance. On the one hand, judicial power operates in a powerful discursive way from a principled core, explaining itself to a broader public in a way that arguably makes judges (or at least the best of them) the political philosophers of the modern age. On the other hand, at some point, the preemptive power of an appointed body drawn from a privileged and elite profession necessarily vitiates democracy, which to a considerable extent requires the body of citizens to make progressively less flawed decisions for itself on the fundamental matters that define a polity, and which is smothered by the authoritative imposition of decisions (even objectively better decisions) from “above.” The constraints on judicial independence which the American literature emphasizes can be seen as a way of sending a message to the judiciary that it may be shifting the balance too far, or at least failing adequately to explain and to persuade. The warning
signs can take the form of legislatures trimming the budget, or a fire-storm of public protest at the content or style of a particular decision, or a string of safe and bland judicial appointments. Beyond a certain point, refining the details of the doctrine of judicial independence can simply become a way of allowing judges not to worry about feedback, like professors who no longer read student evaluations because they now have tenure.

Alec Stone-Sweet captures the appropriate tone in his book *Governing With Judges*, which describes the recent growth in the influence of European constitutional courts (Stone-Sweet, 2000). The wording of his title is delightfully nuanced: not governing by judges, and certainly not governing despite judges or over top of judges, but rather accepting that democratic governance in the twenty-first century involves governing with judges. The challenge for Canada is to develop the appropriate mechanisms and practices for this important new partnership. And the challenge for the Supreme Court, which it may or may not meet, is to realize that it is not simply pursuing the concept of judicial independence to some intellectually compelling conclusion, but rather setting the terms of the practical institutional trade-offs that will shape democratic practice for decades.

**Notes**

1. Representatives of the federal Justice Department met with the Chief Justice to discuss the slow progress of a case, but without informing or inviting counsel for the other side.
2. This decision upheld the process that removed a provincial judge from office for having failed to report the fact that he had been pardoned for a criminal offence.
3. This decision upheld the power of a judicial council to order the removal of a provincial judge, even after the initial committee of investigation had recommended a lesser punishment.
4. The case involved a justice of the peace reorganization scheme by the Alberta government, which increased the credential requirement for certain categories of the office and thereby effectively removed several sitting justices of the peace without cause. Justice Major, for a unanimous court, found that although justices of the peace enjoyed judicial independence, it was not the same independence or to the same extent as provincial judges; the reorganization was acceptable because it was clearly directed at improving the administration of justice in the province, and the role of the judicial council in the court reform process was a further assurance that judicial independence was not compromised.
5. After a Judicial Salary Commission recommended salary increases for justices of the peace, the Alberta government indicated that it would not make additional money available for the purpose, but would be obliged to find the money by reducing other elements of the JP budget.
7 The emergency notice issued to the legal profession by the Chief Justice is available online at http://www.albertacourts.ab.ca/ca/practicenotes/NTPjul032001.htm (site last accessed 10 December 2003).
8 Please see the Web site (site last accessed 10 December 2003).
9 Please see the Web site (accessed June 29, 2003)
10 The Economist, 15 November 2003, p. 11. The specific proposal under discussion was that judges would be appointed by an independent commission that is itself appointed by a non-partisan body; the suggestion drawing the editorial ire was that the government might under some circumstances be able to veto a judicial appointment.

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