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THE DOCTRINE OF JUDICIAL INDEPENDENCE DEVELOPED BY THE SUPREME COURT OF CANADA*

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I. INTRODUCTION

The *Valente*[1] and *Beauregard*[2] cases have given the Supreme Court of Canada an opportunity to interpret the principle of judicial independence.[3] While the Supreme Court's doctrine of judicial independence, to the extent it has developed, is in many ways sound, there are several important aspects of the principle which the court has not yet fully considered. As one of the cornerstones of liberal-democratic theory,[4] it is critical that judicial independence be interpreted as incisively as possible by the Supreme Court. Even minor weaknesses in the Court's approach could have serious long-run consequences for maintaining the legitimacy of the courts as key institutions in Canada's liberal democratic political system. If, for example, the principle is interpreted too narrowly, then the stage is set for the erosion of judicial independence, and thus also of the rule of law. On the other hand, if judicial independence is interpreted too broadly, then the judiciary will have the opportunity

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[1] *Valente* v. *The Queen*, [1985] 2 S.C.R. 673 [hereinafter *Valente*].

[2] *The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56 [hereinafter *Beauregard*].

[3] These decisions should also be regarded as contributions to the body of literature concerning the principle of judicial independence in the Anglo-Canadian tradition. Some of the most commonly cited works in this body of literature are: W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. B. Rev. 769 and 1139; W.R. Lederman, "The Independence of the Judiciary" in A.M. Linden, ed., *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, York University, 1976); S. Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North Holland Publishing Co., 1976); S. Shetreet & J. Deschênes, eds, *Judicial Independence: The Contemporary Debate* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985); and R.M. Dawson, *The Government of Canada*, 5th ed., rev'd by Norman Ward (Toronto: University of Toronto Press, 1970) at 396-410.

[4] John Locke described the importance of an impartial judiciary in *The Second Treatise of Government* (New York: Bobbs-Merrill, 1952 [c. 1690]) at 49-84. The central thrust of Locke and liberal theorists since then is that law consists of norms created directly or indirectly with the consent of all citizens. The question of whether someone has broken the law must be inquired into and answered as objectively as possible, since the law is for the benefit of everyone, not a particular or privileged group. Such an objective or impartial consideration requires independent judges, that is, judges who are not controlled by any of the litigants.

to expand its power and its privileges for reasons not related to liberal democratic theory. Errors in either direction may undermine the credibility of the courts as fair and impartial arbiters of legal disputes.

The essay begins with summaries of the *Valente* and *Beauregard* decisions, and then proceeds to a critique of the doctrine of judicial independence as developed by the Supreme Court of Canada in these two cases. The critique suggests that three aspects of judicial independence have not received careful enough attention from the Court. These are:

1. the relation between judicial independence and judicial impartiality;
2. the relation between judicial independence and the mechanisms devised to attempt to protect it; and
3. the relation between judicial independence and the institutional role of the courts.

II. THE *VALENTE* CASE

The issue in the *Valente* case was whether the guarantees of the independence of provincially-appointed judges were sufficient for the judges to qualify as independent tribunals pursuant to section 11(d) of the *Charter of Rights and Freedoms*. Section 11(d) stipulates that all persons charged with offences have a right to be tried by "independent and impartial" tribunals. Walter Valente had been charged with dangerous driving in 1981. In an attempt to keep his client out of jail, Noel Bates, Valente's lawyer, argued before a Provincial Court Judge late in 1982 that the judge did not have jurisdiction to hear the case, because he did not meet the standard of independence set by section 11(d).[5] According to Bates, the standard for judicial independence in Canada is, at the least, the standard of independence enjoyed by provincial superior court judges. Their security of tenure and financial security are protected

[5]P.T. Heron, "Judicial independence aside, has Walter Valente been forgotten?" (1987) 7 Can. Law. 12.

by sections 99 and 100 of the *Constitution Act, 1867*.[6] Further, Bates noted that superior court judges have their own benefit plans, presumably to protect judicial independence, while Provincial Court judges come under provincial public service benefit plans, and are subject to the same rules of eligibility as ordinary public servants.

In addition to these points, Bates raised two issues which have implications for all levels of courts in Canada. First, he pointed out that the executive branch has the power to grant special privileges to certain judges, such as leave of absence to head a commission of enquiry, or a promotion to a more highly paid position, such as Chief Judge or Justice. Presumably, a judge might favour the executive in order to obtain such privileges. Second, judges must rely on the executive for court administration services, and the executive could take advantage of this situation to influence judicial decisions.

The Provincial Court judge who heard these arguments decided that they had sufficient merit for the case to be considered by a superior court judge. Accordingly, he declined jurisdiction until the case could be heard by the Ontario Court of Appeal. Two other judges and a justice of the peace then decided to decline jurisdiction whenever counsel for an accused raised the judicial independence argument, and this series of events became known as the "judges' revolt."[7]

The Ontario Court of Appeal's decision in this case was that in spite of the absence of constitutional guarantees, and sometimes even of statutory guarantees of judicial independence, adherence to the tradition of judicial independence by the executive branch of

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[6]Section 99 stipulates that superior court judges "shall hold office during good behaviour" until retirement, and that they are removable only through the procedure of joint address of the Senate and House of Commons. Section 100 states that the salaries and pensions of superior, district, and county court judges shall be "fixed and provided" by Parliament. The word "fixed" may imply that the salaries may not be lowered except as part of an overall salary reduction plan during an economic recession. See Lederman in the Can. B. Rev., *supra*, note 3.

[7]See M. Strauss, "Spreading Debate Forseen Over Judges Independence" *The [Toronto] Globe and Mail* (29 December 1982) A1, A2; O. French, "Shedding Light on Judges" *The [Toronto] Globe and Mail* (6 January 1983) A7; and articles in (1983) 7 Can. Law. for an account of these events. The decision of the Provincial Court in the *Valente* case is reported in (1983), 3 C.R.R. 1.

government in Ontario meant that Provincial Court judges could be considered independent for the purposes of the *Charter*.[8] The court suggested a "reasonable person" test to determine whether Provincial Court judges are independent:

> [The test is] whether a reasonable person, who was informed of the relevant statutory provisions, their historical background, and the traditions surrounding them, after viewing the matter realistically and practically would conclude that a provincial court judge ... was a tribunal which could make an independent and impartial adjudication.[9]

The Ontario Court of Appeal's decision was appealed to the Supreme Court of Canada. The unanimous decision of the six-member panel, which upheld the Appeal Court's decision, was written by Mr. Justice Le Dain. He adopted much of Chief Justice Howland's reasoning, including the "reasonable person" test. However, an attempt was made to analyse the concept of judicial independence more precisely. For example, Mr. Justice Le Dain posited that independence and impartiality are distinguishable concepts. Impartiality connotes a state of mind of absence of bias, whereas independence refers to relationships between judges and others, particularly others in the executive branch of government. These relationships should be so structured as to ensure that judges have the capacity to act independently in their decision making.[10]

In order to ensure that judges have this capacity to act independently, Mr. Justice Le Dain identified three "essential conditions" for judicial independence. He claimed that these conditions are "at the heart" of the various approaches to protecting judicial independence in the several Canadian jurisdictions.[11] One set of conditions, for example the conditions for the independence of superior court judges, cannot be taken as the absolute standard. Rather, the standard must come from what is central to all the

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[8] *Regina* v. *Valente (no. 2)* (1983), 41 O.R. (2d) 187.

[9] *Ibid.* at 210.

[10] *Valente, supra,* note 1 at 685.

[11] *Ibid.* at 694.

diverse sets of conditions. Mr. Justice Le Dain observed that the identification of the essential conditions for judicial independence is a difficult task, since "the concept of judicial independence has been an evolving one."[12]

The essential conditions referred to by Mr. Justice Le Dain are security of tenure, financial security, and the institutional independence of judicial tribunals regarding matters directly affecting adjudication. In order to possess security of tenure, a judge must have an appointment which "is secure against interference by the executive or other appointing authority in a discretionary or arbitrary fashion."[13] In order for such security to be achieved, judges may be "removable only for cause" as recommended by an independent review process which affords judges a fair hearing.[14] Statutory guarantees of security of tenure, according to Justice Le Dain, pass the "reasonable person" test. Constitutional guarantees, while perhaps desirable, are not essential.[15] Mr. Justice Le Dain held that supernumerary judges in Ontario (that is, judges of retirement age who are reappointed on a yearly basis) did not meet this minimal guarantee at the time of Valente's trial, as their appointments could be discontinued at the pleasure of the Attorney General, rather than for cause. However, because Valente's judge was not supernumerary, Valente was not affected by this lapse in minimum standards. Moreover, the provincial legislature had since corrected the situation by making the reappointment of supernumerary judges contingent on the recommendation of the Chief Judge or the provincial Judicial Council.[16] Analysed from the perspective of a

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[12] *Ibid.* at 691.

[13] *Ibid.* at 698.

[14] *Ibid.*

[15] *Ibid.* at 702.

[16] Although Mr. Justice Le Dain's reasoning regarding the supernumerary issue is persuasive, one wonders why a supernumerary judge reappointed at pleasure is less independent than a military tribunal. In *MacKay* v. *The Queen*, [1980] 2 S.C.R. 370, the Supreme Court found that a military tribunal, even though it is closely associated with the military establishment, and has no security of tenure, meets the requirements of judicial independence pursuant to section 2(f) of the *Canadian Bill of Rights*, which is the section in

strategy for consolidating judicial power, Mr. Justice Le Dain's handling of the supernumerary question is ingenious.[17] Through this decision, the Supreme Court has successfully claimed the right to determine the standards for the protection of judicial independence, and at the same time no crisis of legitimacy has been created concerning the propriety of courts determining and then policing the extent of their own independence. This is because no statute was actually struck down.[18] The Court merely applauded the provincial government for amending a statute which it implied would have in part been struck down, had it not been so amended.

Mr. Justice Le Dain held that in order for the second condition of financial security to be met, the right to a salary, and where appropriate to a pension, must be established by law.[19] In addition, the paymasters may not use their power over the purse strings to interfere with judicial decision making, for example, by reducing the salary of a judge who consistently decided against claims of the government. Mr. Justice Le Dain did not consider that the setting of judicial salaries by the legislature rather than by the executive, as is the case for federally-appointed judges, to be an essential condition for judicial independence. He noted that under

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the *Bill* which corresponds to section 11(d) of the *Charter*. Nevertheless, *MacKay* is referred to as an authority in *Valente*. The result of this discrepancy is that the threshold between the need for legislative measures to protect judicial independence (as in the supernumerary issue), and reliance on tradition (as in the case of military tribunals) remains unclear, in spite of Mr. Justice Le Dain's firm stance that statutory guarantees of security of tenure are essential to an independent tribunal.

[17]This is not to imply that Mr. Justice Le Dain had such a strategy in mind. However, the *Valente* decision does happen to advance the legitimacy of judicial determination of the scope of judicial independence. For a discussion of strategies which the judiciary, viewed as an organization, may adopt in order to meet its "maintenance and enhancement needs," see Carl Baar, "Patterns and Strategies of Court Administration in Canada and the United States" (1977) 20 Can. Pub. Admin. 242.

[18]On the implications of the courts determining and then policing their own jurisdictions, see P.H. Russell, "Constitutional Reform of the Judicial Branch: Symbolic vs. Operational Considerations" (1984) 17 Can. J. Pol. Sci. 227 at 246.

[19]*Valente, supra*, note 1 at 704.

the Parliamentary system, the executive in fact controls the legislature.[20]

The third essential condition for independence, the collective independence of tribunals, is limited to matters directly affecting adjudication, "assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions."[21] The line which must be drawn between administrative functions which directly affect adjudication, and other administrative functions, is by necessity somewhat indistinct, but what is significant is that Le Dain drew the line around a relatively narrow range of administrative activities. He rejected Bates' argument that judicial control over other aspects of court administration was necessary to judicial independence. Mr. Justice Le Dain claimed that the "reasonable person" test caught only those administrative matters directly related to adjudication.[22] He noted that former Quebec Superior Court Chief Justice Jules Deschênes, the Committee on Judicial Independence of the Canadian Bar Association, former Chief Justice Laskin, and Chief Justice Dickson had all publicly supported much greater judicial control over court administration activities not directly related to adjudication.[23]

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[20] *Ibid.* at 706.

[21] *Ibid.* at 709. These limits are similar to the ones identified by the Ontario Law Reform Commission's *Report on the Administration of Ontario Courts* (Toronto: Ministry of the Attorney General, 1973) at 7, 26-33, and 38-40.

[22] *Ibid.* at 712.

[23] *Ibid.* at 708-12. In 1981, Chief Justice Deschênes with Carl Baar produced a report entitled *Masters in their own house: A Study on the Independent Judicial Administration of the Courts* (Ottawa: Canadian Judicial Council, 1981). The study was sponsored by the Canadian Judicial Council and the Canadian Judges Conference. It recommended that court administration services become independent agencies under the control of judges through a three stage process. The first two stages of this process were endorsed by the Canadian Judicial Council and by the Canadian Bar Association's committee on judicial independence. (See the committee's report, *The Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Foundation, 1985.)) The second stage is decision sharing between the judiciary and the executive; the third stage is complete independence of the court administrative services. Both the late Chief Justice Laskin in "Some Observations on Judicial Independence" (Address to the Canadian Association of Provincial Court Judges, 1980) and Chief Justice Dickson in "The Rule of Law: Judicial Independence and the Separation of Powers" (Address to the Canadian

However, he concluded that such control, although it "may well be highly desirable,"[24] is not essential to the *Charter* requirement of judicial independence.

The central importance of the *Valente* decision is that it establishes at least three "essential conditions" for the existence of judicial independence: security of tenure, financial security, and institutional independence. All three must pass the "reasonable person" test. However, security of tenure requires legislated safeguards in order to pass. Financial security may be fulfilled through less formal means, as long as the right to a salary is established in law, and judicial decisions are not tampered with through salary manipulation. Institutional independence extends only such administrative matters as are directly related to adjudication.

III. THE *BEAUREGARD* CASE

The *Beauregard* case, which was decided by the Supreme Court nine months after the *Valente* case, presented the court with a second opportunity to continue the development of its doctrine of judicial independence.

Marc Beauregard was appointed as a justice of the Quebec Superior Court on 2 July 1975, during a time when the federal Parliament was in the process of making major changes to the salaries and pensions package for federally-appointed judges. These changes were made in two stages. On 4 July 1975, the salaries of provincial superior court judges were increased from $38,000 to $53,000 per year. On 20 December 1975, the changes to the judicial pensions, which provided for contributory pensions, became law, retroactive to the date of the introduction of the legislation, 17 February 1975. Judges appointed before this date were "grandfathered" regarding personal pension contributions, but were required to pay 1.5% of their salaries to a survivor's pension fund. Judges appointed on 17 February or afterwards would contribute,

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Bar Association, Halifax, August 21, 1985) have supported an independent court administration service similar to Deschênes' third stage.

[24] *Ibid.*

within a short time, 7% of their salaries toward personal and survivor's pensions. The level of pension benefits was substantially increased both for new judges and "grandfathered" judges.[25]

Beauregard received his appointment after the increase in salary took effect, but before the pension legislation was enacted. However, because the pension legislation was made retroactive, its provisions included Beauregard in the group of new judges who would not receive the benefits of the "grandfather" clause. Beauregard claimed never to have been told about the impending pension legislation. He had accepted a judgeship expecting a salary of $53,000 per year with no deduction for pension contributions, only to discover later that the new pension legislation would cost him almost $4,000 per year, or $125,000 over his judicial career.[26] In the Federal Court, he challenged the validity of the pension legislation on two grounds:

1. That it violated section 100 of the *Constitution Act, 1867* ("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.")

2. That it violated section 1(b) of the Canadian Bill of Rights — the section which recognizes "the right of the individual to equality before the law and the protection of the law."

The argument based on the *Bill of Rights* did not succeed in the Federal Court or in any of the subsequent appeals. However, the section 100 argument succeeded, for somewhat different reasons, in the Trial Division of the Federal Court, and the Federal Court of Appeal, before going down to defeat in the Supreme Court of Canada.

In dealing with the section 100 argument, Chief Justice Dickson, whose opinion was accepted unanimously on this question, noted that a major purpose of section 100 is to protect judicial independence by making the federal Parliament, rather than the executive, responsible for judicial salaries and pensions. Relying on the *Valente* precedent, Chief Justice Dickson wrote that judicial

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[25] *Beauregard, supra*, note 2 at 59.

[26] *Ibid.* at 95.

independence requires that judicial salaries may not arbitrarily be manipulated in order to influence judicial decisions. The stipulation that the salaries of section 96 judges may only be changed through the public Parliamentary process is intended to reduce the chances of judicial independence being abrogated through salary manipulation.[27]

The section 100 argument presented the Supreme Court with an opportunity to comment further on the nature and requirements of judicial independence. In the *Valente* case, Mr. Justice Le Dain had focussed on the conditions for judicial independence. In *Beauregard*, Chief Justice Dickson's analysis shifted to another aspect of judicial independence — its purpose.[28]

According to Chief Justice Dickson, judicial independence has two purposes. The first is to allow individual judges complete liberty to hear and decide the cases that come before them. "[N]o outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision." Chief Justice Dickson refers to this as the "core" purpose of judicial independence.[29] This was the purpose which was implied by Mr. Justice Le Dain throughout his opinion in *Valente*.[30]

The second purpose of judicial independence is to enable the courts to fulfill their institutional role in Canada, that is, as an independent branch of government whose duty it is to protect the constitution.

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[27] *Ibid.* at 72 and 75-78.

[28] The development of a "purposive" approach to *Charter of Rights* issues has been a hallmark of the post-1982 Supreme Court, especially of the Chief Justice's decisions. See especially *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 and *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295. It is noteworthy that this purposive approach is now being applied to the *Constitution Act, 1867*.

[29] *Beauregard, supra*, note 2 at 69-70.

[30] Mr. Justice Le Dain referred throughout his decision to the necessity for judges to have the capacity to act independently from others. See especially *Valente, supra*, note 1 at 686 ff. Le Dain did not mention the institutional role of the courts in the sense in which Mr. Chief Justice Dickson used this concept in *Beauregard, supra*, note 2.

> The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are ... [the] protector 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.[31]

Because courts in Canada have this institutional role to play, judicial independence, according to Chief Justice Dickson, is even more important in Canada than it is in the United Kingdom. Chief Justice Dickson posited that in order for Canadian judges to perform the institutional role, the judiciary must be "completely separate in authority and function from *all* other participants in the justice system."[32]

Having identified the dual purposes of judicial independence in Canada, Chief Justice Dickson considered the merit of Beauregard's section 100 argument. This argument related to the second essential condition for judicial independence established in the *Valente* case – financial security. Chief Justice Dickson reasoned that Parliament's 1975 pension legislation did not represent arbitrary interference with the financial security of the judiciary in order to influence judicial decision making. Therefore, this legislation could not reasonably be considered an interference with judicial independence.[33]

In addition to arguments related to judicial independence, Beauregard's counsel had put forth a "strict construction" argument, to the effect that the word "provide" in section 100 means that Parliament must provide 100% of the cost of pensions, and that the word "pensions" in section 100 means what it did in 1867 – non-contributory pensions. Chief Justice Dickson invoked the doctrine of progressive interpretation[34] to refute this argument:

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[31] *Ibid.* at 70. It is noteworthy that Chief Justice Dickson fails to mention legislative supremacy in this list of important constitutional values in the United Kingdom. It would be difficult to reconcile legislative supremacy with the position that the courts ought to be separate in authority from the other branches of government.

[32] *Ibid.* at 73 (emphasis in original text).

[33] *Ibid.* at 77-78.

[34] See P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 340.

"The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people."[35]

The strategic effect of the *Beauregard* decision was similar to that of *Valente*, in that governmental action was defended, and no statute was struck down. At the same time, the official Supreme Court doctrine of judicial independence was considerably broadened. Mr. Justice Le Dain had defined the institutional independence of the judiciary to include only matters directly related to adjudication, such as assignment of judges to cases. He had associated the need for this institutional independence to the adjudicative function itself, not to what Chief Justice Dickson referred to as the institutional role of the courts.[36] Chief Justice Dickson moved far beyond the narrow concept of institutional independence in *Valente*. For the Chief Justice, the judiciary has a role to play as protector of the constitution, and as such, it must be "completely separate in authority and function"[37] from the other two branches of government in both the federal and provincial domains.

It is this broadening of the concept of the collective independence of the judiciary in *obiter* which may prove to be the most significant aspect of the *Beauregard* decision in future litigation. Although the *Beauregard* case does not deal with a *Charter* issue, the discussion of the nature of judicial independence in *Beauregard* would certainly be relevant to the deciding of future cases involving the interpretation of section 11(d) of the *Charter*. In particular, the *obiter* in *Beauregard* might be applicable to cases which, unlike *Valente*, concerned actual rather than hypothetical examples of the effect on judicial independence of court administration services provided by the executive.

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[35] *Beauregard, supra*, note 2 at 81.

[36] *Valente, supra*, note 1 at 678.

[37] *Beauregard, supra*, note 2 at 73.

IV. A CRITIQUE OF THE SUPREME COURT'S DOCTRINE OF JUDICIAL INDEPENDENCE

There are three important issues relating to the nature of judicial independence which the Supreme Court did not fully address in *Valente* and *Beauregard*. The first issue is the relation between judicial independence and judicial impartiality. The second is the relation between judicial independence and the various mechanisms or procedures developed by a political system to protect judicial independence. The third is the institutional role of the courts.

A. *The Relation between Independence and Impartiality*

Although Mr. Justice Le Dain distinguished between independence and impartiality in *Valente*, he did not clearly analyse the relation between these two concepts. It is useful, as Mr. Justice Le Dain has done, to identify impartiality as a state of mind, and independence "not merely as a state of mind ... but as a status or relationship to others, particularly to the executive branch of government...."[38] According to this approach, the "primary meaning" to be given to judicial independence is an "objective status or relationship."[39] Nevertheless, he claimed that independence is "a state of mind" (that is, impartiality) "as well as" a status or relationship.[40] Mr. Justice Le Dain seemed to be suggesting that judicial independence includes judicial impartiality, but that independence primarily concerns relationships between judges and others, rather than impartiality. He does not indicate what purpose is served by on the one hand thinking of impartiality as a distinct concept, but on the other hand thinking of it as an element of judicial independence.

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[38] *Valente, supra*, note 1 at 685.

[39] *Ibid.* at 688.

[40] *Ibid.* at 689.

Theodore Becker, one of the few academics to have systematically analysed the nature of the judicial process, has pointed out that independence and impartiality have often been confused with each other by academic writers as well as by judges. He demonstrates the usefulness, from both a theoretical and a research perspective, of considering them as separate but related concepts. Like Mr. Justice Le Dain, Becker identified impartiality with a state of mind and independence with relationships between judges and others, but he was more precise. To Becker, impartiality meant an objective state of mind which is fostered by reliance on law to resolve disputes, whereas independence referred to the ability to decide in opposition to others with political power.[41] The utility of Becker's approach is twofold. First, it facilitates the theoretical exploration of the role of both independence and impartiality in the judicial process. Second, it accommodates the measurement of the degree to which any particular judge possesses independence or impartiality. Becker's primary interest was in measurement; as a result, his discussion of the relation between independence and impartiality was limited. He did posit, however, that impartiality is "the heart of the judicial process."[42] This would seem to be a useful starting point for considering the relation between impartiality and independence. If it is true, as Becker claims, that the state of mind of impartiality is the *sine qua non*[43] of adjudication, then judicial independence can usefully be considered as one condition for judicial impartiality.[44] It is central to the adjudicative process that judges decide disputes, as much as possible, without any pre-conceived notions of favouritism or animosity toward any of the litigants, that is with impartiality. One method of promoting impartiality is to attempt to ensure that the judge is free from outside interference by the litigants or other interested parties,

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[41] T. Becker, *Comparative Judicial Politics* (New York: Rand & McNally, 1970) at 13 and 144.

[42] *Ibid.* at 26.

[43] *Ibid.*

[44] This approach is adopted by F.L. Morton in *Law, Politics, and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1984) at 97.

interference which is intended to bias the judge. In other words, the purpose of judicial independence, which is the freedom from relationships which could reasonably induce bias, is to promote judicial impartiality.

If judicial independence is considered as a support for judicial impartiality, then an analysis of judicial independence cannot avoid a consideration of the nature of judicial impartiality. Complete judicial impartiality, it must be admitted, can never be achieved. In some senses, it ought *not* be achieved. For example, a Canadian judge should not to be expected to remain neutral with regard to the basic tenets of the nation's liberal-democratic political system, which after all is the justification for judicial impartiality in the first place.[45] Perhaps this is one factor which Chief Justice Dickson was alluding to in the *Beauregard* case when he stated that the institutional role of judges calls upon them to protect "the fundamental values embodied"[46] in the constitution. Outside of adherence to these basic norms, however, judges are expected to banish any preconceived notions as to which litigant ought to win a case, so that the judge's decision is based, as much as practically possible, on an objective consideration of the law and of the facts. The state of mind which allows this objective consideration is not an absolute one, one which is either present or not present. Rather, it is a state of mind which judges may come close to, or may be distant from. If it were possible to measure the kinds of biases which affect judicial decision making, then individual judges might be placed on a continuum between the humanly impossible goal of complete impartiality and its opposite, total partiality toward one or the other of the litigants in a case. The principle of the rule of law admonishes Canadian judges to strive to place themselves as close as possible to the impartial end of the continuum. The fact that workshops and conferences occasionally take place which are designed to help judges become aware of possible unconscious biases, for example toward women or minority groups, and thereby overcome to some extent the effects of these biases, suggests that

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[45] See, *supra*, note 4.

[46] *Beauregard*, *supra*, note 2 at 70.

with effort, judges can perhaps come closer to achieving the state of mind of impartiality.[47] Judicial independence, considered as the absence of relationships which are most likely to lead to attitudes of partiality, is only one of the methods developed in our political system to promote judicial impartiality. The rule of natural justice, *nemo judex in sua causa*, is another.[48] The expectation that judges should refrain from joining groups likely to litigate is another.[49] Yet another is the rule that judges may not make speeches about "political" matters.[50] Furthermore, attempts to make the law as explicit as possible could be regarded as promoting judicial impartiality, because such laws reduce the effect of judicial discretion, and thus the possibility for bias.[51]

A complete analysis of judicial impartiality is beyond the scope of this paper. The point which is being emphasized through this cursory discussion of the relation between impartiality and independence is that unless the connection between these two concepts is clearly understood, difficulties are likely to arise in determining whether violations of judicial independence have occurred. For example, the Canadian Judicial Council's Investigation Committee regarding Mr. Justice Thomas Berger concluded that Berger had violated judicial independence because he had

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[47]For the proceedings of one such conference, see Sheilah L. Martin & Kathleen E. Mahoney, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987).

[48]For a discussion of this principle see D. P. Jones & Anne S. De Villers, *Principles of Administrative Law* (Toronto: Carswell, 1985) at 244 ff.

[49]See J.O. Wilson, *A Book for Judges* (Ottawa: Ministry of Supply and Services Canada, 1980).

[50]See "Report of the Investigation Committee of the Canadian Judicial Council in the matter of the Honourable Mr. Justice Berger," mimeo. (Ottawa: Canadian Judicial Council, 1982).

[51]Becker, *supra*, note 41, identified impartiality almost entirely with the existence of clear, explicit laws. Becker may have defined impartiality too narrowly through his attempt to create an operational definition of the concept which would allow for empirical testing of its presence.

abandoned the appearance of impartiality.[52] This conclusion is confusing. The Investigation Committee presented a persuasive argument that Berger had violated the appearance of impartiality. It then jumped to the arguably illogical conclusion that therefore, judicial independence had been violated. As the discussion above has shown, a lack of independence could be considered a good indicator of a lack of impartiality. However, a lack of impartiality taken alone does not necessarily mean a lack of independence. The absence of impartiality could be caused by a number of factors, of which lack of independence is only one. The Investigation Committee's report was not universally well received.[53] One reason for the public criticism of the Report may have been that the Investigation Committee neglected to discuss the relation between independence and impartiality. Absent such an analysis, the committee's conclusion may have seemed unconvincing.

The critical test for judicial independence utilized in *Valente* and *Beauregard* is the "reasonable person" test. The difficulty with this test is that it could prove to be too subjective to serve as a litmus test for judicial independence. A more careful consideration of the nature of impartiality and its connection with independence may help to provide a clearer guide as to whether judicial independence has been violated than the "reasonable person" test.

B. *The Relation between Judicial Independence and its Support Mechanisms*

Three of the methods developed in the Anglo-Canadian tradition to protect judicial independence are tenure until retirement during good behaviour, financial security, and the collective independence of the judiciary regarding matters directly affecting

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[52] "Report of the Investigation Committee of the Canadian Judicial Council in the matter of the Honourable Mr. Justice Berger," *supra*, note 50 at 20 ff.

[53] For example, Alan Borovoy of the Canadian Civil Liberties Association and Jacques Flynn, Opposition Leader in the Senate, were critical of the Report. See Gerald Gall, *The Canadian Legal System*, 2d ed. (Toronto: Carswell, 1983) at 190-191.

adjudication. Mr. Justice Le Dain refers to these as three "essential conditions"[54] for judicial independence. It is perhaps more useful to think of these three factors as *mechanisms* developed by our political system to protect judicial independence, than as essential conditions. To illustrate this point, it is instructive to remember that other political systems which claim to have judicial independence have developed somewhat different protective mechanisms. For example, many state court judges in the United States do not have the security of tenure described by Mr. Justice Le Dain as an essential condition of judicial independence. They may be removed other than for cause and without an independent inquiry. The electorate can remove them for any reason.[55] Most American jurists and political scientists, nevertheless, would contend that such judges are independent.[56] To take a further example, many judges in Canada think that judicial independence implies that even senior judges may not attempt to influence the decision-making process of more junior judges.[57] Chief Justice Dickson in *Beauregard* alluded to this notion by noting that "even another judge [may not] interfere with the way in which a judge conducts his or her case and makes his or her decision."[58] However, if this view is correct, then French judges are not independent, because junior judges are supervised by senior judges, and are promoted according

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[54]*Valente, supra*, note 1 at 691, 694, 704, and 708.

[55]The most recent example of the removal of a judge by the electorate was the electoral defeat of Chief Justice Rose Bird of the California Supreme Court and two associate justices late in 1986. For an analysis of issues in this retention election, see Robert S. Thompson, "Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate" (1986) 59 S. Cal. L. Rev. 809 at 828.

[56]For example, see Becker, *supra*, note 41 at 148. Becker assigns a higher rating to lifetime tenure, as compared to more limited forms of tenure, as one of several indicators of judicial independence. Lack of lifeime tenure does not imply lack of independence to Becker, but rather a less effective means of ensuring independence.

[57]Interviews by the author with a random sample of 40 Ontario judges at all levels of court, 1979 and 1980. Sixty percent of the judges said that senior judges should not have any influence on the decision-making process of junior judges, including decisions regarding the scheduling of cases.

[58]*Beauregard, supra*, note 2 at 69.

to their decision-making abilities as assessed by senior judges. There is no doubt that this promotional system influences how junior judges decide cases. Yet the French consider that their judges are independent.[59] From their perspective, the supervisory responsibilities of senior judges are not a violation of independence, because senior judges are not outsiders who are attempting to destroy a junior judge's impartiality. Rather, their function through the supervisory process is to promote higher levels of impartiality among the junior judges. Moreover, because promotions of judges in France are made from within the judicial system rather than by politicians outside the judiciary, there is no possibility that politicians could use promotional powers to entice judges to comply with the politicians' wishes. In contrast, executive control of judicial appointments in Canada could be used as a lever to manipulate judicial decision making, as Noel Bates pointed out at the *Valente* trial.[60]

What these examples illustrate is that human history has produced a wide range of mechanisms for promoting and protecting judicial independence in countries which claim to adhere to this norm. None of these mechanisms is complete or perfect in itself.[61] What all of the mechanisms are designed to do is to reduce the number of relationships between judges and others which hinder or appear to hinder their impartiality. If Canada continues to mature as a liberal democracy, presumably both her constitutional theorists and her practical politicians will continue to search for more appropriate and effective mechanisms to protect the independence of judges, as well as of others who exercise adjudicative responsibilities. In order to avoid locking the mechanisms for protecting judicial independence in that 119-year old casket abhorred by Chief Justice Dickson, it would be prudent not to confuse judicial

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[59] See H.J. Abraham, *The Judicial Process*, 5th ed. (New York: Oxford University Press, 1986) at c. II and VI.

[60] See the *Valente* trial court decision, *supra*, note 7. To the best of the author's knowledge, there are no documented examples of such occurrences in Canada.

[61] Lederman describes a number of the procedures which have developed in the Anglo-Canadian tradition for protecting judicial independence. See Lederman, *supra*, note 3.

independence — an enduring goal — with the transitory mechanisms thus far developed to protect and promote it.

The question of the continued relevance of the prohibition of the public criticism of the judiciary and judicial decisions, as a mechanism to protect judicial independence, will help to illustrate this point. According to Lederman, entering into relationships with judges by publicly criticizing their decisions could be regarded as attempting to impair their impartiality. Such criticism might be perceived by judges as coercion either to decide future cases in the direction suggested by the criticism, or else suffer a new round of similar criticism.[62] In Canada, the prohibition of criticism of the judiciary and its decisions as a mechanism for protecting judicial independence has been enforced through contempt of court proceedings much more rigorously than in the United States courts, where freedom of expression has been given comparatively greater weight.[63] The question of the continued relevance of the prohibition of criticism of the judiciary and its decisions is certainly an important one, especially in the wake of the Kopyto affair.[64] If the prohibition against criticism of judicial decisions were ever declared another "essential condition" for judicial independence, then further debate about this important issue would be largely academic.

In *Valente*, Mr. Justice Le Dain did note that the "essential conditions" for judicial independence evolve over time so as to adapt to changing social and political needs.[65] This recognition in itself tacitly supports the position of this essay that the phrase, "essential conditions," too rigidly describes the devices which have been invented to protect and promote judicial independence.

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[62]See Lederman in the Can. B. Rev., *supra*, note 3 at 799 and 804.

[63]See C. Beckton, "Freedom of Expression (s. 2(b))," in W.S. Tarnopolsky & Gerald A. Beaudoin, eds, *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) at 75 and 91.

[64]Harry Kopyto was convicted of a form of contempt of court in late October 1986 because of making accusations that the courts were biased in favour of the police. His conviction was overturned on appeal [unreported case]. See L. Shifrin, "A Court Decision from the Middle Ages" *The Toronto Star* (3 November 1986) A15.

[65]*Valente*, *supra*, note 1 at 691-92.

C. *The "Institutional" Role of the Courts*

In *Beauregard,* Chief Justice Dickson claimed that there are two purposes for judicial independence in Canada — to ensure that individual judges may decide cases without outside pressure, and to allow judges to fulfill their institutional role of protecting the constitution. He reasoned that because of the second purpose, safeguards must be put in place to protect judicial independence which are in addition to the safeguards put in place as a result of the first purpose.

This argument, which I will refer to as the "institutional" argument, posits that the courts have an institutional role to play as arbiters between the federal and provincial governments, as defenders of civil liberties against government encroachment, and generally, as protectors of the constitution. Therefore, the courts must be completely separate from the other two branches of government in order to be truly independent and impartial in their institutional role.

Apparently, this degree of separateness from the other two branches would not be necessary if the second purpose of judicial independence did not exist, as is the case, for example, in the United Kingdom.[66] In Canada, however, complete separation of the judiciary is needed because constitutional challenges always involve claims against the executive or legislative branches. The courts cannot act effectively as independent and impartial arbiters if they function under the authority of any of the litigating parties.

There are two problems with the institutional argument. First, it overlooks the fact that even if the courts in Canada did not have to decide constitutional cases, the most frequent litigants in the courts would still be governments. The Crown is the prosecutor in almost all criminal cases. If adequate safeguards are in place to prevent the violation of judicial independence by the Crown in criminal cases, it is difficult to understand why these safeguards

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[66] Chief Justice Dickson thought the institutional role of the courts in Canada made judicial independence more important in Canada than in the U.K. See *Beauregard, supra,* note 2 at 71.

would not also be adequate in constitutional cases. In fact, criminal cases greatly outnumber constitutional cases in Canadian courts. From this perspective, it is even more important to demonstrate to Canadians that judges can and do decide independently from the Crown in criminal cases than in constitutional cases.

It could be countered, however, that the cabinet, as the central body of the executive branch of government, is rarely interested in the outcome of individual criminal cases, whereas the outcome of most constitutional cases is of critical concern. Therefore, the cabinet would be more likely to try to interfere with judicial decision making in constitutional than in criminal cases. Nevertheless, it could just as easily be argued that cabinets are *less* likely to attempt to interfere with judicial decision making in constitutional cases precisely because these cases tend to command such a high profile. Violations of judicial independence would be more likely to come to the public's attention in constitutional cases than in criminal cases. Criminal cases are not as often litigated in the media spotlight as constitutional cases.

The second difficulty with the institutional argument is that it does not recognize that the courts are necessarily part of government.[67] They constitute one of the three branches of government — the one responsible for the adjudication of disputes arising out of law — and in this sense they cannot be completely separate from the other two branches. What is important is that judges, in spite of being part of government, ought to be in the most advantageous position to be impartial as circumstances will permit — not that judges be "completely separate" from the other two branches. Independence, that is, the avoidance of relationships with those in the other two branches of government which may compromise a judge's impartiality, is one of the methods by which

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[67] "Government" is used here to mean the official institutions for governing a country, rather than the executive or the administration. The fact that the word "government" can be used in either of these senses is sometimes confusing. For example, the word "government" in the Canadian constitution contains examples of the use of both senses, and it is not always clear which sense is intended. In *R.W.D.S.U.* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573, the Supreme Court acknowledged that the courts are "one of the three fundamental branches of government" (at 600). The Court also concluded that the references to "government" in section 32 of the *Charter* do not apply to the courts, because "government" there refers to the executive branch (at 598).

impartiality is promoted. However, because the courts are part of government, a complete absence of such relationships is impossible. What is required is the avoidance of those relationships which are the most likely to impair a judge's impartiality.

As Le Dain noted in *Valente*, judges must have control over matters directly affecting adjudication, such as the assignment of judges to cases, and the supervision of staff inside the courtroom. These are matters which, if controlled by the executive branch of government, could very easily be used to affect the outcome of the adjudicative process.[68] However, he specifically stated that judicial independence did not require that judges must control administrative matters other than those directly affecting adjudication.[69] Chief Justice Dickson did not repeat this narrow version of judicial institutional independence in *Beauregard*, and his discussion of the institutional purpose of judicial independence seems to leave open the possibility that institutional independence might necessarily include control over a broader range of court administration activities.

Chief Justice Dickson's address to the Canadian Bar Association in 1985 leaves no doubt that at least as a private individual, the Chief Justice believes that judges should control a broader range of administrative activities in order to protect judicial independence.[70] In this speech, the Chief Justice maintained that Canada's federal system, along with the constitutional position of the *Charter of Rights and Freedoms*, requires the existence of a judiciary "separate in authority and function from all political organs."[71] In order to be truly separate, he argued, the judiciary must be administratively independent from the other two branches of government. This is a theme which the late Chief Justice Laskin

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[68]Not so many years ago, the Crown Attorney's office in a Toronto courthouse controlled the assignment of judges to cases. This power was occasionally used to assign "tough" judges to cases in which the Crown particularly wanted a conviction, according to interviews by the author with Crown prosecutors and court administrators in Toronto in 1979 and 1980.

[69]*Valente*, *supra*, note 1 at 709 ff.

[70]Dickson, *supra*, note 23.

[71]*Ibid.* at 3.

had also pursued, and Chief Justice Dickson quoted from the late Chief Justice Laskin in identifying the minimum requirements of judicial administrative independence:

> 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.[72]

The argument that judges need to control administrative matters not directly related to adjudication in order to protect judicial independence is debatable. In this short essay, it is not possible to present both sides of the issue in any detail.[73] However, several examples will at least illustrate that the problem is a complex one with no obviously correct solution.[74] Under the current Canadian system, in which judges do not normally play roles in administrative matters not directly related to adjudication, it would be possible, for instance, for the executive to slash the budgets of the courts in which the judges decided consistently against the Crown.[75] It would also be possible for the executive to order court office staff to harass a non-compliant judge. Judicial control over budgeting and personnel administration might prevent such episodes.[76]

However, under a system of judicial control of such matters, a new set of relationships would arise which could tempt violations

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[72]Address, at 12, quoting from the late Chief Justice Bora Laskin, "Some Observations on Judicial Independence" *supra*, note 23 at 4-5.

[73]See P.S. Millar & Carl Baar, *Judicial Administration in Canada* (Montreal: McGill-Queens, 1981), the Ontario Law Reform Commission *Report on the Administration of Ontario Courts*, *supra*, note 21, and Deschênes, *supra*, note 23, for more detailed discussions of this issue.

[74]In the survey referred to in note 57, only 47% of the judges thought that the principle of judicial independence required judicial control over such activities.

[75]In April 1986, the Quebec government made serious cutbacks in court staffing. The judiciary was able to obtain an injunction to prevent any firings until such time as the question of whether the firings violated judicial independence could be heard. The outcome of this case may turn on whether the staff were fired for purely economic reasons or in order to manipulate judicial decision making. See *Le Devoir [de Montréal]* (19 avril 1986).

[76]See Deschênes, *supra*, note 23. Deschênes recommended complete judicial control over court administration in order to prevent these kinds of violations of judicial indepencence.

of judicial independence. For example, judges may be called upon to defend their proposed court budget before a legislative committee.[77] It would be natural for judges to lobby the key players in the budget process in support of the court's proposed budget. Such relationships could present opportunities for the violation of judicial independence with regard to any court cases in which the key players in the budget process had an interest. Furthermore, presumably judges would be liable for the normal administrative sanctions for any overexpenditures of the budget. It is not clear that this new set of relationships among judges, legislators, and administrators would further isolate the judges from situations which might lead to violations of judicial independence.

Former Chief Justice Laskin proposed that in order to insulate a judge-controlled court administration from politics, the Attorney General could act as a "conduit" between the judiciary (which would draw up the court's budget) and the legislature.[78] Such a procedure, however, could create yet another relationship which might foster the violation of judicial independence. It would be possible for the Minister to refuse to act as an effective, energetic "conduit" unless the judiciary agreed to make decisions more in accord with the Cabinet's wishes.

Judicial administrative control is not the only possible solution to the problem of protecting the judicial branch from being manipulated by executive control over court administration. Any cabinet minister or public servant who attempted to influence a judge with administrative weapons could be cited for contempt of court for attempting to violate judicial independence. Alternatively, the judge could make public the apparent interference with judicial independence, and call upon the executive to order a public enquiry into the matter. This kind of situation in fact occurred in British Columbia in 1979. The Deputy Attorney General telephoned a Provincial Court Judge to inquire as to whether the judge would be willing to transfer himself to another court so that the issue of the

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[77]Deschênes suggested that if the judges are given the responsibility for the preparation of the budgets of the courts, senior judges could, if they wished, appear before a legislative committee to defend the proposed budget. See *ibid.* at 167.

[78]Late Chief Justice Laskin, *supra*, note 23 at 5.

constitutionality of the province's new *Family Relations Act* could be avoided. The judge in question was committed to having this issue argued, whereas other judges were apparently available who would ignore the constitutional question. The judge made public the telephone conversation, and the resulting furor led to a judicial inquiry into the incident. The inquiry confirmed a violation of judicial independence.[79]

If some judges become involved in personnel administration, another new set of relationships would arise which may lead to a weakening of the safeguards for judicial independence. For one thing, administrative judges could well become directly involved, as management, in confrontations with labour, and perhaps even with labour unions.[80] Such situations could, in fact or in appearance, impair the impartiality of judges in cases involving labour. Moreover, good personnel administration requires a constant awareness of potential personnel problems, and the devotion of time and energy to their solution. It is reasonable to suppose that a preoccupation with personnel problems would distract a judge from cultivating an impartial frame of mind. One of the advantages of not involving judges in personnel administration is that without such responsibilities, judges are free to concentrate on adjudication, unpressured by administrative worries. As a former Ontario Attorney General once claimed, judicial independence means that judges should be "free" from the "stress" of administrative duties.[81]

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[79]Mr. Justice P.D. Seaton, *Report of Commission of Inquiry Pursuant to Order-in Council #1885, 5 July 1979*. Disciplinary action was not recommended because no "evil intent" was involved. The implication was that if any subsequent violations of a similar nature were to occur, they should be dealt with more harshly.

[80]Deschênes *supra*, note 23 at 166 recommended that in order to prevent confrontations between the judiciary and labour unions, court employees should remain part of the civil service for the purpose of collective bargaining. No doubt, such an arrangement would serve a useful purpose. However, even this arrangement might not prevent a judge from developing feelings of animosity toward labour unions if a union's policy was perceived by a judge to affect detrimentally the performance of court employees.

[81]Statement of the Honourable Dalton Bales, Q.C., Attorney General, on the occasion of the tabling of parts one and two of the Ontario Law Reform Commission *Report on the Administration of Ontario Courts* (Toronto: Ministry of the Attorney General, mimeo., 1973) at 9.

If the judiciary were to be assigned the kinds of administrative responsibilities advocated by Dickson and others, then careful consideration should be given to procedures for making judges accountable for their administrative decisions. For example, one of the major justifications for judicial retention elections in California is that they are said to make judges answerable for their administrative decisions. (In theory, it is not proper to make a judicial case decision an election issue unless there has been a violation of impartiality or independence. However, administrative decisions are fair game for debate during election campaigns, as it is thought that most administrative decisions have little to do with adjudicative responsibilities.) The accountability issue and its implications have not usually been addressed by those Canadian judges who advocate a greater judicial role in administration.[82]

The question of what administrative mechanisms would best serve judicial independence — judicial control of all matters related to court administration, or judicial control only of matters directly related to adjudication — is a complex issue with no single correct solution. It would be unwise for the Canadian Supreme Court to attempt to deduce a solution from its current doctrine of judicial independence. The Court's consideration of judicial independence, as it has developed so far, has not even mentioned the practical consequences of judicial control over court administration.[83] It would be imprudent to overlook the effects on judicial independence of the new relationships which judicial control over all aspects of court administration would give rise to.

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[82] For a commentary on judicial retention elections and accountability, see Thompson, *supra*, note 55.

The accountability issue underlines, from another perspective, the danger of labelling the mechanisms developed to promote judicial independence as "essential conditions." If Canadian judges are given broader administrative responsibilities, it would seem sensible at least to consider the potential value of judicial retention elections as an accountability device. However, now that the criteria for removability of judges have been established as part of an "essential condition," the possibility of judicial retention elections to encourage administrative accountability seems to have been ruled out in advance.

[83] The report of the Canadian Bar Association's committee on judicial independence *supra*, note 23 also neglected to consider the practical consequences of the new kinds of relations which judicial control over more aspects of judicial administration would engender. The committee recommended increased judicial control over aspects of court administration not directly related to adjudication as a safeguard for judicial independence.

V. THE SUPREME COURT'S DOCTRINE OF JUDICIAL INDEPENDENCE

The doctrine of judicial independence thus far developed by the Supreme Court of Canada, although sound in some respects, contains deficiencies. In *Valente*, the court prudently rejected the notion that judicial independence for all judges is coterminous with some of the specific constitutional devices which have been invented to help protect judicial independence. However, the analysis in *Valente* is incomplete with respect to the relation between independence and impartiality. Moreover, the characterization of several of the general methods developed to protect judicial independence as "essential conditions" is somewhat too rigid. In *Beauregard*, the Supreme Court wisely rejected a strict construction reading of section 100 of the *Constitution Act, 1867* — an interpretation which would have frozen the devices to protect judicial independence in their 1867 incarnation. However, the apparent attempt in *obiter* to broaden the scope of judicial institutional independence is questionable.

It may be useful for an analysis of the requirements of judicial independence in Canada to take into account (1) the relation between independence and impartiality, and (2) the relation between judicial independence and the mechanisms developed to protect it. Judicial independence may usefully be considered as one very critical safeguard for judicial impartiality. The mechanisms devised to protect judicial independence are best regarded not as "essential conditions" in a timeless sense, but rather as devices developed, sometimes in a trial and error fashion, to respond to the particular needs of a specific era. To enshrine these methods in the constitution through judicial interpretation would limit the constitutional flexibility which is required to allow the judiciary, the legislature, and the executive to act in the most appropriate fashion to protect judicial independence in the wake of changing social and political conditions.

Over the past few years, there have been calls from a number of sources to implant the principle of judicial independence more firmly in the constitution than it now is through section 11(d)

of the *Charter*.[84] (The reference to judicial independence in section 11(d) only covers cases in which persons are charged with offences.) It is questionable whether such an amendment would serve any useful purpose, as the courts have demonstrated that they are quite capable of protecting judicial independence through contempt of court citations without the necessity of additional supports.[85] On the other hand, a firmer guarantee of judicial independence in the constitution, if interpreted unwisely by the courts, could do considerable harm to the reputation of the courts as constitutional philosophers. Canadians might be advised to be cautious about giving the courts too many openings to expand their own empires through a case law definition of a new constitutional reference to judicial independence. Because judicial independence is such an integral part of the liberal democratic tradition, it would be fitting if the concept continued to evolve more through the democratic process than through judicial fiat.

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[84]See the Canadian Bar Association Committee on the Constitution, *Towards a New Canada* (Ottawa: Can. Bar Association, 1978); D.P. Jones, "A Constitutionally Guaranteed Role for the Courts" (1979) 57 Can. B. Rev. 669; and the Canadian Bar Association Committee on the Independence of the Judiciary, *supra*, note 23.

[85]For example, consider the "judges affair," which resulted in the conviction of a cabinet minister for contempt of court. See J. Saywell, ed., *Canadian Annual Review of Politics and Public Affairs, 1976* (Toronto: University of Toronto Press, 1978) at 13-18.