



The Advocates' Society La Société des plaideurs

February 2, 2022

VIA EMAIL: JUSTMIN@novascotia.ca

The Honourable Brad Johns, M.L.A.
Attorney General and Minister of Justice of Nova Scotia
Department of Justice
1690 Hollis Street, P.O. Box 7
Halifax, Nova Scotia B3J 2L6

Dear Minister:

RE: Concern Regarding Changes to Provincial Judicial Appointments Guidelines

We are writing to you on behalf of The Advocates' Society. The Advocates' Society is the leading association of litigation counsel in Canada dedicated to access to justice, excellence in advocacy, and a strong, independent, and courageous bar. We are a not-for-profit association representing approximately 5,500 members across the country, including Nova Scotia. The Advocates' Society's mandate includes making submissions to governments on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Advocates' Society is concerned about the changes to the Provincial Judicial Appointments Guidelines ("Guidelines") that your government announced on January 14, 2022, and which came into effect the same day. In particular, some of the changes to the Guidelines have the potential to undermine judicial independence in the Provincial Court of Nova Scotia.

Judicial independence is essential to the public's confidence in a fair and impartial justice system. The Canadian Judicial Council has said that:

An independent and impartial judiciary is the right of all and constitutes a fundamental pillar of democratic governance, the rule of law and justice in Canada. [...] 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.¹

As an association of courtroom advocates, The Advocates' Society has a strong interest in safeguarding the independence of the judiciary. To that end, in April 2020, The Advocates' Society published a comprehensive statement on judicial independence, entitled [*Judicial Independence: Defending an Honoured Principle in a New Age*](#) (attached for your reference).

The integrity of Nova Scotia's independent, non-partisan judicial appointment process depends upon a clear and meaningful separation between the government of the day and the exercise of judgment by the standing Advisory Committee on Provincial Judicial Appointments ("Advisory Committee"). This

¹ Canadian Judicial Council, [*Ethical Principles for Judges*](#) (2021), at pp. 6-7. See also Chapter I, "Judicial Independence", at pp. 13-17.

separation has the potential to be compromised by the proposed changes to the Guidelines for the reasons that follow.

I. The Minister of Justice Now Appoints the Entire Advisory Committee

We are concerned that the changes to the Guidelines materially weaken the independence of the Advisory Committee from the government.

Under the changes to the Guidelines, the Minister of Justice (“Minister”) will now appoint all members of the committee, including the judicial and lawyer members, as compared to the previous four members of the eight-member Advisory Committee. The Minister’s complete control over the composition of the Advisory Committee could politicize the selection of judicial candidates, thereby undermining public confidence in the independence of the judiciary.

Lawyer Members.

Previously, the Nova Scotia Barristers’ Society’s direct appointment of two lawyers to the Advisory Committee provided independent representation on the Advisory Committee based on the expert assessment of the province’s legal regulator. Now, the Minister will make the appointments from a list of six lawyers provided by the NSBS. The Advocates’ Society’s understanding is that the NSBS has a rigorous process to identify its appointees, including a broad call for expressions of interest, the review of applicants by the NSBS’s Nominating Committee, and approval of the Nominating Committee’s recommendations by NSBS’s Council. The NSBS has had to curtail its usual process to meet the government’s timeline for reconstituting the Advisory Committee under the new Guidelines. The Advocates’ Society is concerned that this abbreviated application process for positions on the Advisory Committee is unlikely to lead to a better process for judicial appointments.

Further, the NSBS has committed to ensuring principles of equity, diversity, and inclusion are taken into account when they appoint members to committees, including appointments to this Advisory Committee. Taking away their ability to appoint members directly to the Advisory Committee detracts from this commitment to ensuring fair and equal representation.

Judicial Members.

Under the previous Guidelines, the Chief Judge of the Provincial Court of Nova Scotia appointed the two judicial members of the Advisory Committee: one judge of the Provincial Court and one judge of the Family Court. Under the new Guidelines, the Chief Judge will provide the Minister with a list of four judges of the Provincial Court and the Minister will appoint one. The Minister will further appoint a retired member of the judiciary to the Advisory Committee. The Chief Judge, and sitting judges of the Provincial Court, have a unique understanding of the judicial role and the Court’s needs. The Advocates’ Society sees no compelling reason to remove the appointment power from the Chief Judge and allocate it to the Minister instead.

Chair.

Whereas the Advisory Committee previously selected its own committee chair, the retired member of the judiciary appointed by the Minister will now automatically be appointed to the chair position. The chair of the Advisory Committee can wield considerable influence in the committee’s operations. The

Advocates' Society believes that the Advisory Committee should continue to select its own chair to safeguard the independence of the committee from the government.

II. Additional Candidate Information to be Provided to the Minister Compromises the Confidentiality and Rigour of the Selection Process

The new Guidelines provide that, in addition to a précis of information to be provided to the Minister about each recommended candidate, the Advisory Committee must include their assessment of how each recommended candidate meets the various selection criteria.

The Advocates' Society is concerned that requiring this additional information will compromise the confidentiality of the Advisory Committee's process. Confidentiality is critical to the rigour of the selection process. References provide information to the Advisory Committee with the expectation that their comments will be kept in complete confidence. They would not be as forthright if they believed their comments about candidates may be shared. Likewise, judicial references are an essential part of the evaluation process, as judges are in a unique position to observe an applicant's qualifications and have valuable information to share with the Advisory Committee. In light of their offices, judges must be assured of the confidentiality of their comments to provide candid feedback about counsel who continue to appear before them.

The new Guidelines also require the Advisory Committee to provide the Minister, upon request, with the list of all candidates who are not recommended or not recommended at this time, along with an explanation as to why the candidates did not meet the selection criteria.

Unsuccessful candidates (potentially including lawyers employed by the government) may be uncomfortable with the prospect of the government receiving the information that they applied but were not recommended, which could discourage qualified candidates from applying. This new addition to the Guidelines also gives rise to the perception that the Minister could second-guess the Advisory Committee's recommendations and the committee's rigorous assessment of whether or not candidates meet the selection criteria. Judicial selection, as a result, would not appear to be independent.

As alternatives that would not compromise the confidentiality of references, discourage applicants from applying, or diminish the appearance of judicial independence, The Advocates' Society would support the government receiving from the Advisory Committee anonymized demographic information about the applicants for judicial office at each stage of the process, to promote transparency and ensure efforts to encourage diverse candidates to apply are successful. The Advocates' Society would further support the government receiving the application packages of all recommended candidates, to ensure the government has relevant information to assist their decision-making.

III. Lack of Consultation and Notice

We understand the changes to the Guidelines were introduced without any prior consultation with stakeholders in the justice system, including associations that represent equity-seeking groups in the legal community. Further, the shortcomings in the existing appointment process that the government was seeking to address were not clearly identified. One of the government's few stated goals for the changes is to help increase diversity on the Advisory Committee, and by implication, on the bench. As such, diverse

stakeholders, including equity-seeking groups, should have been consulted on the perceived problems with the process and what measures would have been most helpful to address them.²

Implementing the Guidelines immediately on the day they were published without any transition was the opposite of “a more transparent, fair and accountable process for appointing provincial judges”³ that the government is purporting to achieve. The result was an abrupt dissolution of the previous Advisory Committee, which was recently constituted in mid-2021, and the immediate constitution of the new Advisory Committee.

The Advocates’ Society can discern no reason why consultation was not undertaken, and appropriate notice was not given, given the importance of judicial appointments to public confidence in the justice system.

IV. Recommendation

The Advocates’ Society recommends that the implementation of the changes to the Guidelines discussed above be suspended and reconsidered. We further recommend that the government undertake meaningful consultation with stakeholders in the justice system, including those who represent equity-seeking groups in the legal community, regarding how the government’s concerns with the existing appointment process can be addressed and how to ensure any changes preserve the integrity and independence of the judicial appointment process in Nova Scotia. This more considered process could also involve the study of best practices in the judicial appointments processes of other jurisdictions.

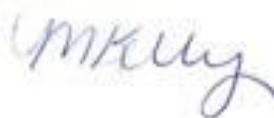
The Advocates’ Society acknowledges that the COVID-19 pandemic has created a significant backlog in the Provincial Court of Nova Scotia, and vacancies on the Court must be filled as soon as reasonably possible to ensure a full complement of judges. As such, we anticipate that stakeholders, including The Advocates’ Society, would be prepared to move quickly to engage with the government on this critical issue.

Thank you for your attention to these submissions. We would be pleased to answer any questions you may have. The Advocates’ Society would further welcome the opportunity to participate in future consultations regarding your government’s other priorities for the justice system in Nova Scotia.

Yours sincerely,



Deborah E. Palter
President



Michelle M. Kelly, Q.C.
Chair, Atlantic Advisory Committee

² We note that significant progress has already been made in the diversity of judicial appointments to the Provincial Court via the current process and initiatives, suggesting that existing measures have been successful. While there of course remains room for ongoing improvement, The Advocates’ Society has no information to suggest that the current measures are inadequate to achieve the desired progress over time.

³ News Release, “[Changes to Provincial Judicial Appointments Guidelines](#)”, Department of Justice, January 14, 2022.

Attachments:

1. The Advocates' Society, *Judicial Independence: Defending an Honoured Principle in a New Age* (April 2020)

CC: The Honourable Pamela S. Williams, Chief Judge of the Provincial and Family Courts of Nova Scotia
Angela Simmonds, M.L.A., Deputy Speaker of the House & Liberal Critic for Justice
Claudia Chender, M.L.A., NDP House Leader & Critic for Justice
Jacqueline Mullenger, Acting Executive Director, Nova Scotia Barristers' Society
Sheree Conlon, Q.C., *Stewart McKelvey*, Director, The Advocates' Society
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 bar¹ 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 process⁴² – 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 lawyers⁴⁸ – 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 judges⁶¹ 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. Québec (Attorney General)*; *Minc v. Québec (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>>.
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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.
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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/oj/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>>.
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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>>.
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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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