March 12, 2021

Mr. Kaleed Rasheed, M.P.P.
Chair of the Standing Committee on the Legislative Assembly
c/o Tonia Grannum, Committee Clerk
Procedural Services Branch
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

Dear Mr. Rasheed and Members of the Standing Committee on the Legislative Assembly:

RE: Bill 245, *Accelerating Access to Justice Act, 2021*

The Advocates' Society, established in 1963, is a not-for-profit association of approximately 6,000 members throughout Canada, including around 5,000 in Ontario. The mandate of The Advocates' Society (the "Society") includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

We are writing to provide the Standing Committee on the Legislative Assembly with comments on Bill 245, the *Accelerating Access to Justice Act, 2021*. Our submissions below address major amendments proposed by Schedule 3 and Schedule 1 to Bill 245. References to section numbers are to the sections as they would appear in the relevant Acts as amended by Bill 245 in its current form.

SCHEDULE 3, *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43

A. Process for Appointing Judges of the Ontario Court of Justice

Introduction

The Society appreciates the opportunity to make submissions with respect to the proposed changes to the process for appointing provincial judges in Bill 245. We previously provided the Attorney General with comments regarding changes to this process being considered by the government. Many of the Society's concerns with the pre-legislative proposals have been addressed in Bill 245, and we appreciate the Attorney General's careful consideration of our earlier submissions. Copies of the Society's previous submissions to the Attorney General dated November 20, 2019, and March 9, 2020, are attached.

The proposed amendments to the judicial appointment process should be viewed through the lenses of transparency, excellence, diversity, and independence from political decision-making. These values define and protect the administration of justice. Any changes, however well-intentioned, that would in any way erode the public's perception of adherence to these values will undermine public confidence in

the selection process and the independence of the judiciary in Ontario. That is why all changes must be carefully considered.

The Society believes that the current appointment process for provincial judges has served the citizens of Ontario extremely well. It is considered the gold standard for a transparent, independent, and non-partisan selection of judges. The current process is respected within Ontario and throughout Canada because of two key features: the independent nature of the Judicial Appointments Advisory Committee ("JAAC") and the JAAC's robust screening process for candidates.

The screening process includes extensive formal inquiries, background checks, and rigorous interviews. It ensures that the list of candidates provided to the Attorney General is of the highest quality. Most importantly, it ensures that there is an independent, non-partisan, transparent process that is protected from actual or perceived favouritism and political interference. The current appointment process ensures judicial excellence, secures the constitutional requirement for judicial independence, and promotes public confidence in the administration of justice.

The Society shares the government's interest in promoting the diversity of judges appointed to the Ontario Court of Justice and enhancing the efficiency of the judicial selection process. However, we question whether either of these goals will be advanced by the amendments.

Diversity is already an important consideration in the selection process for provincial judges. The Ontario Court of Justice may be the most diverse Court in the country, although there remains considerable room for improvement. The Society believes that the diversity of the bench can be best improved by maintaining the current selection process. We encourage and support continuing efforts by the JAAC, the government, and the legal profession to encourage the development and recruitment of highly qualified and diverse candidates for judicial appointment.

Proposed Section 43(9) introduces a new requirement that the JAAC's annual report include statistics about the diversity of applicants at each stage of the application process. This is important information that will assist the government, the JAAC, and other stakeholders in evaluating the selection process by providing a means of identifying readily whether or not diversity is being achieved. If it is not, discussion can more effectively focus on measures that will improve the diversity of the applicants seeking judicial appointment.

We do not believe that the proposed changes to the selection process in Bill 245 can be justified for reasons of efficiency or speed of appointments. There are no concerns regarding delay in the current appointment process of provincial judges. For the most part, judicial vacancies occur when judges retire. In most cases, there is therefore considerable time for the JAAC to complete its work and provide a ranked list of qualified candidates to the Attorney General. Only infrequently does a vacancy remain open for any period of time, and it is usually when a provincial judge is appointed to a higher court or a death unfortunately occurs while in office.

Our specific areas of concern with respect to Bill 245's amendment of the judicial appointment process relate to the following issues:

1. the Composition of the Judicial Appointments Advisory Committee;
2. the Term of the JAAC Chair;
3. the Confidentiality of the JAAC; and

4. the Attorney General's Review of Recommended Candidates.

1. Composition of the Judicial Appointments Advisory Committee

The Law Society of Ontario, the Ontario Bar Association, and the Federation of Ontario Law Associations now each appoint one member of the JAAC. These three appointments provide important independent representation on the JAAC that is based on the assessments of several of the provincial bar's leading professional organizations.

Under Bill 245, the appointment powers are taken away from the province's professional organizations and given to the Attorney General, who will appoint from a list of three names given by each organization (proposed Section 43(2)(b)).

The Attorney General currently has the authority to appoint 7 of the 13 members of the JAAC. If the amendments are implemented, the Attorney General will be given the power to select 10 of the 13 members of the JAAC. We are not aware of any reason for these changes.

There is no basis for suggesting that the current approach to selecting members of the JAAC has resulted in appointments inconsistent with the core values that are to be promoted. In fact, we believe the appointments have been consistent with these values.

Current Section 43(3) of the *Courts of Justice Act* states that "the importance of reflecting, in the composition of the Committee as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized" in the appointment of the lawyer members of the JAAC. The Society believes that the existing legislative requirement makes the proposed change unnecessary. We are also concerned that, if it is made, the change will erode public confidence in the process in the long term due to the potential for increased politicization of the appointment process. The Society supports maintaining the current process whereby the LSO, the OBA, and FOLA each appoint one lawyer to the JAAC.

2. Term of the JAAC Chair

It is proposed that the Attorney General be authorized to designate the JAAC Chair for a term of "up to" three years (proposed Section 43(5)). Under the current provision, the Attorney General shall designate the Chair for a three-year term (current Section 43(6)). There is no reason to believe that the current fixed term for the Chair is not working.

The role of the Chair is important to ensure a transparent and vigorous selection process. Allowing the Attorney General to arbitrarily set the Chair's term of office creates the potential for or perception of political interference in the work of the JAAC and undermines the independence of the JAAC. This is particularly concerning given that the proposed Section 43(11) would authorize the Chair to disclose certain confidential information related to the appointment process.

3. Confidentiality of the JAAC

Proposed Section 43(11) provides that any records or other information in the possession of the JAAC used in relation to the consideration of an application shall be maintained in confidence and shall not be

disclosed except as authorized by the Chair of the JAAC. Maintaining the confidentiality of the information and records in the possession of the JAAC is critical to the integrity of the selection process.

The JAAC's investigations into candidates and its deliberations must be thorough and candid. The suggestion that any information, discussion, or materials before the JAAC could be subject to disclosure will undermine the selection process. Individuals who give references or other information to assist the JAAC do so with the expectation that their comments are provided in confidence. They may not be as forthright or candid if they believe that their comments may be made public.

Confidentiality is also critically important to many applicants. Qualified candidates may be hesitant to apply if documents or information associated with their application or consideration by the JAAC could become public. Some applicants may wish to keep the fact of their application confidential due to concerns about how it could affect their professional practices if their applications fail and become public.

Providing the Chair with such wide discretion to authorize the disclosure of this highly sensitive and confidential information will undermine the appointment process. The result may be that some excellent candidates choose not to apply, references may not be as candid, and the current rigorous vetting process under the protection of confidentiality may be relaxed. If it is necessary to provide the Chair with authority to release any information, that discretion should be clearly circumscribed in the legislation.

4. <u>The Attorney General's Review of Recommended Candidates</u>

New Section 43.1 will require the JAAC to continue to provide the Attorney General with a ranked list of recommended candidates, with brief supporting reasons. The Attorney General can only recommend a candidate who is on the JAAC's ranked list for appointment. The Society strongly supports this process.

At present, the JAAC is required to provide the Attorney General with a ranked list of at least two candidates (current Section 43(9)(2)). In practice, we understand the JAAC frequently provides more than two names for the Attorney General's consideration. The amendments proposed by Bill 245 will require that the ranked list include at least six candidates, rather than the current two (proposed Section 43.1(2)).

In our previous submissions, the Society supported increasing the minimum number of ranked candidates to four, in order to provide the government with ample flexibility in the selection process. While we continue to support the need for an increase in the number of ranked candidates, whether it be four or six, we are concerned that circumstances may arise where the JAAC is unable to identify and provide a list of six highly qualified candidates for a particular judicial position. A vacancy in certain less populated parts of the province, or a vacancy that requires a bilingual candidate, may result in a search that by necessity identifies a smaller number of qualified candidates.

The Society has similar concerns with respect to proposed Section 43.1(7), which allows the Attorney General to reject the ranked list and require the JAAC to produce a new ranked list of at least six candidates from among the remaining candidates. Given that the number of candidates required for the initial list is already being expanded to six, there is a real risk that the JAAC may be unable to provide a further list of highly qualified candidates for many vacancies.

The proposed solution to the JAAC having insufficient candidates to recommend, outlined in proposed Section 43.1(8), may result in unnecessary delay, particularly if the JAAC is required to begin a new process to advertise the judicial vacancy and solicit applications. With an expanded list of at least six highly

qualified candidates, the Attorney General should have sufficient qualified candidates to choose from. Given these concerns, the Society is of the view that proposed Sections 43.1(7) and (8) are unnecessary. If the Attorney General's power to reject the JAAC's ranked list in proposed Section 43.1(7) is adopted, the Society suggests that the JAAC or the Attorney General be required to report annually, in a meaningful way, on the number of times the Attorney General rejected the JAAC's ranked list and requested a new ranked list.

As noted in the Society's previous submissions, if the minimum number of candidates to be recommended by the JAAC is increased, it is important to include language to the effect of "where practicable" or "absent exceptional circumstances." This will allow the JAAC to make recommendations in circumstances where the pool of qualified applicants is smaller. If the JAAC concludes that it will not recommend six candidates, the Society does not object to requiring the JAAC to provide a brief explanation as to why six candidates have not been recommended, provided that the JAAC does not thereby provide any confidential information that could potentially identify an applicant for judicial office.

New section 43.1(2) provides that if the JAAC made a previous recommendation for a judicial vacancy at the same Court location that matches the requirements of a current judicial vacancy within the previous 12 months, the JAAC shall not advertise the current vacancy but shall provide the Attorney General with a ranked list based on its previous work. This blanket prohibition against further advertising the vacancy and considering new candidates is problematic. The circumstances surrounding each particular vacancy are different, and the need to advertise and consider additional candidates will similarly vary.

The circumstances for potential applicants may change within any 12-month timeframe. A blanket prohibition against advertising a position may prevent consideration of highly qualified candidates who are not permitted to submit applications in respect of a new vacancy. The JAAC should be permitted to make a determination on a case-by-case basis as to whether further advertisement of the position is required. In circumstances where the JAAC believes that it has an adequate list of six highly qualified candidates, a further search may not be required. In other circumstances, a further search may be appropriate. While a further advertisement of the position should not be mandatory, the decision as to whether it is required should be left with the JAAC.

Final Comments

The Society has recently published a statement on judicial independence, titled *Judicial Independence: Defending an Honoured Principle in a New Age.* In considering the proposed changes to the process for appointing judges to the Ontario Court of Justice, the Society invites the members of the Standing Committee to review the statement, in particular the section on judicial appointments (starting on p. 8 of the statement). A copy of the statement is attached.

The Society appreciates and supports the government's stated goal of improving the judicial selection process to allow for more highly qualified candidates from diverse backgrounds to be considered for appointment as provincial judges. However, we do not believe Bill 245 will advance this goal. Many of the proposed changes in Bill 245 may be viewed as politicizing a process that has previously been proven as successful in securing a highly qualified and respected independent judiciary for Ontario. It is essential that the judicial appointments process continue to be, and be seen to be, independent and free of political partisanship. These values are fundamental to the administration of justice.

B. New Title for Case Management Masters

Schedule 3 to Bill 245 proposes amending the *Courts of Justice Act* and various other statutes to change the title of case management master to "associate judge". While the Society supports changing the title of case management masters in Ontario, it has some concern that this title may invite some confusion, particularly with "Associate Chief Justice." The Society suggests that the title change be governed by the following principles:

- The name should be gender neutral;
- It should be simple, i.e. one word if possible (for example, "magistrate" or "prothonotary");
- It should connote a legal function; and
- It should minimize confusion with other legal actors.

SCHEDULE 1, *BARRISTERS ACT*, R.S.O. 1990, C. B.3

Schedule 1 to Bill 245 proposes amending the *Barristers Act* to allow current and former Attorneys General for Ontario to be called to the bar of Ontario without complying with the Law Society of Ontario's licensing process for lawyers, and to thereafter practise in the Ontario courts. The Society is concerned about a former Attorney General who is not an Ontario lawyer being able to practise law in Ontario, and represent clients in court, without complying with the Law Society of Ontario's licensing process which is intended to protect the public interest.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. We would be pleased to answer any questions you may have.

Yours sincerely,

Deborah E. Palter
Vice-President

Attachments:

1. The Advocates' Society Letter to Attorney General re: Review of Provincial Judicial Appointments Process, dated November 20, 2019
2. The Advocates' Society Letter to Attorney General re: Proposed Changes – Appointment of Judges and Justices of the Peace, dated March 9, 2020
3. The Advocates' Society, *Judicial Independence: Defending an Honoured Principle in a New Age* (published April 2020)

CC: The Honourable Doug Downey, M.P.P., Attorney General of Ontario
Vicki White, Chief Executive Officer, The Advocates' Society

November 20, 2019

VIA EMAIL

The Honourable Doug Downey, M.P.P.
Attorney General of Ontario
Ministry of the Attorney General
720 Bay St., 11th Floor
Toronto, ON M7A 2S9

Dear Attorney General:

RE: Review of Provincial Judicial Appointments Process

We understand that your government intends to reform the process for appointments to the Ontario Court of Justice. The Advocates' Society has not yet been consulted on the potential reforms or any proposed legislation. Accordingly, we do not know precisely what changes are proposed. Based on your own public comments, however, we are deeply concerned that your government intends to make changes to the important role of the Judicial Appointments Advisory Committee ("JAAC"). Among other things, it appears your government intends to remove or materially alter the ranked short list feature of the current appointment process. The announced changes threaten to undermine public confidence in the appointment process and have significant implications for public confidence in the quality and independence of Ontario's judiciary.

The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The mandate of The Advocates' Society includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice and the practice of law by advocates. Our membership has a strong interest in maintaining the independence of the judiciary.

As you know, the former Attorney General Ian Scott introduced the current system for judicial appointments to the Ontario Court of Justice in 1988. It has received high praise from lawyers and non-lawyers alike as having increased the quality of appointments and curtailed the possibility of partisan political considerations in the appointment process. Many observers have also commented that the short list system used in that process has had a positive impact on the appointment of women and minority candidates and the representativeness of the provincial court bench.

The Advocates' Society has repeatedly endorsed Ontario's current judicial appointments process as exemplary in terms of openness, transparency, merit and diversity. We have repeatedly recommended that the federal government emulate Ontario's judicial appointments process for all appointments to the federal bench, including those to the Supreme Court of Canada. We consider the current process for appointing judges to the Ontario Court of Justice to be a model for an independent judicial appointments process.

As courtroom advocates, members of The Advocates' Society have a compelling interest in ensuring that the process by which judicial appointments are made is beyond reproach. We believe that a strong, vibrant and independent judiciary is fundamental to our Canadian justice system, and that it is essential to upholding our country's democratic values and the rule of law. Judges are responsible for adjudicating disputes that involve the government and government action; this is the very reason that judicial independence from the other branches of government is essential. To that end, the process by which judges are selected should be one that increases public confidence in the appointment process, eliminates political partisanship, and ensures judicial excellence.

A key feature of the current appointments process is the JAAC's provision of a ranked short list of recommendations to the Attorney General, who is required to make the appointment from that list (see ss. 43(8), (9), and (11) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43). The JAAC is an independent committee comprised of members of the judiciary, the bar, and the public. The JAAC is positioned to use its collective skill and experience to objectively identify the strongest candidates for appointment. The Advocates' Society strongly recommends retaining the ranked short list feature of the appointments process in its present form for two reasons. First, it ensures that the most qualified candidates are chosen and that a high standard of excellence is achieved. Second, by limiting the size of the list and requiring that the appointment be made from the list, the risk of real or perceived political partisanship is greatly reduced.

We understand that steps to reform the current process and remove this key feature may be imminent. It is regrettable that matters have reached this juncture without your government having consulted with the independent bar. The courts are a co-equal branch of government with a constitutional mandate. The judicial appointment process is a complex area of government action with serious implications for matters affecting the life and liberties of Ontarians. Changes to this foundational element of the Ontario justice system should be developed only through meaningful consultation with justice system stakeholders. Ontario citizens reasonably expect such consultations to occur on important changes that will directly affect the administration of justice in the Province.

The Advocates' Society would appreciate an opportunity to consult with you on how to ensure that any necessary reforms respect Canadian constitutional principles and other foundational values that underlie the current appointment process. Staff of The Advocates' Society have already contacted your office to arrange a meeting to begin those consultations and we await your response.

Yours sincerely,

Scott Maidment
President

March 9, 2020

VIA EMAIL

The Honourable Doug Downey, M.P.P.
Attorney General of Ontario
Ministry of the Attorney General
720 Bay St., 11th Floor
Toronto, ON M7A 2S9

Dear Attorney General:

RE: Proposed Changes – Appointment of Judges and Justices of the Peace

I write in response to your February 27, 2020 announcement of the changes you intend to make to the process for appointing provincial judges and justices of the peace. This letter will focus on the proposed changes to the appointment of judges.

We have been advised that you intend to introduce legislation reflecting the proposed changes at the first possible opportunity. We are also advised by your office that we will not be given a copy of the proposed legislation for our review, nor will we be provided with more detailed written information. Therefore, in making these submissions, we have relied on the general description of the changes as set out in your press materials and as summarized by your staff at the stakeholder briefing.

As you know, The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada. The mandate of The Advocates' Society includes, among other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. A significant majority of our members practise law in Ontario.

First, thank you for giving The Advocates' Society the opportunity earlier this year to make written submissions on this issue and to speak with you regarding your ideas for reform. The proposal your staff described in the February 27, 2020 stakeholder meeting, further summarized in a press release of the same date, is different from the proposal contained in the government's discussion paper dated January 10, 2020. The changes demonstrate your openness to consulting with stakeholders, and your willingness to alter your views in response to the feedback you have heard. We commend you for being receptive to the suggestions of stakeholders in the justice system.

For example, we are encouraged that you have elected not to provide the Attorney General with the power to see the list of candidates classified by the Judicial Appointments Advisory Committee ("JAAC") as "not qualified". We similarly support the decision not to grant the Attorney General the ability to require the JAAC to reconsider its classification of a candidate as "not qualified". We also support the publication of aggregate statistics regarding the diversity of candidates at various stages of the JAAC's

screening process, as well as the move to an online application system and electronic meetings and interviews. Finally, we endorse your decision to provide the JAAC with authority to determine whether it will adopt any additional selection criteria that might be proposed by the Attorney General.

Regrettably, little has been done to address our overriding concerns with your reform proposals, which we have expressed to you from the outset. Our concerns remain that your reforms would open the door to politicization of the appointment process, would diminish the ability of the independent JAAC to assist the Attorney General in appointing the highest-quality judges for Ontario, and would undermine public confidence in Ontario's judiciary.

Specifically, the JAAC would be required to classify all candidates for judicial office as "highly recommended", "recommended", or "not recommended". The JAAC would also be required to rank every single candidate who is in the "highly recommended" or "recommended" category, and to provide that ranked "long list" to the Attorney General together with a "short list" composed of a minimum of six candidates. The Attorney General would then be permitted to select one of the candidates from the short list of six, or to reject the list and ask the JAAC for another short list of a minimum of a further six candidates. There is no limit on the number of times the Attorney General can request additional short lists.

We strenuously object to the requirement that the JAAC provide the Attorney General with a ranked long list of all candidates the JAAC has determined to be "highly recommended" or "recommended". The Attorney General's power to see every candidate on the long list, coupled with the Attorney General's unlimited power to repeatedly request fresh short lists from the JAAC, effectively gives the Attorney General the power to appoint any candidate on the long list of "highly recommended" or "recommended" candidates. The Attorney General could simply identify a specific candidate on the long list and request repeated short lists until the candidate was included in the short list. The requirement that the Attorney General select candidates from the "short list", which is intended to be a constraint upon political patronage, is thereby rendered illusory.

There appears to us to be no sound reason to take this approach in reforming the appointment process. There are two important reasons that we object to it.

First, it effectively deprives Ontario of an established appointment process that has improved public confidence in the judiciary. The established process has achieved this by discouraging political patronage appointments to the bench and encouraging the appointment of high-quality candidates selected by an expert committee. Under the established process, political patronage appointments are not only discouraged, but the public knows they are discouraged. This inspires public confidence in both the quality and independence of the judiciary appointed under that process. By contrast, your proposal would increase the power of the Attorney General to select and appoint "like-minded" judges, or judges who have demonstrated an adherence to a particular view or political orientation favoured by the government of the day. It will create a risk of appointments tainted, or seen to be tainted, by political patronage, with negative implications for public confidence in the quality and independence of Ontario's judiciary. As you know, under the federal judicial appointment process, the federal Judicial Advisory Committees ("JACs")

assess candidates as "highly recommended", "recommended", or "unable to recommend" for appointment, and the JACs then provide the Minister of Justice with a list of all "highly recommended" and "recommended" candidates. This federal process has recently been criticized in the media for partisan political involvement after the JACs have made their recommendations. We consider it regrettable that your government appears intent upon opening Ontario's judicial appointments to the very same public criticism.

Second, requiring the JAAC to categorize all applicants, and rank all those in the "recommended" or "highly recommended" categories, would be tremendously resource-intensive and time-consuming. Without a significant expenditure of new resources, we believe that this would slow down the process significantly – precisely the opposite of what the government is hoping to achieve. Moreover, the time commitment involved in ranking the entire list could result in the JAAC having to curtail the rigorous vetting it currently undertakes with regard to each recommended candidate, which could impact the quality of judges ultimately appointed to Ontario's courts.

Subject to a review of the proposed legislation, which may reveal additional areas of concern, The Advocates' Society believes it could support the government's legislation if the government were to make all of the following changes:

- remove the requirement that the JAAC rank the entire list of "highly recommended" and "recommended" candidates;
- remove the Attorney General's power to review the entire list of "highly recommended" and "recommended" candidates;
- require the JAAC to provide the Attorney General with a ranked short list of a minimum of six candidates, which the Attorney General could reject; and
- require the JAAC or the Attorney General to report annually, in a meaningful way, on the number of times the Attorney General rejected the JAAC's short list and requested an additional list.

These changes would safeguard the public interest in maintaining a high-quality and independent judiciary in Ontario. They would also serve to maintain public confidence in the independent judiciary. Moreover, we believe they would be welcomed by other legal organizations and members of the legal community.

We would welcome the opportunity to further discuss this issue with you.

The Advocates' Society would also like to work constructively with the government on what we believe are more pressing issues facing the Ontario justice system that we know are of mutual concern. Those include the reforms proposed by Bill 161, the *Smarter and Stronger Justice Act, 2019*, harmonizing Ontario's family law with the amendments to federal family legislation, creating an effective and sustainable Legal Aid system for Ontario's most disadvantaged residents, and proper measures to address the current underfunding of Ontario's justice system.

Yours sincerely,

Scott Maidment
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates' Society

Judicial Independence

Defending an Honoured Principle in a New Age

April 2020

"Judicial independence" is a phrase we often use, but seldom stop to think about. This thoughtful statement asks us to consider what judicial independence means – not just to the judiciary, or the bar, but to all Canadians. It is Canadians who benefit from a strong and independent judiciary. And ultimately, it is Canadians who have the power to strengthen and protect it. Here, The Advocates' Society gives them some of the tools they need to do so.

- The Right Honourable Richard Wagner, P.C.
Chief Justice of Canada

Foreword

Strong, independent institutions are crucial to a robust democracy. Canadian democracy is built on the foundation of an accountable government where the apparatus and powers of the state are divided. In Canada, the legislature enacts laws, the executive administers laws, and the judiciary interprets and applies laws. The judiciary must be independent from the other branches of government to perform its critical function. This fundamental separation of powers serves all citizens, not just those who seek justice before the courts. Knowing laws will be fairly and impartially applied provides citizens with the security of an honest and orderly system of government.

An essential part of The Advocates' Society's mission is to safeguard and promote judicial independence in Canada. As officers of the court, members of the independent private bar[1] have a special obligation to speak publicly in support of the proper administration of justice and in defence of the independence of the judiciary. Judges are limited in the ways they can advocate for judicial independence. The bar has a central role to play in ensuring that the public understands the truth at the core of judicial independence: that independence is not for the benefit of the judge, but for the benefit of the judged.[2]

Judicial independence ensures that judges can act as neutral referees, applying the law without influence from the government of the day, religious institutions, corporations, or other powerful forces. It ensures that cases are decided on their merits regardless of the identity, status, or influence of the people or organizations before the court. The right to have disputes decided by an independent judiciary has been enshrined in Canada's Constitution as a right enjoyed by every Canadian. It is also important that judges *be seen* to be independent, so that the public can have confidence that cases are decided without improper influences.

> ***As a judge, my duty was to apply the law and call the case the way I saw it … Sometimes a judge must make unpopular decisions that may go against her deepest preferences. That is why judges enjoy judicial independence.[3]***
>
> ***- Beverley McLachlin***

An independent judiciary strengthens the rule of law and contributes to the legitimacy of our system of government. The rule of law and the right to equal protection of the law are values that are as critical to a democracy as free and fair elections.

Like other foundational elements of democracy, judicial independence is vulnerable to threats. Its protection requires constant vigilance. Society, and the legal community in particular, must guard against what may appear to be even small incursions into this principle. If we fail to respond to these incursions with sufficient vigour, there is a real danger that the collective commitment to judicial independence will wane.

> ***The price of liberty is eternal vigilance.[4]***

Historically, concerns about judicial independence focused on the possible influence of the King or Queen on the outcomes of court cases. Over time, the potential for the executive (royal and, later, elected) to use its authority to pressure judges in deciding cases has come to be restrained by law, convention, the Constitution, and the shared expectations of all Canadians. Today, judicial independence may also be challenged by actions outside the formal power of the executive or the legislature.

The Advocates' Society has noted with concern that the need for its voice on issues of judicial independence is arising with greater frequency. This is likely related to increased public interest in the courts and their decisions. Scrutiny is to be encouraged: in a free and democratic society, it is desirable that judicial decisions be the subject of robust public debate. On occasion, however, public debate exceeds appropriate bounds and threatens judicial independence. On such occasions, The Advocates' Society feels obliged to defend the principle of judicial independence and restore balance to the public debate. Respect for judicial independence and public confidence in the judiciary are mutually reinforcing. When public confidence is eroded, it becomes easier for those with formal power to weaken judicial independence.

The Advocates' Society therefore believes that a common public understanding of judicial independence – what it is and why it matters – is more important now than ever. Ultimately, it is the public who can best safeguard the essential elements of democracy, including an independent judiciary. The independent private bar must ensure that public officials, journalists, and citizens who care for the progress and values of our country understand the stakes in any contest for judicial independence. That is our purpose in publishing this statement.

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Part I: Why Judicial Independence Matters in Canada

Judicial independence matters because it ensures that judges can make their decisions free from external influences or interference, and that the public maintains confidence in the administration of justice.

An independent judiciary is the cornerstone of the Canadian justice system.

People, companies, and governments come before the courts to resolve disputes with one another. Judges decide the outcome of many types of disputes, which can mean, for example, convicting someone of a crime, ordering one person to pay another a sum of money, or deciding who will have custody of children after a divorce. Judges must make these decisions by deciding what happened (i.e. the facts) based on the evidence presented to them. Judges then apply the law to those facts. Judges should not be externally pressured or improperly influenced by any other considerations in their decision-making. In most cases, one side will be adversely affected by the judge's decision. It is therefore essential that all parties receive a fair hearing by an independent and impartial judge so that they respect the court's decision, or contest it only by way of further appeal to the courts.

Judicial independence must be distinguished from the concept of judicial impartiality. Impartiality reflects the need for decision-makers to be free from any incentive or predisposition towards one party in preference to the other. Independence is a broader concept, which encompasses impartiality. It requires that the judiciary be organized and supported in a way that precludes any outside influences – particularly from other parts of government – from interfering with impartial decision-making. In a truly independent system, judges will be secure in the knowledge that the decisions they make will have no effect on their personal safety, their economic security, or the institutional and economic viability of the judiciary.

In addition to actually *being* independent, it is important for judges to also *appear* independent. Justice must not only be done, it must also be *seen* to be done. This is the rationale for the open court principle: conducting court proceedings in public invites public scrutiny and inspires public confidence in the justice system and the rule of law.

Judicial independence is one of the most important aspects of a democratic legal system. The Canadian Judicial Council (CJC)[5] has stated that:

> An independent judiciary is the right of every Canadian. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. … [J]udges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judges.[6]

Canada's Constitution guarantees judicial independence, and there are safeguards in place to preserve the independence of judges. These protections are "not created for the benefit of the judges, but for the benefit of the judged".[7] The Supreme Court of Canada has recognized that Canadians are the beneficiaries of an independent judiciary: "Litigants who engage our judicial system should be in no doubt that they are before a judge who is demonstrably independent and is motivated only by a search for a just and principled result."[8]

The primary goals of judicial independence are:

- to enable judges to render decisions in accordance with the law and the facts, without concern for the consequences to themselves, which assures the public that their cases will be decided, their laws interpreted, and their constitution applied without fear or favour;[9]
- to sustain public confidence that justice will be done in individual cases and that an individual's case is not pre-determined because of political, economic, or social pressures;[10] and
- to ensure government power is exercised within the bounds of the law (i.e. maintain the rule of law).[11]

Part II: The Origins of Judicial Independence in Canada

In Canada, the constitutional *separation* of powers means the executive, the legislative, and the judicial branches of government perform their functions separately. The constitutional *division* of powers allocates power between the federal and provincial governments; both levels of government have the power to establish and administer Canadian courts.

Judicial independence is guaranteed by the Constitution, unwritten constitutional principles, and federal and provincial laws. The main components of judicial independence are the security of tenure, financial security, and administrative independence of judges.

The Supreme Court of Canada has held that judicial independence is "the lifeblood of constitutionalism in democratic societies."[12] Judicial independence is not an end in itself, but a means to safeguard our constitutional order and maintain public confidence in the administration of justice.[13] To understand the sources and scope of judicial independence in Canada, we first need to understand our constitutional order, and its impact on how Canadian courts are organized and administered.

1. Canada's Constitutional Order

The Constitution is the supreme law of Canada and establishes the structure of Canada's government.[14] Although the Constitution is technically a collection of different documents,[15] two are central to Canada's constitutional order. Both contain important protections of judicial independence:

- Canada was established by the adoption of the *Constitution Act, 1867*.[16] Sections 96 to 101 of the *Constitution Act, 1867*, establish the judiciary.
- In 1982, Canada adopted the *Canadian Charter of Rights and Freedoms* as part of the *Constitution Act, 1982*.[17] The *Charter* guarantees the rights of all persons accused of a crime to a fair trial "by an independent and impartial tribunal".

The unwritten constitutional principle of separation of powers between different parts of the government plays an important role in shaping our understanding of judicial independence.[18] The separation of powers means that the executive branch, the legislative branch, and the judicial branch each perform separate, although not necessarily unrelated, functions.[19]

- **Executive Branch:** Although the Queen is the head of Canada's executive branch, it is an unwritten constitutional principle that executive authority is exercised by the Prime Minister and their Cabinet. The role of the executive branch is to run the government and administer the laws passed by the legislature. Among other things, the executive ensures that programs and services are provided to ordinary Canadians. The executive is accountable to Parliament for the operation of the government and its departments, through the convention of responsible government.
- **Legislative Branch:** Parliament is the legislative branch of government. It creates and passes laws. Because the legislature is elected, and the executive is not, the convention of responsible government requires mechanisms to ensure that the executive is democratically accountable. The most important of these is the confidence convention, which specifies that the executive must, at all times, maintain the confidence of the House of Commons.
- **Judicial Branch:** The judiciary interprets and applies the laws of Canada, including the Constitution. When a law or executive action is challenged in court, the judiciary has the power and duty to decide whether the law or action is consistent with the Constitution and, if not, to provide an appropriate remedy.

The Constitution also sets out how Canada, as a federation, allocates power between the federal and provincial governments. Because both levels of government can make laws, the Constitution creates a "division of powers", whereby a government can only legislate within those areas where it has authority. The courts can declare a law unconstitutional if it was enacted by a level of government that did not have the power to enact it.

Canada's Constitution authorizes the federal and provincial governments to establish four types of courts: (i) the provincial courts; (ii) the superior and appellate courts of the provinces and territories; (iii) the federal courts (the Federal Court, the Federal Court of Appeal, the Tax Court of Canada, and the Courts Martial); and (iv) the Supreme Court of Canada. The power to establish these courts and appoint judges to them is set out in the Constitution, and is divided between the federal and provincial governments in a manner that reflects Canada's federal structure:

- **Section 92(14) of the *Constitution Act, 1867***, gives the provinces exclusive jurisdiction over "[t]he 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." Under the authority of this provision, the provinces establish both

the superior and appellate courts of the provinces and other provincial courts,[20] like the Ontario Court of Justice and the Cour du Québec. It is important to note that although s. 92(14) allocates the authority to establish the superior courts to the provincial legislatures, the judges of the superior courts across Canada are appointed by the federal government. The judges of provincial courts such as the Ontario Court of Justice or the Cour du Québec are appointed by the respective provincial governments.

- **Section 101 of the *Constitution Act, 1867***, gives the federal government the authority to establish a "General Court of Appeal for Canada, and … any additional Courts for the better Administration of the Laws of Canada." Parliament established the Supreme Court of Canada in 1875, which became the final court of appeal for Canada in 1949 after appeals to the U.K. Privy Council were abolished.[21] The Supreme Court has found that the essential features of the Court, which are reflected in the *Supreme Court Act*,[22] are protected from change except through constitutional amendment.[23] Parliament has also established the Federal Courts, the Tax Court of Canada, and the Courts Martial.

2. Sources of Judicial Independence

Judicial independence is guaranteed in Canada by the written Constitution,[24] unwritten constitutional principles,[25] and by federal and provincial statutes.[26] Judicial independence is therefore robustly protected in Canada, but it does not have a uniform meaning across the country.[27] In the following sections, we set out the sources of judicial independence, and then discuss how those sources have been interpreted and applied.

The *Constitution Act, 1867*, contains three key sections that lay the foundation for an independent judiciary.[28]

- **Section 96** of the *Constitution Act, 1867*, gives the federal government the authority to appoint judges to provincial superior courts.[29] The courts have interpreted s. 96 as a guarantee of judicial independence. Superior courts have "inherent" jurisdiction that cannot be removed by the federal or provincial legislatures.[30] This prevents governments from establishing a parallel court system where the principles of judicial independence do not apply.
- **Section 99(1)** provides that "the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons."[31] This provision has been interpreted to give judges "security of tenure," which means that judges cannot be removed from office without cause, and even then, only by a vote in Parliament.
- **Section 100** stipulates that the "salaries, allowances, and pensions" of judges shall be determined and provided by Parliament.[32] The topic of judicial compensation is explored below. Courts have circumscribed Parliament's authority to establish salaries to require salaries that are sufficiently high to attract outstanding candidates and insulate them from corruption.[33]

While these sections of the Constitution may appear ordinary, their crucial importance cannot be overstated. Courts have interpreted them to mean that no government actors, interest groups, individuals, or even other judges may interfere with the independent and impartial manner in which a judge makes their ruling.[34] They also ensure that judges can render decisions without fear of reprisals from the government.

By their terms, these three provisions of the *Constitution Act, 1867*, apply only to superior court judges. However, the *Canadian Charter of Rights and Freedoms* adds a constitutional guarantee of judicial independence in other courts that hear criminal matters. Subsection 11(d) of the *Charter* provides that "[a]ny person charged with an offence has the right […] to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Many criminal matters are heard by provincial court judges, and s. 11(d) therefore requires those judges to be independent.[35]

In addition to the sources of judicial independence arising from the text of the Constitution, important guarantees arise from unwritten principles. The unwritten constitutional principle of judicial independence is recognized by the preamble to the *Constitution Act, 1867*, and elaborated on in the specific sections identified above.[36] The Supreme Court of Canada has found that unwritten principles extend the guarantee of judicial independence to all courts in Canada.[37] The result is that provincial and territorial court judges have the same guarantees of judicial independence as their federally-appointed counterparts. While the provinces and territories have some leeway in how they meet the requirements for judicial independence, none is free to ignore them.

3. Fundamental Components of Judicial Independence

The Supreme Court of Canada has enunciated three main components of judicial independence: (1) security of tenure,[38] (2) financial security,[39] and (3) administrative independence.[40]

Security of tenure means that a judge cannot be removed from office except in cases of significant misconduct. In practice, it means judges can exercise their best judgment without fearing retribution for particular decisions – for example, dismissal or demotion – from the other branches of government.

Financial security for judges means two things. First, it means that judges are adequately compensated for their work. Second, it means the executive or the legislature cannot use their control over government finances to reduce judicial compensation arbitrarily, which could lead to the perception that the government can influence judges' decisions. This ensures that judges are not susceptible to financial pressures and are not encouraged to make decisions that benefit their future economic opportunities.[41]

Administrative independence is an extension of the judicial function. How litigants interact with the court and how cases move through the court system can be as important as the decision made at the end of the case. Administrative independence means that decisions about how courts operate remain first and foremost in the hands of judges. Courts must also be granted the resources they need to fulfil their function as an independent branch of government in deciding disputes in a timely and effective manner. Administrative independence ensures that judges can make decisions that are unpopular but legally correct, and not suffer economic retaliation in the form of cutbacks to court infrastructure.

There are individual and institutional dimensions to these three components of judicial independence. Judicial independence must be maintained not just in fact, but also in public perception: the judiciary must not only *be independent* but it must also *be seen* to be independent.

Part III: Safeguards & Threats to Judicial Independence

We will now look at existing safeguards of judicial independence, as well as potential areas of interference with judicial independence. Safeguards for the independence of the judiciary are incorporated into the processes for how judges are appointed to courts in Canada, how and why they can be removed from office, how much they are paid, and how judges are educated about changes to the law and society that occur throughout their tenure. Interference with judicial independence can range from overt coercion, harassment, or threats against judges, to far more subtle challenges, such as budgetary choices, or legislative or executive actions that undermine the institutional safeguards of judicial independence. Comments by the public or political leaders can also sometimes undermine the independence of judges.

1. Appointment

The federal, provincial, and territorial governments have different processes for appointing judges to courts. To ensure judicial independence, governments must appoint judges that are meritorious and diverse, through a robust and transparent appointment process. When judicial appointment processes are or appear to be politically motivated, it weakens public confidence in the administration of justice.

As explained above, judges in Canada are appointed by either the federal government or the provincial and territorial governments. Judicial independence and public confidence in the judiciary depend in part upon the appointment of judges who are representative of the diversity of Canadian society, have demonstrated their professional and personal excellence, and are appointed in a transparent and politically neutral way. Moreover, it is important for an appointment process to be structured to avoid lobbying or partisanship, or an appearance that a judge may be beholden to the person or party who appointed them.

A diverse judiciary that is representative of the communities it serves is an important element of judicial independence. Canada's federal judicial appointments process – while at times the subject of criticism for political partisanship in the process[42] – is to be commended for its emphasis on appointing judges who reflect the diversity of Canada's population. Candidates for superior courts, federal courts, or appellate courts are assessed by provincial and territorial Judicial Advisory Committees ("JACs").[43] The JACs consist of seven members, including judges, lawyers, and members of the public, and are composed to achieve gender balance and to reflect the diversity of each jurisdiction. The guidelines for JACs explicitly state that along with assessment of professional competence and overall merit, JACs must "strive to create a pool of candidates that is gender-balanced and reflective of the diversity of each jurisdiction, including Indigenous peoples, persons with disabilities, and members of linguistic, ethnic and other minority communities, including those whose members' gender identity or sexual orientation differs from that of the majority."[44] The members of the JACs are given training, specific assessment criteria, and sample questions to ask when making inquiries about candidates in order to enhance their ability to collect relevant information and to identify highly qualified candidates who may have a different background or experience than their own. JACs assess candidates as "highly recommended," "recommended," or "unable to recommend" for appointment. The Minister of Justice considers the JAC's recommendations, may consult with a variety of stakeholders, and then recommends a candidate to the federal Cabinet for appointment by the Governor General.[45]

Each of Canada's provinces and territories has a screening committee that assists the Attorney General or Minister of Justice in assessing candidates for judicial appointment to the provincial or territorial courts of that jurisdiction. Provinces and territories vary in their approaches to the committee's role and composition, and the screening process it undertakes. Most committees consist of members of the bench, the bar, and the public. Several operate in a manner similar to the federal JACs by categorizing candidates as recommended or not, either on a rolling or vacancy-specific basis.[46] However, some committees rank candidates and submit a short list to the Minister or Attorney General, from which they must select a candidate for appointment.

The Advocates' Society considers the selection of judges from a short list produced by an independent committee to be preferable in terms of protecting judicial independence, as it limits the potential for the politicization of the appointment process.

Quebec's process for appointing judges of the Cour du Québec is one example of a screening process that results in a short list for the Minister of Justice. The process was established following the 2011 *Commission of Inquiry into the appointment of judges* chaired by Michel Bastarache, a recently retired Justice of the Supreme Court of Canada.[47] It requires that every judicial vacancy be advertised and that competitions be held for each vacant position. An independent committee composed of five people – the chief justice of the Cour du Québec, two lawyers, including one who does not appear in court, and two persons who are not lawyers[48] – assesses candidates' human, professional, social, and community experience and their level of awareness with respect to social realities.[49] For each vacancy, the committee provides the Minister of Justice with a list of three names, in alphabetical order, that are recommended for the position. The legislation expressly provides that no political affiliation may be considered by the committee.[50] The Minister may only recommend a candidate from the list to Cabinet for appointment. This rigorous, independent process aims to ensure that only the most highly qualified candidates are considered for appointment and that the potential for political interference in the process is limited.

Ontario's process for appointing judges to the Ontario Court of Justice is similar to Quebec's. An independent committee established by legislation thoroughly screens candidates for judicial office and puts forward a ranked short list of recommendations for the Attorney General's consideration. This independent committee is composed of judges, lawyers, and a majority of members of the public. In screening candidates, the committee considers their professional excellence, community awareness, personal characteristics, and the desirability of reflecting the diversity of Ontario society in judicial appointments. The Attorney General may only recommend a candidate from the committee's short list to the Lieutenant Governor in Council for appointment to fill a judicial vacancy.[51] The Ontario government is currently contemplating changing this process to be more similar to the federal judicial appointments process.[52]

Manitoba's judicial appointment committee and the Yukon's Judicial Council also provide (unranked) short lists of candidates to their respective Ministers of Justice for consideration, to which the Ministers are restricted in making their ultimate recommendations for appointment.[53]

Public confidence in the independence of the judiciary is undermined when judges are perceived to carry out their mandate influenced by politically partisan viewpoints. It is fortunately rare in Canada for judges to be publicly linked with the politician or party in power when they were appointed. Moreover, lawyers who practise before the courts know that the party in power when a given judge was appointed usually offers no meaningful clues to how the judge is likely to decide the case. Most visibly, the output of our Supreme Court confirms that while judges sometimes disagree strongly about the proper result in a case, their disagreements do not typically track any individual political affiliation. Former Chief Justice of the Supreme Court of Canada Beverley McLachlin has observed that

> Justices of the Supreme Court of Canada are not generally appointed for their political views, and once appointed, they do not hew to the political agenda of the prime ministers who chose them. In the United States, it is accepted – indeed, expected – that presidents will nominate Supreme Court justices based, in large part, on their political leanings, and that the justices will vote on many questions along political lines. Not so in Canada.[54]

We are fortunate that former Chief Justice McLachlin's words about Justices of the Supreme Court of Canada hold true across Canada and at all levels of courts.

2. Tenure, Accountability, and Removal of Judges

Judges' security of tenure is a main component of their judicial independence: it means they can make decisions that are unpopular, or even wrong, without being dismissed from office. However, judges are still accountable for their *decisions* through the appeal process, and for their *conduct* through judicial councils that investigate complaints and discipline judges if misconduct is found.

Once appointed, judges in Canada have security of tenure, on good behaviour, until they reach the age of mandatory retirement.[55] Security of tenure means a judge cannot be removed from the bench for making an unpopular decision or for making mistakes. As noted already, the Supreme Court has held that security of tenure is an essential condition for judicial independence.[56]

Security of tenure does not mean that judges are not accountable for their decisions. Just the opposite is true. Judges almost always exercise their authority in a public and transparent process, which invites public and media scrutiny of the administration of justice and judicial decisions. Judges are required to give meaningful reasons to explain why they have decided a case or an issue in a particular way. Canada has a robust appeal process that ensures judicial decisions are reviewed and, if erroneous, corrected. Individual decisions and trends in the law are subject to academic and public commentary. Changes in the law that originate with judges can be and, indeed, occasionally are reversed by the legislature.

Judges are also accountable for their conduct. In cases where a judge conducts themselves in a manner that is inconsistent with the

judicial role, there are mechanisms in place for complaints to be initiated and, if warranted, for the judge to be disciplined. The process involves an independent council that makes findings about whether there has been misconduct and then recommends appropriate discipline (including dismissal in extreme cases). Federally, this independent body is the CJC. The CJC is led by the Chief Justice of the Supreme Court and is composed of the Chief Justices and Associate Chief Justices of the federal and provincial courts across the country. Panels of judges constituted by the CJC investigate complaints about judges.[57] After the investigation, the CJC may recommend to Parliament, through the Minister of Justice, that a judge be removed from office. Federally-appointed judges can be removed from the bench for specific reasons set out in law, such as misconduct, infirmity, failing in the execution of their office, or engaging in conduct that is incompatible with their judicial office.[58] No judge in Canadian history has actually been removed by Parliament, but certain judges have retired or resigned after the CJC recommended their removal.[59]

For provincially- and territorially-appointed judges, there are provincial and territorial judicial councils – composed of judges, members of the public, and generally also lawyers – who receive and review complaints about judicial conduct. These judicial councils investigate allegations of a judge's misconduct or incapacity and may hold hearings to determine whether the allegations are substantiated. The councils can dispose of complaints in a variety of ways, such as dismissing the complaint if unfounded, resolving the complaint, warning or reprimanding the judge, ordering remediation or education for the judge, suspending the judge, or, in the most serious cases, recommending to the government that the judge be removed from office. The CJC and the provincial and territorial judicial councils ensure that judges' conduct inside and outside the courtroom supports public confidence in the administration of justice.

It is important to note that judicial misconduct does *not* include making decisions that some people – or even most people – disagree with, or making decisions that turn out to be wrong. A judge's decision in a particular case is reviewed by means of an appeal to a higher court. Calls for the discipline or dismissal of a judge who has rendered a controversial or unpopular decision undermine both the reality and perception of judicial independence, particularly if widely published. While judges must continue to make principled decisions despite calls for their dismissal or discipline, the independent private bar must also stand guard against these types of unwarranted assertions. Public figures must understand and communicate that while judges sometimes get it wrong, the proper remedy for judicial error is appellate review, not judicial discipline.

3. Judicial Compensation

Judges' financial security is also a main component of their judicial independence: it means the government cannot arbitrarily alter judges' compensation and judges are thereby insulated from financial pressure from the government.

Financial security for judges is an essential component of judicial independence. The federal government is responsible for fixing federally-appointed judges' salaries and paying them, while the various provincial and territorial governments set and pay the salaries of judges that they appoint. Financial security embodies three requirements: (1) judicial salaries can be maintained or changed only by recourse to an independent commission; (2) no negotiations are permitted between the judiciary and the government; and (3) salaries may not fall below a minimum level. Financial security has both an individual and an institutional component.

It is important that judges be compensated for their work in a way that is commensurate with their role and years of experience in the legal system. Salaries and benefits for judges should be sufficient to attract outstanding lawyers to become judges.

Financial security also means that judges should not worry that the executive or the legislature will use their control over government finances to reduce judicial compensation. If that were the case, then judges might be reluctant to make decisions that favoured individuals or businesses over the government in cases coming before them, or it may appear that they were reluctant to do so. For example, the Supreme Court has held that performance-related pay for the conduct of judge advocates and members of the General Court Martial violated the principle of judicial independence, because it could reasonably lead to the perception that those individuals might alter their conduct during a hearing in order to favour the military establishment.[60]

Judicial independence therefore requires that judicial salaries and benefits be fixed and subject to review and adjustment through neutral processes that insulate judicial compensation decisions from the day-to-day finances of government. This is done through federal and provincial legislation that standardizes salaries for judges[61] and provides for arm's length bodies to regularly assess salaries and recommend adjustments based on a variety of economic and financial factors.

For example, the Judicial Compensation and Benefits Commission is an independent commission that reviews the salaries and judicial benefits for federally-appointed judges every four years.[62] In assessing judicial compensation, the Commission considers:

> (a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
> (b) the role of financial security of the judiciary in ensuring judicial independence;
> (c) the need to attract outstanding candidates to the judiciary; and
> (d) any other objective criteria that the Commission considers relevant.[63]

Provinces have established independent commissions for this purpose as well. The federal and provincial governments are not obliged to accept the recommendations of the various judicial compensation commissions, but must give a cogent reason for rejecting them.[64]

4. Judicial Education

Judges must be educated about changes in the law and society on an ongoing basis. However, judicial education should not serve the interests of particular parties before the court. Judicial independence may be at risk when other branches of government oblige judges to undergo training with specific content.

Judicial education and training raise different concerns relating to judicial independence. While all parties to a court case are free to make their submissions in the public venue of the court, where they can be questioned and tested by the other side, judicial education occurs in private. The extent to which all sides of an issue are canvassed in training sessions will depend on decisions made by the educator. Judicial education can become particularly controversial when it is about social context rather than legal principles, which can appear more subjective and political. The CJC, which issues professional development requirements for federally-appointed judges, notes that "[t]raining sessions provided to judges must … serve the interests of justice alone and not that of external forces, governmental or otherwise."[65]

The National Judicial Institute (NJI) is the primary training and education provider for federally-appointed judges. It is an independent organization led by judges.[66] The NJI works with judges, courts, and other judicial education organizations to provide education to judges in-person and online.[67] The NJI has been an effective forum in which the continuing education of judges is accomplished.

Judicial education should remain under the control and supervision of the judiciary and free from outside influence. Efforts by legislatures to dictate what judges are taught as part of mandatory judicial education risk interfering with the perception of judicial neutrality. For example, Parliament has recently sought to make education in sexual assault law a mandatory requirement for federally-appointed judges.[68] While there is an emerging consensus that education on this subject would serve the interests of justice, judicial independence may be threatened when the executive or legislature attempts to determine the content of judicial education. Members of the public may reasonably fear that judges are being influenced by the government to decide certain types of cases in a particular way. This fear is especially acute in criminal law, when the power and resources of the government are brought to bear on the individual accused of a crime. No person facing criminal charges should fear that their antagonist in court is dictating what the judge is being taught about how to decide such cases.

5. Resources for the Judicial Branch

The judicial branch requires adequate funding from the government, obtained through a neutral process, to fulfill its independent role in Canada's constitutional order.

Courts must also have the resources they need to decide disputes in a timely and effective manner. As discussed above, this is a component of the administrative independence of the judiciary.

To carry out their constitutional duties, judges are dependent on provincial and federal governments to fund the administration and infrastructure of the court system, including, for example, court buildings, salaries of court staff, legal aid, and translation services. Decreases in funding for physical court facilities, court administration, and judicial resources can threaten judicial independence. If governments were to chronically underfund the court system, it would, over time, undermine the ability of the judiciary to fulfill its function as an independent branch of government. Indeed, it means little to have an independent judiciary if litigants are unable to access the courts.[69] To strengthen judicial independence, it is desirable for the judiciary to have independence in the preparation and presentation of court budgets, and in the expenditure of approved court budgets.[70]

Governments are also routinely litigants before the courts that they are funding. It is essential that the process for courts to request adequate resources from governments be structured in a way that avoids conflicts or the perception of conflicts between the courts and the funding government. This relationship constitutes a potential flashpoint for government interference or the perception of government interference in the independence of the judiciary. The Supreme Court

of Canada and the federal Minister of Justice have provided an example of how this can be managed. The Chief Justice of the Supreme Court of Canada and the federal Minister of Justice have entered into a public accord that sets out the framework for their relationship, including the process for the Court's funding requests to the government.[71]

6. Increased Public Interest and Scrutiny

Public debate about judicial decisions is to be encouraged in a healthy democracy. However, public discourse may become a threat to judicial independence when the individual judge or the legitimacy of the court is attacked, or the criticism is really an attempt to influence the judge's ultimate decision in a case.

Judicial decisions are quite properly the subject of public discussion. Since the *Canadian Charter of Rights and Freedoms* was adopted in 1982,[72] judicial decision-making has increasingly intersected with public policy. Judges are obliged to address controversial issues, and they are required to make decisions based on the applicable law and the facts. Those decisions may be divisive or unpopular. As such, judicial decisions appropriately draw intense public scrutiny and provoke heated public debate. With the steady rise of the use of social media by Canadians, the volume of that debate and its visibility has only increased.

Public debate and criticism of laws, as well as discussion of judges' decisions and the reasons they give, are crucial in any vibrant democracy. On infrequent occasions, however, public debate crosses the line into a threat to judicial independence: this occurs when criticism is an attempt to intimidate or influence a judge about their decision in a particular case, or when it questions the institutional independence of the court. Amplified by social media, such comments can be threatening to a judge that is singled out and damaging to our justice system. Cases must be decided, and be seen to be decided, solely on the applicable law and the evidence tendered inside the courtroom, not on who has the loudest microphone outside it.

Judges are expected to be able to withstand withering public criticism – no matter the source, volume, or medium – and make difficult decisions. However, when public criticism of judges or the court strays outside appropriate bounds, The Advocates' Society will speak up to support the duty of judges to rigorously apply the law to the facts in each case without regard to external pressures.

7. Discourse between the Executive Branch and the Judicial Branch

The public comments of political leaders can pose a threat to judicial independence when they undermine public confidence in the independence of the judiciary or the integrity of the judicial system.

The Prime Minister of Canada, Premiers, and Cabinet Ministers – i.e. members of the executive branch of government – are frequently called upon to comment publicly on the results of trials or decisions made by the judicial branch. Legislators and other civic leaders may also be called upon to do so. Free speech is essential to a functioning democracy. Public officials may express their disagreement with current laws and, indeed, seek to reform them. They are also free to criticize judicial decisions. Public officials ought to exercise restraint, however, so that their comments are not perceived as attacking an individual judge or otherwise undermining the legitimacy of the judicial branch of government. Regrettably, there have been recent, notable examples of a lack of such restraint. In a number of these cases, The Advocates' Society has publicly condemned remarks by public officials which threaten judicial independence.

One example occurred in 2013, when an issue arose regarding the eligibility of a prospective appointee to the Supreme Court of Canada under the *Supreme Court Act*.[73] As part of the usual process to fill a vacancy on the Court, the Chief Justice of Canada met with the Parliamentary selection committee at its invitation to discuss proposed candidates. Following this meeting and before the proposed nomination, the Chief Justice brought the eligibility issue to the government's attention. The appointment was made and subsequently challenged by an individual citizen and the Province of Quebec.[74] The matter was referred to the Supreme Court of Canada for decision, and it ruled that the nominee was ineligible.[75] Rumours were subsequently circulated and reported in the media to the effect that the Chief Justice had lobbied against the appointment before the Supreme Court had overturned it.[76] In that context, the Prime Minister's office publicly stated that the Prime Minister had declined to take a call from the Chief Justice prior to the appointment, on the advice that such a conversation would be "inadvisable and inappropriate."[77] Because of the Prime Minister's suggestion that the Chief Justice had acted improperly, the Chief Justice was forced to take the unprecedented step of releasing a timeline of events in order to clarify her actions.[78] The Advocates' Society wrote an open letter to the Prime Minister expressing its concern that the comments from the Prime Minister's office had served to undermine public confidence in the administration of justice.[79]

In 2016, The Advocates' Society was moved to join our professional colleagues in the United States in condemning statements by the President of the United States directed at United States District Court Judge James Robart. In the context of the District Court's travel ban ruling, the President referred to Judge Robart as a "so-called judge". The Advocates' Society noted that Judge Robart is a duly appointed member of a court of justice entrusted by the United States Constitution with the authority to rule upon the constitutional validity of executive orders. The Advocates' Society condemned the President's remarks as improper, disrespectful, and a threat to judicial independence and authority.[80]

In 2020, the leader of a Canadian federal political party publicly commented on a Federal Court of Appeal decision that ruled in favour of the government in a case concerning its approval of an oil pipeline project.[81] The leader repeatedly stated that the judges of the Federal Court of Appeal are "nominated" by the federal government; when asked what he meant, he stated "I think people can understand that."[82] These remarks improperly suggested that the Court had decided in favour of the federal government because its members are appointed by that government, and that such judges are not independent in disputes in which the government has an interest. Such remarks constitute a threat to judicial independence and undermine public confidence in Canada's judiciary. Comments of this nature particularly threaten public order in cases where the decision is on a controversial subject and may provoke a strong public reaction, because they undermine the legitimacy of that decision. For these reasons, The Advocates' Society spoke out to defend the independence of the Federal Court of Appeal after the remarks were made.[83]

Other recent examples have included public remarks from members of the government suggesting that a court decision invalidating legislation lacked legitimacy because the judge was "appointed" whereas the government was "elected",[84] and public remarks that implicitly criticized a high-profile criminal jury verdict.[85]

Public officials should desist from noting that judges are appointed and not elected as a means of criticizing court decisions that challenge legislative or executive action. As far as judicial independence is concerned, the fact that Canadian judges are unelected is a positive feature of our democratic system. It ensures that judges, insulated from the day-to-day opinions and will of the majority, are able to decide cases without regard to the popularity or influence of the litigants.[86] The judiciary's unelected status underlies their constitutional legitimacy as a co-equal branch of government. When a public official suggests it is illegitimate for a court to assess the constitutionality of a law, this weakens public confidence in the judicial branch. It sows confusion about the proper exercise of the court's constitutional mandate. By undermining respect for judicial decisions, it can also threaten public order.

Similarly, a public official's direct attack upon a jury verdict in a criminal trial has the potential to undermine public confidence in the administration of justice. The right to trial by jury in serious criminal cases is constitutionally protected.[87] A trial by jury is conducted under the direction of a trial judge, who determines what evidence will be heard by the jury and is responsible for directing the jury in the law and in its application to the facts as found by the jury. A public official's direct criticism of a jury verdict may encourage a view that the verdict is illegitimate, notwithstanding that it is the outcome of a constitutionally valid judicial process. This is particularly problematic in high-profile cases where the verdict may already prompt intense public debate and media controversy.

While political leaders can and should participate in debate about the issues that may come before the courts, respect for judicial independence ought to move political leaders to be restrained and thoughtful when they participate in such debates. They should neither engage in nor encourage criticism that attacks individual judges or the institution of the judiciary.

Lawyers and civic leaders should also bear in mind that judges are limited in their ability to defend themselves in the public sphere. For that reason, the independent private bar and other civic leaders must step forward when necessary to preserve and support the principle of judicial independence and to maintain public confidence in the administration of justice.

8. The Conduct of Judges In and Out of Office

The conduct of judges themselves can also threaten the public perception of their independence – judges are therefore expected to remain cautious in expressing their opinions on controversial topics, in choosing their public engagements, and in their conduct or work after retirement from judicial office.

Judges' conduct, both while they are sitting on the bench and after they retire, can affect the public's perception of the independence of the judiciary. While judges are not expected to stop participating in society, or to live in an "ivory tower" during or after their judicial career, they must be careful that their actions do not compromise public confidence in judicial independence. Unlike other threats to judicial independence discussed in this paper, the conduct of judges is a potential threat to judicial independence that comes from within the judiciary itself.

For example, while in office, judges are expected to avoid wading into political issues or controversies that do not pertain to the operation of the courts, judicial independence, or fundamental aspects of the administration of justice.[88] If judges were to express opinions about the issues of the day, the lines between the judicial branch of government and the executive or legislative branches could become blurred, compromising judicial independence. This is all the more important given the rise of social media: as mentioned above, the use of social media is growing amongst Canadians, and judges are no exception. Judges are expected to be cautious in their communications

on social media. Even when judges are not directly communicating on social media, they need to be aware that they are under scrutiny by members of the public, who may communicate a judge's behaviour through social media. For example, in 2017, the public reacted strongly to a Canadian judge who wore a "Make America Great Again" hat in court, which was circulated widely on social media and caused portions of the public to have doubts about the judge's impartiality.[89]

Judges are also encouraged to exercise restraint in choosing public and professional engagements to attend outside the courtroom. For example, in 2017, the CJC launched a review of the conduct of Tax Court judges who attended social events following educational conferences that were sponsored by organizations active in the tax industry. These organizations were involved in litigation before the Tax Court.[90] While the CJC dismissed the complaints against the judges, noting judges should have access to a wide range of professional development opportunities,[91] the issues underlying the complaints were reported in the media and could negatively affect public confidence in the independence of the courts from established industry participants.

Judges are expected to remain conscious of public confidence in the independence of the judiciary after they retire from judicial office. The CJC is developing principles to guide judges' conduct in their post-retirement careers, which The Advocates' Society anticipates will clarify how judges can continue to maintain public confidence in the judiciary after leaving judicial office.

Conclusion

We live in a new age of threats to democratic values, made more threatening by platforms that permit instant communication to a wide public audience. With this statement, The Advocates' Society reaffirms its commitment to vigilance in defending the honoured principle of judicial independence. We call upon all members of the independent bar, and all citizens who care for the continued strength of Canada's democracy, to share that commitment with us.

Endnotes

1. An independent bar is one that is free from interference from the government in providing legal services to individuals: *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at paras. 97-101, [2015] 1 S.C.R. 401.
2. *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103 at para. 31, [2007] 4 F.C.R. 714.
3. Beverley McLachlin, *Truth Be Told: My Journey through Life and the Law* (Toronto: Simon & Schuster, 2019) at 233.
4. This quote is attributed to various significant historical individuals. In the Rt. Hon. Lord Justice Denning's "The Price of Freedom: We Must Be Vigilant Within The Law", (1955) 41:11 *American Bar Association Journal* 1011 at 1011, he attributes it to John Philpot Curran.
5. The CJC is responsible for maintaining and improving the quality of judicial services in Canadian superior courts: *About the Canadian Judicial Council*, online: Canadian Judicial Council <https://cjc-ccm.ca/en/about>.
6. Canadian Judicial Council, *Ethical Principles for Judges*, online: Canadian Judicial Council <https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.
7. *Cosgrove v. Canadian Judicial Council*, *supra* note 2 at para. 31.
8. *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44 at para. 1, [2005] 2 S.C.R. 286 [*Prov. Court Judges' Assn. of N.B. v. N.B.*].
9. *Gratton v. Canadian Judicial Council (T.D.)*, [1994] 2 F.C. 769 at para. 16, 115 D.L.R. (4th) 81.
10. *Ibid*.
11. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 10, 150 D.L.R. (4th) 577 [*Re Provincial Court Judges*].
12. *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at 70, 30 D.L.R. (4th) 481.
13. *Ell v. Alberta*, 2003 SCC 35 at para. 29, [2003] 1 S.C.R. 857.

14. *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 153, [2013] 1 S.C.R. 623.
15. *Constitution Act, 1982*, s. 53, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
16. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
17. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
18. The idea of the separation of powers in a Parliamentary democracy evolved over hundreds of years, and not without bloodshed. The Magna Carta of 1215, the English Civil War of 1642-1651, and the Glorious Revolution of 1688 together established the concept that Parliament could pass laws and that they could and did bind the executive (i.e., the Crown). The convention of responsible government was established in pre-confederation Canada during the nineteenth century.
19. *Re Provincial Court Judges*, *supra* note 11 at paras. 125, 138ff; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 at para. 104ff, [2004] 3 S.C.R. 381; *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455 at 469-70, 23 D.L.R. (4th) 122.
20. *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras. 32-33, [2013] 3 S.C.R. 3; *Dupont et al. v. Inglis et al.*, [1958] S.C.R. 535 at 542-43, 14 D.L.R. (2d) 417; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at para. 51, 130 D.L.R. (4th) 385.
21. Supreme Court of Canada, *Creation and Beginnings of the Court*, online: Supreme Court of Canada <https://www.scc-csc.ca/court-cour/creation-eng.aspx>.
22. R.S.C. 1985, c. S-26.
23. *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433.
24. *Constitution Act, 1867, supra* note 16, ss. 96-101; *Charter*, *supra* note 17, s. 11(d).
25. *Re Provincial Court Judges*, *supra* note 11 at paras. 82-109.
26. The statutory guarantees reflect the constitutional guarantees. See e.g. *Judges Act*, R.S.C. 1985, c. J-1; *Security of Tenure of Military Judges Act*, S.C. 2011, c. 22; *Charter of human rights and freedoms*, R.S.Q. c. C-12, s. 23; *An Act respecting the remuneration of judges*, S.Q. 1997, c. 84; *Courts of Justice Act*, R.S.O. 1990, c. C.43; *Provincial Court Act*, R.S.B.C. 1996, c. 379; *Judicial Compensation Act*, S.B.C. 2003, c. 59; *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2.
27. Some core components probably apply to every judicial function in Canada, while others vary depending on the court or the issue before the court.
28. Martin L. Friedland, "Judicial Independence and Accountability in Canada" (2001) 59:6 *The Advocate* 859 at 860.
29. *Ibid*. The historical explanation for why this authority was provided to the central (federal) government is unclear. Some scholars theorize that the Constitution provided this power to the federal government because the key actors during Confederation wanted to keep this power in their hands (*ibid*). Others have suggested that it was a means of limiting local political influence over judicial appointments. There is perhaps some truth in both explanations. Whatever the historical reason may be, the consequence is that the federal government plays a dominant role in the judicial appointment process.
30. Access to a superior court is guaranteed by s. 96 of the *Constitution Act, 1867*: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *MacMillan Bloedel Ltd. v. Simpson*, *supra* note 20; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554; *Crevier v. A.G. (Quebec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.
31. *Constitution Act, 1867*, *supra* note 16, s. 99(1). See Part III.2 below.
32. *Constitution Act, 1867*, *supra* note 16, s. 100. See Part III.3 below.
33. *The Queen v. Beauregard*, *supra* note 12; *Re Provincial Court Judges*, *supra* note 11.
34. *Girouard v. Canada (Attorney General)*, 2019 FC 1282 at para. 38.
35. *Valente v. The Queen*, [1985] 2 S.C.R. 673, 52 O.R. (2d) 779 [*Valente*].
36. *Re Provincial Court Judges*, *supra* note 11 at paras. 82-109.
37. It should be noted that in any given case, the precise source and extent of the protection of judicial independence may depend on the court and the nature of the issue being heard.
38. *Valente*, *supra* note 35 at 694, 698 ("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").

39. *Ibid.* at 704 ("…financial security […] 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").
40. *Ibid.* at 708 ("the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function").
41. In this regard, Friedland, *supra* note 28 at 861, suggests that we do not want judges retiring either too old or too young. The judge should be placed in a position where they have nothing to lose by doing what is right and little to gain by doing what is wrong.
42. Daniel LeBlanc & Sean Fine, "Liberals under fire for partisan involvement in judicial appointments", *The Globe and Mail* (18 February 2020), online: Globe and Mail <https://www.theglobeandmail.com/politics/article-liberals-under-fire-for-partisan-involvement-in-judicial-appointment/>.
43. Office of the Commissioner for Federal Judicial Affairs Canada, *Overview of Federal Judicial Appointments*, online: Government of Canada <https://www.fja.gc.ca/appointments-nominations/index-eng.html>.
44. Office of the Commissioner for Federal Judicial Affairs Canada, *Guidelines for Judicial Advisory Committee Members* (October 2016), online: Government of Canada <https://www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html>.
45. Office of the Commissioner for Federal Judicial Affairs Canada, *Overview of Federal Judicial Appointments*, *supra* note 43.
46. See e.g. *Provincial Court Act, 1991*, S.N.L. 1991, c. 15, ss. 5, 18; Judicial Council of the Provincial Court of Newfoundland and Labrador, *Guidelines and Procedures Regarding the Selection of Candidates for Judicial Appointment*, online: Provincial Court of Newfoundland and Labrador <https://court.nl.ca/provincial/judiciary/guidelines_attachments.pdf>; *Provincial Court Act*, R.S.N.S. 1989, c. 238, s. 3; *Provincial Judicial Appointments: Guidelines to Ensure Appointments Based on Merit*, online: The Courts of Nova Scotia <https://www.courts.ns.ca/About_Judges/how_judges_appointed.htm>; *Provincial Court Act, 1998*, S.S. 1998, c. P-30.11, ss. 6, 53-54; Courts of Saskatchewan, *Judicial Appointments*, online: Courts of Saskatchewan <https://sasklawcourts.ca/index.php/home/provincial-court/judges/judicial-appointments>; *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 9.1; *Judicature Act*, R.S.A. 2000, c. J-2, ss. 31-32; Alberta Justice and Solicitor General, *Application Process for Provincial Court Judge Candidates*, online: Alberta Courts <https://albertacourts.ca/pc/about-the-court/judicial-information/judicial-appointments>; *Provincial Court Act*, R.S.B.C. 1996, c. 379, ss. 6, 21-22; Judicial Council of BC, *Annual Report 2018*, at 19-21, online: Provincial Court of British Columbia <https://www.provincialcourt.bc.ca/judicial-council#AR>; *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, ss. 4, 5.3.
47. *Commission d'enquête sur le processus de nomination des juges de la Cour du Québec, des cours municipales et des membres du Tribunal administratif du Québec*, rapport, Québec, Publications du Québec, 2011.
48. *Regulation respecting the selection procedure of candidates for the office of judge of the Court of Québec, municipal court judge and presiding justice of the peace, Courts of Justice Act*, R.S.Q., c. T-16, r. 4.1.
49. *Ibid*., art. 25.
50. *Ibid*., art. 26.
51. *Courts of Justice Act*, *supra* note 26, ss. 42-43; Judicial Appointments Advisory Committee, *Policies and Process*, online: Ontario Court of Justice <https://www.ontariocourts.ca/ocj/jaac/policies-and-procedures/policies-and-process/>.
52. Ministry of the Attorney General, *Backgrounder: Ontario's Current and Proposed Judicial Appointments Process* (27 February 2020), online: Ontario.ca <https://news.ontario.ca/mag/en/2020/02/ontarios-current-and-proposed-judicial-appointments-process.html>.
53. *Provincial Court Act*, C.C.S.M. c. C275, ss. 3-3.6; *Territorial Court Act*, R.S.Y. 2002, c. 217, ss. 6, 8-9.
54. McLachlin, *supra* note 3 at 297.
55. The mandatory retirement age for superior court judges is 75 (*Constitution Act, 1867*, *supra* note 16, s. 99(2)); in some provinces and territories, the retirement age for provincial court judges is 70 (Canadian Judicial Council, *Who appoints judges, and for what term?*, online: Canadian Judicial Council <https://cjc-ccm.ca/en/resources-center/know-your-judicial-system/what-do-judges-do>).

56. Although the security of tenure of Canadian judges is well-established, the same cannot be said of all countries, or even all democracies. In 2017, Poland's government enacted legislation reducing the retirement age of judges from 70 to 65. The legislation, one of several major changes to the court in recent years, was seen as an attempt to remove senior judges and gain political control of Poland's Supreme Court. Poland's government suspended the change and reinstated the affected judges after being ordered to do so by the European Court of Justice ("Poland reverses law on removing judges following EU court ruling", *BBC News* (21 November 2018), online: BBC <https://www.bbc.com/news/world-europe-46296859>).
57. The *Judges Act* sets out an extensive regulatory process for the investigation of complaints (*supra* note 26, ss. 63-66). An Inquiry Committee constituted by the CJC can hold a public or private hearing and prepares a report to the broader Council.
58. *Ibid*., s. 65.
59. Recall that s. 99(1) of the *Constitution Act, 1867*, *supra* note 16, provides that judges of superior courts are removable by the Governor General on address of the Senate and House of Commons. As this procedure has never been used to remove a judge in Canada, it is unclear how it would function (Friedland, *supra* note 28 at 860). Most scholars believe that a majority vote in the House of Commons and the Senate would meet the constitutional requirements for removing a judge (*ibid*).
60. *R. v. Généreux*, [1992] 1 S.C.R. 259, 88 D.L.R. (4th) 110.
61. See e.g. *Judges Act*, *supra* note 26, ss. 9-22; *An Act respecting the remuneration of judges*, *supra* note 26; *Framework Agreement on Judges' Remuneration*, O. Reg. 407/93; *Judicial Compensation Act*, *supra* note 26; *Territorial Court Act*, *supra* note 26.
62. *Judges Act*, *supra* note 26, s. 26.
63. *Ibid*., s. 26(1.1).
64. *Prov. Court Judges' Assn. of N.B. v. N.B.*, *supra* note 8.
65. Canadian Judicial Council, *Professional Development*, online: Canadian Judicial Council <https://cjc-ccm.ca/en/what-we-do/professional-development>.
66. National Judicial Institute, *Who We Are*, online: National Judicial Institute <https://www.nji-inm.ca/>.
67. National Judicial Institute, *Judicial Education in Canada*, online: National Judicial Institute <https://www.nji-inm.ca/index.cfm/judicial-education/judicial-education-in-canada/>.
68. In the first iteration of this proposal, Parliament sought to make completion of education in sexual assault law and social context a requirement for eligibility for judicial appointment (Bill C-337, *An Act to amend the Judges Act and the Criminal Code (sexual assault)*, 1st Sess., 42nd Parl., 2017); in the second, eligibility for judicial appointment is restricted to "persons who undertake to participate in continuing education on matters related to sexual assault law and social context" (Bill C-5, *An Act to amend the Judges Act and the Criminal Code*, 1st Sess., 43rd Parl., 2020).
69. A core component of The Advocates' Society's mission is to promote access to justice. The Advocates' Society has often intervened in court cases and made submissions to governments and other bodies when access to justice is at issue. For example, The Advocates' Society is a strong proponent of the establishment and maintenance of a sustainable legal aid system. To view The Advocates' Society's contributions to access to justice, including court interventions, submissions to the government, regulators, and other organizations, and publications on various aspects of access to justice, please see The Advocates' Society's website at <https://www.advocates.ca/>.
70. *Valente*, *supra* note 35 at 708-712.
71. *Accord Between The Chief Justice of Canada And The Minister of Justice and Attorney General of Canada* (22 July 2019), online: Supreme Court of Canada <https://www.scc-csc.ca/court-cour/accord-justice-eng.aspx>.
72. *Charter*, *supra* note 17.
73. *Supra* note 22.
74. The Canadian Press, "Marc Nadon's failed journey to the Supreme Court", *CBC News* (8 May 2014), online: Canadian Broadcasting Corporation <https://www.cbc.ca/news/politics/marc-nadon-s-failed-journey-to-the-supreme-court-1.2636403>.
75. *Reference re Supreme Court Act, ss. 5 and 6*, *supra* note 23.

76. John Ivison, "Tories incensed with Supreme Court as some allege Chief Justice lobbied against Marc Nadon appointment", *National Post* (1 May 2014), online: National Post <https://nationalpost.com/news/politics/tories-incensed-with-supreme-court-as-some-allege-chief-justice-lobbied-against-marc-nadon-appointment>.
77. Postmedia News, "Harper refused 'inappropriate' call from chief justice of Supreme Court on Nadon appointment, PMO says", *National Post* (1 May 2014), online: National Post <https://nationalpost.com/news/politics/harper-refused-inappropriate-call-from-chief-justice-of-supreme-court-on-nadon-appointment-pmo-says>.
78. Supreme Court of Canada, News Release (2 May 2014), online: Supreme Court of Canada <https://decisions.scc-csc.ca/scc-csc/news/en/item/4602/index.do>.
79. Letter from Alan H. Mark to The Right Honourable Stephen Harper, P.C. (4 May 2014).
80. The Advocates' Society, Press Release, "The Advocates' Society Defends Independence of the Judiciary" (8 February 2016).
81. *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34.
82. Susan Delacourt, "BQ leader crosses a line with his criticism of Canada's courts", *Toronto Star* (5 February 2020), online: Toronto Star <https://www.thestar.com/politics/political-opinion/2020/02/05/bq-leader-crosses-a-line-with-his-criticism-of-supreme-court.html>.
83. The Advocates' Society, Press Release, "The Advocates' Society Defends Judicial Independence" (10 February 2020).
84. Ryan Flanagan, "Ford says he'll use notwithstanding clause in attempt to force cuts to Toronto council", *CTV News* (10 September 2018), online: CTV News <https://www.ctvnews.ca/canada/ford-says-he-ll-use-notwithstanding-clause-in-attempt-to-force-cuts-to-toronto-council-1.4086779>).
85. Tom Parry, "Justice minister's tweet on Boushie verdict inspired wave of angry emails, letters", *CBC News* (26 May 2018), online: Canadian Broadcasting Corporation <https://www.cbc.ca/news/politics/boushie-trial-minister-tweet-1.4679089>.
86. Some of the most serious challenges to judicial independence simply cannot occur under the Canadian system of judicial appointments. See e.g. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).
87. *Charter*, *supra* note 17, s. 11(f).
88. Canadian Judicial Council, *Ethical Principles for Judges*, *supra* note 6, Principle 6.D.3(d).
89. Adam Carter, "Canadian judge who wore Trump hat in court suspended for 30 days" *CBC News* (12 September 2017), online: Canadian Broadcasting Corporation <https://www.cbc.ca/news/canada/hamilton/zabel-hat-decision-1.4285487>.
90. Harvey Cashore, Kimberly Ivany, & Gillian Findlay, "'Potential misconduct' probe launched into judges after CBC revelations" *CBC News* (7 March 2017), online: Canadian Broadcasting Corporation <https://www.cbc.ca/news/business/judges-probe-potential-misconduct-1.4013170>.
91. Canadian Judicial Council, News Release (20 July 2017).

Acknowledgments

Nearly 60 years have now passed since The Advocates' Society was founded. Since its inception, one of the Society's hallmarks has been its strong thought leadership on matters of importance to the administration of justice, the rule of law and the practice of advocacy. With a Board of Directors comprised of leaders of the Canadian litigation bar, a dedicated and highly capable staff and a vibrant national membership, The Advocates' Society is uniquely positioned to carry on this fine tradition today. This is admirably reflected here in our Statement on Judicial Independence. The Board of Directors of The Advocates' Society identified the publication of a comprehensive statement on judicial independence as one of its priorities for the 2019-2020 term. The Society's Judicial Independence Task Force then assumed responsibility for directing the extensive research, writing and wide consultations that are necessary to produce a work of this calibre. Work on the Statement began in the Summer of 2019 and the Statement was approved by the Society's Board of Directors on April 7, 2020. On behalf of our Board of Directors and members of The Advocates' Society, I would like to express our sincere appreciation to all of those who contributed so much of their time, thought and leadership to the completion of this fine work. We especially thank the members of our Judicial Independence Task Force.

Scott Maidment, President
The Advocates' Society
April 9, 2020

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