

# JUDICIAL INDEPENDENCE AND JUDICIAL PLACE OF RESIDENCE: A TALE OF TWO (OR MORE) CITIES?

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*Judicial independence is an “unwritten constitutional principle” of democratic constitutional governance and the rule of law. At its most basic, judges must be independent and impartial in their adjudicative functions—an individual dimension of independence. More broadly, the Supreme Court of Canada has declared that judicial independence also recognizes the dimension of institutional independence from the executive and legislative branches of government. One aspect of that is “place of residence” of a superior court judge, in which case a distinction must be made between initial appointment and subsequent transfer from one judicial district to another. While appointment to a particular judicial district is the prerogative of the executive, transfer to another district is fraught with issues of judicial independence, particularly when the executive claims a veto on the transfer of a judge. This article examines judicial independence in the context of “place of residence” through the lens of Canadian law, supplemented with international and comparative perspectives. The article concludes that a provincial law requiring executive consent to transfer a judge from one judicial district to another is unconstitutional.*

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*L'indépendance judiciaire est un « principe constitutionnel non écrit » de la gouvernance constitutionnelle démocratique et de la primauté du droit. À la base, les juges doivent être indépendants et impartiaux dans l'exercice de leurs fonctions juridictionnelles; il s'agit de la dimension d'indépendance individuelle. Considérée dans une perspective plus large, la Cour suprême du Canada a déclaré que l'indépendance du pouvoir judiciaire reconnaît également la dimension de l'indépendance institutionnelle vis-à-vis des pouvoirs exécutif et législatif du gouvernement. Appliqué au « lieu de résidence » d'un juge d'une cour supérieure, il convient de distinguer la situation impliquant une nomination initiale et de celle de son transfert ultérieur d'un district judiciaire à un autre. Bien que la nomination à un district judiciaire quelconque soit du ressort exclusif du pouvoir exécutif, le transfert d'un district judiciaire à un autre se heurte à des problèmes d'indépendance du pouvoir judiciaire, en particulier lorsque l'exécutif réclame un veto sur le transfert d'un juge. Cet article examine l'indépendance*

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*judiciaire dans le contexte du « lieu de résidence » du point de vue de la jurisprudence canadienne, mais aussi des perspectives internationales et comparatives, pour conclure qu'une loi provinciale qui exige le consentement de l'exécutif pour transférer un juge d'un district judiciaire à un autre est inconstitutionnelle.*

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## 1. Introduction

Judicial independence is a foundational principle of Canadian constitutionalism and the rule of law. The basics are well established. As expressed by the Supreme Court of Canada, judicial independence includes three core characteristics and two dimensions. The core characteristics are financial security, security of tenure and administrative independence; the dimensions are personal and institutional.<sup>1</sup> Yet, despite the guidance provided by relevant jurisprudence, the contours of judicial independence are not always clear.

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<sup>1</sup> *Reference re Remuneration of Judges of the Prov Court of PEI*, [1994] 2 PEIR 49, [1994] PEIJ No 123 (QL); *Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, 1997 CanLII 317 [PEI Reference].

Judicial residence—that is, the location where a judge resides as opposed to the location where a judge may sit on occasion by assignment—may present issues of judicial independence, particularly when a judge is transferred from one judicial district to another. Is the transfer of a judge a matter within the exclusive authority of the chief justice of the particular court? Is the consent of the particular judge required? What about the executive? Must the Attorney General or Minister of Justice consent to the transfer? Is transfer an issue of judicial independence at all?

These issues are matters of public interest and attract public attention, particularly when the parties at odds are the chief justice of the court and the provincial minister, as it was in New Brunswick.

This article examines the concept of judicial independence as it applies to the place of judicial residence and concludes that judicial independence is undermined by government insistence that government consent is required for any such transfer. The article also considers place of residence and judicial independence in the broader context of court-executive and court-legislature roles.

## 2. Background to the Issue

In early 2016, the government of New Brunswick introduced a bill in the Legislature to require ministerial consent before the Chief Justice of the Court of Queen’s Bench (“QB”) could transfer a judge from one judicial district to another (relocate place of residence).<sup>2</sup> The Minister of Justice characterized the proposed amendment as a “housekeeping measure that brings the assignment of judicial residences in line with the laws of most other provinces.”<sup>3</sup> Simple in form and seemingly straightforward in meaning, Bill 21 proposed that the Chief Justice “with the consent of the Minister of Justice, may designate the place at which a judge is to establish residence.” The Bill further provided that the Minister’s consent would be required if the Chief Justice sought to change a judge’s designated place of residence, regardless of whether the original designation occurred before or after the coming into force of the provision.

The initial response to the Bill was muted. The Official Opposition spokesperson noted that just two provinces required ministerial consent and, though two is not “most other provinces,” he had “no difficulty with it.”<sup>4</sup> The QB Chief Justice at the time, the Honourable David Smith,

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<sup>2</sup> Bill 21, *An Act to Amend the Judicature Act*, 2nd Sess, 58th Leg, New Brunswick, 2016 (first reading 5 February 2016).

<sup>3</sup> *NB Hansard* at 29/122 (10 February 2016) (Second Reading) [*NB Hansard*].

<sup>4</sup> *Ibid* at 30/122.

reacted differently. He publicly expressed surprise at the lack of notice and consultation on Bill 21, which he characterized as direct interference with judicial independence.<sup>5</sup> The New Brunswick branch of the Canadian Bar Association and the Law Society of New Brunswick publicly supported the Chief Justice.<sup>6</sup> By the time the Bill reached the Committee stage in late April 2016, the Official Opposition spokesperson declared that the Bill “so smacks of executive meddling in the judiciary that it is outrageous.”<sup>7</sup>

In late April 2016, the Minister rejected a compromise offered by Chief Justice Smith in the form of a “consultation” and insisted on a veto over any decision to transfer or relocate a QB judge.<sup>8</sup> Commenting publicly on the Bill, both the Premier and a government Minister (with responsibilities unrelated to justice issues) characterized the bill as a needed response to the “revolving door” situation in northern and rural communities, which saw judges being assigned to one judicial district upon appointment and then transferred to fill vacancies in larger cities.<sup>9</sup>

June 2016 saw three developments of note: (1) a Cabinet shuffle resulted in the appointment of a new Minister of Justice; (2) the legislative session ended without Bill 21 being enacted; and (3) after the House adjourned, the Chief Justice approved the requests of two justices to relocate to (or closer to) their pre-appointment home communities.<sup>10</sup>

When the House reconvened for the fall session, the government reintroduced its “consent” initiative as Bill 17 (on 16 November 2016). However, it made no effort to advance the bill to enactment until some six months later when, during the last four days of the legislative session, Bill 17 received a second reading, committee debate, third reading and Royal Assent between May 2 and May 5, 2017. Bill 17 amended the

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<sup>5</sup> Adam Huras, “Chief judge speaks out on bill that aims to cut his powers”, *Times & Transcript* (Moncton) (25 Feb 2016) B1 [Huras, “Chief judge speaks”].

<sup>6</sup> Anne Whiteway Brown, “Association asks to offer feedback”, Letter to the Editor, *Telegraph Journal* (Saint John) (27 February 2016) A11; See also Adam Huras, “Law Society slams new rule for judges”, *Telegraph Journal* (4 March 2016) A1.

<sup>7</sup> *NB Hansard*, *supra* note 3 at 48–49/65 (27 April 2016).

<sup>8</sup> Adam Huras, “Chief Justice rallies against proposed changes”, *Times & Transcript* (Moncton) (29 April 2016) A9. Speaking in the Legislature, the Minister went so far to state that QB judges had contacted him to express support for the bill, a statement he later withdrew when asked to identify the judges and when questioned on the appropriateness of such conversations with judges; See Daily Question Period, NB Legislature (Video), 20 May 2016, daily sitting 32 at 12:31.

<sup>9</sup> Huras, “Chief judge speaks”, *supra* note 5; Adam Huras, “Veto power needed on judge homes, says Gallant”, *Times & Transcript* (Moncton) (5 March 2016) B1.

<sup>10</sup> Jacques Poitras, “[Chief Justice moves 2 judges in wake of Bill 21 failing to pass](#)”, *CBC News* (12 July 2016), online: <[www.cbc.ca/news/canada/new-brunswick/chief-justice-move-two-judges-bill-1.3675547](http://www.cbc.ca/news/canada/new-brunswick/chief-justice-move-two-judges-bill-1.3675547)>.

*Judicature Act*, with the crucial amendments being sections 12.01(3), (4) and (5) of that statute, as discussed in the next section of this article. Public controversy continued during this time, but the strategy of saving consideration of the bill until near the end of the session gave little time for debate in the Legislature and created a false hope among some that the bill would again die on the order paper.

During the debate on Bill 17, the new Minister of Justice did not mention the “revolving-door” justification for the bill. Instead, the Minister identified the following government interests: (1) ensuring service in both official languages; (2) addressing workload issues impacting court schedules; (3) ensuring that there are sufficient judges in each judicial district and that the government has a voice on matters of judicial residence; and (4) addressing the impact on levels of service available in a judicial district when a judge transfers from one district to another.<sup>11</sup> The Minister said that Bill 17 addressed these concerns by ensuring that the chief justice, the individual judge and the minister must each consent to a transfer.

It did not take long for the amendments to become a flashpoint. On November 27, 2017, a QB judge, Justice Thomas Christie, referenced the amendments when recusing himself from further involvement in civil proceedings involving the provincial government. When first appointed to the Court four years earlier to fill a vacancy in Saint John, the Fredericton-based judge had privately expressed to the Chief Justice his wish to transfer to Fredericton whenever a vacancy arose in that district. In the meantime, he commuted between his home and family in Fredericton and his judicial duties in Saint John. When a Fredericton vacancy eventually arose, the Chief Justice advised the Minister on November 6, 2017 of his intention to transfer Justice Christie from Saint John to the Fredericton judicial district with effect on November 15, 2017. The Minister’s responded on November 14, 2017, saying that he would not consent “at this time” and would be consulting with federal officials and local lawyers.

In *NB Assoc of Nursing Homes v Prov of NB*,<sup>12</sup> Justice Christie explained his recusal decision. He first noted that the order-in-council appointing him did not specify a judicial district and that his place of residence had not been “designated” for the purposes of the *Judicature Act*. With government counsel involved in the matter before him, Justice Christie then concluded:

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<sup>11</sup> *NB Hansard*, *supra* note 3 at 16/45 *et seq* (3 May 2017).

<sup>12</sup> *NB Assoc of Nursing Homes v Prov of NB*, 2017 NBQB 219 [*NB Nursing Homes*].

[T]he Minister's current involvement in my reassignment places me in an actual conflict of interest position as he is purporting to exercise control over a decision that affects me *at the same time* I am seized with the present matter—a matter that engages the various and competing interests of the Province and the sixty nursing home Applicants.<sup>13</sup>

Of particular concern to Justice Christie was the “lack of any publicly known guidelines which may direct the Minister’s assessment of the decision ... or that could provide a basis for reasons to understand it” and the same lack of specificity about the proposed consultation with, for example, local lawyers.<sup>14</sup>

The Chief Justice subsequently notified the Minister, by letter dated December 7, 2017, that Justice Christie was “assigned immediately” to the Fredericton judicial district; later, responding to the Minister’s request for clarification, the Chief Justice confirmed the reassignment to be permanent.<sup>15</sup>

In late December 2017, various responses to the transfer came to the public’s attention. One was that lawyers representing persons convicted of drug offences sought to appeal their convictions, in part on the ground that the judicial independence of their trial judges had been compromised because Chief Justice Smith had authorized the relevant search warrants. One of these impugned trial judges had been Justice Christie, so the defence lawyers in that case contended that his independence *may* have

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<sup>13</sup> *Ibid* at para 8.

<sup>14</sup> *Ibid* at para 9.

<sup>15</sup> “[Minister asks chief justice to clarify transfer of judge without approval](#)”, *CBC News* (8 December 2017), online: <[www.cbc.ca/news/canada/new-brunswick/justice-minister-reacts-judge-transfer-1.4439888](http://www.cbc.ca/news/canada/new-brunswick/justice-minister-reacts-judge-transfer-1.4439888)>. A further development occurred ten months later, in October 2018, when Chief Justice Smith consented to the transfer of two judges and then sought the Minister’s consent. The two judges had filled judicial vacancies in districts some distance from their home communities and wished to transfer to their home judicial districts. The Chief Justice, who, through counsel, had publicly contemplated a court challenge to the legislation (Bill 17 as enacted) requested the Minister’s consent to the transfers and the Minister consented. Media reported that the Chief Justice commented: “I recognize that this political decision has been formalized and I cannot unilaterally ignore it.” See also Jacques Poitras, “[Liberal justice minister agrees to the transfer of two judges](#)”, *CBC News* (19 October 2018), online: <[www.cbc.ca/news/canada/new-brunswick/two-judges-transferred-legal-stalemate-1.4870323](http://www.cbc.ca/news/canada/new-brunswick/two-judges-transferred-legal-stalemate-1.4870323)>.

<sup>16</sup> Jacques Poitras, “[Convicted drug traffickers question judges’ independence from chief justice](#)”, *CBC News* (7 February 2018), online: <[www.cbc.ca/news/canada/new-brunswick/judge-transfer-nb-courts-1.4523379](http://www.cbc.ca/news/canada/new-brunswick/judge-transfer-nb-courts-1.4523379)>. In 1999, Justice Drapeau (as he then was) rejected a similar argument that he and the entire Court of Appeal recuse themselves from hearing an appeal because Chief Justice Daigle served as chair of the provincial Judicial Council which had recommended a Provincial Court judge’s removal from office.

been compromised in the hope that the Chief Justice would favourably consider his request to transfer.<sup>16</sup> The Court of Appeal dismissed these arguments as without merit given the lack of any allegation of specific misconduct and the presumption of good faith by a senior judicial officer in the exercise of administrative powers.<sup>17</sup>

### 3. Legislative Context

#### A) New Brunswick Legislation

The relevant provisions of the *Judicature Act* (NB) are as follows:

##### Residence of judge

4(1) At least one judge of the Family Division or the Trial Division of the Court of Queen's Bench shall reside in each of the following municipalities or within an area of fifty kilometres from the municipality: [list of eight municipalities omitted]

##### Responsibilities of the Chief Justice

12.01(1) For the purpose of ensuring the proper functioning of the Court, the Chief Justice of the Court of Queen's Bench is responsible for the administration of the judicial responsibilities of the Court of Queen's Bench in relation to the judiciary.

12.01(2) In carrying out his or her duties ... the Chief Justice

(a) shall direct and supervise the assignment of judicial duties to individual judges and may alter those duties from time to time,

(b) shall determine the total annual, monthly and weekly workload of individual judges,

(c) may require a judge to act during the absence of another judge in the place of the judge who is absent,

(d) may designate the place where a judge is to hold sittings and the days on which he or she is to hold such sittings, and

(e) may designate the place where a judge is to establish and maintain an office.

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See *Nouveau-Brunswick c Moreau-Bérubé* (1999), 217 NBR (2d) 230, 1999 CanLII 32991 (CA).

<sup>17</sup> *Williams v R*, 2018 NBCA 70 at para 65, referring to *Ontario Deputy Judges Association v Ontario (Attorney General)*, 2011 ONSC 6956, aff'd 2012 ONCA 437 at paras 5, 40, 58.

12.01(3) Subject to subsections (4) and (5), the Chief Justice of the Court of Queen's Bench, with the consent of the Minister of Justice, may designate the place at which a judge is to establish residence.

12.01(4) If the Chief Justice of the Court of Queen's Bench designates a place at which a judge is to establish residence under subsection (3), the Chief Justice of the Court of Queen's Bench shall not designate a new place of residence for the judge without first obtaining the consent of the Minister of Justice and the judge.

12.01(5) If, before the commencement of this subsection, the Chief Justice of the Court of Queen's Bench designated a place at which a judge was to establish residence, the Chief Justice of the Court of Queen's Bench shall not designate a new place of residence for the judge without first obtaining the consent of the Minister of Justice and the judge.<sup>18</sup>

The legislative history of the *Judicature Act* is informative.

For present purposes, it suffices to refer to the 1952 version, reflecting the former circuit court system. It required two QB judges to reside in Moncton and one in either Fredericton or Saint John.<sup>19</sup> From 1956 to 1978, the Act required a judge's place of residence to be approved by the Lieutenant-Governor in Council ("LGIC").<sup>20</sup> The Legislature repealed that provision in 1978 and substituted the now-familiar requirement that a number of judges reside in each of eight listed municipalities.<sup>21</sup> In 1981, the Legislature extended the listed municipalities approach to include the Family Division and created a residual authority in the LGIC to "designate" the place of residence of one judge of the Family Division<sup>22</sup>—which increased to two judges in 1982.<sup>23</sup>

In 2001, the Legislature combined the separate residence provisions for the two divisions of the Court, repealed the designation authority of the LGIC in relation to the Family Division, and enacted the present wording of subsection 4(1).<sup>24</sup> The amending Act also addressed the administrative responsibilities of the Chief Justice by inserting section 12.01 of the present Act but with section 12.01(3) then reading: "On the appointment of a judge made after the commencement of this subsection, the Chief Justice ... may designate the place at which the judge is to establish residence." It

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<sup>18</sup> *Judicature Act*, RSNB 1973, c J-2 (as amended).

<sup>19</sup> *Judicature Act*, RSNB 1952, c 120, s 4(2).

<sup>20</sup> *Judicature Act*, SNB 1956, c 42, s 1.

<sup>21</sup> *Judicature Act*, SNB 1978, c 32, s 4.

<sup>22</sup> *Judicature Act*, SNB 1981, c 36, s 3.

<sup>23</sup> *Judicature Act*, SNB 1982, c 34, s 2.

<sup>24</sup> *Judicature Act*, SNB 2001, c 29, s 6.



is this provision that the 2017 amendments altered to create a role for both the Minister and the individual judge.

### **I) “Designation” of Place of Residence**

In addressing a judge’s place of residence, Bill 17 followed the wording of the previous version of section 12.01(3), which provided that, following appointment, the Chief Justice “may designate the place at which the judge is to establish residence.” The wording is consistent with the Chief Justice’s authority, per section 12.01(2)(d) and (e), to “designate the place where a judge is to hold sittings of the Court” and to “establish and maintain an office.” It is to be observed that the statutory language is permissive; that is, the Chief Justice “*may* designate” rather than “shall designate.”

What does “designate” mean? Is it formal, in the sense of a “designation” in writing? Can it be informal, in the sense of informal verbal agreement? When it involves the Chief Justice and a government minister, it is likely to be formal and in writing as the communication is between two branches of “government” and, when it involves the Chief Justice and a judge, it is likely to be less formal though recorded in the form of a letter, memo or even an email or text.

It is clear that, in a province in which the LGIC has a role to designate, direct, authorize and approve the place of residence of a judge upon initial appointment or in respect of a transfer, the LGIC acts by order-in-council so there is a written record of the designation, direction, or other communication.

### **II) Initial Judicial Appointment—New Brunswick and other Provinces**

Except for one province, federal orders-in-council appointing superior court judges are silent on appointment to a specific judicial district. The exception is Quebec, for which the orders-in-council identify the specific judicial districts to which judges are appointed.

We reviewed the 61 orders-in-council issued in relation to judicial appointments to provincial superior courts during the period of January to June 2019. We found those applicable to five provinces (BC, AB, SK, MB and NL) refer only, for example, to appointment to the Supreme Court or Court of Queen’s Bench of the named province; those applicable to three provinces (ON, NB and NS) identify the Trial or Family Division

of the Court; a ninth (QC) identifies the specific judicial district to which the appointment is made; the tenth province (PE) had no appointment during this period but an earlier order-in-council mentioned only the court.<sup>25</sup> Thus, except for Quebec, the orders-in-council do not name a specific judicial district to which the judge is assigned within the province.

The news releases accompanying the orders-in-council take a different approach. These releases are not prepared by the Orders-in-Council Office but by communication officers at Justice Canada and include varying details and tidbits of information on the location of the vacancy that the appointee is to fill. For example, a 2019 news release concerning a judicial appointment to the Superior Court of Justice of Ontario explains that “due to the internal transfers effected by the Chief Justice, this position is located in Toronto” and a second news release, about an appointment to the Court of Queen’s Bench of Alberta, explains that the appointee is replacing a judge from Edmonton but that “due to an internal transfer, this vacancy is located in Lethbridge.”<sup>26</sup> Obviously, a news release does not have legal effect.

Table 1, below, summarizes the roles of the individual judge, the Chief Justice, and the provincial executive in decisions concerning the initial place of residence of a judge and any subsequent transfer.

In relation to place of residence or assigned judicial district at the time of appointment as a judge of the provincial superior court, provincial legislation identifies the role of the Chief Justice in terms of consent (as “approve,” “assign” or “designate”) in three provinces (BC, ON, NB); as consultation, in one province (MB); is silent on this point in five provinces

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<sup>25</sup> “[Orders in Council—Search](#)” (last modified 31 April 2017), online: *Government of Canada* <orders-in-council.canada.ca>. This survey is based on the 61 orders-in-council issued from 1 January to 30 June 2019 plus one issued on 31 August 2018 in relation to Prince Edward Island for which no such order-in-council was issued in the first six months of 2019. Despite the statutory authority of the Chief Justice to assign and reassign a judge to a judicial region in Ontario (see Table 1 below), Justice Canada published a news release announcing the appointment of a new Regional Senior Judge for the Northeast Region of Ontario and the transfer of the departing judge: “[Government of Canada announces judicial appointments in the province of Ontario](#)” (24 April 2019), online: *Department of Justice* <canada.ca/en/department-justice/news/2019/06/government-of-canada-announces-judicial-appointments-in-the-province-of-ontario.html>.

<sup>26</sup> “[Government of Canada announces judicial appointments in the province of Ontario](#)” (31 January 2019), online: *Department of Justice* <www.canada.ca/en/department-justice/news/2019/01/government-of-canada-announces-judicial-appointments-in-the-province-of-ontario.html>; “[Government of Canada announces judicial appointments in the province of Alberta](#)” (8 March 2019), online: *Department of Justice* <www.canada.ca/en/department-justice/news/2019/03/government-of-canada-announces-judicial-appointments-in-the-province-of-alberta.html>.

(AB, SK, QC, PE, NL); and is expressed in limited terms in one province (NS) in relation to the Chief Justice designating two “resident judges” in each judicial district. In contrast, the role of the provincial executive (LGIC, Minister) is expressed in terms of consent in the legislation of five provinces (AB, SK, MB, NB, NL); consultation in two provinces (BC, NS); and is not expressly addressed in three provinces (ON, QC, PE).

**Table 1: Decision-Making Roles re Place of Residence**<sup>27</sup>

Province	Judge	Chief Justice (“CJ”)	Provincial Government/Attorney General (“AG”) / LGIC
BC	consent re transfer	approval re initial residence and any transfer	AG consulted by CJ
AB			Minister’s approval in writing re initial residence and any transfer
SK	consent re transfer		LGIC directs initial residence and transfer
MB	consent re transfer	consulted by Minister	on recommendation of Minister, LGIC directs initial residence and any transfer
ON		assigns to region and may reassign (residence not expressed)	
QC		consent re change of assigned judicial district / residence	on recommendation of Minister, government may authorize judge to change place of residence
NB	consent re transfer	may designate place of residence—initial and transfer	consent of Minister re designation of place of residence—initial and transfer
PE			
NS	consent re transfer	to designate two “resident” judges per district	AG consulted by CJ re designation and any transfer
NL	consent re transfer		LGIC approves initial judicial centre/residence and any transfer

<sup>27</sup> *Supreme Court Act*, RSBC 1996, c 443, s 2.1(6)–(7), as amended by *Miscellaneous Statutes Amendment Act (No. 3)*, SBC 2018, c 36; *Court of Queen’s Bench Act*, RSA 2000, c C-31, s 6; *Queen’s Bench Act, 1998*, SS 1998, c Q-1.01, s 6; *Court of Queen’s Bench Act*, CCSM c C280, s 9(2); *Courts of Justice Act*, RSO 1990, c C.43, ss 53(1)(i)–(j), by regulation fixes number of judges per region; *Courts of Justice Act*, CQLR c T-16, s 32 specifies number of judges and place of residence for each judicial district; *Judicature Act*, RSNB 1973, c J-2, s 12.01; *Judicature Act*, RSPEI 1988, c J-2.1, no provision; *Judicature Act*, RSNS 1989, c 240, s 25(2)–(6); *Judicature Act*, RSNL 1990, c J-4, s 22(2)–(3).

### III) Transfer from One Judicial District to Another

The statutory regime applicable to the post-appointment transfer of a judge from one judicial district to another also varies in provincial legislation.

As reflected in Table 1, the decision-making role of the chief justice in relation to a subsequent transfer of a judge from one place of residence or judicial district to another is expressed in terms of consent in five provinces (BC, ON, QC, NB, NS); as consultation in one province (MB); and as having no express role (silent on this point) in four (AB, SK, PE, NL). In contrast, the provincial executive's role (LGIC, Minister) is expressed as consent ("approve," "designate," "authorize") in six provinces (AB, SK, MB, QC, NB, NL); as consultation in two provinces (BC and NS); and not expressed in two provinces (ON, PE).

Only Quebec and NB expressly require the consent of both the chief justice and the provincial executive in the legislation concerning judicial transfers.

In five provinces, the legislation provides for the individual judge to consent to a transfer (BC, ON, QC, NB, NS).

### 4. Analysis: Domestic Principles

Judicial independence is an "unwritten constitutional principle" of democratic constitutional governance and the rule of law. At its most basic, judges must be independent and impartial in their adjudicative functions. This is an *individual* dimension of judicial independence. More broadly, the Supreme Court of Canada has declared that judicial independence also recognizes the dimension of *institutional* independence of the judicial branch from the executive and legislative branches of government. A landmark in this development is *Valente v R*,<sup>28</sup> in which the appellant challenged the Ontario Provincial Court's status as "an independent and impartial tribunal" under section 11(d) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada defined judicial independence in terms of two dimensions (individual and institutional) and three "essential conditions" of security of tenure, financial security and "institutional independence ... with respect to matters of administration bearing directly on the exercise of [a court's] judicial function."<sup>29</sup> Justice LeDain, for the Court, endorsed the Ontario Court of Appeal's conclusion that "*assignment of judges, the sittings of the court and the court lists*"

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<sup>28</sup> *Valente v R*, [1985] 2 SCR 673, 1985 CanLII 25 [*Valente* cited to CanLII].

<sup>29</sup> *Ibid* at para 47.

[emphasis added] are matters essential to the adjudicative function and, thus, beyond the reach of executive interference.<sup>30</sup>

The *Valente* court also established the test to determine whether a tribunal is independent; viz, “whether the tribunal may be reasonably perceived as independent.”<sup>31</sup> The perception is that of a reasonable and informed person and must be “a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.”<sup>32</sup>

In succeeding years, the Court has considered judicial independence in various contexts. A theme that has emerged is that judicial independence is not a right of the judge or the judiciary collectively; it is a right of the public and litigants who appear before the courts.<sup>33</sup> Without confidence in judicial independence and impartiality, the rule of law is itself undermined.<sup>34</sup>

We agree with the CBA-NB statement of June 2016 that the Supreme Court of Canada has already considered the involvement of the provincial executive in a change of a judge’s place of residence and its relation to judicial independence. Though not expressly mentioned in the CBA-NB statement, the key case is *Reference re Remuneration of Judges of the Provincial Court (PEI); Reference re Independence & Impartiality of Judges of the Prov Court of PEI* (“PEI Reference”).<sup>35</sup> This decision involved two references by the Lieutenant Governor of Prince Edward Island relating to judicial remuneration and judicial independence; three unrelated criminal matters from Alberta that were joined on appeal and that challenged the independence of the Alberta Provincial Court; and a challenge by the Manitoba Provincial Judges Association to salary reductions implemented as part of a public sector wage restraint program. These four appeals

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid* at para 22.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Cosgrove v Canadian Judicial Council*, 2007 FCA 103 at para 30: “The independence of the judiciary is a constitutional right of litigants, assuring them that judges will determine the cases that come before them without actual or apparent interference from anyone, including anyone representing the executive or legislative arms of government”.

<sup>34</sup> See *Gratton v Canada (Judicial Council)*, [1994] 2 FC 769 (per Justice Strayer).

<sup>35</sup> *Reference re Independence & Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, (*sub nom Provincial Court Judges (No 1)*, *sub nom R v Campbell*), 1997 CanLII 317 [*Provincial Court Judges (No 1)*].

were heard together because they raised several issues relating to the independence of provincial courts.

Of particular interest is one of the questions posed in the *PEI Reference* on judicial independence and an issue addressed in the three Alberta cases.

The specific and relevant reference is the *Reference re Independence & Impartiality of Judges of the Provincial Court of Prince Edward Island* portion of the overall reference.<sup>36</sup> In response to question 3(c)—whether involvement of the provincial executive in designating the place of residence of a Provincial Court judge impacted the status of the Court as “independent and impartial” within the meaning of section 11(d) of the *Charter*—Justice Mitchell, for the Appeal Division of the PEI Supreme Court, relied on *Valente* to answer in the negative “unless it could be shown that these matters bear immediately and directly on the exercise of the adjudicative function.”<sup>37</sup>

The three Alberta cases—*R v Campbell*, *R v Ekmecic* and *R v Wickman*<sup>38</sup>—concerned summary conviction offences for which proceedings had commenced in Provincial Court and had either been adjourned and were awaiting trial or had been heard but the judgment was still pending. On application to the Alberta Court of Queen’s Bench for a stay of proceedings, defence counsel successfully challenged the independence of the Provincial Court, including the issue of place of judicial residence. The relevant legislation<sup>39</sup> provided that the Attorney General “may designate the place at which a judge shall have his residence.” All three motions were heard by Justice McDonald, who, in extensive reasons, held that the section infringed both the individual judge’s financial security and the Court’s administrative (i.e., institutional) independence because it authorized the Minister to control a judge’s place of residence “from time to time during his entire judicial career.”<sup>40</sup> Justice McDonald declined a stay of proceedings on the basis that his conclusion on the constitutional issue meant that the offending provisions were no longer of any force or effect and, accordingly, the defendants’ right to a Provincial Court with judicial independence was no longer infringed. Thus, the Crown lost on the constitutional issue but succeeded on the remedy.

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<sup>36</sup> *Reference re Independence & Impartiality of Judges of the Provincial Court of Prince Edward Island* (1995), 130 Nfld & PEIR 29, 1995 CanLII 3430 (SC (AD)) [cited to CanLII].

<sup>37</sup> *Ibid* at para 17.

<sup>38</sup> *R v Campbell* (1994), 160 AR 81, 1994 CanLII 5258 (QB) [*Campbell & Ekmecic* cited to CanLII]; *R v Wickman*, 1995 ABCA 255 [*Wickman*].

<sup>39</sup> *Provincial Court Judges Act*, SA 1981, c P-20, s 13(1)(a), as repealed by *Justice Statutes Amendment Act*, RSA 2000, c 16 (Supp), s 33.

<sup>40</sup> *Campbell & Ekmecic*, *supra* note 38 at para 201.

The Alberta Court of Appeal held that it lacked jurisdiction to hear the appeals because the *Criminal Code* did not provide for an appeal of declaratory orders.<sup>41</sup> The Crown then appealed to the Supreme Court of Canada.

In the *PEI Reference*, Chief Justice Lamer, for the majority, wrote extensive reasons that focused mainly on issues of judicial independence in the context of the financial security of provincially appointed judges. But he also specifically addressed subsidiary issues concerning administrative independence, including place of judicial residence. The lone dissenter, Justice La Forest, disagreed with the majority conclusions on financial security—particularly the requirement of a judicial compensation commission to intercede between the judges and the executive—but joined the majority on the subsidiary issues, including place of judicial residence. Thus, on the subsidiary issues, the Supreme Court of Canada was unanimous.

In relation to the PEI appeal, Chief Justice Lamer agreed with the Court of Appeal's result but for different reasons:

Although the question does not refer to specific provisions of the *Provincial Court Act*, it seems that the relevant section is s. 4. Section 4(1)(b) authorizes the Chief Judge to “designate a particular geographical area in respect of which a particular judge shall act.” Furthermore, under s. 4(2), “[w]here the residence of a judge has been established for the purpose of servicing a particular geographical area pursuant to clause (1)(b), that residence shall not be changed except with the consent of the judge.”

Section 4 is constitutionally sound. Upon the appointment of a judge to the Provincial Court, it is necessary that he or she be assigned to a particular area. Furthermore, the stipulation that the residence of a sitting judge only be changed with that judge's consent is a sufficient protection against executive interference.<sup>42</sup>

On the residence issue in the Alberta appeals, the reasons were brief. Chief Justice Lamer concluded that the provisions were unconstitutional because the executive power to designate a judge's residence was not limited to the initial appointment:

[I] do agree with the trial judge's holdings that ss. 13(1)(a) and 13(1)(b) of the *Provincial Court Judges Act* are unconstitutional. Both of these provisions confer powers on the Attorney General and Minister of Justice (or a person authorized

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<sup>41</sup> *Wickman*, *supra* note 38.

<sup>42</sup> *PEI Reference*, *supra* note 1 at paras 254–55.

by him or her) to make decisions which infringe upon the administrative independence of the Alberta Provincial Court.

Section 13(1)(a) confers the power to “designate the place at which a judge shall have his residence.” Counsel for the appellant rightly points out that it is reasonable (although not necessary) to vest responsibility for designating the residence of judges with the executive, because that decision concerns the proper allocation of court resources. However, my concern is that, as it is presently worded, **s. 13(1)(a) creates the reasonable apprehension that it could be used to punish judges whose decisions do not favour the government, or alternatively, to favour judges whose decisions benefit the government.** Section 13(1)(a)’s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. The appellant tried to demonstrate that s. 13(1)(a), when properly interpreted, was so confined. However, the words of the provision are not qualified in the manner in which the appellant suggests. Section 13(1)(a) authorizes the Minister of Justice and the Attorney General to designate a judge’s place of residence at any time, including his initial appointment or afterward. It therefore violates s. 11(d) of the *Charter*.<sup>43</sup>

The Court’s responses to the PEI and Alberta appeals regarding place of judicial residence are consistent. They both “flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized.”<sup>44</sup> Indeed, this is a unifying theme: Chief Justice Lamer repeats the words *depoliticized* or *depoliticization* ten times in his majority reasons, reflecting a separation-of-powers approach.

The PEI provision on residence conferred the authority on the Chief Judge, not the Minister, and applied to both the initial appointment and subsequent changes, though when designating a change of residence, the provision required the judge’s consent. Chief Justice Lamer apparently considered the provision on initial appointments to be common sense because a new judge would have to be assigned judicial duties at some location.

In the Alberta situation, the statute expressly conferred a decisional role on the provincial executive in the person of the Attorney General/Minister of Justice to designate a judge’s place of residence. It is this executive role that the Court held to be inconsistent with judicial independence and the separation of powers and, thus, constitutionally impermissible.

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<sup>43</sup> *Ibid* at paras 265–66 [Underlining in original; bold emphasis added].

<sup>44</sup> *Provincial Court Judges (No 1)*, *supra* note 35 at para 131 [emphasis in original].



We do not construe Chief Justice Lamer's emphasis on the consent of the individual judge in the *PEI Reference* as implying that this alone suffices. Requiring a judge's consent may be a sufficient protection of judicial independence against executive action to change a place of residence, but it does not address the situation that arises when the chief justice and the judge agree to a change of residence and the executive seeks to veto it. The interference in judicial independence in such a situation is obvious and the Court's response to the Alberta appeals confirms this conclusion.

It is this very role that Bill 17 has created for the New Brunswick Minister of Justice in relation to the superior court, the QB. It is the same role that exists in the legislation of four other provinces; that is, executive consent. That such a role was held unconstitutional in relation to the Alberta Provincial Court should indicate, *a fortiori*, the same result when applied to superior court judges. What the Supreme Court held in 1997 should be depoliticized has, 20 years later, been re-politicized by the enactment of Bill 17 and the Minister's expressed intention to consult federal officials and local lawyers about the transfer of a named judge from one judicial district to another. Even without that expressed intention, the requirement of executive consent in the legislation is not valid.

Depoliticization can be achieved in various ways. For example, after the *PEI Reference* decision, Alberta amended the *Provincial Court Judges Act* to repeal section 13(1)(a) and replace it with a provision authorizing the Minister to designate a judge's place of residence upon initial appointment and stipulating that any subsequent change "be made by the Judicial Council at the request of the Chief Judge."<sup>45</sup> The Legislature thus provided a decision-making role for an independent body of judges and laypersons apart from the provincial executive.

In PEI, the statutory provisions regarding the functions of the Chief Judge and a Provincial Court judge's place of residence remain the same as when considered by the Supreme Court of Canada in the *PEI Reference*. A sitting judge's residence can only be changed with that judge's consent, but the executive has no express role in that regard.

It should be obvious that the relevant principles examined in these decisions in relation to the Provincial Court are equally applicable to the relationship between the provincial executive and the provincial superior courts.

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<sup>45</sup> *Provincial Court Act*, RSA 2000, c P-31, s 9.42(2).

## 5. Analysis: International Principles

As the Supreme Court noted in both *Valente* and the *PEI Reference*, international legal organizations have promoted and adopted instruments for the promotion and protection of judicial independence,

In *Valente*, Justice LeDain briefly mentioned the *Universal Declaration on the Independence of Justice* (1983);<sup>46</sup> in the *PEI Reference*, Chief Justice Lamer not only referred to, but quoted the *Basic Principles on the Independence of the Judiciary* (1985)<sup>47</sup> and the *Draft Universal Declaration on the Independence of Justice* (1988).<sup>48</sup> Both Justice LeDain and Chief Justice Lamer referred to these instruments to support their analysis of judicial independence in the context of judges' financial security. Chief Justice Lamer did not cite either instrument in his analysis of place of judicial residence. Indeed, neither instrument expressly addresses judicial independence in relation to residence. The *Montreal Declaration* commencing at article 2.16, with its explanatory note, is headed "Posting, Promotion and Transfer" and reads, in part:

2.16 The assignment of a judge, to a post within the court to which he is appointed[,] is an internal administrative function to be carried out by the judiciary.

[Explanatory Note: Unless assignments are made by the court, there is a danger of erosion of judicial independence by outside interference. It is vital that the court not make assignments as a result of any bias or prejudice or in response to external pressures. These comments are not intended to exclude the practice in some countries of requiring that assignments be approved by a Superior Council of the judiciary or similar body.]

2.18 Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.

[Explanatory Note: Unless this principle is accepted, transfer can be used to punish an independent and courageous judge, and to deter others from following his example. This principle is not intended to interfere with sound administrative practices enumerated in the law. Thus exceptions may be made, for example,

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<sup>46</sup> *Universal Declaration on the Independence of Justice*, 10 June 1983 (Montreal: First World Conference on the Independence of Justice) [*Montreal Declaration*].

<sup>47</sup> *Basic Principles on the Independence of the Judiciary*, UN Crime Congress, 29 November 1985, GA Res 40/32 & 40/146.

<sup>48</sup> *Draft Universal Declaration on the Independence of Justice*, 1 September 1988, E/CNA/Sub.2/1988/25 (UN Subcommittee on Prevention of Discrimination and Protection of Minorities).

where a judge in his early years is transferred from post to post to enrich his judicial experience.]

Though not focused on place of residence, the Explanatory Notes to articles 2.16 and 2.18 state the same rationale invoked by Chief Justice Lamer in the *PEI Reference* to declare section 13(1)(a) of the Alberta statute unconstitutional:

[M]y concern is that, as it is presently worded, s. 13(1)(a) [re Attorney General's authority to designate a judge's place of residence] creates the reasonable apprehension that it could be used to punish judges whose decisions do not favour the government, or alternatively, to favour judges whose decisions benefit the government.<sup>49</sup>

As expressed in the relevant international instruments, the exercise of judicial authority is to be “independent and impartial”; that is, free from external influences. This is the same rationale articulated by Justice Christie in his 2017 recusal decision in *NB Assoc of Nursing Homes v New Brunswick*.<sup>50</sup>

The international instruments are grounded in the institutional concept of the separation of powers. This is reflected in the Explanatory Memorandum issued by the Committee of Ministers of the Council of Europe in *Recommendation Rec (1994) 12 on independence, efficiency and role of judges*, which states:

The independence of judges is first and foremost linked to the maintenance of the separation of powers ... The organs of the executive and the legislature have a duty to ensure that judges are independent. Some of the measures taken by these organs may directly or indirectly interfere with or modify the exercise of judicial power. Consequently, the organs of the executive and legislative branches must refrain from adopting any measure which could undermine the independence of judges.<sup>51</sup>

<sup>49</sup> *PEI Reference*, *supra* note 1 at para 266 and text accompanying note 43 [emphasis added].

<sup>50</sup> *NB Nursing Homes*, *supra* note 12 and accompanying text.

<sup>51</sup> Council of Europe, Committee of Ministers, 518th Sess, *Recommendation No R (94)12*, (1994) at para 15. See also Leandro Despouy, [Report of the Special Rapporteur on the independence of judges and lawyers](#), United Nations Human Rights Council, 13 May 2008, A/HRC/11/41, online (pdf): <advokat-prnjavorac.com/legislation/Recommendation.pdf> at para 18; Diego Garcia-Sayán, [Report of the Special Rapporteur on the independence of judges and lawyers](#), United Nations Human Rights Council, 9 June 2017, A/HRC/35/31, online: <www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx> at paras 27–32.

The “transfer” provisions in the international instruments on judicial independence thus provide a close analogy to place of residence, particularly as both are expressions of the same rationale. The 2008 *Mount Scopus International Standards of Judicial Independence* states:

2.3 The Judiciary as a whole shall enjoy independence and autonomy vis-à-vis the Executive.

2.19 The power to transfer a judge from one court to another shall be vested in a judicial authority according to grounds provided by law and preferably shall be subject to the judge’s consent, such consent not to be unreasonably withheld.<sup>52</sup>

## 6. Analysis—Comparative Principles

### A) Federal Court of Canada

By way of comparison to the provincial legislative regimes, all Federal Court judges in Canada are required to reside in the “National Capital Region or within 40 kilometres of that Region.”<sup>53</sup> In the conduct of their judicial business, these judges travel to judicial centres across the country much in the tradition of English KB/QB judges on circuit. The government does not provide “secure locations” for use of travelling Federal Court judges but does cover travel expenses.

### B) England and Wales

In the absence of a statutory provision regarding place of residence, the High Court (which includes QB) judges in England and Wales generally reside in London and conduct legal proceedings at the Royal Courts of Justice (the Law Courts). Like their ancient predecessors, they also travel to the six circuits into which England and Wales are divided for judicial administrative purposes.<sup>54</sup> Though relating to a transfer from one division

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<sup>52</sup> “[Mount Scopus International Standards of Judicial Independence](#)” (2015), online (pdf): *International Commission of Jurists* <[www.icj.org/wp-content/uploads/2016/02/Mt-Scopus-Standards.pdf](http://www.icj.org/wp-content/uploads/2016/02/Mt-Scopus-Standards.pdf)>.

<sup>53</sup> *Federal Courts Act*, RSC 1985, c F-7, s 7(1). Subsection 7(2) of the Act authorizes the creation of a rota system to ensure a sufficient number of judges when the demands of judicial business make it expedient. See e.g. *Federal Court Rules*, SOR/98-106, r 40.

<sup>54</sup> See “[High Court Judge 2019–20: Information page](#)” (last visited 24 September 2019), online: *Judicial Appointments Commission* <[www.judicialappointments.gov.uk/149-high-court-judge-201920-information-page](http://www.judicialappointments.gov.uk/149-high-court-judge-201920-information-page)>, which states: “All the posts are based at the Royal Courts of Justice in London. As the jurisdiction covers England and Wales, judges can be deployed to sit in courts in Wales that apply primary legislation different from the law in England. Although most sittings will be at the Royal Courts of Justice some of this work is undertaken outside London and can involve stays away from home. In cases where

of the High Court to another and not to place of residence, the relevant statutory provision requires the Lord Chief Justice to obtain the consent of both the individual judge and the senior judge of the Division from which the judge is to be transferred and to consult the Lord Chancellor.<sup>55</sup>

### C) United States Federal District Court

In the United States, judges in the federal court system are officially nominated by the President and confirmed by the advice and consent of the Senate.<sup>56</sup> Appointments at the trial (District Court) level are made to one or more districts depending on factors of population and geography.<sup>57</sup> Subject to an exception, a judge must reside within the assigned district or,

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this causes personal difficulties, arrangements can be made with the appropriate Head of Division subject to business needs.” See also Gary Slapper & David Kelly, *The English Legal System*, 11th ed (London: Routledge, 2010) at 163. See also Supreme Court Rules, O 33(1). The Judicial Appointments Commission confirms that, though there is no legislative provision requiring High Court judges to reside in London, practical considerations mean that “most will live in or near London” (email communication 3 October 2019). Government financing of “judges’ lodgings” in several locations throughout England and Wales has occasionally given rise to public complaints regarding the cost of maintaining the more than thirty lodges and the associated staff to support the judges while on circuit. See Chris Hastings, “[High Court judges’ accommodation costs taxpayers more than £5 million a year](#)”, *The Telegraph* (4 April 2009), online: <[www.telegraph.co.uk/news/uknews/law-and-order/5105210/High-Court-judges-accommodation-costs-taxpayer-more-than-5-million-a-year.html](http://www.telegraph.co.uk/news/uknews/law-and-order/5105210/High-Court-judges-accommodation-costs-taxpayer-more-than-5-million-a-year.html)>. See also Hayley Dixon, “[Judges lose their Sky TV at taxpayer lodgings](#)”, *The Telegraph* (14 October 2013), online <[www.telegraph.co.uk/finance/property/10376847/Judges-lose-their-Sky-TV-at-taxpayer-funded-lodgings.html](http://www.telegraph.co.uk/finance/property/10376847/Judges-lose-their-Sky-TV-at-taxpayer-funded-lodgings.html)>. See also *Courts Act 1971* (UK), ss 2, 28(1).

<sup>55</sup> *Senior Courts Act 1981* (UK), s 5(2): “The puisne judges of the High Court shall be attached to the various Divisions by direction given by the Lord Chief Justice after consulting the Lord Chancellor; and any such judge may with his consent be transferred from one Division to another by direction given by the Lord Chief Justice after consulting the Lord Chancellor, but shall be so transferred only with the concurrence of the senior judge of the Division from which it is proposed to transfer him.”

<sup>56</sup> Nominations are presented to the Judiciary Committee in the form: “[Nominee] of Missouri, to be United States District Judge for the Eastern District of Missouri, vice [Incumbent], retired. See “[Nominations](#)” (last visited 2 October 2019), online: *Committee on the Judiciary* <[www.judiciary.senate.gov/meetings/09/25/2019/nominations](http://www.judiciary.senate.gov/meetings/09/25/2019/nominations)>. See Michael C Tolley, “Legal Controversies over Federal Judicial Selection in the United States: Breaking the Cycle of Obstruction and Retribution over Judicial Appointments” in Kate Malleson & Peter H Russell, eds, *Appointing Judges in the Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) 80 *et seq* (General discussion of “advice and consent”).

<sup>57</sup> *Judiciary and Judicial Procedure*, tit 28 USC § 81–131 [28 USC]. The *US Code* identifies the number of and the geographic extent of “districts” in each state. A count of the provisions by state finds that 26 states are a single district (e.g. the New England states); twelve are divided into two districts (e.g. Virginia, Washington and West Virginia);

if more than one, within one of those districts.<sup>58</sup> The exception arises if the judicial council of the circuit determines that the public interest or the nature of the judicial business requires a judge to establish residence “at or near” a particular court location or an identified area within the district. In such a circumstance, the judicial council can order this to be done and leaves the choice of the relocating judge to the judges of that district and, in default of agreement, to the judicial council itself.<sup>59</sup> Consent of the judge is not necessarily required.

For administrative purposes, district judges are assigned a “duty station” which serves as a base of operations for the performance of their judicial duties. It also provides the basis for reimbursement for travel and related expenses in the performance of judicial duties.

The chief judge of a circuit has the authority to make a temporary assignment of a District Court judge to another district within the same circuit (“visiting judge”) and the chief justice of the United States can temporarily assign a District Court judge to a district in another circuit, if the chief judge of the district to which the judge is to be assigned issues a “certificate of necessity.”<sup>60</sup> There is no authority to transfer a judge from one district or circuit to another on a permanent basis.

## D) US State Courts

At the state level, the methods of initial selection of superior court judges vary by state but can be identified with three types of election (partisan, non-partisan, and legislative), two types of appointment (gubernatorial

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nine have three districts (e.g. Florida, Illinois and North Carolina); and three have four districts (California, New York and Texas). In addition to the fifty states, the Code also provides for District Courts in Puerto Rico and the District of Columbia. Districts are, in turn, subdivided into geographic areas identified as “divisions”.

<sup>58</sup> *Ibid* § 134(b).

<sup>59</sup> *Ibid* § 134(c).

<sup>60</sup> *Ibid* § 292(b), (d). In 1980, the Deputy Assistant Attorney General in the Office of Legal Counsel issued an opinion that proposed provisions to permit federal judges to transfer to the District of Columbia (“DC”) for unlimited periods of time to perform administrative duties presented “novel and troublesome constitutional questions.” The opinion concluded that the temporary assignment provisions in the *US Code* are defensible, but the proposed unlimited transfers served to deprive the President of the power of nomination and the Senate of its power of confirmation of judges to specific districts. This constitutional infirmity arose because judges who completed such administrative duties in DC were to have the option of remaining in D.C. as a judge of that District without nomination by the President or confirmation by Congress. See “[Legislation Authorizing the Transfer of Federal Judges from One District to Another](#)” (last visited 2 October 2019), online: *Department of Justice* <[www.justice.gov/file/24421/download](http://www.justice.gov/file/24421/download)>.

and assisted gubernatorial) and combinations of these methods.<sup>61</sup> With terms of office limited, for example, to six or seven years, the same or another method may apply to term renewal.

The issue of judicial residence can be illustrated using state examples of these methods (with a focus on the point of initial selection and transfers).

Election serves to link a candidate for elected judicial office to specific constituents and thus effectively limits the ability of a judge to transfer from one judicial district to another without seeking a mandate from the other constituency.

States with election as a method of judicial selection require a candidate to identify publicly as a candidate for a specific judicial position and get elected to that position. It is this limitation that restricts the free movement of a sitting judge from one judicial district to another. Often, the judicial position is identified by a specific number (such as Civil Division 56, Department 61) so there can be no question of a simple transfer from one position to another; the mandate derived from the election is limited to a specific position identified geographically as well as institutionally.

If the election is partisan, such as in Indiana, candidates for judicial office are identified on the ballot by party affiliation, if any, or as independent/non-partisan.<sup>62</sup> In relation to continued place of residence, the Indiana Constitution requires Circuit Court judges to reside in the circuit to which the judge is elected<sup>63</sup> and the *Indiana Code* requires Standard Superior Court judges be “a resident of the county in which the court is located.”<sup>64</sup> It is not possible for such a judge to transfer to another

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<sup>61</sup> Compare the classifications at Ballotpedia and the National Centre for State Courts online. See “[Judicial selection in the states](#)” (last visited 28 April 2020) online: [Ballotpedia](https://ballotpedia.org/Judicial_selection_in_the_states) <[ballotpedia.org/Judicial\\_selection\\_in\\_the\\_states](https://ballotpedia.org/Judicial_selection_in_the_states)> and <[www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=>](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=>)>. The data on the Ballotpedia website for initial selection of superior court/circuit court judges at the state level reflects the following statistics regarding method: partisan election (9), non-partisan election (19), legislative election (2), gubernatorial appointment (2), assisted appointment (14), and a combination of methods (4).

<sup>62</sup> Ind Code tit 3 art 8, c 2 § 7(a)(4) [Ind Code]: “declaration of candidacy”. See also “[Candidate Information](#)” (last visited 7 October 2019), online: *Indiana Secretary of State—Election Division* <[www.in.gov/sos/elections/2395.htm](http://www.in.gov/sos/elections/2395.htm)>; A review of the candidate list for the 2018 election for the Circuit Court self-identified the following affiliations: Republican—37, Democratic—17, Independent—1 and Non-Partisan—1 and, as candidates for the Superior Court, Republican—29, Democratic—5, Non-Partisan—4 and Independent—1.

<sup>63</sup> Ind Const art VII § 7 [Ind Const].

<sup>64</sup> Ind Code, *supra* note 62, tit 33 art 29, c 1 § 3(b)(1). To offset travel and “other necessary expenses,” the Indiana Legislature provides \$2,000 to Circuit and Superior

judicial position within the same court without seeking the position by election.

If the election is non-partisan, candidates for judicial office are not identified by political affiliation, if any. This is the system in Nevada for the selection of District Court judges.<sup>65</sup> The state *Constitution* provides that District Court judges “shall be elected by the qualified electors of their respective districts.”<sup>66</sup>

In the absence of a constitutional provision setting qualifications for judicial office, the Legislature has set the qualification, in part, as “a qualified elector and has been a bona fide resident of this State for 2 years next preceding the election.”<sup>67</sup> The concept of a “qualified elector” is, in turn, defined by the *Constitution* as a person of age “who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election.”<sup>68</sup> Thus, to qualify for election as a District Court judge, a candidate must have resided in the district before the election (at least 30 days).<sup>69</sup>

Though elected to a specific judicial position in a specific district, the District Court judges in Nevada are authorized to exercise their jurisdiction throughout the state.<sup>70</sup>

It is on this jurisdictional basis that state law authorizes the Chief Justice of the Supreme Court to assign “any district judge to another

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Court judges who reside and serve in circuits or district encompassing more than one county: *Ibid* art 38, c 1 § 2(1), (2); Some flexibility is provided by a provision of the Indiana Constitution which authorizes the Legislature to provide for temporary appointments of Circuit Court judges to serve in a different circuit “in cases of necessity or convenience and in case of temporary inability of any Judge ...”: *Ibid*, art 7 § 12, “Substitution of Judges).

<sup>65</sup> Election returns record that five of seven District Court judges elected during the 2018 general election were unopposed for retention. None were identified by affiliation with any political party, See “[Election Information](#)” (last visited 9 October 2019), online: *Nevada Secretary of State* <[www.nvsos.gov/sos/elections/election-information](http://www.nvsos.gov/sos/elections/election-information)>.

<sup>66</sup> Nev Const art 6 § 5 [Nev Const]. At present, seven districts consist of a single county, three have two counties, and one has three counties. The Nevada Constitution, art 6 § 5 expressly establishes nine judicial districts but gives the Legislature authority “for increasing or diminishing the number of the judicial districts and judges therein.” The Legislature has exercised this authority to organize the state’s 16 counties into 11 judicial districts: Nev Rev State tit 1, c 3 § 3.010 [Nev Rev State tit 1].

<sup>67</sup> Nev Rev State tit 1, *supra* note 66, c 3 § 3.060(1)(d).

<sup>68</sup> Nev Const, *supra* note 66, art 2 § 1 [emphasis added].

<sup>69</sup> Nev Rev Stat tit 24, c 293 §§ 293.1755, 293.177(2)(b); The state elections statute shifts the residency qualification period slightly to “30 days immediately preceding the date of the close of filing of declarations of candidacy.”

<sup>70</sup> Nev Rev State tit 1, *supra* note 66 § 3.220.



district court” in order to “expedite judicial business and to equalize the work of the district judges”<sup>71</sup>—a phrase that does not seem to contemplate relocation to another district for a permanency.

Again, it is the election that links a candidate for judicial office to a specific constituency and a District Court position. Thus, subject to a temporary assignment by the Chief Justice, the judge cannot transfer or be transferred to another judicial position or district unless elected to that position or district.

The “legislative election” system has little likelihood of increasing in importance due to the obvious risk of politicization of the judicial appointment process. Virginia is one of the two states with this system. The state *Constitution* requires that Circuit Court judges (and other judges) be elected to office by majority vote in both Houses of the General Assembly.<sup>72</sup> In the event of a judicial vacancy, the governor may make a temporary appointment when the General Assembly is not in session but the appointee is subject to legislative election when the Assembly resumes.<sup>73</sup> Significantly, for present purposes, the state *Constitution* also requires that “each judge of a trial court of record shall during his term of office reside within the jurisdiction of one of the courts to which he was appointed or elected.”<sup>74</sup>

By statute, Circuit Courts exist for all counties in Virginia and for several cities, each of which is officially named as the Circuit Court of that county or city.<sup>75</sup> The *Code of Virginia* declares that Circuit Court judges “shall during their service reside within their respective circuits” but does not address a transfer between circuits.<sup>76</sup> In relation to temporary

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<sup>71</sup> *Ibid* § 3.040. More likely, the Chief Justice assigns a “senior judge” to perform the duties on a temporary basis at the request of the District Court and subject to the consent of the senior judge. A senior judge is generally a retired (or eligible to retire) District Court judge who has served at least four years and who has applied to the Supreme Court for a commission as a senior judge which, when issued, is for a one-year term and is renewable. A senior judge in Nevada is not paid a *per diem* but is paid for time served on judicial duties as a proportion of the monthly salary the judge received as a full-time judge and is assigned a “home court” (duty station) for the purpose of calculating travel expenses.

<sup>72</sup> Va Const art VI § 7 [Va Const].

<sup>73</sup> *Ibid*; See also “[Judicial Selection Overview](#)” (last visited 3 October 2019), online: *Commonwealth of Virginia: Division of Legislative Services* <dls.virginia.gov/judicial.html>; “Names of candidates are submitted by General Assembly members to the House and Senate Committees for Courts of Justice”.

<sup>74</sup> Va Const, *supra* note 72 [emphasis added].

<sup>75</sup> Va Code tit 17.1 § 17.1-501A.

<sup>76</sup> *Ibid* § 17.1-507 [emphasis added]. This is reinforced by the express requirement in § 17.1-509: “Whenever a vacancy occurs in the office of judge, a successor, who shall be a resident of the same circuit, shall be elected....”

assignments and transfers, the state Constitution identifies the role of the Chief Justice of the Supreme Court as “administrative head of the judicial system” and confers specific authority to “temporarily assign any judge of a court of record to any other court of record except the Supreme Court” and to “assign a retired judge, with his consent, to any court but the Supreme Court.”<sup>77</sup> Such consent is not required of a sitting judge but, sensibly, is required of a retired judge—though logic suggests it should apply to both.

The system of legislative election replaces the voting public with political actors but maintains a direct link between the candidate and a specific judicial circuit where, as judge, the candidate must reside. As elsewhere, the flexibility of temporary reassignment exists in Virginia through the Chief Justice.

The “governor appointment” method of selection formally involves a direct nomination by the state governor. Maine is such a state. For initial appointments to the state Superior Court, the state *Constitution* authorizes the governor to “appoint” judicial officers subject to receiving a positive recommendation from a joint committee of the House and Senate and review by the full Senate, which can defeat the committee recommendation by a two-thirds vote.<sup>78</sup> The same process applies to the renewal of a judge’s term of office (seven years). State legislation provides that the Chief Justice of the Superior Court “shall assign the justices of the Superior Court to preside at various locations of the court”; that is, in the eight judicial regions into which Maine’s sixteen counties are divided.<sup>79</sup> Both the state *Constitution* and legislation are silent on the place of residence for judges within the state.

Maine’s Administrative Office of the Courts (“AOC”) confirmed the absence of place-of-residence restrictions (“a judge can reside wherever s/he decides”) and that the state does not cover moving expenses for a judge to relocate from one judicial region to another. Like the assigned “duty station” approach that applies to federal District Court judges, Superior Court judges in Maine are assigned a “duty station” that serves as the base point for calculation of travel and related expenses while on judicial business. When assigned to hold court in another judicial region, that location may be a temporary “duty station” for such purposes.<sup>80</sup>

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<sup>77</sup> Va Const, *supra* note 72, art VI § 4 [emphasis added].

<sup>78</sup> Me Const art X § 6.

<sup>79</sup> Me Rev Stat art IV § 101.

<sup>80</sup> Telephone conversation conducted on 17 January 2019.

The strict “governor-appointed” character of judicial appointments in Maine has been somewhat modified by executive order. The current Maine governor has followed her predecessor’s example of issuing an executive order to establish a committee to review and make recommendations on judicial appointments.<sup>81</sup> The governor selects the committee membership and retains the final decision on any selection.

The “assisted appointment” method of judicial selection has, since its adoption in Missouri, become increasingly popular and is characterized by the desire to reduce the potential for political considerations in the selection and appointment of judges. The vetting and recommendation functions of a non-partisan body is the key feature of the “assisted appointment” method of judicial selection.

The *Missouri Constitution* provides for superior courts of general jurisdiction, styled Circuit Courts,<sup>82</sup> which sit in 46 judicial circuits. The *Constitution* further provides that the term of office for Circuit Court judges is six years and that persons under consideration must be US citizens for ten years, qualified voters in the state for three years and residents of their specific circuit “for at least one year.”<sup>83</sup> Presumably, these qualifications continue during the judge’s term of office. The state *Constitution* is silent on the continuing residence of a Circuit Court judge but does expressly provide that the Supreme Court of the state can make temporary transfers of such judges “from one court or district to another.”<sup>84</sup>

The *Missouri Constitution*, as amended, expressly provides that Circuit Court vacancies in Jackson County and Saint Louis are to be filled for an initial term by the governor selecting one of three persons whose names were submitted by the “nonpartisan judicial commission.”<sup>85</sup> This is the assisted appointment method in Missouri. Where this “merit system” is not applicable (and in relation to a subsequent term of office when it

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<sup>81</sup> The most recent iteration of this independent body is the “Governor’s Judicial Nominations Advisory Committee” pursuant to Executive Order No 7 FY 19/20 (10 April 2019).

<sup>82</sup> Mo Const art V § 1.

<sup>83</sup> *Ibid* §§ 19, 21 (respectively).

<sup>84</sup> *Ibid* § 6. Having addressed temporary transfers but not permanent transfers, the interpretative rule *expressio unius est exclusio alterius* may be used.

<sup>85</sup> *Ibid* § 25(a). The section also provides that, if the governor fails to make an appointment within sixty days, the commission “shall appoint one of the nominees to fill the vacancy.” By further amendment, county electorates can adopt this “merit system” by popular vote, which the voters have done in four additional counties.

is), Circuit Court judges are selected by partisan election or re-election in each circuit or circuit division.<sup>86</sup>

Finally, Missouri law makes travel allowances available to Circuit Court judges in certain circumstances. First, it is available to judges who must travel for judicial duties, if their circuit consists of a single county with a population smaller than 200,000 and there is more than one court location at which to hold court; second, it is available to Circuit Court judges if their circuit consists of more than one county.<sup>87</sup>

## **E) Conclusion on Comparative Analysis**

As outlined above, the comparative analysis of place of residence at initial appointment generally considers it as a matter of constitutional and legislative concern. This is consistent with the reasoning of the Supreme Court of Canada in *PEI Reference*. Both the federal Canadian court system and the US federal and state court systems expressly address place of residence at and after selection and assuming office.

The Canadian Federal Court system has one rule: place of residence is within the National Capital Region or a set distance thereof. The US federal and state court systems similarly constrain freedom of movement in relation to place of residence. The US rationale is linked to the method of selection and is logically consistent because of the nature of the method of selection and the identification of the specific judicial office for which the candidate is selected. To permit a judge to relocate permanently to a different judicial district is to deprive the appointing power (i.e. governor or electorate) of the constitutional and/or legislative authority to select the judges who are to sit in judgment.

The exception is the High Court of England and Wales in relation to which place of residence is not the subject of legislation and is left to the decision of the individual judge as a practical matter.

What is remarkable in these models is the consistent absence of a voice for the executive government at any level. That temporary transfers and assignments are left to the decision of the judiciary reflects the clear view that such decisions are internal matters for the judiciary itself. In all the examples discussed, the federal and state executives have no independent

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<sup>86</sup> See results of the 6 November 2018 general state election: "[Missouri Election Results](#)" (last visited 8 October 2019), online: *Missouri Secretary of State* <[www.sos.mo.gov/elections/s\\_default](http://www.sos.mo.gov/elections/s_default)>.

<sup>87</sup> Mo Rev Stat §§ 478.017–478.020 (1979).

and decisive voice. Only in respect of England and Wales is there an executive voice—and not on decision, but consultation.

## 7. Conclusion

We conclude that Bill 17 is unconstitutional to the extent that it expressly subjects a judge's change of place of residence to the consent of the Minister of Justice (or any government minister). In other words, subsections 12.01(3)(4) and (5) of the *Judicature Act* are unconstitutional.

We hope to have shown here that place of judicial residence was at issue in two of the decisions in the *PEI Reference* and was addressed by the Court as an issue distinct from the others in that case. The Court's holdings are conclusive. That those decisions addressed provincial court judges and not superior court judges is, in our view, irrelevant to the analysis of judicial independence.

We conclude by considering the Minister's various rationales for requiring his consent. First, the policy goal of ensuring that the courts have the capacity to provide bilingual court services. We have no doubt that the goal is worthy in an officially bilingual province. But rather than being addressed through place of residence, it could easily be addressed by amending section 4(1) of the *Judicature Act* to provide not just that a judge of either the Family or Trial Division of the Court reside in each of the listed municipalities/judicial districts but also that at least one or two judges be bilingual. This, the government and the Legislature did not do.

It will be recalled that the other rationales were based on workload issues that may impact scheduling and the level of service in a judicial district when a judge transfers. Yet the *Judicature Act*, subsection 12.01(1) (b), already declares it to be the Chief Justice's responsibility to "determine the total annual, monthly and weekly workload of individual judges." That would likely include not only the number of matters before each judge in the past week, month, or year but also the number conducted in either or both official languages and the number of future matters already scheduled or pending. Chief Justices have likely been monitoring the work of their courts since the courts began. In any event, the workload rationale would appear to be an internal matter for the court subject to the umbrella of judicial independence. It cannot justify a requirement of ministerial consent to change a judge's place of residence. It is not rational to assume that a Chief Justice or a judge would undermine the administration of justice in a judicial district by means of a change of a place of residence.

There was also a twofold rationale of giving the government a voice on judges' place of residence and on ensuring that there was a sufficient number of judges in each judicial district. The latter concern is already covered by section 4(1) of the *Judicature Act*, which requires there to be "at least" one judge in each judicial district. If the number of judges per district had really reached the level of ministerial concern, it might be expected that the amending legislation would have simply increased the number of judges in certain judicial districts. This, the government and the Legislature did not do.

There was then the wish expressed for decisional voices for the Chief Justice, the Minister and the individual judge. In the context of Bill 17, the Minister was the only one without an effective voice because the Chief Justice and the three judges who had requested transfers had already and individually expressed a voice and it was of consent. Distilled, it appears that the government wanted a controlling voice (read "veto") on judges' places of residence. But why should the executive intervene in the decision of where an individual judge is to reside? We are concerned that, despite protestations of benign intent and superficially plausible rationales, there may be unarticulated reasons for such interventions, whether now or in the future. In short, the intervention of the executive in the form of a veto on judicial moves re-politicizes that which the Supreme Court has worked so assiduously to depoliticize.

Our analysis of international and comparative principles fully supports these conclusions. Executive silence on a judge's place of residence is consistent with respect for judicial independence. Silence is often a good position to take. In the 1997 American Bar Association *Report on Separation of Powers and Judicial Independence*, the authors wrote:

... Congress has, throughout our history, resisted the temptation to test the logical extremes of its powers over the judiciary. Rather, Congress has for the most part limited its regulatory reach over the courts to exercising periodic oversight, and delegating to the judiciary the means necessary for the courts to regulate themselves. As a consequence, constitutional crises have been averted, and the interbranch relationship has usually been cooperative and constructive.<sup>88</sup>

This view has much to commend to Canadian legislators. As expressed in the 2017–2018 annual report of the Canadian Judicial Council: "The separation of powers between the executive, legislative and judicial

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<sup>88</sup> ["An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence"](https://www.americanbar.org/content/dam/aba/migrated/2011_build/government_affairs_office/independentjud.authcheckdam.pdf) (4 July 1997), online (pdf): *American Bar Association* <[www.americanbar.org/content/dam/aba/migrated/2011\\_build/government\\_affairs\\_office/independentjud.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/government_affairs_office/independentjud.authcheckdam.pdf)>.

branches of government rightly ensures that the first two branches respect the independence of the third.”<sup>89</sup>

When appointed as judges, lawyers often have spouses engaged in their own careers and their communities; they may also have children engaged with their schools, friends and community activities. It is no secret that, everywhere in Canada, there are judges who have taken on the financial burden of renting apartments in the communities where they exercise their judicial tasks and have not uprooted their spouses and children from their home communities. This may be a short- or long-term solution. But, if a judicial vacancy opens in a judge’s home community, should the judge not be able to fill that vacancy as long as reasonable and efficient access to justice continues? That is clearly a decision for the Chief Justice and the judge, perhaps after consultation with—not consent from—the Minister of Justice. The constitutional imperative of judicial independence requires as much.

Finally, while this article has focused on judicial independence in the institutional context, there is also the individual context in terms of the relationship between the chief justice and an individual judge. What is the proper response to an errant chief justice who reassigns or refuses to reassign a judge for improper reasons? What remedy is available to the individual judge? As discussed, it seems obvious that neither a chief judge nor a government minister can “move judges around” for improper reasons. Reassignments or relocations must have a proper administrative purpose. In *Wachowich v Reilly*,<sup>90</sup> the Alberta Court of Appeal specifically found that Chief Judge Wachowich’s attempted reassignment-relocation of Provincial Court Judge Reilly had an underlying disciplinary purpose that could not be disguised as an administrative purpose. The judge successfully sought judicial review of the Chief Judge’s decision and the Court of Appeal unanimously dismissed the Chief Judge’s appeal. This is a prime example of judicial review as a remedy to redress conflict between a chief judge and judge. Another avenue is a complaint to the appropriate federal or provincial judicial council. The Canadian Judicial Council has wide authority to “investigate any complaint or allegation in respect of a judge of a superior court”<sup>91</sup> and the provincial councils have similar authority in relation to provincially-appointed judges.<sup>92</sup> There is

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<sup>89</sup> “[2017–2018 Annual Report—Highlights](http://www.cjc-ccm.gc.ca/cmslib/ar17-18/en.html)” (2017), online: *Canadian Judicial Council* <[www.cjc-ccm.gc.ca/cmslib/ar17-18/en.html](http://www.cjc-ccm.gc.ca/cmslib/ar17-18/en.html)>.

<sup>90</sup> *Wachowich v Reilly*, 2000 ABCA 241.

<sup>91</sup> *Judges Act*, RSC 1985, c J-1, s 63(2).

<sup>92</sup> See e.g. *Provincial Court Act*, RSNB 1973, c P-21, s 6.6(1): “The Judicial Council shall receive and the chairman shall refer ... for investigation all written communications suggesting any misconduct, neglect of duty or inability to perform duties on the part of a judge”.

no evidence that either of these remedies are widely needed or used in Canada, which also suggests that there is little need for the executive to be concerned with the need to correct a chief justice or chief judge in his or her decisions regarding judicial transfers.