

JUDICIAL INDEPENDENCE AND THE SUPREME COURT OF CANADA

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This article examines the recent landmark decision on judicial independence issued by the Supreme Court of Canada. The author outlines the essential features of the decision, and explains why this is one of the Court's most significant judgments on the subject. Although the issue of judicial remuneration in three provinces united the four separate appeals before the Court, the case was fundamentally about the separation of powers and the proper relationship of the judiciary to the political branches of government. This relationship between provincial courts and the governments that instituted them had become stressed in recent years, and that historical context is outlined in the article. The controversial aspects of the decision are identified, as well as areas of possible future conflict between provincial courts and governments. However, the author concludes that the principles provided by the Supreme Court will help the justice system deal with any future disputes in a civil and depoliticized manner.

Cet article examine la décision de principe rendue récemment par la Cour suprême du Canada sur l'indépendance judiciaire. L'auteur résume les points essentiels de la décision et explique les raisons pour lesquelles cette décision constitue une des décisions les plus importantes à ce sujet. Bien que la question de la rémunération des juges dans trois provinces unisse les quatre appels distincts devant la Cour, la séparation des pouvoirs et la relation appropriée entre le judiciaire et les différents secteurs politiques du gouvernement constituent les questions fondamentales de cette affaire. Cette relation entre les cours provinciales et le gouvernement qui les a créées est devenue tendue au cours des dernières années et ce contexte historique est résumé dans cet article. Les aspects controversés de la décision de même que les domaines susceptibles de devenir la source de conflits entre les cours provinciales et le l'avenir sont identifiés. Cependant, l'auteur conclut que les principes gouvernement dans établis par la Cour suprême aideront le système judiciaire à gérer les litiges futurs de façon civile et dépolitisée.

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I. Introduction

Judicial independence is for the benefit of the public; not a perk for judges.¹ But what does that mean in practice? During the past two decades, the Supreme Court of Canada has dealt with that question in a number of decisions,² but its most recent, *The Judges' Reference*,³ is one of its most significant. Unlike earlier decisions, this one dealt with institutional questions about the relationship between the judiciary and the political branches of government.⁴ The specific issue was whether financial security, long recognized as a core characteristic of individual judicial independence, had a collective or institutional dimension as well. The court determined that there was such a dimension to judicial independence, that it applied to all courts, and that in the cases before it, the judges lacked the required independence.⁵ The court outlined a commission process as a mechanism to provide such institutional independence. However, in order to determine the issue, the court examined the proper constitutional relationship of the judiciary to the executive and the legislature, and concluded that this existing relationship had to be depoliticized.⁶ The requirements set by the court, outlined below, will have significant impact on the relationship of the provincial courts and the governments that established them. The significance of this case is further evidenced by the variety of parties cases before the court,⁷ the number of interveners,⁸ the

¹ Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 1, quoting from a speech by Chief Justice Antonio Lamer C.J.: "The rule of law, interpreted and applied by impartial judges, is the guarantee of everyone's rights and freedoms...Judicial independence is not a perk of judicial office. It is a guarantee of the institutional conditions of impartiality."

² D.A. Schmeiser and W.H. McConnell, *The Independence of Provincial Court Judges: A Public Trust* (Toronto: Canadian Association of Provincial Court Judges, 1996) at 8 for a summary of this history: "III. The Supreme Court of Canada and Judicial Independence." Also, Friedland, *ibid.* at 7-18.

³ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] S.C.J. No. 75.

⁴ *Ibid.* at para. 302, per La Forest J.'s description of the Executive and Legislative branches of government.

⁵ This did not have the effect of invalidating the past decisions of these courts. The consequences of this ruling were clarified on a re-hearing. See *infra* at note 28.

⁶ *Ibid.* at para. 122 and 131.

⁷ Individual citizens, judges and a provincial government variously sought relief or guidance from the Court. The Alberta case arose from three accused persons challenging the constitutionality of their trials before provincial court judges in Alberta. In the Manitoba case, provincial court judges themselves through their association had sued the Manitoba government civilly. In the P.E.I. case, it was the provincial cabinet that referred a number of questions to the Supreme Court.

⁸ The Canadian Bar Association and the Federation of Law Societies of Canada intervened; as did the Attorneys General of Canada, Quebec, and Saskatchewan; as did the Canadian Judges Conference, the Canadian Association of Provincial Court Judges, the Conference des juges du Québec, the Saskatchewan Provincial Court Judges Association, and the Alberta Provincial Judges' Association.

uncharacteristically far-reaching scope of the decision,⁹ and the near-unanimity of the court with the judgment of Chief Justice Lamer.¹⁰ Only La Forest J. dissented, both from the result and from the broad scope of the majority decision.

II. The Decision

Although the decision answers a number of specific questions,¹¹ three points are the most significant. They are also the focus of La Forest's dissent, who otherwise agreed with substantial portions of the Chief Justice's reasons and shared a considerable measure of agreement on many of the issues.

⁹ See *Friedland*, *supra* note 1 at 10 and 17, discussing the Court's prior decisions on related issues: "The 'judicious self-restraint' — to use Peter Russell's words — that was shown in Le Dain's well-crafted judgment in *Valente* was carried over to the next Supreme Court judicial independence case, *Beauregard*.... The six Supreme Court of Canada cases on judicial independence discussed above in general show a reasonable, pragmatic, and restrained approach to the issues." Russell also commented upon this "self-imposed constraints of the Canadian judiciary, especially the country's highest court, in interpreting the Charter" in a 1996 publication: see *infra* note 79 at 146. In sharp contrast, however, as regards *The Judges' Reference* decision, Russell is quoted as saying "the court's activism in this area was not only somewhat embarrassing, but also an inadequately explained departure from a 1986 decision on the same point." (See "Lawyer says top court deserves tough criticism", *The Globe & Mail*, April 18, 1998 at 1).

¹⁰ The judgment of Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by Lamer C.J. La Forest J. dissented in part. McLachlin and Major JJ. were not on the panel.

¹¹ In Manitoba, other issues included whether the government could unilaterally suspend the operation of Judicial Compensation Committee and whether the government could order the withdrawal of court staff, in effect shutting down the court on those days. In Alberta, other issues included unilateral changes to the judges' pension plan made by the government; the power of the Attorney General to designate the court's sitting days and judges' place of residence; and the process for disciplining and removing judges. Questions raised in the two P.E.I. references were long and complex, raising issues about government power over: suspension and removal of judges; discretionary sabbatical and sick leave; alterations to pensions and formulae for calculating remuneration; the location of court offices and staff in relation to other government offices and staff; the administration of the court's budget; the judges' place of residence; communication with judges relating to the administration of justice; vacancy of the chief judge's position; funding of legal counsel for the chief judge; and "any other factor or combination of factors" arising from the Statement of Facts, including the query whether provincial court judges must be paid the same as superior court judges. In almost all these questions, the Court ruled there was no infringement of judicial independence. However, in addition to the remuneration issue, the Court held that powers of determining judicial residence and designating sitting days (or withdrawal of court staff on sitting days) did infringe judicial independence.

In answering the Manitoba questions, the Court commented on the disputed role of the Chief Judge of the Provincial Court of Manitoba in ordering the closure of the Manitoba Provincial Court. In doing so, the Supreme Court articulated limits to a Chief Judge's constitutional authority. See para. 275: "Even if...the Chief Judge retained control over the decision to close the Manitoba Provincial Court throughout, there would nevertheless have been a violation of s. 11 (d), because the Chief Judge would have exceeded her constitutional authority when she made that decision. As this Court held in *Valente*, control over the

First, Lamer C.J. traced the roots of judicial independence to an unwritten constitutional principle:¹² "Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located."¹³ La Forest J. did not deny that the Constitution embraces unwritten rules rooted in the preamble, but did take issue "with the Chief Justice's view that the preamble to the Constitution Act, 1867 is a source of constitutional limitations on the power of the legislatures to interfere with judicial independence."¹⁴ By Lamer C.J.'s analysis, the express provisions of the Constitution, including s. 11 (d) of the *Charter*,¹⁵ are understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble.¹⁶ To La Forest J., these express provisions are not mere elaborations: "On the contrary, they are the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review."¹⁷

Second, Lamer C.J. extended constitutional guarantees of judicial independence to *all courts*, not just the superior courts.¹⁸ La Forest J. would limit such constitutional protection only to "superior court and other judges specified in section 96 of the Constitution Act, 1867, as well as to inferior (provincial) courts exercising criminal jurisdiction."¹⁹ Lamer C.J. found serious

sittings of the court falls within the administrative independence of the judiciary. And as I indicated above, administrative independence is a characteristic of judicial independence which normally has a collective or institutional dimension. It attaches to the court as a whole. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, it is important to remember that the Chief Judge is no more than "primus inter pares": *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 at 304. Important decisions regarding administrative independence cannot be made by the Chief Judge alone."

At the time of writing, a provincial court Judge in Alberta has challenged the Chief Judge's disciplinary and administrative powers to transfer a judge against his will. See Quicklaw, News and Wire Service, DB CPP "Judge wins reprieve in court battle against boss," by Carol Harrington, Calgary, August 7, 1998: "A controversial Alberta judge, who was told by his boss that his "atrocious" judgments were a disgrace to the bench, won a reprieve Friday against efforts to have him reassigned. A Court of Queen's Bench justice temporarily ordered a hold on a decision to move provincial court Judge John Reilly, 52, who sparked a political conflict in 1997 over conditions on the Stony Indian reserve, from his job on the circuit court to the bench in Calgary." For the various judgements in the case referred to, see *R. v. Hunter*, QL [1997] A.J. 723, 933, 1215 and [1998] A.J. 510.

¹² *Supra* note 3 at paras. 82-109.

¹³ *Ibid.* at para. 109.

¹⁴ *Ibid.* at para. 303.

¹⁵ Enacted by the *Canada Act 1982* (U.K.), c.11, Schedule B, Part I.

¹⁶ *Supra* note 3 at para. 107.

¹⁷ *Ibid.* at para. 319.

¹⁸ *Ibid.* at para. 106.

¹⁹ *Ibid.* at para. 324. He went on to explain that the inferior courts not so protected could rely on the appellate and supervisory jurisdiction of the superior courts: "If the impartiality of decisions from inferior courts is threatened by a lack of independence, any ensuring injustice may be rectified by the superior courts."

limitations with that method of analysis. The first and most serious limitation was that "the range of courts whose independence is protected by the written provisions of the Constitution contains large gaps."²⁰ La Forest J., however, was concerned with the uncertainty that might result from giving constitutional protection to courts generally without being able to determine with some precision what the term 'court' encompasses.²¹

It is not my purpose to explore these first two points of disagreement. Lamer C.J.'s judgment speaks for itself. His constitutional analysis is thorough, it won the panel's support, and it is the law. On the other hand, La Forest J.'s judgment, while not supported by any other justice, is a thorough critique of the majority's decision.²² It too speaks for itself. The two judgments can be compared and contrasted on their own terms and without my interpretation.

The third significant point deals with the essential components of financial security as it pertains to the institutional independence of courts. The disagreement on this point is not based on the above disagreements on the appropriate constitutional principles. Both Lamer C.J. and La Forest J. proceed to this third question on the same constitutional basis: namely, the express requirements of s. 11 (d) of the *Charter* and the Court's previous decisions, especially in *Valente*.²³ However, La Forest J. is silent on the escalating confrontations between the provincial judiciary and their governments. Lamer C.J. takes this into account in his concern about the politicization of the relationship between the judiciary and the political branches of government. Since the judgment does not explain the history of this deteriorating relationship, some background and context is helpful to an understanding of how the justice system came to be in crisis. That history is outlined in the next section. From the perspective of provincial court judges, who lived through that history, the majority got it right. The majority's remedy — a commission process that is non-binding on the government — may seem to some to be, as La Forest J. said, "a triumph of form over substance."²⁴ It is a significant remedy, however, because it provides an

²⁰ *Ibid.* at para. 85.

²¹ *Ibid.* at para. 323. He was also concerned that the three cases were primarily argued on the basis of s. 11 (d) of the *Charter* and that counsel only made minimal reference to the issue of the preamble of the *Constitution Act, 1867*. See for example para. 302: "I am, therefore, deeply concerned that the Court is entering into a debate on this issue without the benefit of substantial argument. I am all the more troubled since the question involved the proper relationship between the political branches of government and the judicial branch, an issue on which judges can hardly be seen to be indifferent, especially as it concerns their own remuneration."

²² La Forest J.'s dissent is a detailed critique of the majority's analysis. Rob Martin, who disagreed with the majority ruling, wrote: "I had thought after reading Lamer C.J.'s judgment to write a critique of it. But then I read the judgment of Gerard La Forest J. and realized this would not be necessary. Every criticism one might conceivably wish to make is there and expressed with clarity and force." ("Martin's Creed", *Law Times*, Nov. 3-9, 1997 at 9).

²³ *Valente v. R.*, [1985] 2 S.C.R. 770

²⁴ *Supra* note 3 at para. 343.

important structure for communication, a forum, that has been lacking. Without such a credible forum, there was a danger that executive-judicial disputes would become more politicized and public. The Court's remedy defers to parliamentary supremacy, while providing a shield for the judiciary. If both the provincial judiciary and their governments treat the commissions with respect and trust, then they will be treating each other similarly. The *status quo* has proved to be a fertile breeding ground for mistrust and disrespect. While the majority's remedy as outlined in this third point cannot guarantee to right the relationship, it does provide reason for hope.

On this third point, of maintaining the institutional independence of a court,²⁵ the majority identifies certain constitutional requirements pertaining to judicial remuneration, pensions or other benefits.²⁶ These are:²⁷

- (1) provincial court judges salaries can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class;
- (2) any changes to or freezes in judicial remuneration require prior recourse to a special commission process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation;
- (3) provinces are constitutionally bound to establish these commissions, and any changes made without prior recourse to them are unconstitutional; (On a re-hearing, the Court suspended this requirement for one year.)²⁸
- (4) the commission must convene if a fixed period of time (e.g. three to five years) has elapsed since its last report to consider the adequacy of judges' salaries in light of cost of living or other relevant factors;

²⁵ Although the majority extend the principle to all courts, not just those exercising criminal jurisdiction under the Charter, at this level of constitutional consideration, both La Forest J. and the majority apply the same constitutional framework of s. 11 (d).

²⁶ These components need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances, such as war or pending bankruptcy. *Supra* note 3 at para. 137.

²⁷ *Supra* note 3 at paras. 131-37, 166-85 and "VIII. Summary" at para. 287. These are divided in this article into eight separate points for ease of subsequent reference, but the court lists these as three components, including my first six points as one component.

²⁸ See (1998) 121 C.C.C.(3d) 474, from the headnote at 475: Since the Court had found Provincial Court judges in three provinces lacked independence, the Attorneys General requested declarations deeming past decisions made by such judges valid. The Court held that by the doctrine of necessity, the judges past decisions were valid. But the Court suspended its original declaration for one year to give the provinces time to conduct the constitutionally required judicial remuneration review process. The declarations made in the original judgment that the Alberta regulations and Manitoba legislation, both which reduced judicial salaries, were invalid continued to have retroactive force.

- (5) the recommendations of the commission are non-binding, but the government must justify any departure from the recommendations by a standard of simple rationality;
- (6) whether any such departure meets this standard of simple rationality can be tested in a court of law;
- (7) under no circumstances can the judiciary engage in negotiations (no horse-trading) over remuneration with the executive or legislature, although concerns and representations can be made;
- (8) judicial salaries cannot be reduced or eroded below a basic minimum level which is required for the office of a judge.

Applying the same constitutional principles, La Forest J. could only agree with points 1 and 8. He rejected the need for a commission process and all that flowed from it.²⁹

III. The Fundamental Issue

Unlike the first two points, this third point of disagreement is not about the applicable law.³⁰ They agree that the goal at issue is individual and public confidence in the justice system.³¹ They also agree on the test to be applied to the facts of the cases: namely, would a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically conclude that the court was independent?³²

La Forest J. partly discerned the perception of the reasonable person on the following grounds:

“It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this.... In my view, such a person would not view the linking of judges’ salaries to those of civil servants as compromising judicial independence.”³³

²⁹ *Supra* note 3 at para. 326-29.

³⁰ There is a distinction here between almost a factual finding that such a commission is unnecessary and the constitutional question of whether the Court had the power to require governments to establish commissions. On the latter jurisdictional point, La Forest J. held at para. 333 that “Section 11 (d) does not empower this or any other court to compel governments to enact “model” legislation affording the utmost protection for judicial independence. This is a task for the legislatures, not the courts.” It is the former evidentiary aspect of his analysis that is discussed in this and the following paragraphs.

³¹ *Ibid.* at para. 336 per La Forest J., and at 112-14 per Lamer C.J..

³² *Ibid.*

³³ *Ibid.* at para. 337 and 341.

La Forest upheld the P.E.I. and Alberta governments' actions based on his assessment of the opinion of the reasonable person.³⁴ The Chief Justice³⁵ and others could credibly disagree with that assessment. For example, the Canadian Bar Association's counsel Thomas Heintzmann said in his submissions to the Court:

"The judges are being treated for salary purposes as if they were civil servants. Judges are not civil servants and lumping them with civil servants creates the very impression of lack of independence that [the *Charter*] was intended to prevent. Civil servants are expected to carry out the government's wish and are paid to do so; judges are not....

A reasonable person, if he or she understood the relevant principles of law, would fear for the institutional independence of the provincial court. He or she would believe that if judges are treated like civil servants, then they will act like civil servants. He or she would believe that the exercise of a unilateral power over a judge would sooner or later have an influence on that judge."³⁶

The different conclusion reached on this third point by Lamer C.J., however, is not based on a simple difference of opinion about the perception of this fictional, reasonable person. He raises his sights to a longer and more comprehensive view of the circumstances of the cases before the Court, and focuses first on the strained institutional relationship they evidenced. That is not a matter of perception, but rather it is a matter of fact. But that fact was not material in *La Forest J.*'s reasons. Although he concluded that provincial court judges are "made of sturdier stuff" and would not feel threatened by the government actions, he did not then account for the litigation across the country in which provincial court judges were raising exactly those concerns. Even without knowing the specifics of the various disputes and confrontations, the very scale of the distress among this judicial group is significant in itself. The silence of *La Forest J.* on this issue is in marked contrast to the broader vision of Lamer C.J., which saw the immediate cases as symptomatic of this more fundamental issue.

As if to highlight the priority of that reality, the Chief Justice began his analysis of the appeals with that concern. Before he began his legal analysis, Lamer C.J. felt compelled to comment "on the unprecedented situation which these appeals represent. The independence of provincial court judges is now a live legal issue in no fewer than four of the ten provinces in the federation."³⁷ The confrontations were more widespread than that. As *Schmeiser* and *McConnell*

³⁴ *Ibid.* at paras. 354 and 355. He found that the Manitoba government's actions, however, did violate judicial independence because they used economic pressure on the judges to get them to concede the constitutionality of the government's actions. See para 365.

³⁵ *Ibid.* at para. 157.

³⁶ Thomas Heintzmann on behalf of the Canadian Bar Association. See the transcript of the hearing held the week of December 2, 1996. The 10 hours of hearing have been edited to a one-hour video. See *Judicial Independence—Canada 1996* (North Battleford: Allyssa Studios, 1997) Gerald Seniuk, ed.

³⁷ *Supra* note 3 at para. 6.

observed: "Future legal historians may look back on the decade of the nineties as a time of unparalleled conflict between Canadian Provincial Court systems and the governments which established them. There was scarcely a single jurisdiction in which serious tension did not exist between judges and cabinet, and in a majority of provinces major disagreements on matters of constitutional principle resulted in lawsuits being launched on the issue of judicial independence."³⁸

Although the Chief Justice would not comment on the merits of cases not before the court, he did take into account "the national scope of the question which has come before us in these appeals." The pivotal importance of this concern is clearly stated:

"Although the cases from the different provinces are therefore varied in their origin, taken together, in my respectful view, they demonstrate that the proper constitutional relationship between the executive and the provincial court judges in those provinces has come under serious strain. Litigation, and especially litigation before this Court, is a last resort for parties who cannot agree about their legal rights and responsibilities. It is a very serious business. In these cases, it is even more serious because litigation has ensued between two primary organs of our constitutional system —the executive and the judiciary — which both serve important and interdependent roles in the administration of justice.

The task of the Court in these appeals is to explain the proper constitutional relationship between provincial court judges and provincial executives, and thereby assist in removing the strain on this relationship. The failure to do so would undermine "the web of institutional relationships...which continue to form the backbone of our constitutional system" (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para 3).³⁹

Fundamentally, the appeals were not as much about judicial remuneration as they were about judicial relationships with the political branches of government. Although the four separate appeals were united by the issue of judicial remuneration in three provinces, these cases were not primarily about money. They were about the separation of powers.⁴⁰ Specifically, the *Judges' Reference*

³⁸ *Supra* note 2 at 1. This publication provides information on the various disputes and litigation. See especially Appendix "A" and "B".

³⁹ *Supra* note 3 at paras. 7-10.

⁴⁰ Although some authors hold that Canada does not have America's separation of powers doctrine, Canadian courts have suggested it does. See *Friedland*, *supra* note 2 at 26. But even without a full separation of powers doctrine, at least the separation of judicial power seems fundamental. See Sir A.T. Denning, *The Spirit of the British Constitution* (1951) Can. Bar Rev. 1180 at 1182: "The keystone of the rule of law in England has been the independence of the judges. It is the only respect in which we make any real separation of powers. There is here no rigid separation between the legislative and the executive powers: because the ministers, who exercise the executive power, also direct a great deal of the legislative power of Parliament. But the judicial power is truly separate." This issue was seen as fundamental in the *Judges' Reference* by Lamer C.J., *supra* note 3 at para. 138: "...the institutional independence of the courts is inextricably bound up with the separation of powers, because in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government."

was about how these separate institutions could properly interact; what relationships they could have; and whether any boundaries had been crossed. In its decision, the Court sought to depoliticize the relationship:⁴¹

What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized.... [T]he depoliticization of these relationships is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as s. 11(d) of the *Charter*, must be interpreted in such a manner as to protect this principle.⁴²

IV. *Historical Context*

The need to depoliticize courts arises from their role as defenders of the Constitution.⁴³ The growing need to protect the provincial courts' institutional independence⁴⁴ arises from those courts' growing constitutional role.⁴⁵ It is in that context that the present cases arose. These appeals were merely the latest battleground under the *Charter*.

⁴¹ *Supra* note 3 at para. 140, where the Court defines depoliticization as meaning that "the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice."

⁴² *Ibid.* at paras. 140-41.

⁴³ See *Beauregard v. R.*, [1986] 2 S.C.R. 56 at 69, 72 and 73, per Dickson C.J. for a unanimous court: "Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies....The enactment of [the *Charter*] conferred on the courts another truly crucial role: the defense of basic individual liberties and human rights against intrusions by all levels and branches of government....The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system."

⁴⁴ See *Friedland*, *supra* note 1 at 175-224 about this evolving concept of institutional independence.

⁴⁵ *Ibid.* per Lamer C.J. at para. 126 and 129: "[T]he institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court judges....There is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence....It is worth noting that the increased role of provincial courts in enforcing the provisions and protecting the values of the Constitution is in part a function of a legislative policy of granting greater jurisdiction to these courts. Often, legislation of this nature denies litigants the choice of whether they must appear before a provincial court or a superior court. As I explain below, the constitutional response to the shifting jurisdictional boundaries of the courts is to guarantee that certain fundamental aspects of judicial independence be enjoyed not only by superior courts but by provincial courts as well. In other words, not only must provincial courts be guaranteed institutional independence, they must enjoy a certain level of institutional independence."

With the passage of the *Charter*, the two principles of parliamentary supremacy and judicial independence came increasingly into conflict. From the beginning, most of the premiers opposed an entrenched bill of rights.⁴⁶ Many premiers viewed the transfer of such powers to the courts as tantamount to “a constitutional revolution entailing the relinquishment of the essential principle of Parliamentary democracy, the principle of Parliamentary supremacy.”⁴⁷ Although these new powers were not sought by the judges, it had some unpleasant consequences for them, as the late Sopinka J. explained in a speech: “[T]he *Charter* has turned the court into the messenger who is likely to get shot for bringing bad news. By enacting the *Charter*, the legislative branch of government enacted a permanent invitation to the judiciary to tell the majority that it is wrong — that it cannot do what it wants to do, or at least that it cannot do it in the way it wants to do it. If the majority is in a particularly surly mood, bringing this kind of bad news can be a singularly unpleasant business.”⁴⁸

Canada has had relatively few documented cases of private and direct government interference with judicial decision-making.⁴⁹ The hint of any such interference has been universally condemned, and some governments have instituted guidelines to guard against it.⁵⁰ That type of interference is not what gave rise to the disputes underlying these appeals. In these cases, the attempted interference was institutional and public. In a speech to judges in Ukraine, Sopinka J. described one source of such attacks in Canada as follows: “Political figures both in power and opposition, spurred on by public clamour, indulge themselves in public criticism of judges and even demands for discipline.”⁵¹ Such attempts to influence judicial decision-making on a collective scale by widely publicized political attacks caused the provincial court judiciary to try to institutionally insulate itself from the political branches of government. The judiciary was unaccustomed to such criticism, for as W. R. Lederman pointed out, our traditions “impose much restraint on debate concerning judicial conduct.”⁵²

⁴⁶ See K. McRoberts, *Misconceiving Canada — The Struggle for National Unity* (Toronto: Oxford University Press, 1997) at 167: “Most of the English-Canadian premiers were firmly opposed to the concept [of the *Charter*], which they saw as a major and ill-advised departure from Canada’s political traditions.”

⁴⁷ *Ibid.*

⁴⁸ Address to the Ukrainian-Canadian Conference on Judicial Independence and Accountability, Kyiv, October 2, 1997 at 19.

⁴⁹ *Supra* note 1 at 28.

⁵⁰ *Supra* note 2 at 2-3, also citing examples from P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) 78-81. Also see Friedland at 28-30.

⁵¹ *Supra* note 48 at 15.

⁵² W.R. Lederman, *The Independence of the Judiciary* (1956) 34 Can. Bar Rev. 769 at 788. Lederman quotes Mr. Gladstone at 789 as follows: “But nothing could be more injurious to the administration of justice than that the House of Commons should take upon itself the duties of a court of review of the proceedings of an ordinary court of law; or of the decisions of a competent legal tribunal, — or that it should tamper with the question

As alarming as such pressures are, they are all the more threatening when the attacks are lead by Ministers of Justice or their deputies, the very legal officers that traditionally defended the judiciary.⁵³ Such attacks will be felt especially by provincial courts, which are “creatures of statute [whose] existence is not required by the Constitution.”⁵⁴ Furthermore, the sense of vulnerability will be heightened because these sometimes-hostile ministers have great administrative powers over those courts.⁵⁵

As a result, provincial courts across Canada, working through their respective provincial and national associations, began seeking ways to institutionally insulate themselves from the political branches of government. One of the main focuses of such attempts was to build commission processes.⁵⁶ Over the past 15

whether judges are on this or that particular assailable and endeavour to inflict upon them a minor punishment by subjecting their official conduct to hostile criticism.” (italics added.)

⁵³ See for example, *Doyle v. R.; Temela v. R.* (1992) Appeal Nos. CA00331, 00302 and 00303 NWTCA at 2 and 4: “[T]he Minister called a press conference to denounce the attitudes of the same Judge. At it, he invited the public to express their discontent and to send that expression on to the Minister for transmission to the Council.” (The minister had made a complaint about the judge to a disciplinary council. One complaint was that the sentence imposed by the judge was the wrong length. The investigation exonerated the judge and criticized the minister.)....[T]he Minister made a public statement which said only two things: the report was accepted and concluded the process; but that society’s faith in the justice system had to be revitalized, given concerns of some people. The Minister did not mention the fact that the Territorial Court Judge had been exonerated, or that he himself had been criticized.”

Also see the disposition dated January 12, 1994, to a complaint filed by the Deputy Minister of Justice with the Judicial Council of Saskatchewan on October 7, 1992, against two judges of the provincial court.

Also see W. H. McConnell, *The Sacrifice of Judicial Independence in Saskatchewan: The Case of Mr. Mitchell and the Provincial Court* (1994) 58(1) Sask. L. Rev. 3 at 19: “[The Justice Minister] was an incisive critic of a perceived over-use of the Charter by all judges. In the spring of 1987, he told the Progressive Conservative annual convention in Regina that lenient judges “in ivory towers” had better start paying attention to the will of the people.”

Also see the recent public comments by Alberta’s Justice Minister Jon Havelock, as reported in, “Courts Stepping Out of Bounds”, *The Calgary Herald* on Nov. 13, 1997 In a column in the same newspaper on Nov. 14, 1997, Catherine Ford called on the Minister to resign. She wrote: “Only a court not beholden to politicians can be brave. Yet the Alberta government, with Justice Minister Jon Havelock as point man, believes the public supports attempts to politicize the judiciary and to place judges under the government’s control. Some do. Those who value their rights and freedoms do not. A number of challenges have been issued, including Premier Ralph Klein’s suggestion that judges were civil servants, as accountable to the government as any other of its minions.”

The responsibility of a Minister of Justice to the judiciary will be explored in a paper by Robert H. McKercher and Gerald T.G. Seniuk entitled *The Minister and the Judges*.

⁵⁴ *Supra* note 3 at para. 126 per Lamer C.J.

⁵⁵ *Supra* note 1 at 181: “In contrast with the federal courts, all provincial and territorial courts are now run by the attorney general’s departments. Many judges, lawyers, and government officials expressed to me a desire to find a better solution. They recognize the awkwardness of the existing situation.”

⁵⁶ *Supra* note 2 at 42-44.

years, much effort was spent simply trying to establish for provincial courts something similar to the Triennial Commission procedure established in 1981 for federally appointed judges.⁵⁷ This was an on-going, evolving development that met with setbacks and difficulties along the way.⁵⁸ But in some jurisdictions, an apparently stable and mature commission process appeared in place by the early 1990s.

The disputes that gave rise to the appeals before the Supreme Court in large part stemmed from the fear that the actions of some provincial governments obliterated that effort as governments pursued deficit reduction. To provincial court judges, this was a fight to save a credible, commission process. That question is now settled. With this decision, the Supreme Court of Canada has now made a commission process, or some similar "institutional sieve,"⁵⁹ a constitutional requirement for all courts.

V. *Hollow Victory or Reason for Hope*

Since the commission is non-binding, is this a hollow victory, as La Forest J. suggested?⁶⁰ The history of other commissions might suggest it is. For example, Professors Schmeiser and McConnell, in their report prepared for the Canadian Association of Provincial Court Judges, recommended a binding process because "the history of government action on provincial court salaries has been a history of broken promises. What is needed is some method to force

⁵⁷ *Supra* note 1 at 56.

⁵⁸ See W.H. McConnell, *op. cit.* footnote 53 at 19-24 for details of this history in one province.

⁵⁹ *Supra* note 3 at para. 185: "By laying down a set of guidelines to assist provincial legislatures in designing judicial compensation commissions, I do not intend to lay down a particular institutional framework in constitutional stone. What s. 11(d) requires is an institutional sieve between the judiciary and the other branches of government. Commissions are merely a means to that end. In the future, governments may create new institutional arrangements which can serve the same end, but in a different way. As long as those institutions meet the three cardinal requirements of independence, effectiveness, and objectivity, s. 11(d) will be complied with"

In this regard, some other models had been developing. For example, the Alberta government had established a principle of setting provincial court judges' salaries at a percentage of the federally appointed judiciary. In other provinces the provincial court judges' salaries often seemed linked to the level of salary established for the Deputy Attorney General. During these years of confrontation, the governments did not apply such formulae.

Friedland, *supra* note 1 at 65-66, outlines such alternative models in other jurisdictions, and favoured them over the commission model: "I suggest that these models be considered as a possible substitute for the present Triennial Commission. A similar approach at the provincial level could be used..."

⁶⁰ *Ibid.* at para. 343: "Under the Chief Justice's approach, governments are free to reduce the salaries of judges, in concert with all other persons paid from public funds, so long as they set up a commission whose recommendations they are for all practical purposes free to ignore. In my view, this result represents a triumph of form over substance."

governments to keep the promises, and even contracts, which they have made.”⁶¹ Similarly, the federal Triennial Commission, also non-binding, has not produced better results. Chief Justice Lamer stated in 1994 that “it looks good on paper, but it has one problem: it just does not work. Why? Because the Executive and Parliament have never given it a fair chance.”⁶² Even the commissioners express frustration. The most recent report of the federal Triennial Commission branded the process a failure, noting: “As has been noted by a succession of our predecessors, the Triennial Commission review process was instituted by Parliament to reduce the presence of political partisanship in the course of determining judicial salaries and benefits. To date, the process has been a failure.”⁶³ The failure was attributed to government inaction on the recommendations: “In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen almost totally upon deaf ears. The reasons for this state of affairs have been largely political.”⁶⁴

Despite that bleak past, there is reason to hope for the future. First and foremost, these commissions, unlike the earlier ones, are constitutional structures, and they will command greater respect for that reason. Furthermore, that history can be viewed as our learning experience. Many of the confrontations did not reflect a disrespect for the commissions. They reflected an inexperience with these new processes and a carelessness about what they represented. Many of these commissions were cutting-edge innovations developed in Canada by the judiciary and the political branches of government. They were like pathfinders, faltering and stumbling as we found our way. Part of that inexperience included a lack of awareness of the turmoil caused if the process broke down. We now know how serious the consequences can be to public confidence in the justice system when that happens. Thus, we now have commissions of greater stature and parties with greater awareness and experience.

In addition, there is now a uniform criteria for these commissions.⁶⁵ The Court did not dictate the exact shape and powers of the commissions, leaving different provinces free to reflect local circumstances. But every commission must be *independent* (this is accomplished in the appointment process and with some fixed term of office), *objective* (their salary recommendations must be by reference to objective criteria, not political expediciencies) and *effective*. If this process is to succeed, great deference must be shown to the commission’s recommendations, and “they should not be set aside lightly.”⁶⁶ This effectiveness

⁶¹ *Supra* note 2 at 13.

⁶² *Supra* note 1 at 56, quoted from a speech made at the annual meeting of the Canadian Bar Association on August 20, 1994, as reported in 1994 Year Book of C.B.A. (Ottawa: C.B.A., 1994) at 10.

⁶³ *Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits*, September 30, 1996 at 31.

⁶⁴ *Ibid.* at 7.

⁶⁵ *Supra* note 3 at paras. 166-85.

⁶⁶ *Ibid.* at para. 133.

can be guaranteed in the various ways outlined earlier.⁶⁷ Two of the most important are: 1) if the executive or legislature does not follow the commission's recommendation they must then justify this to a standard of simple rationality; and 2) the reasons can be tested in a court of law. Although the test of simple rationality is weaker than some urged upon the Court,⁶⁸ it is not ineffectual because: 1) it screens out decisions based on purely political considerations; and 2) a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government.⁶⁹

There is, therefore, reason to hope that the pattern of confrontation can be broken as a result of this decision. There is the opportunity for a fresh start and a workable structure to guide the judiciary and the political branches of government, which are together stewards of the justice system. Their duty is to provide justice and to maintain individual and public confidence in the justice system. If the commission process and recommendations are treated with trust and respect, then the parties' relationship will reflect that fact and the public in turn will trust and respect the parties and the justice system.

⁶⁷ *Supra* at note 27.

⁶⁸ This is a weaker standard than that under s. 1 of the *Charter*, the test which some had urged upon the Court. See para 182-183: "Section 1 imposes a very rigorous standard of justification. Not only does it require an important government objective, but also it requires a proportionality between this objective and the means employed to pursue it. The party seeking to uphold the impugned state action must demonstrate a rational connection between the objective and the means chosen, that the means chosen are the least restrictive means or violate the right as little as reasonably possible, and that there is a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgment of the right.... The standard [of simple rationality] requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis."

There is also the exceptional test of dire emergency. In considering the Manitoba factual situation, the Chief Justice briefly discussed where economic circumstances might warrant the suspension of the commission process. See para. 235: "I have defined an economic emergency as a dire and exceptional situation precipitated by unusual circumstances, for example, such as the outbreak of war or pending bankruptcy. Although Manitoba may have faced serious economic difficulties...the evidence tendered by the government does not establish that Manitoba faced sufficiently dire and exceptional circumstances to warrant the suspension of the involvement of the JCC."

⁶⁹ *Ibid.* at para. 183. The British Columbia Court of Appeal was the first court to apply this standard of review to an executive-legislative decision to reject a commission's recommendation. See *infra* note 75, *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, where it was held that actual reasons must be given, either, for example, in the report of the executive or in the resolution of the legislature. The court held that the test to be applied by a reviewing court is "an administrative law principle or test that was enunciated by the Supreme Court of Canada in the recent case of *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748."

While there is no guarantee that that hope will be realized,⁷⁰ there are some encouraging signs. Some provincial governments have now honoured the recommendations of their Provincial Court Commissions, thereby breaking with the history of broken promises outlined by Professors Schmeiser and McConnell.⁷¹ Similarly, the federal government introduced legislation in 1998 to implement many of the 1995 Triennial Commission's recommendations for federally appointed judges.⁷² While this does not represent a great number of resolved disputes, at least each of these does represent one less potential strain on the justice system, removing the potential for confrontation that could erode confidence. Each also adds to a growing momentum⁷³ to countervail a history that presaged a state of prolonged, national confrontation.

And most importantly, where there are new or remaining unresolved disputes, there is now a framework to guide the parties to a civil resolution through the courts. This is a welcome alternative to the uncertainty of the past.⁷⁴

⁷⁰ J.S. Ziegel, *The Supreme Court Radicalizes Judicial Compensation* (1998) 9;2 Constitutional Forum 31 at 40: "Chief Justice Lamer's avowed purpose was to put to rest the unprecedented spate of litigation instigated by provincial court judges and presumably to put their relationships with the provincial governments on a more stable footing. In my view, there is no guarantee that either hope will be realized."

⁷¹ The Saskatchewan government settled its litigation three months before the Supreme Court released its decision. The settlement adopted the salary level as set by a commission whose supposedly binding report was earlier rejected by the government. The settlement has since been ratified by an independent commission report. Since the Supreme Court decision, commissions have reported in all jurisdictions except in Ontario, which has held hearings. As of this writing, Manitoba and Quebec governments have not acted on their commission reports. Alberta and Newfoundland governments did not follow their commissions' recommendations, and the matters are now under judicial review. All other jurisdictions have adopted the commission recommendations either totally or substantially enough so as not to invite judicial review.

⁷² The judgment applied to all courts and judges equally, including of course those who were federally appointed. Prior to this judgment, the federal triennial commission reports had "fallen almost totally upon deaf ears" (*supra* note 64). In the fall of 1998, Parliament passed legislation implementing the recommendations.

⁷³ There are incipient signs of a respectful dialogue on judicial independence in place of the previous public confrontation. For example, the Law Commission of Canada facilitated a round table discussion between judges and Deputy Attorneys-General from across Canada. The meeting was held in March of this year, and was attended by approximately 70 persons. The purpose of the meeting was to consider the judgment, its implications and the options for future executive-judicial relationships. In addition, there are jurisdictions that were previously in dispute where the government and judiciary are now working together to implement the Court's decision. In Saskatchewan, for example, the Deputy Attorney-General John Whyte spearheaded such a consultative effort with the judges that ended up significantly re-writing the Provincial Court Act to ensure all sections reflected a proper constitutional relationship.

⁷⁴ Prior to the Supreme Court decision, there was little precedent to guide the judges and governments in these conflicts. As lower cases grappled with the issues, there was no uniformity in rulings or in reasoning. For the variety of different rulings and judicial reasoning in the cases appealed to the Supreme Court, see *supra* note 3 at para. 11 to 81.

Also, see *R. v. Osachuk*, [1995] S.J. No. 9 (Saskatchewan Court of Queen's Bench) and [1995] S.J. No. 50 (Saskatchewan Court of Appeal).

With no constitutionally recognized model of dispute resolution to guide them, there was a danger either of public confrontation or backroom brokering, either of which could undermine confidence in the justice system. The judgment has already saved the system from that, as one outstanding dispute after another begins to be measured against these new constitutional requirements and resolved.⁷⁵

Also, see *British Columbia Legislative Assembly Resolution on Judicial Compensation (Re)* (1996), 139 D.L.R. (4th) 325. This judgment was overturned on appeal. See *infra* note 75.

⁷⁵ *Reference re Territorial Court Act (Northwest Territories)*, [1998] 1 W.W.R. 733. This was one of the first decisions following *The Judges' Reference* case. It dealt with the appointment of full-time deputy judges to serve for fixed terms. Although this issue was unrelated to the Supreme Court's compensation issues, the judgment reflected the new constitutional spirit in the land. Vertes J. said at 746 that the Supreme Court had "extended the written and unwritten constitutional underpinnings of judicial independence to all courts.... This judgment, in my opinion, emphasizes the need to scrutinize with great care the legislative provisions affecting the Territorial Court to determine if they are compatible with the constitutionally recognized principles of judicial independence and impartiality."

In *the Matter of the Newfoundland Provincial Court and Judicature Acts*, 1998 St. J. No. 0337 Supreme Court of Newfoundland (Trial Division), judgment filed May 21, 1998. This was a compensation issue dating back to 1991, and included an assessment of the constitutionality of the government's attempt to rectify all deficiencies brought to light by *The Judges' Reference* case. At para. 72, Roberts J. summarized his findings made "in light of the new paradigm for judicial independence developed in the *Provincial Court Judges Case*." He ordered the government to implement a compensation tribunal report of 1992, and found sections of the *Public Service Restraint Acts* of 1991 and 1992 to be unconstitutional as they related to the judges. Roberts J. also ruled it was unconstitutional for the government to retain to itself the right to appoint two of the three members of the compensation tribunal. He further ruled that thereafter, the chairperson ought to be decided upon by the nominees of both the government and the judges. He held the positive resolution model to be constitutional, subject to an overall maximum delay of six months. The government was also constitutionally required to provide remuneration and funding for the tribunal, as well as funding for the judges to make representations to it. The government appealed and the matter was argued in January, 1999.

Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General), [1998] B.C.J. No. 1230, British Columbia Court of Appeal, Vancouver, judgment filed May 26, 1998. This decision overturned the earlier decision of Esson C.J., *supra* note 74, who held that the legislature's decision to reject a commission's report could only be overturned on judicial review if it was patently unreasonable, which he held it was not. On appeal, Hall J.A. applied the new test of simple rationality as outlined in *The Judges' Reference*, and found the legislature's decision failed the test. He also found it failed the standard mandated by its own legislation. This was evidenced by the legislature's across the board rejection of every recommendation, even those which were modest and of no immediate financial import. Stressing the need to show "considerable deference paid by a reviewing court to matters that are policy driven and political in nature", the court remitted the recommendations for reconsideration by the government within the time limited by the legislation. The Judges' Association application for leave to appeal to the Supreme Court of Canada on this part of the ruling was dismissed without reasons in January, 1999. In the meantime, the B.C. government adopted the subsequent recommendations of the 1998 commission.

Mackin v. New Brunswick (Minister of Finance), [1998] N.B.J. No. 267 (See also *Rice v. New Brunswick*, [1998] N.B.J. No. 266), per Deschênes J., who declared unconstitutional the repeal of a provincial court judge's right to elect supernumerary status. The declaration

While the judgment might provide "much fertile new ground"⁷⁶ for litigation,⁷⁷ this disadvantage is outweighed by its practical mechanism for restoring order in these floundering executive-judicial relationships. As a mechanism, its effectiveness in avoiding litigation will be proportionate to the ability of the judiciary and the government to observe "a proper measure of deference by each to each."⁷⁸

VI. *Controversial Aspects and Future Concerns*

The Supreme Court's laudable attempt to de-politicize the executive-judicial relationship can be seen in the context of a controversial, global "judicialization of politics."⁷⁹ One definition of this term is "the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives."⁸⁰ This global process, which may be "one of the most significant trends in late-twentieth and early-twenty-first century government," has been viewed in Canada "with concern not just from the left, but also from the right and

was suspended "until such time as the issue of the repeal of the supernumerary status has been dealt with through the commission process." (para. 61).

Justices of the Peace in Ontario have applied to the Ontario Court (General Division) seeking, among other relief, an order requiring the government to implement the 1995 recommendations of a Remuneration Commission.

⁷⁶ *Supra* note 70 at 40. For example, the parameters of the test of rationality might be such a source of litigation, given that the commission's decision itself will be a reasoned decision having taken into account all appropriate considerations. Will the reviewing court look beyond the formal reasons of the legislature and consider cabinet or caucus deliberations that resulted in the actual decision?

⁷⁷ Although questions that arise as a result of the judgment continue to be answered, as of the date of this writing, some of the consequential questions remain outstanding. One such question is whether the governments remain liable for compensation withheld in the past. The court's order on the re-hearing (see *supra* note 28) seems to suggest it will be owed after the year's suspension. As the Supreme Court held itself seized of the case during the suspension period, Provincial Court judges from Quebec have applied to the Supreme Court for direction on this point, but the court held that that was a question for the trial court. Another question is what remedy should a reviewing court give if it finds that the government failed the simple rationality test. Roberts J., in *Newfoundland* (*op. cit.* note 75) ordered the legislature to implement the commission's recommendations, whereas Hall J.A. in *British Columbia* (*op. cit.* note 75) remitted the matter back to the government for reconsideration. The Alberta Order-in-Council was set aside by Mr. J. Forsyth on January 27, 1999 and which is now under appeal. In *New Brunswick* (*op. cit.* note 75), Deschenes J. suspended a declaration of unconstitutionality until the issue could be placed before a commission.

⁷⁸ *Supra* note 75, per Hall J.A. at para. 33 in the British Columbia Court of Appeal decision.

⁷⁹ See for example, C.N. Tate and T. Vallinder (Eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

⁸⁰ *Ibid.* at 28.

⁸¹ *Ibid.* at 5 and 6.

center.”⁸¹ Judicial activism in this case was further complicated by the fact that the decision was about “an issue on which judges can hardly be seen to be indifferent, especially as it concerns their own remuneration.”⁸² Given that context, the decision was bound to be controversial.

As to the issue of judicial activism, it appears that the Supreme Court justices felt compelled to enter these controversial waters because they correctly perceived that if they did not take action the executive-judicial relationship would continue to deteriorate. The situation before them spoke for itself, and demonstrated that the proper constitutional relationship between the executive and the provincial court judges was under serious strain. The circumstances could be fitted within one or more of the many conditions that have facilitated the expansion of judicial power.⁸³ The justices saw that their task was to explain the proper constitutional relationship between provincial court judges and provincial executives, “and thereby assist in removing the strain on this relationship.”⁸⁴ The known history of the past decade was evidence of the need for some dispute resolution mechanism.⁸⁵ There did not exist, prior to this decision, any mechanism to adjudicate such executive-judicial disputes in a manner that preserved parliamentary supremacy and judicial independence. Had the court not acted, it would have affirmed the *status quo*, which was increasingly leading the judiciary and the executive into confrontational politics all across the country. Interveners, such as the Federation of Law Societies and the Canadian Bar Association, warned the court of the danger of affirming the *status quo*. All the justices on the panel agreed that the goal at issue was individual and public confidence in the justice system. Given all of that, the majority’s remedy seems a reasonable, restrained example of judicial activism. It simply provides for an arms length process that is subject to parliamentary supremacy and judicial review.

As to the issue of a judicial conflict of interest, it can be argued that the Supreme Court had to act out of necessity. Naturally it would have been better had the developing commission processes been allowed to evolve naturally, rather than being ordered as “a constitutionally imposed requirement with all the difficulties this poses.”⁸⁶ But it must be remembered that the judiciary and

⁸² *Supra* note 3 at para. 302.

⁸³ See *supra* note 79 at 33: “The presence of democracy, a separation of powers system, a politics of rights, a system of interest groups and a political opposition cognizant of judicial means for attaining their interests, weak parties or fragile government coalitions in majoritarian institutions leading to policy deadlock, inadequate public support, at least relative to judiciaries, and the delegation to courts of decision-making authority in certain policy areas all contribute to the judicialization of politics.”

⁸⁴ *Supra* note 3 at para. 7 and 8.

⁸⁵ See McConnell, *supra* note 53 for a thorough description of one such case that spells out in detail how one jurisdiction treated its judges over the past decade in connection with this issue. This is only one example of what has been described (see *supra* note 2 at 13) as a national “history of broken promises.”

⁸⁶ *Supra* note 70 at 35.

others, such as the Canadian Bar Association, had spent more than a decade building such processes. It was the governments, not the judges, who repeatedly scuttled these developments, and thereby exposed the independence of their courts to serious question. Once that question was raised, it was obvious that "some one, some panel must be deemed competent to adjudicate the issues."⁸⁷ Lacking any other mechanism and out of necessity, that task fell by default to the Supreme Court of Canada. Perhaps, as Jacob Ziegel suggests, "the search for an impartial tribunal to adjudicate judicial independence issues deserves further consideration and the *Judges'* case should not be treated as the last word on the subject."⁸⁸ Possibly, if the dialogue between the executive and the judiciary continues, some such informal dispute resolution mechanisms may develop.⁸⁹

But there are no signs of such developments at present, which is unfortunate because there are potential conflicts involving the provincial courts and governments in Canada.⁹⁰ These can arise because of the perpetuation of outmoded distinctions between provincially and federally appointed judges. As Jacob Ziegel observes:

"At bottom, however, Chief Justice Lamer does not address the most pervasive and most deeply felt of the judges' grievances – the disparity between their status and compensation and that accorded their federal counterparts. Perhaps there is no effective answer because of the constitutional anomaly of provincially appointed judges carrying the bulk of the burden of enforcing federally enacted criminal laws while having to settle for provincially created and administered compensation packages. It would have been helpful if the Chief Justice had at least acknowledged the existence of the problem."⁹¹

The fundamental issue that often drives the surface conflicts between provincial courts and their governments has much to do with the existence of a two-tiered trial court system inherited from a previous century.⁹² Although this is not specifically addressed in the judgment, Chief Justice Lamer does begin to conceptually break down this hierarchical distinction by making all judges equally independent. How heartening it must be to litigants to know that, when it comes to this most fundamental principle of what it means to be a judge, a provincial court judge is as complete a judge as any other. In contrast, it would

⁸⁷ *Ibid.* at 41.

⁸⁸ *Ibid.*

⁸⁹ *Supra* note 73.

⁹⁰ For sources of potential conflict, see *Independence and Impartiality: The Case of Provincial Court Judges* (1998) 9:4 Constitutional Forum 95-126, which contains four separate articles on the topic: R.A. Macdonald and A. Lajoie, *Auctioneers, Fence-Viewers, Popes-And Judges* at 95; P. McCormick, *Twelve Paradoxes of Judicial Discipline* at 105; C. Baar, *Judicial Independence and Judicial Administration: The Case of Provincial Court Judges* at 114; W. Renke, *The Independence and Impartiality of Provincial Court Judges: Rapporteur's Comments* at 121.

⁹¹ *Supra* note 70 at 40.

⁹² My thanks to Noel Lyon, Professor of Law Emeritus, Queen's University, for his many helpful comments on this subject, which he made as we developed an article exploring the implications of this two-tiered legacy.

be disheartening⁹³ to rely only on the traditional guarantees of independence as stated by La Forest J, who wrote that: "The superior courts have significant appellate and supervisory jurisdiction over inferior courts. If the impartiality of decisions from inferior courts is threatened by a lack of independence, any ensuing injustice may be rectified by the superior courts."⁹⁴ In the modern circumstances, that may be confusing the problem with the solution. The majority decision, while it may not have addressed this fundamental problem, avoided that danger. Thus, while the issue was not addressed explicitly by the court, the principles outlined by the majority will be helpful in guiding the resolution of any other disputes that might arise from this fundamental tension in the justice system.

VII. Conclusion

The Supreme Court has provided a necessary mechanism for the setting of judicial salaries. It is an arms length process that respects parliamentary supremacy and judicial independence. It incorporates many of the ideas developed over the past decade by the judiciary, governments and the legal profession. The same constitutional principles of independence now apply to all courts. These principles and the commission process will help the justice system deal with any future disputes in a civil, non-confrontational manner. Had the court not acted, the trend would have continued toward greater politicization and confrontation because of the absence of a constitutionally appropriate method to resolve disputes between these two primary constitutional institutions. Had that happened there was a serious risk of undermining the public's confidence in the administration of justice. The judgment of the court has not only averted that danger, but also provided principles that supercede traditional superior and inferior divisions between courts. These principles will help resolve any future issues arising from the fundamental problems posed by a two-tiered trial system.

⁹³ It is disheartening because, in my opinion, the perpetuation of an inferior status fosters attitudes that can lead to disrespect of provincial court judges such as that outlined *supra* note 53. That such attitudes can affect an accused person's perception of the independence of the court is apparent in the Alberta appeals. The constitutional challenge by accused persons there was in part precipitated by Premier Ralph Klein's remarks in a radio interview. See *supra* note 3 at para. 19 and "VII. The Remarks of Premier Klein" at para. 285. W. Renke in *supra* note 90 at 121 saw the Premier's comments as the catalyst leading to a crisis: "I do not think it an exaggeration to suggest that we, in Alberta, are reaching the point of crisis: Albertans may decide to respect the constitutional integrity of the judicial function; or we may, to the extent possible, seek to subordinate judging to politics — and a bitter and narrow politics that could turn out to be.

⁹⁴ *Supra* note 3 at para. 324.