Judicial Independence Under a Charter of Rights Australian Snapshot – Canadian Camera

by The Honourable Justice Brian Sully*

Introduction

Canada has had since 1982 a constitutionally entrenched Charter of Rights and Freedoms. Australia has, as yet, no such constitutional enactment, but there is abroad the notion that it should have.

A useful point of reference for an overview of the debate currently emerging in Australia is a recently published work of Wilcox J of the Federal Court of Australia: *A Charter of Rights for Australia?* [2]. Wilcox J, touches glancingly on the point with which this article will be primarily concerned, namely the effect of the enactment of a constitutionally entrenched Charter of Rights upon the constitutional independence of the Judiciary. Wilcox J says:

> "... there is no doubt that the composition and decisions of the United States Supreme Court are today politically controversial in a manner and to an extent unknown for Australian courts. I am sure most Australians would share my view that, if an Australian Charter of Rights would similarly politicise the High Court of Australia, any benefits it offered would be purchased at too high a price." [3]

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[1] An electronic version of this paper is available at the Macarthur Law Review's Web site. (http://libweb.macarthur.uws.edu.au/maclr/maclr.htm)

[2] Sydney, Law Book Company; 1993.

[3] ibid Preface viii.

Wilcox J subsequently makes a very detailed review of both the US Bill of Rights and the Canadian Charter. He draws from this study a conclusion that, on balance, an Australian Charter would be worthwhile in principle, and workable in practice. In reasoning to that conclusion, Wilcox J poses and discusses what he describes as "substantial issues". These issues he defines as follows:

* "... is there a need for a Charter, or is it sufficient for us to continue to rely on common law protections?"

* "... given that it would transfer some power from legislatures to the courts, is a Charter compatible with democratic principles?"

* "... having regard to their composition and procedures, are courts capable of satisfactorily discharging the responsibilities which a Charter would impose upon them?"

* "... would this new role have such an effect upon the courts as to diminish their ability satisfactorily to perform their existing functions?" [4]

Wilcox J prefaces his discussion of these four issues by engaging in an exercise that he describes as "clearing the debris". He stresses the importance of comparing like with like, and expresses agreement with a comment of the Australian Constitutional Commission that it is not worth the trouble of seeking to amend the Australian Constitution so as to include in it an entrenched statement of rights: "... which are neither legally binding nor enforceable by the courts". In that context Wilcox J says:

> "And, if those principles are to be enforceable by the courts, this must be by an independent judiciary willing and able to grant relief to an individual against a government. ... In considering an enforceable Australian Charter, it is misleading to refer to totalitarian countries whose judges are creatures of the executive". [5]

It seems to the writer, with respect, that this is to beg the very question at which the present article is aimed: i.e. the question whether the interests which are going to be affected by an enforceable Charter can be expected to accept a scheme of enforceability predicated upon the existence of a genuinely independent judiciary.

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[4] ibid at 219.

[5] ibid at 215.

That the question is a real one is supported by some observations made by Sir Ninian Stephen, then a serving Justice of the High Court of Australia, in a paper contributed by him to a collection of papers edited by Shetstreet and Deschenes under the title: *"Judicial Independence: The Contemporary Debate"*. [6] Sir Ninian's paper is based upon a public lecture delivered by him at the University of Melbourne in September 1981. The paper is entitled: *"Judicial Independence: A Fragile Bastion"*, and in it Sir Ninian says:

> "There are two quarters from which activist judicial law making may inadvertently arouse powerful opposition anxious to do battle with judges whom they have come to perceive as their opponents, and perhaps for that purpose to extend their attack to include the concept of judicial independence itself. First there are all those interested groups injured by particular instances of judicial law-making; then there are the other arms of government. I do not, of course, suggest that either will engage in anything so sinister as a premeditated undermining of the judicial arms of government. Nor need I; my thesis is indeed made out if what happens is no more than sustained attacks upon the courts, magnified in their effect upon the public consensus by the distorting mirrors of the media ... Isolated attacks, the judiciary can no doubt survive unscathed, but it may be different if any thorough-going policy of judicial law-making is undertaken. It is not difficult to see how such attacks, having ready media exposure, may over time erode an existing community consensus of support for an independent judiciary, converting it to a conviction that the activities of the judiciary must be shackled. In that direction lies the path towards substantial loss of judicial independence. Although that independence is supported by provisions as to the tenure and remuneration of judges which may make it seem relatively unassailable, in times of inflation the latter is an illusory safeguard and the former may not, of itself, in the long term, prove effective." [7]

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[6] Dordrecht, Boston, Higham Ma. U.S.A, M, Nijhoff, Distributors for the US and Canada, Kluwer Academic Publisher, 1985.

Sir Ninian Stephen's paper appears as Chapter 49 in the publication. Sir Ninian was successively a Judge of the Supreme Court of Victoria; a Justice of the High Court of Australia; and Governor-General of Australia. Sir Ninian contributes a short Foreword to Wilcox J's book, but what he there says does not appear to the writer to be in any way at odds with the opinions expressed in the paper here cited.

[7] ibid at 539, 540.

The Concept of the Constitutional Independence of the Judiciary

The relevant historical background is conveniently summarised as follows by Professor P. H. Lane, sometime Professor of Constitutional Law at the University of Sydney:

> "In earlier times and especially during the reign of the Stuarts judges held office precariously, durante bene placito. Occasionally and certainly after the Revolution, judges secured some kind of independence of tenure. quamdiu se bene gesserint. Finally the privileged independence of the judges was wrung from the Crown. And so, the Act of Settlement 1701, ... read: 'Be it enacted ... That ... judges' commissions be made quamdiu se bene gesserint and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them'. Apart from the times when the Crown did exercise its arbitrary pleasure, the judges came under the good-behaviour provision, i.e. the judges were given an estate for life in the office. But it was a conditional estate. The condition that gave rise to forfeiture was 'incapacity' or 'misbehaviour'. 'Incapacity' mean 'mental or bodily infirmity'. 'Misbehaviour' was constituted (I) by an act within the judicial function, i.e. positively, by an improper exercise of the judicial function, or negatively by a wilful neglect of duty or non-attendance, or (ii) by an act outside the judicial function; and this latter act was narrowly defined as an act found by the ordinary courts and leading to a conviction for a crime which rendered the judge unfit to exercise office." [8]

That this definition is representative of the way in which the basic concept of judicial independence is traditionally expressed, does not entail that the concept either has always been, or is now, generally accepted in non-legal circles. Neither does it entail a general acceptance of the proposition, implicit in the basal concept, that Judges must necessarily occupy, and be seen to occupy, a special place in the life of the community, not for the mere personal aggrandisement of the Judges themselves, but for the constant, practical and fearless reinforcement of the rule of law itself.

Two articles written for the Australian Law Journal by Professors Zelman Cowen and David Derham, as they then were, provide convenient examples

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[8] P.H. Lane: *Commentary on the Australian Constitution* Sydney, Law Book Company, 1986 at 371, 372.

of how, apart altogether from an exacerbating tendency stemming from the conventional curial resolution of Charter-based rights, the executive arm of government has not always set the desirable example of proper respect for the constitutional independence of the Judiciary. Especially relevant in that respect is the remark, reported in one of the articles, made by a particular Member of the Victorian Legislative Assembly during what was apparently a very acrimonious debate, in 1931, about certain proposals as to judicial remuneration: "There is too much respect paid to these people".[9]

It should not be thought that this kind of surly posturing is a thing of the past. In 1993, the Parliament of NSW debated a Bill for an Act to reform the legal profession.[10] One provision of the legislation, now enacted, establishes a Legal Practitioners Admission Board. This Board replaces two statutory authorities, the Barristers Admission Board, and the Solicitors Admission Board, and makes the new Board the sole admitting authority. For the first time ever, the Judges of the Supreme Court constitute a minority of the membership of the sole admitting authority. During the course of the debates, an amendment was moved to the end of increasing the judicial membership of the new Board. The Member moving the amendment put these submissions in support of his proposal:

> "Suffice it to say that last night I said in detail that both the bar and the judges of the Supreme Court are highly critical of the proposed composition of the Legal Practitioners Admission Board. The judges, in particular, note that for the first time in the history of this State they will be in a minority on the Admission Board. The judges put the cogent and persuasive view that the Admission Board needs the political neutrality and independence of the judges.
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> ... The views of the judges about the composition of the Admission Board are supported by the bar, which has urged the Opposition to press for the board to be constituted in the manner that the Opposition suggests, or, at the very least, to maintain a majority representation of the judges of the Supreme Court. After all, the practitioners are being admitted as practitioners of the Supreme Court of New South Wales.

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[9] The earlier article is entitled "The Independence of Judges" (1952-1953) 26 *ALJ* 462. The later article is entitled: "The Constitutional Position of the Judges" (1955-1956) 29 *ALJ* 705. The quoted comment is at 711.

[10] The Bill was the *Legal Profession (Reform) Bill, 1993*. The quotations from the Parliamentary Debates are taken from the official Hansard report of the Debates of the Legislative Council of New South Wales on 28 October, 1993.

It is by no means unreasonable and it follows long practice that the judges should maintain their majority on the Admission Board." [11]

The Minister in charge of the Bill made the following response:

"At present the Chief Justice and the judges of the court constitute a majority on each board. However, two points must be noted. First, the separate admission boards often meet jointly, particularly when dealing with issues of admission policy as distinct from individual applications. Second, I understand that the decision-making process rarely involves a divided vote. Differences of opinion are primarily resolved through discussion. Four of the nine members of the proposed Legal Practitioners Admission Board will be judges. Only in the circumstance where both branches of the legal profession and the Attorney General's representative take a position contrary to the judges on admission issues could the judges be outvoted. Such a circumstance is highly unlikely. It must also be remembered that admission as a barrister or solicitor carries with it the consequence that such legal practitioners are officers of the court.

Education and practical training standards appropriate to legal practice – which are of great concern to the professional councils – are also involved. ... If there is a dispute and a decision has to be taken, the numbers will be equal between the judges and the members of the legal profession. When that occurs, it will be appropriate for the fifth person to make a decision, in support of either the judges or the legal profession. Nothing could be fairer than that. The proposal contained in the amendment is advocated by the Bar Association and the judges, not by the largest section of the legal profession - the solicitors. The proposal seeks to retain the status quo of dominance of the bar and the judiciary over admissions. The Bill proposes a system of fairness, not of dominance."[12]

With respect, this reasoning is confused and confusing. It acknowledges, correctly, that admission to legal practice, whether as barrister or solicitor, constitutes the admittee an officer of the Supreme Court. It becomes, thereupon the public duty and responsibility of the Judges of the Supreme Court to ensure that their officers are, to begin with, persons proper to be admitted to such practice. This was the rationale of the former judicial voting majority on each of the former admission boards. Not only is that

[11] ibid at 4646.

[12] ibid at 4646, 4647.

fundamentally important public protection swept away, but no reason, other than a merely rhetorical one that might fairly be thought openly insulting to and contemptuous of the Judges, is advanced in justification of the change.

The same might be said of the following response to an amendment which was moved to the end of providing that a Legal Profession Advisory Council, newly established by the legislation, should be chaired by the Chief Justice or his nominee:

> "The Government takes the view that it is, first, inappropriate to put the Chief Justice into that position but, second, it is inconsistent with the purpose of the legislation, which is to ensure that competition policy which is in the interest of the total community is adhered to. The whole purpose of the legislation is to break down the restrictive practices that have bedevilled the legal profession in this State, this country, and perhaps in the whole of the common law world for generations, if not centuries.
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> This can only be done by making certain that it is an independent committee where there is at least a balance of views between the lawyers and the lay people and, if there is a divided position, a prominent independent chairman cuts the Gordian knot. To leave that responsibility to the Chief Justice is not appropriate. By leaving the lawyers in charge, it would effectively mean that the intention of the legislation would not be achieved, the status quo would potentially be retained. If there is anything in this legislation that will take the legal profession into a new era, it is the ability to get rid of restrictive practices." [13]

This statement is, surely, egregiously insulting to the Chief Justice of the Supreme Court. The clear inference which is invited is that the Chief Justice cannot be trusted to function as a "prominent independent chairman" of the new Council. There could scarcely be a more stark example of what Sir Anthony Mason, then Chief Justice of the High Court of Australia, identified when, during an address opening the 1993 Conference of the Supreme Court, he remarked upon what he described as "... the decreasing vitality of two old conventions. The first was that the Attorney General defends the Judiciary; the second was that politicians exhibit restraint in criticizing the Judiciary".[14]

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[13] ibid at 4646, 4647.

[14] "A Brief Perspective on the Judiciary": Opening Address – New South Wales Supreme Court Judges' Conference: 30 April 1993, at 3.

In an article recently published in the Australian Bar Review,[15] Justice M.D. Kirby, the then President of the Court of Appeal Division of the Supreme Court of New South Wales, makes a detailed and very revealing historical review of the Australian experience concerning Executive subversions of the fundamental constitutional principle of judicial independence. His Honour is concerned primarily with a device which has become increasingly popular with Executives both of the Commonwealth and of the States, namely the device of simply abolishing particular Courts or Tribunals, the members of which have, pursuant to their establishing statutes, security of tenure in accordance with the conventional Act of Settlement terms, and of thereupon reconstituting the particular Court or tribunal, but without reappointing some particular member(s), and without observing the traditional alternative of redeploying to an equivalent Crown appointment carrying the same terms of tenure and of remuneration. His Honour takes note of the provisions of the Australian Constitution which entrench, in respect of the Justices of the High Court of Australia and of the Judges of such other Courts as the Federal Parliament may establish, the conventional Act of Settlement provisions as to tenure and remuneration, and proceeds:

> "The State Constitution Acts of Australia included provisions similar to those in ... the Australian Constitution to protect the tenure of judges in the States. But, save for any entrenched provision, those constitutions could readily be amended. Their amendment does not, generally, require approval of the people at referendum. It was this differentiation which exposed appointees to Federal offices (who were not justices of the High Court or of courts created by the Federal Parliament) and all State appointees to courts and tribunals to vulnerability as to their legal tenure. Eventually, the point had been driven home, by numerous illustrations, that all that protects such tenure is a convention that Parliaments and Executive Governments of Australia will respect the tenure out of deference to the high constitutional principle which it upholds. The lesson of more recent times in Australia is that such respect has been eroded. It is not too much to say that it now lies in ruins." [16]

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[15] "The Abolition of Courts and Non-Reappointment of Judicial Officers in Australia": (1995) *12 Australian Bar Review*, at 181-209.

[16] ibid. at 186

Professors Cowen and Derham conclude the second of their two articles with the following observations and advice:

> "The two episodes which we have discussed in this and the earlier paper appear to expose a dangerous attitude on the part of the executive government. It appears that the Victorian government in 1865, 1932 and 1954 took the view that the judges were members of the public service and that these particular members of the public service need to be placed under some kind of control by the executive. There is likewise little doubt that the Victorian government which in 1952 directed an admonition to a County Court judge took a similar view. It is necessary for all those who understand our history and see the dangers in the growth of government by the executive in this century to raise their voices on proper occasion to protest against governmental practices which will diminish the effective independence of the judiciary. In a sense the judges are civil servants and servants of the Crown. But it is improper and dangerous to regard or to allow them to be regarded as a part of the general public or civil service. Unless we are to live again some of the more painful episodes in our history, we must remember that the judges and the courts they staff have for a long time occupied a very special position in the constitutional structure; and that position should be regarded tenderly by the other branches of government."[17]

Obviously, such an approach pitches at the very highest level the concept of judicial independence. Can the approach survive in Australia the enactment there of a constitutionally entrenched Charter of Rights? Are there relevant lessons to be learned from the Canadian experience? If so, do those lessons suggest that, in the words of Wilcox J.:

> "... any benefits ... offered would be purchased at too high a price"?

Judicial Independence under the Canadian Charter: Introduction

Section 11 of the Canadian Charter is headed: 'Proceedings in Criminal and Penal Matters". The section enumerates nine particular rights which are to enure for the benefit of: "(a)ny person charged with an offence ...". One such right is stated to be a right:

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[17] 29 ALJ at 713.

"(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal [emphasis added].

This right has been invoked in a number of cases which have found their way ultimately to the Supreme Court of Canada, which is the Canadian equivalent of the High Court of Australia. Two such decisions, in particular, are of present relevance: *Valente v The Queen*[18]; *The Queen v Lippé*[19]. Two further decisions, - *The Queen v Beauregard*[20]; *Mackeigan v Hickman*[21] - do not raise directly a s.11(d) point, but they do touch in various ways the content of the principle of constitutional judicial independence.

It is proposed to examine briefly each of these decisions from the point of view only of the light cast by each upon the effective maintenance of the judicial independence of a Court which is called upon to adjudicate Charter-type claims of right.

Before doing so, it is convenient to attempt a brief overview of the current Canadian situation respecting judicial independence.

The basal constitutional provisions are those contained in a small group of sections comprising Part VII of the Canadian Constitution. Of those provisions, s96 provides that the Governor-General of Canada: "shall appoint the Judges of the Superior, District and County Courts in each Province ...", with certain stipulated exceptions not here relevant. Sub-sections 99, 100 and 101 provide as follows:

"99 (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, and shall be removable by the Governor-General on Address of the Senate and House of Commons.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

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[18] *Valentine v The Queen* [1985] 2 SCR 673.

[19] *The Queen v Lippé* [1991] 2 SCR 114.

[20] *The Queen v Beauregard* [1986] 2 SCR 56.

[21] *Mackeigan v Hickman* [1989] 2 SCR 796.

100 The Salaries, Allowances and Pensions of the Judges of the Superior District, and County Courts, ... shall be fixed and provided by the Parliament of Canada.

101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

These provisions are better understood in the light of their historical background which is summarised conveniently as follows by Professor Hogg in his classic work: Constitutional Law of Canada[22]:

"At the time of consideration, each of the uniting provinces had its own system of courts modelled on the English courts. The system included a 'superior' court or courts with jurisdiction throughout the province, unlimited by subject matter. Below the superior court in all provinces except Quebec were 'county' or 'district' courts with jurisdiction limited by territory to a local county or district as well as by subject matter. Below the county or district courts were 'inferior' courts staffed by magistrates or justices of the peace with jurisdiction over small civil claims and minor criminal offences. All these courts were expressly continued after confederation by s.129 of the Constitution Act, 1867, and their organisation and jurisdiction remained the responsibility of the provinces by virtue of s.92(14).

The structure of the courts in each province including those provinces admitted after confederation, did not until recently depart radically from the pre-confederation pattern. In each province, despite variations in nomenclature, organisation and jurisdiction, it was still possible to identify the three tiers of the judicial system: (a) 'superior' court or courts, which in each province now includes a court of appeal as well as a trial division; (2) the 'county' or 'district'; courts which did not however exist in Quebec; and (3) the 'inferior' courts which in most provinces are now called 'provincial courts'. In the 1970's, the idea of 'amalgamating' the county and district courts into the superior court became popular among reformers. What is involved in amalgamation is the abolition of the county and district courts and an increase in the size of the superior court."

[22] Scarborough, Ontario, Carswell, 3rd Ed. 1992 at 162.

In addition to the foregoing historical background, it needs to be understood that the Canadian Constitution, in s.92 thereof, allocates a range of exclusive legislative powers to the Provincial Legislatures. One such head of power is:

> "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

During this power and the practical consequences of its exercise, Professor Hogg says:

> "But these courts, whether they were in existence at the time of confederation or were established later under s.92(14), are not confined to deciding cases arising under provincial laws. The provincial power over the administration of justice in the province enables a province to invest its courts with jurisdiction over the full range of cases, whether the applicable law is federal or provincial or constitutional. Then, there is an appeal from the provincial court of appeal, which stands at the top of each provincial hierarchy, to the Supreme Court of Canada. Although the Supreme Court of Canada is established by federal legislation, it is more of a national than a federal court, because it is a general court of appeal for Canada', with power to hear appeals from the provincial courts (as well as from ... [other] ... federal courts ...) in all kinds of cases, whether the applicable law is federal or provincial or constitutional. The position of the Supreme Court of Canada, with its plenary jurisdiction, at the top of each provincial hierarchy, has the effect of melding the ten provincial hierarchies into a single national system." [23]

Professor Hogg expresses the view that the provisions, earlier quoted, of Part VII of the Canadian Constitution entail, when correctly construed, that the protections embodied in ss96 - 100 do not apply to federal courts created pursuant to the power conferred in that behalf by s101. Professor Hogg points out that this proposition, if correct, entails in its turn that the Canadian Government could confer upon some other authority than the Governor-General the power of appointment; could leave to mere administrative determination federal judicial remuneration; and could invest non-judicial bodies or persons with jurisdictions, functions and powers of

[23] ibid at 163.

a kind traditionally exercised by superior, district or county courts. Presumably this means, [but setting to one side for the moment any specific provisions of the Canadian Charter], that the Canadian Government could, in effect, marginalise the Federal Courts, including to some extent at least, the Supreme Court itself, by such delegations of judicial function and power to mere administrative bodies; and could, as well, so structure those mere administrative bodies as to depart from those standards of secure tenure and otherwise that have traditionally been recognised as essential to effective judicial independence. Professor Hogg himself does not go so far, and would probably take the view that those apprehensions are unreal in that they would not be acceptable in Canadian society, - [and the point can be made in exactly the same way about Australian society], - by reason of the deeply entrenched and prized tradition of effective judicial independence. In my view, such an approach has serious weaknesses, and I shall say more about them in the conclusions which this paper will offer.[24]

The Decision in *Valente*[25]

This case arose out of the refusal of a Judge of the Criminal Division of the Provincial Court of Ontario to hear a particular matter until it should be first determined that he was an independent tribunal within the meaning of that expression in s11(d) of the Charter. The proposition that the Judge did not satisfy the requirements of the Charter was based upon arguments summarised as follows:

"1. ... [T]he salaries of the provincial judges are determined by the executive branch of the government without the benefit of the scrutiny of the legislature.

2. The judicial salaries are not a charge on the consolidated revenue fund, but are subject to annual appropriation.

3. Neither is there a pension charged on the consolidated revenue fund.

4. Nor is there any judicial pension other than one provided for under the Public Service Superannuation Act, and this notwithstanding s34 of the Provincial Courts Act.

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[24] ibid at 182-184 under the heading: "Appointment, Payment and Tenure of Federal Judges"

[25] *Valentine v The Queen* [1985] 2 SCR 673.

5. Both the Act and the regulations provide for control of the judge and could be used to influence a judge or to apply real or perceived pressure to judges generally."

Some of the sections that are capable of destroying the appearance of independence are as follows:

"6. A judge may be appointed to sit during pleasure - s5(4) of the *Provincial Courts Act*. Moreover, any provincial court judge appointed after attaining the age of fifty-five years cannot receive any pension under the Public Service Superannuation Act unless the cabinet reappoints him during pleasure after he reaches retirement age for a sufficient duration that he attains his minimum years of service to qualify for pension. Under the *Judges Act*, it is the Judge who chooses whether to retire. Can a provincial court judge under such a disability be seen to be independent in a cause involving the Attorney General?

7. The Attorney General can appoint senior judges at greater pay than ordinary judges.

8. The executive branch can authorise judges to engage in any business, trade or occupation.

9. The Attorney General can authorise certain judges to do arbitrations, be conciliators, be a member of a police commission for which additional remuneration is received.

10. The executive branch purports to be able to appoint a rules committee composed of persons not necessarily judges for rules under the Criminal Code.

11. The executive branch has the power to make regulations for the inspection and destruction of judges' books, documents and papers (s34(1)(b) of the *Provincial Courts Act*).

12. In the regulations the Attorney General can grant leave of absence for up to three years and the executive branch can grant it with pay.

13. The last mentioned regulation incorporates regulation 881 where judges are referred to as civil servants.

14. The judge has the same sick leave as a civil servant and his salary is reduced in the same manner as a civil servant when sick.

15. The Deputy Attorney General can require the judge to attend for medical examinations and to produce directors' certificates.

16. A Deputy Attorney General can grant a judge a leave of absence for up to a year for employment with the Government of Canada or other public agency. A provincial judge in Ontario has been made a Deputy Minister while retaining his position as a judge, a matter deplored by Chief Justice Bora Laskin of the Supreme Court of Canada.
17. The judge receives the same financial benefits as the other civil servants as set out in s77, namely: (a) a basic life insurance plan, (b) a dependent's life insurance plan, (c) a long-term income protection plan, (d) a supplementary insurance plan, (e) a dental insurance plan. Some of these plans are paid for by the government and all affect the financial status of the judge.
18. The *Provincial Courts Act* provides a procedure to remove a judge after an inquiry but it does not require a vote in the legislature as there is with a supreme court judge. The *Public Service Act* has a regulation under section [sic] 12 and 13 which includes a provincial court judge. The significance of this is that a provincial court judge can be classified as a Crown employee and therefore under some direction by the executive branch of the government and there may be other Acts which have regulations that affect the provincial judges."

The Supreme Court of Canada held that the Judge did satisfy the Charter requirements.

The reasoning of the Court commences with the drawing of a distinction between the Charter requirements of both impartiality and independence. Impartiality is said to refer to: "... a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. ... [It] ... connotes absence of bias, actual or perceived". Independence it is said: "... reflects or embodies the traditional constitutional value of judicial independence. As such it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees".[26]

The Court then points out that judicial independence, as thus understood, had two related facets, namely, that of the personal independence of any particular Judge; and that of the collective or

[26] ibid at 685.

institutional independence of the Court to which that Judge belongs. The test for deciding whether in a given case such a composite judicial independence exists is:

> "... as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception 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."[27]

The Court then turns to the problem of defining those essential conditions or guarantees of judicial independence in the context of s11(d) of the Charter. The discussion commences with some general observations about the changing conceptions of judicial independence and of those safeguards necessary for its maintenance. The reasoning of the Court is caught in the following passage:

> "Conceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence in as ample a measure as possible. Opinions differ on what is necessary or desirable or feasible. This is particularly true, for example, of the degree of administrative independence or autonomy it is thought the courts should have. It is also true of the extent to which certain extra-judicial activity of judges may be perceived as impairing the reality or perception of judicial independence. There is renewed concern about the procedure and the criteria for the appointment of Judges as that may bear on the perception of judicial independence. Professional and lay concern about judicial independence has increased with the new power and responsibility given to the courts by the Charter. ... It would not be feasible,however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s11(d) of the Charter, which may have

[27] ibid at 689.

to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence for purposes of s11(d) must bear some reasonable relationship to that variety. Moreover it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s11(d) and not any particular legislative or constitutional formula by which it may be provided or guaranteed."[28]

Against that background, the Court takes up and dismisses fairly peremptorily a submission, which had been made by the Provincial Court Judges' Association, to the effect that there should be a uniform standard of judicial independence for the purposes of s11(d) of the Charter, and that it should reflect the provisions, previously noted herein, of ss 99 and 100 of the Canadian Constitution. The Court, rejecting the submission, reasons as follows:

"These provisions are generally regarded as representing the highest degree of constitutional guarantee of security of tenure and security of salary and pension. They find their historical inspiration in the provisions of the Act of Settlement of 1701 ... Provincial court judges contend that they should have the same constitutional guarantees of security of tenure and security of salary and pension as superior court judges. Whatever may be the merits of this contention from the point of view of legislative or constitutional policy, I do not think that it can be given effect to in the construction and application of s11(d). To do would be, in effect, to amend the judicature provisions of the Constitution. The standard of judicial independence for purposes of s11(d) cannot be a standard of uniform provisions. It must necessarily be a standard that reflects what is common to, or at the heart of, the various approaches to the essential conditions of judicial independence in Canada."[29]

The Court turns, next, to a more precise formulation of what it sees as the essential matters which must be objectively discernible if it is to be found that a particular Judge or tribunal enjoys judicial independence sufficient to satisfy s11(d) of the Charter. The Court identifies three such essentials:

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[28] ibid at 692, 693.

[29] ibid at 693, 694.

The first such essential is described as: "security of tenure". The core of this concept, as envisaged by the Court, appears in the following passage, in which the Court expresses its conclusion in the instant case:

> "... that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s.11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."[30]

The Court then looks at the more particular point taken in para 6 of the objections as hereinbefore summarised. The Court holds that the provisions for appointment at pleasure are inconsistent with the essential condition of security of tenure; notes that, in any event, they did not purport to apply to the particular Provincial Court Judge involved in the instant case; and expresses approval of certain statutory amendments which had been made shortly prior to the Supreme Court hearing, and for the manifest purpose of assuaging any concerns that might be felt about appointments at pleasure. In reasoning to these views, the Court spends some time considering the role of tradition as a buttress of effective judicial independence. I shall return to these passages; and, also, to the Court's reasoning concerning the legislative amendments to which I have referred.

The second essential of judicial independence is described as:

> "... financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a person that depends on the grace and favour of the Executive." [31]

The Court considers in detail the legislative provisions in point, and concludes that they do not infringe this, second, essential of judicial independence. It is not necessary for present purposes to go into the fine

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[30] ibid at 698.

[31] ibid at 704.

detail of those provisions, but it is relevant to notice the following steps in the Court's reasoning:

> "The essential point ... is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. Making judicial salaries a charge on the Consolidated Revenue Fund instead of having to include them in annual appropriations is ... theoretically a measure of greater security, but practically it is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole."[32]

> "The provisions established a right to pension and other benefits which could not be interfered with by the Executive on a discretionary basis. ... Making the provisions governing civil servants applicable to the provincial court judges did not purport to characterize provincial judges as civil servants or increase the discretionary control of the Executive over the judges. It may well be preferable that the pensions and other financial benefits of judges should be given special and separate treatment in the law, as they now are, because of the special position and requirements of judges in this respect, but the application of the civil standards to provincial court judges ... did not ... affect their essential security in respect of pensions and benefits."[33]

> The third, and final, essential of judicial independence is described as: "... the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function."[34]

The Court, upholding the challenged provisions, takes a cautious and restricted view of this essential of judicial independence. The Court takes note of various urgings and recommendations from various sources from an enhancement of the institutional independence of the Courts, but will not itself go beyond a requirement of:

> "... judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function".[35]

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[32] ibid at 706.

[33] ibid at 707, 708.

[34] ibid at 708.

[35] ibid at 712.

The Court deals, finally and fairly briefly, with the discretionary ancillary benefits to which objection had been taken. The Court's conclusion is put summarily as follows:

> "While it may well be desirable that such discretionary benefits of [sic] advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive ... I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s11(d) of the Charter. In so far as the subjective aspect is concerned, I agree with the Court of Appeal that it would not be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication."[36]

I make the following comments about the *Valente* decision:

[1] It seems to me that, of the eighteen separate points of objection to which the Court refers at the commencement of its published reasons, two, items 10 and 11, are not dealt with specifically in the judgment. No doubt it is implicit in the result that the Court did not see either of these two points as contraventions of any of the stated essentials of judicial independence. The fact remains that the two points are not the subject of any particular discussion; notwithstanding that, prima facie at least, they appear to be incompatible with the essential element of institutional independence.

[2] There appears to be, with respect, some confusion of reasoning in the examination of the essential requirement of security of tenure. On one hand, the Court refuses to require that the highest standards in that respect be a uniform requirement for all tribunals having jurisdiction and power touched by s11(d) of the Charter. On the other hand, the Court gives but one distinct rationale for that position, and that rationale gives rise to some disquieting possibilities as to this essential of independence.

The rationale is the
"... great range and variety" of the "... legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence ...".

The Court's stated position is that any definition of the essentials of

[36] ibid at 714.

judicial independence for the purposes of s11(d), "must bear some reasonable relationship to that variety". Why must they? If the answer be: because to do otherwise would be altogether too difficult from an administrative point of view, is not the consequence to leave open possibilities for the preservation of the outward forms of security of tenure, while eating away at the substance? Indeed, the very amended Ontario scheme which was held sufficient compliance with the secure tenure principle is a good example. Granting that it might well be thought a significant improvement in formal mechanism to substitute for the Lieutenant-Governor-in-Council, the Judicial Council for Provincial Judges, - a concession which is not by any means self-evidently sound, - why does it follow that there has been an improvement in the substance of the provincial scheme of appointment? The substance remains appointment at pleasure: all that has changed is that a large number of persons have to be pleased, and they include, in any event, two nominees of the Lieutenant-Governor-in-Council, who might very well turn out to be people whose qualifications to pronounce upon a proposed appointment or re-appointment, are not learning in the law and experience in its practice, but some more diffuse "representativeness" of what is usually described, in this type of context, as "the community" or "the broader community". Add in the distorting aspect of the media, and what is left, in a practical sense, of security of tenure for a Judge whose appointment or re-appointment is at anyone's "pleasure", and who, by having exposed frankly his processes of judicial reasoning, in accordance with his sworn duty, has offended some vocal and politically influential interest group?

[3] The Court's discussion of security of tenure includes an interesting exploration of the role and the reliability of tradition in the protection of effective judicial independence. The Court does not take the point beyond a broad conclusion that, although tradition may fairly be regarded as a continuing buttress of judicial independence, reliance upon tradition cannot be taken so far:

> "... as to treat other conditions or guarantees of independence as unnecessary or of no practical importance ... It is a question of the relative importance that one is going to attach to tradition in a particular context as ensuring respect for judicial independence despite an apparent or potential power to interfere with it. Moreover, while tradition reinforced by public opinion may operate as a

> restraint upon the exercise of power in a manner that interferes with judicial independence, it cannot supply essential conditions of independence for which specific provision of law is necessary".[37]

Accepting, as I respectfully believe can be done, the correctness of these perceptions, they leave uncanvassed some obvious and obviously critical questions. For example: do current developments in society suggest that there is, in a real and effective sense, any remaining pull of tradition likely to be effective to prevent, not a full-scale and open, but a gradual and persistent attempt by the political powers that be to rein in effective judicial independence? And what is really to be understood by that "public opinion" to which the Court refers? To these questions, also, I shall return when offering some conclusions.

[4] As to financial security, the Court sees the essential requirement as being that all relevant aspects of judicial remuneration should be "... established by law, [there being] ... no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge".

Yet again, one can readily and respectfully agree with the bare principle as thus stated. That does not come, however, to grips with current political reality. Sixty years ago the Executives in the United Kingdom, in Canada and in Australia alike took the view that it was entirely appropriate for an Executive initiative to be taken to effect a reduction in the remuneration of serving Judges as part of a more general campaign to cut Public Service remuneration generally. As has been earlier noted, at least one Australian politician was prepared to go on record as espousing the view that the proper response to a measured and serious constitutional submission of the Judges, was to brush the submission aside upon the basis that too much respect was shown towards them anyway. In Australia, at least, that sentiment is very much alive and well.

And what is to be said of Executive action that simply ignores judicial remuneration, leaving it at the mercy of inflation to the point where the perceived comparative public standing of the Judiciary is slowly but persistently eaten away? What about an Executive that publicly and aggressively defends this stance upon the basis that there is nothing so very special anyway about the Judiciary? I shall return to these questions.

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[37] ibid at 702.

[5] In its discussion of the third essential element, namely personal and institutional independence, the Court takes, once again, a position which is very contained, and which leaves open, it is respectfully submitted, some important questions about effective judicial independence.

During its discussion of institutional independence, the Court refers to statements on the topic by a former Chief Justice of the Court, and by the then incumbent Chief Justice. The Court quotes the following observations of the former Chief Justice Laskin:

"Coming now to another element which I regard as desirable supports for judicial independence, I count among them independence in budgeting and in expenditure of an approved budget, and independence in administration, covering not only the operation of the Courts but also the appointment and supervision of the supporting staff. Budget independence does not mean that Judges should be allowed to fix their own salaries; it means simply that the budget should not be part of any departmental budget but should be separately presented and dealt with. I do not, of course, preclude its presentation by a responsible Minister, but he should do this as a conduit, and yet as one able to support the budget after its preparation under the direction of the Chief Justice or the Chief Judge and the chief administrative officer of the Court. So too, should the Court, through its Chief Justice or Chief Judge and chief administrative officer, have supervision and direction of the staff of the Court and of the various supporting services such as the library and the Court's law reports."[38]

Certainly in parts of Australia, a refusal to provide for the suggested enhanced degree of curial autonomy has given rise to some disturbing trends. To take but one example, the Supreme Court of which the writer is a member, is consistently under-resourced by the Executive to the point where the Court has been forced to become, and is treated by the Executive as essentially, self-financing, with the inevitable consequence that Court filing fees now stand at levels which are a significant barrier to ready general public access to the Court.

Such matters are left uncanvassed by the *Valente* decision.

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[38] ibid at 710, 711.

The Decision in *Beauregard*[39]

Strictly speaking, this case does not involve an interpretation of the Canadian Charter, the facts giving rise to the case having occurred prior to the constitutional entrenchment of the Charter. The point particularly in issue was whether a statutory amendment requiring certain Judges, but not all Judges, to contribute to their pension scheme infringed judicial independence; and was, as well, contrary to the requirement of s1(d) of the Canadian Bill of Rights, - a statutory, but not constitutionally entrenched precursor of the Canadian Charter, - that every individual have: "the right ... to equality before the law and the protection of the law".

A majority judgment was written by the Chief Justice, Dickson CJ, for three of the five Justices who heard the case. All five Justices agreed on the judicial independence point, but there was dissent from two Justices on the Bill of Rights point.

The majority judgment written by the Chief Justice contains an extended discussion of the principle of judicial independence and its practical application. The Chief Justice adopts the individual/institutional aspects of the principle to which *Valente* made reference, and proceeds to this conclusion:

> "The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely the protection of the Constitution and the fundamental values embodied in it, - rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies."[40]

The Chief Justice continues with an extended discussion of what he calls: "Foundations of Judicial Independence in Canada". Not all of this discussion is equally relevant to Australia as to Canada, but the following observations certainly are so:

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[39] *The Queen v Beauregard* [1986] 2 SCR 56.

[40] ibid at 70.

> "First, Canada is a federal country with a constitutional distribution of powers between federal and provincial governments. As in other federal countries, there is a need for an impartial umpire to resolve disputes between two levels of government as well as between governments and private individuals who rely on the distribution of powers. In most federal countries the courts play this umpiring role. ... That role, still fundamental today, requires that the umpire be autonomous and completely independent of the parties involved in federal-provincial disputes.
>
> Secondly, the enactment of the Canadian Charter of Rights and Freedoms, ... conferred on the courts another truly crucial role: the defence of basic individual liberties and human rights against intrusions by all levels and branches of government. Once again, in order to play this deeply constitutional role, judicial independence is essential."[41]

The Chief Justice goes on to discuss the content of the principle of judicial independence; and, generally speaking, adopts the statements made in that respect in *Valente*. The Chief Justice is, however, careful to emphasise more than once that the *Valente* analysis is as applicable to the relationship between the legislature and the Courts, as it is to the relationship between the Executive and the Courts.

> In applying the principles as thus canvassed to the submission that : "Parliament cannot diminish, reduce or impair established salary or remunerative benefits", the Chief Justice disposes very briefly of the submission upon the basis that:
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> "At the end of the day, all that ... [the challenged legislation] ... does, is treat judges in accordance with standard, widely used and generally accepted pension schemes in Canada. From that factual reality it is far too long a stretch ... to the conclusion that ... [the challenged legislation] ... violates judicial independence."[42]
>
> The Chief Justice then adds a rider to what he has just said. The rider is this:
>
> "The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable

[41] ibid at 71, 72.

[42] ibid at 77.

purpose, or if there was a discriminatory treatment of judges vis-a-vis other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be ultra vires s100 of the *Constitution Act*, 1867."[43]

This decision leaves open a potentially very important question, namely the power of Parliament to legislate so as to change the established salary, pension and other entitlements of incumbent Judges as distinct from Judges to be appointed after the coming into effect of the particular legislation. As it happened, the legislation with which *Beauregard* was concerned contained provisions which protected the right of an incumbent Judge to a non-contributory pension, requiring a modest future contribution, consonant in its operation with comparable pension schemes elsewhere in Canadian society, to the pension entitlement of a deceased Judge's surviving spouse. Insofar as the legislation dealt with salary, it increased rather than decreased the basic judicial remuneration. The legislation did not deal at all with ancillary benefits such as sickness or recreational leave entitlements.

It would not be at all surprising to find, both in Canada and in Australia, that current economic conditions would tempt governments of all political persuasions to attempt to "roll back" current judicial remuneration arrangements. Indeed, the Canadian Provinces of Alberta, Nova Scotia and Prince Edward Island have already taken precisely such action, the Prince Edward Island legislation having given rise to litigation which will almost certainly reach ultimately the Supreme Court of Canada.

With respect, the decision both could and should have established simply and clearly that any attempt by Parliament or Executive to diminish existing judicial entitlements for current incumbents cannot and will not be countenanced for the reason that to recognise that power in any shape or form would be to place into the hands of unscrupulous politicians and journalists a very real means of sending coded threats to the constitutionally independent judiciary. Instead, the decision leaves wide open real possibilities for more or less subtle, but nonetheless potentially effective, underminings of effective constitutional judicial independence, by means, in particular, of carefully calibrated financial assaults. As Beetz J says in his dissenting judgment:

"... (I)f, as I think, the impugned enactment contravenes s1(b) of the Canadian Bill of Rights, it takes on an added dimension in that it

[43] ibid at 77.

> treats unevenly judges who are expected to administer justice with an even hand. Furthermore, it emanates from the very Parliament which is the custodian of the judges' independence. While the impugned enactment is not sufficiently severe to impair the independence of judges, it is one that tends to affect the serenity of those concerned for the rest of their term of office. Judges may be expected to rise above such considerations but it is difficult to see how it could be conducive to the better administration of justice that they should be put to the test."[44]

It is true, of course, that the Chief Justice's rider, earlier mentioned, fires, so to speak, a warning shot across the bows of those who have no time for the niceties of judicial independence; but that is, with respect, only to beg further, rather than to settle once and for all, the outstanding question mentioned above. Quite apart from the manifest ambiguities in such terms as: "any hint"; "colourable purpose"; "might well be held", the rider itself might well be argued by Parliament and Executive to support in terms legislation such as the Depression-era legislation, earlier discussed, which is designed to reduce the remuneration entitlements of all persons paid by the government out of public funds, and which simply lumps in the Judges as though they were in truth no more than public servants employed by Parliament or the Executive.

The Decision in *Mackeigan*[45]

This case arose in Nova Scotia out of the wrongful conviction for murder of a 17-year old boy who served subsequently some 11 years in prison for a crime he had not committed. In due course the Appeal Division of the Supreme Court of Nova Scotia was asked to re-examine the conviction; and that process led to the quashing of the conviction, and to the subsequent award to the person wrongfully convicted of compensation.

The re-examination was conducted by a panel of five Judges, assigned to the task by the Chief Justice of Nova Scotia, who himself presided at the re-examination. One of the Judges so assigned had been the Provincial Attorney-General at the time of the original trial. The report of the re-examining Judges contained observations, not essential to their conclusion

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[44] ibid at 109.

[45] *Mackeigan v Hickman* [1989] 2 SCR 796.

that there had been a miscarriage of justice, but highly critical of the victim of that miscarriage. These two features of the re-examination became themselves highly controversial, and in due course, a Provincial Royal Commission was established with a very broad mandate to find out how the original miscarriage had come to pass, and to pronounce upon such other related matters as the three Royal Commissioners might think relevant.

In due course the Royal Commissioners sought to procure the attendance before the Royal Commission of all five of the Judges who had re-examined the original conviction. The Royal Commissioners foreshadowed an intention to explore three particular questions, namely: [1] the process of reasoning leading to the decision to quash the original conviction; [2] the precise identification of the materials which the five Judges had regarded as having been formally before them in connection with that process of reasoning; and [3] but only as to the Chief Justice himself, why he had assigned to the reviewing panel the former Provincial Attorney-General.

Of the seven Justices of the Supreme Court of Canada who dealt with the matter in that Court, three rejected as impermissible interferences with judicial independence, all three of the proposed questions. Lamer J came to the same end result; but he expressed agreement in principle with the reasons of Corey J who dissented in part from the majority. La Forest J agreed with the majority, but published separate reasons raising a particular constitutional question not relevant to the present paper. Wilson and Corey JJ agreed that the first of the proposed questions was excluded by the absolute judicial privilege against any inquiry seeking to go behind the stated reasons for a judicial decision; but thought that the other two questions did not go to the adjudicative function of the reviewing Judges, but rather to adjunct administrative functions which enjoyed a wide, but essentially qualified, privilege, the qualification lying in the need to ensure public confidence in the administration of justice by opening up fully anything suggestive, prima facie, of bias, as was the case with the inclusion of the former Attorney-General in the reviewing panel of Judges; and anything necessary to establish, not how the Judges had reasoned on the materials formally before them, but what materials they had actually regarded as having been so before them.

For the purposes of the present paper, *Mackeigan* does not add anything of substance to the principles that emerge from the *Valente* and *Beauregard* decisions, to both of which *Mackeigan* makes repeated reference.

It is, however, worthwhile to note that the majority judgments depend very much upon a precise, conventional construction of the relevant statutory provisions pursuant to which the Royal Commission has been appointed. It is interesting to note in that regard the following observations of McLachlin J, writing for three Justices:

> "I should not, however, be taken as suggesting that a judge could never be called to answer in any forum for the process by which the judge reached a decision or the composition of the court on a particular case. I leave to other cases the determination of whether judges might be called on matters such as these before other bodies which have express powers to compel such testimony and which possess sufficient safeguards to protect the integrity of the principle of judicial independence."[46]

Apart altogether from the manifest imprecision of what is thus stated, such an approach appears to be impossible of reconciliation with principles earlier stated in that very judgment, when, speaking of precisely these two subject matters, McLachlin J says as to the former:

> "To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how or why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence."[47]

and as to the latter:

> "To allow the executive a role in selecting what judges hear what cases would constitute an unacceptable interference with the independence of the judiciary. Inquiries after the fact must be similarly barred, in my view. A Chief Justice who knows that he or she may be examined and cross-examined by the executive or its emanation on why he or she assigned a particular judge to a particular case may feel, consciously or unconsciously, pressure to select someone pleasing to the executive. Even if the Chief Justice did not permit himself or herself to be influenced by such a prospect, the public perception that he or she might have been influenced could harm the esteem in which our system of justice is held. In short, the principle of judicial independence which underlies judicial impartiality and the proper functioning of the courts

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[46] ibid at 833, 834.

[47] ibid at 831.

would be threatened by the possibility of public inquiries as to the reason for the assignment of particular judges to particular cases."[48]

The Decision of *Lippé*[49]

This appeal concerned the structure of municipal courts in the province of Quebec. The relevant legislation provided that an advocate accepting appointment to a municipal court was not to be thereby prevented from practising, with certain stipulated exceptions not here relevant in their detail, as an advocate before any municipal court. The legislation provided in various respects for what were, obviously, intended safeguards against any conflict of interest, bias or other inappropriate consequence of the retained right of private practice.

It was contended by certain persons who had been convicted of criminal offences in various municipal courts, that they had not had an impartial and independent hearing as required by s11(d) of the Canadian Charter. The Supreme Court of Canada rejected the contention.

Two separate judgments were published; one, by Lamer CJ, a joint judgment of three of the seven participating Justices; the other, by Gonthier J, a joint judgment of the other four Justices. Both judgments reach a common conclusion, but exhibit some significant differences of approach on the principle of judicial independence.

The judgment written by Lamer CJ turns upon the simple proposition that the real question to be decided was not a question of judicial independence at all, but rather a question of institutional judicial impartiality:

> "The potential problem in this appeal is that, on an institutional level, municipal court judges could be perceived as being improperly influenced by various forces. Since the respondents are alleging no state influence, the issue does not fit squarely within traditional judicial independence jurisprudence; since they are alleging no individual bias on the part of any particular judge, neither can the issue be dealt with as a problem of bias on a case-by-case basis ... [T]his case therefore

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[48] ibid at 833.

[49] *R. v Lippé* [1991] 2 SCR 114.

highlights the difficulties of distinguishing between impartiality and independence. While the significance of such a distinction may not always be apparent, in a case such as this, involving allegations of partiality on an institutional level, it becomes particularly important."[50]

The Chief Justice does make, however, some significant observations, as follows, on the subject of the content and scope of the principle of judicial independence:

"The content of the principle of judicial independence is to be determined with reference to our constitutional tradition and is therefore limited to independence from the government. ... I do not intend, however, to limit this concept of 'government' to simply the executive or legislative branches. By 'government' in this context, I am referring to any person or body, which can exert pressure on the judiciary through authority under the state. ... I would also include any person or body within the judiciary which has been granted some authority over other judges; for example, members of the court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice ..."[51]

"The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a 'means' to this 'end'. If judges could be perceived as 'impartial' without judicial 'independence', the requirement of 'independence' would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality."[52]

The Chief Justice continues his analysis by examining a concept of "institutional impartiality" of which he says that it "has never before been recognized by this Court"[53]. "Institutional impartiality" looks at the question whether the challenged system "... is structured in such a way as to create a reasonable apprehension of bias on an institutional level ...."[54]. The test to be applied to a question of "institutional impartiality" is analogous to the test accepted in *Valente*.

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[50] ibid at 135.

[51] ibid at 137, 138.

[52] ibid at 139.

[53] ibid at 140.

[54] ibid at 140.

The Chief Justice expresses the view that, although it might well be thought that part-time Judges are not an ideal judicial arrangement, nevertheless the mere fact that a Judge is part-time "does not in itself raise a reasonable apprehension of bias" [55]. But, if the Charter does not proscribe outright the use of part-time Judges, it does proscribe part-time Judges whose extra-judicial occupations are incompatible with the proper performance of their judicial duties. Whether, in any given sense, a part-time Judge does in fact have some disqualifying extra-judicial occupation, is to be determined by the application of an elaborate three-stage test as follows:

> "Step One: Having regard for a number of factors including, but not limited to, the nature of the occupation and the parties who appear before this type of judge, will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?
>
> Step Two: If the answer to that question is 'no', allegations of an apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis.
>
> However, if the answer to that question is 'yes', this occupation is per se incompatible with the function of a judge. At this point in the analysis, one must consider what safeguards are in place to minimize the prejudicial effects and whether they are sufficient to meet the guarantee of institutional impartiality under s.11(d) of the Canadian Charter. Again, the test is whether the court system will give rise to an apprehension of bias in the mind of a fully informed person in a substantial number of cases. It is important to remember that the fully informed person at this stage of the analysis must be presumed to have knowledge of the safeguards in place. If these safeguards have rectified the partiality problems in the substantial number of cases, the tribunal meets the requirements of institutional impartiality under s.11(d) of the Canadian Charter. Beyond that, if there is still a reasonable apprehension of bias in any given situation, that challenge must be brought on a case-by-case basis."[56]

The Chief Justice then applies the three-stage testing to the objections which had been made specifically in the instant case, which objections the Chief Justice summarises as follows:

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[55] ibid at 144.

[56] ibid at 144, 145.

"(a) Part-time judges who are also practising law could be pressured by clients to make a particular decision on an issue.

(b) An appearance of a conflict of interest could arise if a lawyer of the judge's firm or a lawyer involved in a deal with the lawyer's firm appeared before the judge.

(c) If the judge's firm was pursuing a particular government contract, the judge may feel pressured to favour the government position in a decision.

(d) Clients of the judge could be called to testify in a case before the judge."[57]

The Chief Justice concludes that the first of the three posited questions should be answered affirmatively. Thereupon, the second question is not applicable, and it becomes necessary to look into the third, safeguards, question. The Chief Justice does so, examining in careful detail the statutory judicial immunities, and the established code of judicial ethics, applicable to part-time municipal judges; and concludes that the third question should be answered in the negative.

The judgment written by Gonthier J agrees "substantially" with the reasoning of the Chief Justice, but differs sharply from the Chief Justice's "restrictive definition ... for 'judicial independence' as related solely to independence from government."[58]

Gonthier J picks up some of the observations which are made in the Universal Declaration on the Independence of the Judiciary, and emphasises the need, in the context of modern litigation, for effective judicial independence from any influence, whether emanating from government, from the parties themselves, or from any other source whatsoever, that might properly influence a Judge, or give rise to reasonable apprehension of such improper influence.

It is submitted that the approach taken by the Justices for whom Gonthier J was writing is to be preferred. To restrict the concept of judicial independence as is proposed by the Chief Justice, even allowing for the extension to any person or body capable of exerting influence on Judges "through authority under the state", leaves effective judicial independence unprotected against other obvious sources of attempted improper influence: the parties themselves, especially if either is or both are, politically and/or economically influential, and, of course, the media, are the obvious examples.

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[57] ibid at 146.

[58] ibid at 152.

Conclusions

When the late President Eisenhower left office, he made a valedictory telecast in which he warned his fellow Americans of what he called "the military/industrial complex". The President's point was that there had come into existence within the American polity a coalition of identifiable interests of such power as to pose a real contingent threat to the very survival of democracy in the United States.

Some thirty years later, it is possible to identify another such combination of forces in Western societies, including in particular, contemporary Australian society. The new combination might be described as the "single issue/infotainment" complex.

The "single issue" component refers to the current spate of activist groups each of which is mobilised politically for the achievement of some particular political and social objective(s). No doubt it is in the nature of things that reasonable minds might well differ in their perceptions of the intrinsic merits of this or that such group and its particular preoccupation(s). What cannot be doubted is the existence as a general rule of certain characteristics common to all these activist groups: they are wholly single-minded and self-absorbed; they are strident and uncompromising in both the articulation and the pursuit of their particular demands; they are ruthless in their attitudes towards and in their dealings with anybody or anything that stands, or appears to stand, in their respective paths; they demand immediate and total political acceptance and action; and they are generally adept at all the arts of lobbying and media manipulation.

The "infotainment" component has reference to the nature and operation in contemporary Australian society of the mass media, both print and electronic, but particularly electronic. Granting that there are a few honourable exceptions to the general rule, that rule is, nevertheless, that strict truth and a responsible evenhandedness in presentation and comment, all run a distant and very poor second to the need to present a "story", - preferably an "exclusive" one extensively trumpeted abroad as such, - to a general reading, listening, or, and for the most part, viewing public which has been conditioned for decades to expect and to accept flashy, febrile, highly personalised and intellectually undemanding journalism, but especially television journalism, as though it were thoughtful and reliable reportage of and comment upon the great issues of the day. For the most part, the mass media in contemporary Australian society are heavily

cartelised, narcissistic, and power-hungry. The strategy according to which they pursue their agenda of power is the strategy of fear: that is to say, the creation of a general sense that any person or group or body who or which will not conform to whatever might be the prevailing media consensus or line on a particular issue, can expect to be denied a platform at all; or, if allowed a platform, to be misreported, misrepresented, or simply ridiculed. The strategy tends to become especially ruthless in the face of any direct criticism of media power, or of media attempts to set the public agenda. The particular tactics which enliven that strategy are those of the selective reporting of facts, and the ideological slanting of comment. In the result, the great issues of the day are, more often than not, presented and dealt with in a manner that is intellectually shallow, and openly contemptuous of any position that contradicts the position for which the particular writer or broadcaster wishes to contend. Incessant in their demand that all forms of public authority be open and "accountable", - which many editors, journalists, and so-called "media celebrities" seem to think means accountable to them, - the contemporary media are uniformly resentful of any suggestion that they might be accountable for the way in which they use, or abuse, their undoubted power and influence in the life of the community. And, indeed, they are not effectively so accountable, save by means of an action at law for damages for defamation, a branch of the law which the media constantly attack, denigrate and seek to undermine; or by means of proceedings for contempt of Court, an expedient only available in the grossest type of case; and then, one which the Courts are seemingly reluctant to use resolutely.

The "single issue/infotainment complex", as thus understood, plainly has no time for tradition. It is about the pursuit of raw political power. The traditions, civilities and graces that are supposed to stabilise, and to elevate the content and the tone alike of public discourse within any civilised society deserving of the description, are treated with a languid contempt if they happen not to get in the way of the political or social fashion of the moment; and are actively misrepresented, ridiculed and undermined as "bourgeois", "reactionary", "anachronistic", or the like, if they do happen to get in the way.

These destabilising, anti-tradition tendencies, dangerous enough without more, become heightened, and therefore much more dangerous, when they operate in a social environment in which both public and private morality have become in significant degree a movable feast from which

each may choose this or that item according to little, if anything, more than the subjective whim of the moment; and then, generally speaking, in the language or rights, with barely a nod in the direction of duty or responsibility.

In such an environment, and even without any complicating consequences of a constitutionally entrenched Charter or Bill of Rights, the fundamental concept and the critical importance of judicial independence do not become one whit less important to the maintenance of genuine personal freedom underpinned by the rule of law, but they do become much more vulnerable to undermining.

Such a process of undermining can take all manner of forms, but a good and simple insight into the process can be found in the following observations of MacDonald CJ in the *Prince Edward Island* case earlier mentioned:

> "In today's society many people criticise, condemn or vilify judges because they see judges as being in a favoured or privileged position, and believe no person should be so positioned. Also, increasingly, government by many of its actions, assumes that it has authority over judges and purports to make judges subservient to government."[59]

What effect upon these societal trends is likely to result from a constitutionally entrenched Charter or Bill of Rights?

In a paper entitled: *"Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms"*[60], Professor Jeremy Webber of McGill University, Montreal, offers a detailed and thoughtful review of the Canadian experience. Professor Webber's paper ranges far more widely than the narrow question of judicial independence with which this paper is concerned, but he has the following observations about what he sees as "judicial philosophizing" about Charter issues:

> "Although there may be broad popular agreement within society over the bald statement of the rights, ... there is often healthy disagreement over the philosophical framework within which those rights should be interpreted. ... These questions have to be decided in the course of

[59] The quotation is taken from a report appearing in the issue for 23 September, 1994 of the Nova Scotia "Chronicle-Herald".

[60] Canterbury Law Review: Australasian Law Teachers Association Annual Conference: 1993, Vol. 5 No. 2 at 207-234.

> applying the Charter to specific cases, yet that task can quickly take the courts into highly contentious areas of social philosophy, especially when charter rights are given very broad interpretation. When deciding specific cases, courts will also be fashioning an official, enforceable, theory of society, possessing the same conservatism and staying power that judge-made law generally has. ... Rather than working out principles in specific circumstances through time (arguably the forte of judges), judges can end up ruling in the abstract, on the correctness of doctrines of moral philosophy. Paradoxically, a charter intended to protect differences of opinion can itself become the agency of a new orthodoxy, an orthodoxy whose definition is entrusted to an unrepresentative forum largely isolated from the democratic process."[61]

There are several things to be said about this critique. First, it expresses a disheartening but by no means infrequent academic criticism of the judiciary, namely, that the Bench is, as a collegiate whole, and as of course, stamped with an intellectual equivalent of the mark of Cain, made manifest in an unrelenting, arid, thoughtless and legalistic conservatism. This is not at all consistent with the writer's own experience and observation of the working either of the Court of which he is a member, or of the Courts before which he practised previously for some 28 years.

Secondly, it is worthwhile remembering that, if the forum which has been entrusted with umpiring the Canadian Charter is "unrepresentative" and "isolated from the democratic process", it is precisely an action of that very democratic process that approved the adoption of the Charter and the conferment of that pivotal role upon a Judiciary which the electorate was prepared to trust over any other interested contender for the particular responsibility.

Thirdly, it would be helpful to know where the critics of the Judiciary as umpires of the Charter would prefer to see the umpiring role established. Would a "Constitutional Commission" or a "Constitutional Court" or a "Constitutional Tribunal" engineered meticulously so as to include a membership "representative" of the "broader community" according to the present politically-correct fashion in such matters, be any the less prone to isolation, or to philosophising? Human nature being what it is, the probabilities are that the answer is: no. What is more, the outcome might

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[61] ibid at 229.

give a nasty shock to those who think that only Judges are prone to impose subjective views as though they were objective facts.

Later in his paper, Professor Webber notes the efforts which the Supreme Court of Canada appear to have made to preserve a real degree of flexibility in its approach to Charter issues, and comments:

> "This flexibility has, however, been achieved at a cost. ... [M]any of the Supreme Court's critics have argued that its judgments are insufficiently devoted to rights and too tolerant of legislative choice. While the court itself has been modest in its claims to infallibility, its critics (especially its academic critics) have been less so, often castigating the court for failing to adopt (in their view) the correct philosophy, or for failing to articulate a sufficiently consistent theory. There is considerable self-righteous invective hurled at the court, invective that expresses little understanding of the central difficulty of Charter adjudication: the problem of developing appropriate principles on a very contested terrain."[62]

The research upon which the present paper is based has not uncovered a better example of that "self-righteous invective" than the following excerpts from: "The Charter of Rights and the Legalization of Politics in Canada"[63], by Michael Mandel, Associate Professor at Osgoode Hall Law School, York University:

> "The courts try to instil in us an acceptance of arbitrary hierarchy, a one-way respect that is not based on whether it is deserved but on the (literally) elevated position of the person we are supposed to respect. The Charter exalts courts even more. I think they should be cut down to size."[64]

> "Confining legal politics to the courtroom is not only a difficult trick, but an impossible one. A difficult but possible trick, but one that makes a lot more sense, is to bring democratic politics into the courtroom. To undermine legal politics at its source. To challenge the authority of the court and thereby authoritarianism in general. That is what I have been trying to do with this book. But the conditions have to be right for such a project to have half a chance of success.

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[62] ibid at 231.

[63] Thompson Educational Publishing, 1994.

[64] ibid at Preface, xii.

> We have to deepen and strengthen the democracy of our politics so that we have something to bring into court, something to compete with legalised politics, to make it seem absurd and irrelevant, like the Monarchy or the Senate. Legalized politics cannot simply be abolished. It must be made to wither away."[65]

It seems to the writer that Canadian experience, as canvassed in this paper, can only bring one back full circle to the apprehensions expressed by Sir Ninian Stephen. In Australian society, the "cutting-down-the-tall-poppies" syndrome is always fermenting not so very far beneath the surface of public affairs. The syndrome runs like a connecting thread through the practical action in contemporary Australian society of the "single issue/ infotainment complex". Even without the magnifying spotlight of controversial Charter-type judicial decisions, there are plenty of currents in contemporary Australian society and public affairs which are inconsistent with, indeed positively inimical to, the maintenance of effective judicial independence. The Canadian experience suggests that the addition of that magnifying spotlight is apt to cause Courts to be flexible in Charter decision-making, perhaps in a conscious effort to neutralise any incipient challenge to effective judicial independence, but thereby to provoke the very kind of "cut them down to size" undermining that is apt to give a dangerous opening to those persons and groups in contemporary society which do not want any judicial, or, indeed, any other institutional independence that is capable of limiting their own agenda of power.

Further, the Canadian experience seems to the writer to require a much more guarded view than that of Sir Ninian Stephen, earlier quoted, about any "premeditated undermining of the judicial arm of government" in the wake of a constitutional entrenchment of a Charter or Bill of Rights. As previously explained, it is the view of this writer that such a process of undermining is discernible in Australia, even without any added stimulus from such a Charter or Bill. But if, as the Canadian experience suggests to this writer, there is not, perhaps, an absolute certainty, but a real and present risk that an entrenched Charter or Bill will add fuel to that particular fire, then it is better, in the interest of freedom under the rule of law, to do without the entrenched enactment; the more so when as established a Canadian constitutional academic authority as Professor Hogg makes this general assessment of the Charter's place in Canadian life:

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[65] ibid at 311.

> "The Charter will never become the main safeguard of civil liberties in Canada. The main safeguards will continue to be the democratic character of Canadian political institutions, the independence of the judiciary and a legal tradition of respect for civil liberties. The Charter is no substitute for any of these things, and would be ineffective if any of these things disappeared. This is demonstrated by the fact that in many countries with bills of rights in their constitutions the civil liberties which are purportedly guaranteed do not exist in practice."[66]

The linch-pin of the Canadian Charter is its enforceability by Courts which are generally thought to be genuinely independent, and invulnerable in that independence. The same would be true in Australia of any constitutionally entrenched formal statement of fundamental rights and freedoms. It would be a cruel irony indeed to find that that the very process of independent adjudication thought fundamental to the entire exercise was apt to provoke attempts, even more determined that those discussed earlier in this paper, to undermine precisely that independence.

Perhaps, instead of being too easily carried away by the visionary rhetoric of the proponents of such constitutionalised formulations, we should be attending once again to some truly visionary jurisprudence, not to speak of realpolitik, as stated by Brandeis J of the United States Supreme Court more than 60 years ago:

> "Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[67]

Plus cà change ...?

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[66] n22 at 796.

[67] *Olmstead et al v United States* [1928] 277 US 438 at 479.