



ALTERNATIVE
MODELS
OF COURT
ADMINISTRATION

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FOREWORD

On behalf of members of the Subcommittee on Models of Court Administration, I am pleased to present the final report *Alternative Models of Court Administration*. The report was prepared by the consultants employed by the Subcommittee to assist it in carrying out its work.

The Canadian Judicial Council has long been aware of the inefficiencies of the executive model of Court administration as well as the challenge it presents to the independence of the judiciary. Prior to 2003, Council had already sponsored 2 major studies and dedicated a Chiefs' seminar to issues and concerns surrounding court administration.

In a 2003 Judge's Day speech in Montreal, the Council's chair, Chief Justice McLachlin, pointed out that through these, and other, previous studies dealing with administrative efficiency and judicial independence, a great deal of wisdom had been amassed. She then went on to say: "It is now time to build on this wisdom and seek to formulate concrete suggestions to this lingering challenge to judicial independence."

The Chief Justice was referring to the fact that earlier that year the Subcommittee on Alternative Models of Court Administration had been established and tasked by the Administration of Justice Committee and the Executive Committee of the Council to: (1) identify the standards of administrative control Courts should exercise in order to ensure the required standard of judicial independence; and to (2) come up with alternatives to the executive model of Court administration designed to better preserve judicial independence; better preserve the judiciary as a separate branch of government; enhance public confidence in the judicial system; and improve the quality and delivery of judicial services.

I am satisfied that this Report fulfils the mandate contained in the terms of reference and formulates the concrete suggestions referred to by Chief Justice McLachlin. The Subcommittee believes the alternative the Report calls the "Limited Autonomy and Commission Model" will best achieve the goals set out in the terms of reference and what the Supreme Court of Canada refers to in the *Remuneration Reference* as the constitutional imperative of depoliticizing, to the extent possible, relations between the judiciary and other branches of government. However, realizing that, for a variety of reasons, one size may not fit all, the Report also identifies several other alternatives. Any of these would be more appropriate for the administration of the Courts of a modern constitutional democracy like Canada than the existing executive model that presently prevails in all the provinces and territories of the country.

As Chair, I thank my colleagues on the Subcommittee Chief Justice Catherine Fraser, Chief Justice David Smith, Chief Justice Michel Robert, Associate Chief Justice Robert Pidgeon, Associate Chief Justice Douglas Cunningham, Mr. Justice Kenneth Hanssen and Mr. Justice Robert Edwards for their dedication, hard work, cooperation and support these past two years. I also wish to thank our Provincial Court advisors, Chief Justice Brian Lennox and Madam Justice Kathleen McGowan, for their participation and advice. Thanks to Chief Justice Beverley McLachlin and her executive advisor Nancy Brooks for their help and support. Thanks to all who contributed to the success of this Report by participating in interviews and seminars, including all the members of the Council and numerous Deputy Ministers and other administrative officers of Courts across Canada.

I also thank the two teams of talented and dedicated consultants, the authors of the Report, Professors Karim Benyekhlef and Fabien Gélinas from Montreal and Robert Hann, Professor Lorne Sossin and Professor Carl Baar from Toronto, who worked so diligently and collegially on this Project. Some of their work on the project was contributed pro bono. I thank them for that demonstration of good citizenship.

Thanks to the staff at the Canadian Judicial Council office for the secretariat services and advice they provided. Finally, I thank the Administration of Justice Committee for giving me the opportunity to chair the Subcommittee and to work with such wonderful people on such an interesting and important Project. It was a great experience and I learned much more than I contributed.

The Honourable Gerard Mitchell
Chair
Subcommittee on Alternative Models of Court Administration

CHAPTER 1 INTRODUCTION AND EXECUTIVE SUMMARY

1.1 THE BACKGROUND FOR THE REPORT

This report examines and evaluates different “Models of Court Administration”. Models refer to organizational frameworks which prescribe the way in which decisions would be made that determine court administration policies and operational practices. More specifically, the report analyzes the role of the judiciary in decision-making within such models.

The report is the work of a project begun in 2003 by the Canadian Judicial Council and overseen by a subcommittee of its Administration of Justice Committee. That subcommittee recognized the emergence of a number of critical issues affecting judicial-executive relations. Those issues cross provincial and territorial boundaries and affect all Court levels. As set out in the Committee’s request for proposals:

These issues include how best to avoid inappropriate negotiations between the executive and judicial branches of government, ensure the provision of appropriate support services and Court facilities for the third branch of government and enhance accountability for the use of public monies while safeguarding judicial independence.

The purpose of this project is to serve as a catalyst for real change and reform. Following the direction of the subcommittee, this report

- identifies the standards of administrative control that Courts should exercise in order to ensure the required standard of judicial independence, and
- explores, develops and identifies models of court administration that are alternatives to the existing “executive”¹ model, in order:
 - a) to better preserve judicial independence and the status of the judiciary as a separate branch of government;
 - b) to enhance public confidence in the judicial system; and
 - c) to improve the quality and delivery of judicial services.

The models examined in this report address two kinds of relationships:

1. the relationship between the judiciary and the government—that is, the relationship that defines the accountabilities and responsibilities of the judiciary or “Court”² with respect to court administration policy and operations vis-à-vis the government or the Legislature, the Attorney General and/or the CEO of an independent body; and

.....
¹ The “executive” model is one in which—although there are many variations—policy and operational decision-making for court administration is the responsibility of an executive department headed by a cabinet minister, usually the Attorney General or Minister of Justice.

² In the current document, we use the term “Court” to refer both to the Chief Justice *per se*, and to a judge or group of judges to whom the Chief Justice has delegated responsibility and authority for court administration.

2. the relationship between the judiciary and the management of the courts — that is, the relationship between whoever is seen as accountable and responsible for court administration policy and operations (whether that be the “Court”, the Attorney General or the CEO of an independent body) on one hand, and the head of a court administrative unit (the Court Executive Officer³) on the other.

The structure of this first key relationship will in large part determine the nature of the second.

Twenty years ago, following the *Deschenes Report*,⁴ countries such as Australia looked to Canadian studies for new models of court administration.⁵ Now, Australian jurisdictions feature different models of self-governing Courts with impressive records of improved effectiveness and efficiency. Canada, by contrast, now ranks as one of the last common law jurisdictions in which court administration continues to be controlled by the executive branch of government. In every Canadian province, notwithstanding a trend toward greater judicial involvement in court administration, Courts are operated as a division of the Attorney General’s ministry, rather than as a separate branch or even a separate department of government. Increasingly, voices from both the judiciary and the executive are asking: is there a better way forward for court administration in Canada?

In order to determine and elaborate a preferred model for court administration in Canada, this project has focused on collecting information from five sources:

1. detailed review of related constitutional considerations,
2. two rounds of over 60 interviews and consultations (each) with Chief Justices and Deputy Ministers and other key participants in court administration from most jurisdictions in Canada, with the first round focusing on the models currently existing in Canada, and the second round of interviews focusing on a range of alternative models,
3. two full day seminars held with the Canadian Judicial Council following each round of interviews at which the issues raised during the consultations were discussed,
4. a review of the range of models used in Courts in other jurisdictions internationally, and
5. a review of the more general body of knowledge on models of administrative decision-making in Courts and in other organizations.

.....
³ In the current document, we use the term “Court Executive Officer” to describe the person who is operational head of the Court administration unit. That person may in different jurisdictions have a different title, such as Director of Court Services, ADM for Courts, Chief Court Administrator, Registrar, or Clerk of Court.

⁴ Jules DESCHNES, *Maître chez eux/Masters in Their Own House: A Study on the Independent Judicial Administration of the Courts* (Montreal: Canadian Judicial Council, Sept. 1981).

⁵ See Thomas W. CHURCH and Peter A. SALLMAN, *Governing Australia’s Courts* (Carleton South, Victoria: Australian Institute of Judicial Administration, 1991).

1.2 KEY OVERALL CONCLUSIONS

Based on the evidence collected and analysis undertaken, this report has come to the following conclusions:

1. Canada has fallen behind peer jurisdictions such as Australia in innovations in court administration. Although the trend in most Canadian provinces is toward an enhanced judicial role within the executive model, the deficiencies of the executive model continue to impair the ability of courts to fulfill court administration goals and objectives.
2. The analysis of the evidence indicates that there is a compelling constitutional rationale for changing the executive model of court administration in Canada to a model or models which feature a greater degree of judicial autonomy.
3. This change ensures judicial independence.
4. This change also enhances the accountability of the judiciary in court administration, as well as achieving improved effectiveness and efficiency in court administration.
5. Although there are legitimate variations in viewpoints and the strengths of those positions on the issue, concerns about the shortcomings of the executive model of court administration are widely held among the judiciary and this view is shared by some executive officials.
6. There is significant support for a model of court administration based on limited autonomy for the judiciary within an overall budget for court administration set by the appropriate legislative authority. Support extends further to linking this limited autonomy to the use of an independent commission for the prevention and resolution of disputes related to the overall size of the budget allocated to the judiciary.
7. There is also a need for a professional court administration with a chief executive officer responsible to the Chief Justice. The existence of a CEO to handle day-to-day operations will be important in ensuring that the judiciary is not preoccupied with those matters and can focus on overall strategic direction of court administration.
8. This report concludes that an optimal model of court administration would be one which provides the judiciary with autonomy to manage the core areas of court administration while ensuring (by the carefully considered use of an independent commission) that the authority of the political branches over resource allocation is not used arbitrarily.

1.3 FORMAT OF THE REPORT

This project assesses the strengths and weaknesses of specific alternative models from a number of perspectives. Not surprisingly, we found that different people and different types of analyses bring sometimes dramatically different assumptions, definitions and approaches to discussions about the judicial role in court administration. Capturing the important lessons to be learned from this rich diversity is of course critical to any discussion of the issue. However, from that diversity it was possible to identify—from each perspective—directions which preserve and promote an independent judiciary and which are most capable of effectively and efficiently meeting court administration needs.

The analysis of the evidence leading to the key overall conclusions is presented in seven chapters.

Chapter 2: Where We are Now: Variations on The Executive Model

Chapter 2 describes the executive model of court administration and analyzes the results of preliminary consultations conducted for this study on the issues, concerns and priorities relating to this model of court administration.

Key Specific Findings and Conclusions (Chapter 2)

Based on the analysis in Chapter 2, it is apparent that the executive model is deficient in several key respects:

1. Courts lack stable funding and discretion over expenditures, creating obstacles to strategic and long-term planning.
2. Court administrators often have divided loyalties to executive and judicial offices which can undermine the effectiveness of court administration.
3. The Attorneys General's willingness and capacity to represent the Courts' interests in Government decision-making is eroding.
4. The mutual trust between judicial and executive leadership is jeopardized by the present climate of disputes over court administration budgets and the implementation of judicial compensation commission recommendations.

Chapter 3: How Did We Get Where We Are Now? Implications for the Future

Chapter 3 provides an important historical overview for considering the prospect of moving from the current (and arguably anomalous) executive model of court administration decision-making to the alternative models outlined in Chapter 8. The Chapter both traces the development of the current model in Canada and other countries, and provides examples of how other countries have moved beyond the type of administrative structures currently in place in Canada.

Key Specific Findings and Conclusions (Chapter 3)

The analysis of Chapter 3 provides considerable historical evidence supporting the possibility and feasibility of Canada moving from the current executive model to an alternative model. In particular, these findings support the following:

1. Current models were not designed to run the Courts as they are now.
2. Current models have not been around as long or as universally as most might assume.
3. Not only is the impetus for change understandable, but positive change is also possible and desirable.

Chapter 4: Constitutional Foundations for Change

Chapter 4 examines the critical constitutional dimension of court administration. First, it summarizes key recent and emerging trends in Canadian constitutional law. In particular it argues that one cannot assume that the end of the process of defining the constitutional requirements of judicial independence has been reached. That process is essential to understanding the dynamic normative context in which models of court administration must be analyzed. The discussion pays particular attention to the changing role of the judiciary and the recognition of the “constitutional imperative of depoliticization”. The second part of the discussion looks at possible institutional obstacles to change in the area of administrative autonomy, namely the federal and parliamentary structures of Canada in the context of the separation of powers. The discussion then turns to the broader normative context defined over the past quarter century in international declarations, official statements and other soft law instruments—a context that recognizes the importance of administrative autonomy in fleshing out the general principle of judicial independence.

Key Specific Findings and Conclusions (Chapter 4)

Seven conclusions may be drawn from the constitutional analysis in Chapter 4, conclusions which can serve as guiding principles for considering alternative models of court administration:

1. The constitutional position can only be analysed in the dynamic context of the evolution of the role of the judiciary under the Canadian constitution. Over the last 25 years, there has been a formidable increase in judicial responsibilities and an ever-growing involvement of Courts in the resolution of socio-economic questions. Institutional arrangements in matters of court administration have not followed suit.
2. The inherent jurisdiction of Courts of law should not be expected to form the basis of fundamental changes in institutional arrangements. However, inherent jurisdiction is based on the rationale that Courts must have all the powers necessary for the exercise of their jurisdiction. Inherent powers can therefore be expected to evolve with judicial responsibilities, along with the constitutional requirements of judicial independence.
3. There are no constitutional impediments to the adoption of models of court administration that involve a high degree of judicial autonomy. The federal distribution of powers, the institutional arrangements peculiar to the parliamentary tradition and the conventions of responsible government create no obstacle to the adoption of such models.

4. Even though constitutional requirements do have a harmonizing effect at the level of principles, federalism allows for a measure of provincial autonomy in the design of models of court administration.
5. The constitutional imperative of depoliticization of the relations between the political branches and the judicial branch very likely calls for a greater measure of administrative independence than is afforded by the models currently in place.
6. A brief comparative review of the usual reference jurisdictions, the United Kingdom, the United States and Australia, shows a clear trend toward governments granting greater administrative autonomy to the Courts.
7. Finally, statements of principle from the last 25 years of international “soft law” instruments have recognized the importance of administrative autonomy in promoting and preserving judicial independence and clearly support a move in Canada toward a limited judicial autonomy model of court administration.

Chapter 5: What Criteria Should Be Used for Assessing Alternative Models?

Leaving aside any evolving constitutional requirements concerning judicial independence, an agreement to implement changes to the current model would be more likely if it were accompanied by evidence that the new model will improve the impacts of Court activity on society (Court outcomes or effectiveness) and the way Courts carry out their function (court processes and efficiency). More specifically, comparisons of one court administration model to another—or descriptions of the failings or advantages of particular existing or potential models—must be made in terms of the degree to which the alternative furthers the achievement of specific institutional objectives of the Courts.

At the same time, monitoring and reporting court administrative performance in terms of a clearly defined set of goals and objectives is essential for all models if they are to effectively focus and manage court resources—and to be accountable to others for that management.

Chapter 5 therefore presents a number of specific “outcome” and “process” objectives of the Courts—and consequently, of court administration.

Key Specific Findings and Conclusions (Chapter 5)

Three conclusions follow closely on the discussion in Chapter 5:

1. First, increased use of court performance goals and objectives would enhance court administrative *efficiency and effectiveness* under any of the models.
2. Second, setting clear administrative goals and objectives—and regularly monitoring and openly reporting performance in terms of those goals and objectives—would provide an effective process for ensuring *accountability* under any of the alternative models.
3. In particular, by providing an effective accountability mechanism, administrative goals and objectives would provide the strong mechanism needed for ensuring effective accountability to a broad range of communities under judicially-led models of decision-making.

Chapter 6: What is the Scope of Court Administration?

In much of the past quarter-century's debates, the term "court administration" has been defined in an overly simplistic manner. For instance, much of the discussion has treated court administration as a monolithic whole. The right decision-making model for one part therefore has to apply to all parts. Furthermore, when the discussion does focus on only one or two administrative areas (for instance, setting the overall budget of the Court, or the physical layout of the courtroom), other equally important areas (such as setting court objectives, or ensuring adequate working conditions for staff and access for the public) are often given insufficient attention.

Chapter 6 brings much needed clarity to what is meant by "court administration," by addressing two of its important sub-dimensions. Section 6.1 begins by identifying 5 broad *areas* of activities (leadership and direction, organization and partnerships, strategies and tactics, resources, and support systems) that together are essential to effective and efficient court administration. The section also identifies specific types of decision-making activities within each broad *area*, and then analyzes the relative advantages and disadvantages (in terms of advancing specific institutional court objectives) of applying each of these models to these different types of administrative activities.

Section 6.2 then introduces a second dimension by noting that the design and operation of each type of administrative activity (e.g. information systems, budgeting) can be broken down into a number of specific developmental *stages* of administrative decision-making. As an example, the specific area, "budgeting," is broken down into 11 distinct stages: starting from "developing the whole budget process"; proceeding through a number of stages such as "modifying and deciding on the size and composition of the budget" and "bookkeeping"; and finishing with "monitoring actual and budgeted financial performance".

One of the important results of disaggregating "court administration" into these separate *areas* and *stages* is that one then can see the possibility that one type of court administrative decision-making model could be appropriate for a particular type of decision (e.g. the identification of the information required to support case/caseload management), while another significantly different decision-making model could be appropriate for other types of decisions (e.g. the day-to-day operation of the system that would provide that information).

Key Specific Findings and Conclusions (Chapter 6)

The analysis of Chapter 6 had a critical influence on determining the preferred model.

In particular:

1. Different types of court administrative decision-making might be best made under different "pure" models. The possibility was therefore opened to having the optimal model for the totality of court administration decisions to be a combination of different "pure" models.
2. More specifically, if a model with increased judicial control were the most appropriate for many areas or stages of court administrative decision-making, it would be unlikely to be most appropriate for all. That being the case, the most likely option would be a "limited" judicial autonomy model (i.e. one in which other models of decision-making would apply to court administration decisions outside certain limits).

3. The existence of different *stages* of court administration decision-making also opened up the possibility of improving the optimal model (or set of models) by incorporating yet another type of alternative model for certain *stages* of decision-making. As will be seen later, our recommended solution does just that, by adding a “commission” model to handle certain disputes between the judiciary and budget authorities.
4. Finally, given the wide variation in the nature and complexity of court administrative activities from one jurisdiction to another, different Court jurisdictions may find it appropriate to adopt variations of the model(s) felt most appropriate in other jurisdictions.

Chapter 7: What Roles do Other Groups Have in Courts Administration?

Chapter 7 then clarifies another important dimension of the analysis. The Chapter argues that it is no longer appropriate to conduct the discussion of models of court administration within a framework that focuses almost exclusively on the roles of the Chief Justice and the Attorney General. Today, such discussions must consider the increasingly important roles played by other groups—especially governmental authorities that do not reside within the Department or Ministry of the Attorney General, including central agencies such as management boards, cabinet committees, facility construction agencies, computer and information systems agencies, and human resource/public service agencies.

Key Specific Findings and Conclusions (Chapter 7)

The analysis in Chapter 7 is important to any consideration of the executive model and its alternatives. In particular:

1. Given the increased role of other government departments and agencies in court administration decision-making, it is inappropriate to assume that the Attorney General exerts as strong a role in court administration decisions as before. This has implications for the degree to which the executive model (with the Attorney General representing the executive) should be seen as continuing to be the most appropriate.
2. Thus, given the increasing influences of other groups, the ability of the Attorney General to act as a protector of the Courts is reduced.

Chapter 8: Different Models: Different Levels of Control over Decisions

The literature and practice are replete with different types of models of court administration that could be considered. However, to facilitate discussion of the main issues, we identify seven distinct groups of models that capture and emphasize key relevant differences in approach:

1. Executive Model
2. Independent Commission Model
3. Partnership Model
4. Executive/ Guardian Model
5. Limited Autonomy Model
6. Limited Autonomy & Commission Model
7. Judicial Model

Chapter 8 elaborates on each of these models (and their many variants) and explores which model is most appropriate for different areas and stages of court administration decision-making. Chapter 8 also summarizes the views and opinions gathered about each model from the two rounds of consultations and the two workshops.

Key Model-Specific Findings and Conclusions (Chapter 8)

Highlights of the discussions of individual models include:

1. The **executive model** is one in which—although there are many variations—policy and operational decision-making is the responsibility of an executive department headed by a cabinet minister, usually the Attorney General or Minister of Justice. Notwithstanding the significant successes and accomplishments of Canadian court administration, it is apparent that the executive model is deficient in key aspects. Further, the success of the executive model has often in the past depended on the level of trust and communications that exist among specific persons occupying key decision-making positions—and their dedication and willingness to make modifications to the pure executive model. It is a very positive sign that these modifications—most if not all toward greater (but limited) judicial autonomy—have generated significant improvements and have earned support from both the Court and the executive. However, the independence of the judiciary, the effectiveness and efficiency of the courts, and public confidence in the justice system requires an improved and robust model that ensures that jurisdictions take full advantage of more of the types of improvements that have already proven to be advantageous.
2. The **independent commission model** contemplates a range of decision-making in court administration being undertaken by an independent commission which, by definition, would be beyond both executive and judicial control. The independent commission model offers some advantages; most notably it provides a “level playing field.” However, it does so by reducing the influence of the executive (and others) to a level similar to that of the judiciary currently. The model therefore fails to resolve one of the key concerns with the executive model, since it fails to enhance the judicial role in court administration decision-making.
3. The **partnership model** involves different decision-making mechanisms through which the judiciary and executive would collaborate in setting the direction for court administration. Neither the judiciary nor the executive under this model could impose a decision on the other. This model has some appeal—and it may be appropriate in smaller jurisdictions where such models are used routinely in decision-making in other areas of government and civil society. However, for most jurisdictions, it fails to resolve the key concerns with the executive model in a number of dimensions; for instance, the absence of a clearly defined decision maker and the dependence on the particular characteristics of the different partners. In fact, in many circumstances this model could exacerbate many of the undesirable features of the executive model.

4. The **executive guardian model** involves a lead executive role in court administration decision-making but allows for judicial intervention in certain circumstances. This model partially resolves the key concerns with the executive model, by giving the Court power to order either that certain court administration activities take place or that certain activities be stopped. However, this model also has some deficiencies. In particular, it does not incorporate any ongoing mechanisms to facilitate effective Court involvement in larger strategic decisions that will have fundamental impacts on judicial independence and the effectiveness and efficiency of court administration. The judiciary could veto decisions, but not initiate them.
5. The **limited autonomy model** provides for judicial control and autonomy over certain areas of court administration decision-making. Under this model, the executive continues to control the setting of overall court administration budgets but the Court is self-governing within that global budget. This model resolves many of the key concerns with the executive model. While consistent with a Westminster system of Parliamentary supremacy, and while maintaining democratic accountability over resource allocations, this model is based on judicial control and autonomy over core areas of court administration. However, this model does not address dispute avoidance or dispute resolution between the judiciary and executive over court budgets.
6. The **limited autonomy and commission model** incorporates the features of the limited autonomy model but joins that model with the use of an independent commission on issues surrounding the global budget, which falls outside the scope of limited autonomy, and in this way provides self-governing Courts and the executive with a mechanism for avoidance and resolution of budget disputes.
7. The **judicial model** establishes judicial control over virtually all court administration decisions, including the setting of the global budget. It resolves some of the key concerns with the executive model, but gives rise to a different parallel set of legitimacy and accountability concerns over the role of the judiciary in self-governing Courts.

Key General Findings and Conclusions (Chapter 8)

Although implicit in some of the foregoing, a number of more general findings and conclusions are evident from the analysis of Chapter 8:

1. Change is already a fact of court administration in Canada.
2. Virtually all the recent changes in Canadian court administration have been in the direction of greater judicial control and autonomy.
3. There are legitimate variations in positions and the strengths of those positions on certain issues related to most of the models.
4. However, concerns over the executive model of court administration are widely held among the judiciary and by a few executive officials.
5. There is significant support for a model of court administration based on the combination of limited autonomy for the judiciary in many areas of court administration and an independent commission for the avoidance and resolution of court administration disputes.

Chapter 9: The Recommended Model: Limited Autonomy and Commission

The purpose of this report has been to determine which model of court administration would better preserve judicial independence and the institutional integrity of the judiciary, better enhance public trust and confidence in the judicial system, better improve the quality and delivery of judicial services and better develop a culture of continuous improvement in the administration of Canadian courts.

Based on our analysis, it is apparent that a greater degree of judicial autonomy in court administration is likely to advance all of these goals.

More specifically, we conclude that a **model of limited autonomy with an independent commission for prevention and resolution of disputes regarding the global budget for court administration** represents the most flexible, coherent and constructive framework within which to realize these goals.

CHAPTER 2

WHERE WE ARE NOW: VARIATIONS ON THE EXECUTIVE MODEL

2.1 DESCRIPTION OF THE EXECUTIVE MODEL

In the executive model, court administration is controlled by the executive, which in turn reports to the Legislature. The “first” representative of the “executive” will usually be the Attorney General or Minister of Justice. However, since responsibility for certain court administration decisions in most jurisdictions has been assumed by other parts of the government, court administration cannot be seen as a separate unit and in fact, the “executive” is more correctly seen as represented by a number of government ministries. A chief justice has no defined relationship to the minister (or ministers); whether advice is sought or not is purely a matter of executive discretion. Furthermore, the judiciary has no direct formal relationship, advisory or otherwise, to court administration. However, even a court staff member is to serve a chief judge or chief justice, that staff member can do so only when authorized by the executive. Finally, by far the majority of jurisdictions have not established a clear and measurable set of goals and objectives by which court administrative performance should be assessed, and in virtually none of the jurisdictions has the judiciary (and other key stakeholders) had a meaningful role in setting the expectations by which those who run the Court can be held accountable.

While the executive model has been justified by the principles of ministerial responsibility and legislative supremacy, many provincial governments, in consultation with the judiciary, have recognized the significant shortcomings of that model and have modified it in recent years by way of informal understandings, formal rules, or more elaborately drafted Memoranda of Understanding. The result has been a multitude of variations on the basic model. Indeed, variations have become the rule rather than the exception.

Some of these variations have or could be made to mitigate aspects of the executive model that limit judicial input into court administrative decisions. They therefore reflect the view that the ability of the executive branch to manage effectively is impaired unless the judiciary can be mobilized in designing and implementing improvements and reforms. For instance:

- The executive could formally delegate to a chief justice the authority and accountability to work toward a specific objective and ensure that court administrators and various stakeholder groups (e.g. the bar) work together toward the same objectives in specific areas, for example implementation of court delay reduction programs.
- The executive could enter into agreements with the chief justice of a Court in order to delegate authority over a certain area of court administration decision-making, for instance, control of expenditures within a specific portion of the court administration budget or supervision of certain court staff.⁶ The Memorandum of Understanding (MOU) between the Attorney General

⁶ B.C. was the first province to take this step (in the mid-1970s); Ontario and Alberta among others have followed. It was B.C. Chief Justice Nathan Nemetz’s intention to expand the scope of the “judicial administration” budget to approximate a Limited Autonomy Model, as elaborated below in Chapter 8.5.

of Ontario and the Ontario Court of Justice is an example of such an initiative. This MOU, in operation since 1993, provides the Chief Justice of the Ontario Court of Justice with a significant degree of control over the budget of the Office of the Chief Justice. This control does not extend, however, to the operational budget of the Court. The MOU also sets out that the Executive Coordinator, a government official, exercises financial and administrative responsibilities in and for the Office of the Chief Justice, and takes direction from the Chief Justice. The Executive Coordinator consults with Attorney General representatives and prepares the operating budget for the Chief Justice's Office to be included in Attorney General estimates.

The Attorney General and Provincial Court of British Columbia have an agreement which delegates even greater budgetary control to the Chief Judge of that Court. This initiative has now led to a formal set of protocols, signed in 2002, which sets out in writing the roles and responsibility of the Attorney General and the Chief Judge of the Provincial Court in several areas, including budgetary matters. The Chief Judge has significant discretion in allocating the budget once it is set by the government. The protocols also mandate when consultations are required on certain kinds of administrative decision-making and contemplate regular meetings between judicial and executive leaders. The protocols, like the Ontario MOU, are not intended to serve as an enforceable agreement between the Court and the government but rather set out in a more formal fashion the existing mutual expectations and responsibilities.

- The executive could make it a matter of policy and practice that the Chief Justice's input be sought and considered as an integral part of decision-making processes, especially earlier in those processes. In particular, the chief justice could be consulted in a systematic, routinized and effective way—rather than by way of an occasional courtesy call. The Manitoba Court Executive Board is an example of such a framework. This long running administrative initiative provides a venue for judicial and executive leaders (i.e. the three Chief Justices, the Deputy Minister, and the Director of Court Administration) to meet regularly, develop collaborative approaches to shared problems and engage in high-level exchanges of information. While the Board is seen as a collaborative body designed to facilitate the smooth functioning of the executive-judicial relationship, it does not engage in decision-making on budgetary or significant administrative matters. A similar initiative has been launched in Newfoundland which places the Minister on the executive board as well.
- The executive could formally delegate to a chief judge and a court administrator the authority to make binding decisions in relation to court administration. An example of such a formal delegation is the legislative restructuring of the Federal Court, enacted in 2002 and effective in 2003, that creates the office of the Chief Administrator as the head of a new Court Administration Service. The Chief Administrator is appointed on the recommendation of the Minister of Justice following consultation with the four Chief Justices of the Federal Courts. Distinctive features of this model include the power of Chief Justices to issue binding written direction to the Chief Administrator and the responsibility of the Chief Administrator to report annually to Parliament. This restructuring shifts the focus of the executive model for the Federal Court away from a direct relationship between Chief Justices and the Deputy Minister of Justice or Minister of Justice toward a direct relationship between the Chief Justices and the Chief Administrator.⁷

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⁷ This variation moves the executive model a considerable distance toward the "Executive Guardian" model described later in chapter 8.4.

- The executive could permit the judiciary to enhance its policy and planning capacities so it could play a more meaningful role in court administration. The creation of the Executive Office of the Nova Scotia Judiciary is an example of this initiative. This office was established to coordinate joint administrative policies and provide policy and media services to the Nova Scotia Courts. It was funded by reallocating existing resources and is seen as a first step toward building the capacities of the Court to undertake a greater role in court administration. While this office has a small budget and no formal decision-making role in the budgetary or administrative process, it was designed to overcome the tendency for Superior Courts and Provincial Courts to maintain entirely separate relationships with the executive.
- The executive could, through legislation or practice, permit judicial involvement in court administration decision-making that amounts to de facto autonomy. One example of such a practice in Canada is the role undertaken by the Registrar of the Supreme Court. Through a combination of statutory and administrative measures, the Registrar of the Supreme Court, by statute, functions as a “CEO” of the Supreme Court, under the direction of the Chief Justice, and exercises significant control over the budgetary and administrative processes of the Court. Other appellate Courts, including the Alberta Court of Appeal and the Quebec Court of Appeal, have been granted levels of administrative autonomy.

It should, however, also be noted that despite many of the modifications that have been introduced to the executive model, new developments in governance have strengthened executive control and created new limitations on the judicial role in court administration.

- In particular, as Chapter 7 makes clear, the unified ministry-focused version of the executive model (with the Attorney General representing “the executive”) has given way to an increasingly centralized multiple service-agency version. Thus, not only does the judiciary have to influence—through the largely informal means to which it is limited—the Attorney General, it has to influence the much wider range of government departments, committees and agencies involved in court administration decision-making (including but certainly not limited to Premier’s Offices, Treasury Boards and other central agencies throughout the provinces that have taken on additional key roles in labor-management negotiations, budget cutback processes, information systems design and facilities management). And yet, the judiciary possesses no means to do so short of lobbying or negotiating with these bodies.
- Equally revealing is the involvement of other parts of the justice system in key administrative initiatives. The development of court management information systems only within the context of an integrated justice system is a prime example. Such approaches may make sense purely from an efficiency point of view. However, they certainly may not make sense in terms of principles of justice that assume a clear division between the judiciary and court administration on the one hand, and those that argue their cases before an independent Court on the other.

2.2 THREE CONCLUSIONS ON THE LIMITS OF THE EXECUTIVE MODEL

Three conclusions can be drawn about the executive model in every provincial and territorial jurisdiction:

1. The Courts still have no authority to develop or administer independently of government a significant part of the court administration budget, nor to direct the carrying out of other court administrative activities considered to have significant impact on judicial services. Neither chief justices nor their Courts' administrators have the kind of fiscal and operational authority that allows them to function apart from ministerial or broader governmental directives. Concerns have been expressed in many quarters that this represents a significant threat to the independence of our judiciary.
2. Second, consensus has not been developed amongst key stakeholders on the appropriate goals and objectives that should be achieved by court administration. One of the key reasons for this lack is the fact that the Courts are missing the appropriate level of infrastructure to undertake the data collection, research, consultation and analysis needed to adequately address the questions that must be asked in order to develop the goals and objectives.⁸ A key prerequisite to any mechanism for ensuring accountability—accountability of both the Court and the executive to each other—and more importantly of both groups to the public is thus absent.
3. Finally, despite this lack of consensus on precise measures to be used, there is in many quarters a belief that the effectiveness and efficiency of court administration could be improved through adoption of different management models.

In short, and notwithstanding the many variations on the executive model noted above, it remains characterized by executive control. To the extent the judiciary has a role in court administration outside the constitutionally mandated adjudicative sphere, it is one expressly delegated by the executive. The result is that the executive model is largely dependent on relationships of trust and goodwill between the executive and the judiciary to function. Such relationships may change with each new minister, deputy minister or chief justice and the vicissitudes of the political climate. As the consultations discussed below indicate, this represents a fragile and unsatisfactory basis for court administration.

2.3 FIRST STAGE OF CONSULTATIONS

As indicated above, the consultations in support of this project were undertaken in two stages. The first stage focused on respondents' experience with the executive model of court administration, including various innovations within that model which have facilitated a range of roles for judges in court administration decision-making. The second stage, discussed subsequently in Chapter 8, focused on respondents' views of the executive model in relation to the other six alternative models identified in this report.

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⁸ Questions such as: "Where are we going as a Court?" "What strategic initiatives and changes in policies and procedures are needed?" "What judicial complement and other resources are required?"

The preliminary consultations included discussions with a range of approximately 60 key participants in court administration, including present and former Chief Justices at all levels of Courts and in all jurisdictions in Canada, puisne judges, former and current Attorneys General, political advisors, Deputy Ministers of Justice, Court Services Directors and Assistant Deputy Ministers, Attorney General staff, court staff including registrars and executive legal officers, political science and legal academics, members of the bar and other court observers. The consultations also have included discussions with the subcommittee of the Canadian Judicial Council overseeing this research project. These discussions built on a number of earlier, important studies investigating alternative models of court administration,⁹ as well as the parallel constitutional and administrative investigations conducted as part of this project.

The results of this preliminary consultation are presented below. A number of sections begin with quotations taken from the interviews.

2.3.1 The Impact of Governmental Structures on Court Administration

“Courts are viewed as a branch of the Ministry, not as a branch of government.”

In most provincial jurisdictions, judicial participants in the preliminary consultations echoed the refrain that the Courts, as a budgetary and administrative unit, are viewed and treated by the executive as a branch of the Attorney General’s ministry rather than as a separate branch of government. This view was not shared at the federal level, where since the 1970s there has been a gradual separation between the Federal Court and Supreme Court on the one hand and the Department of Justice on the other.

The impression that the Courts are treated as a branch of the ministry manifests itself in myriad ways. Most importantly, placing the budget for court administration within the overall ministry budget reflects this mindset. Courts have almost no ability to set priorities for court expenditures. This is not surprising as in the vast majority of the jurisdictions, the federal level being a notable exception, Courts have little, if any, input into court budgets, much less meaningful control over how it is spent.

Having court staff and government managers together report to the same Assistant Deputy Minister or Deputy Minister is another characteristic of the ministry umbrella extended over the court administration sector. Sometimes, however, what appears minor or trivial may be nonetheless perceived as emblematic of this dynamic. In one jurisdiction, for example, a memo was sent to the registrar of a court addressed to all “divisions” in the Ministry requiring certain budgetary targets to be met. In other jurisdictions, having the same email address as ministry staff or having ministry staff (e.g. Crown prosecutors) share resources with court staff (i.e. photocopy and fax machines) was highlighted as symptomatic of this mindset. In less populous provincial and territorial jurisdictions and in rural areas more generally, it is not uncommon for courthouses to be located directly in government buildings which also house ministry staff.

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⁹ These include Chief Justice DESCHÊNES’ 1981 Report entitled *Masters in their Own House*, the 1995 study by Charles TREMBLAY for the Conseil de la magistrature du Québec, *Rapport préliminaire sur la faisabilité de l’indépendance administrative de la magistrature*, the *Report of the Ontario Courts Inquiry* by Mr. Justice ZUBER in 1987, and Professor Martin FRIEDLAND’s 1995 Canadian Judicial Council landmark study *A Place Apart*.

All these features, large and small, contribute to the impression that the Courts and the ministry are not separate or distinct governmental institutions. More substantively, the fact that court expenditures on office furniture, library acquisitions, staff, security and information technology often require direct approval by a ministry manager reinforces the absence of any functional separation between Courts and the executive branch as does the absence of any Court control over funding priorities.

2.3.2 The Impact of Litigation on the Executive-Judicial Relationship

“The mutual trust is eroding.”

Following the Supreme Court’s decision in the *Remuneration Reference*¹⁰ in 1997, provinces established independent compensation commissions to set salaries, pensions and benefits for provincially appointed judges and Justices of the Peace. By 2004, the majority of provinces in Canada experienced significant litigation in their Superior Courts between governments and judges’ associations challenging either the commissions’ recommendations or the rejections of those recommendations by governments. The result has been an unprecedented degree of adversarial contact between provincial governments and provincial judiciaries. The Supreme Court’s most recent decision in *Remuneration Commissions Decision*¹¹ is expressly intended to address this adversarial context. In this decision, discussed below in Chapter 4, the Supreme Court clarifies the basis on which a government may reject the recommendation of a remuneration commission. It remains to be seen whether this latest judgment will have an effect on the trend to turn to litigation to resolve executive-judicial disputes over compensation.

Several participants in the consultations cited this litigation as a contributing factor to the erosion of mutual trust between the government and judiciary on matters of court administration. The compensation litigation has affected this relationship in two ways. First, it has led to adversarial rancor, as most litigation does, which may spill over into other settings; and second, because budgets for salaries and benefits are viewed by the executive as, to some extent, “taken away” from government, the pressure increases on court administration budgets to meet the demands of ever more fiscally constrained governments. This assumes of course that any increases to salaries and benefits recommended by compensation commissions are to be funded out of existing court administration envelopes, an assumption which itself raises obvious constitutional issues.

Other participants pointed to the role of *Charter* and aboriginal rights litigation and well-publicized attacks on “judicial activism” as a source of tension in executive-judicial relations. This tension is exacerbated in constitutional cases where judicial decisions are seen as having a significant impact on the allocation of public resources or the ability of the government to pursue its policy preferences.

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¹⁰ *Reference regarding the Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1977] 3 S.C.R. 3 [Remuneration Reference]

¹¹ *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.

2.3.3 The Impact of Limits on Judicial Input in Executive Decision-making on Court Administration

“Sometimes we are asked, but mostly we are told.”

A survey of “court management relationships” conducted for the Canadian Judicial Council in 2000 and updated in 2002 revealed that in about one-third of Canadian jurisdictions, Chief Justices reported having no role in the budgetary process. In the other two-thirds of Canadian jurisdictions, Chief Justices reported a limited and largely ineffective role, which consisted in some cases of reviewing budgetary submissions, submitting business plans, outlining budgetary needs or meeting with the Registrar or Director of Court Administration to discuss budgetary issues. In a small number of Appellate Courts, Chief Justices indicated that they exercise a significant degree of control over the allocation of budgets but a limited role in the budgetary process.

Our consultations revealed a widely shared sense that judges are increasingly consulted on matters of day to day administration, including security, technology and facility concerns, but that the depth and frequency of budgetary consultations varies widely (from being told what government has already decided to meaningful input) and depends as much on personality and predisposition of the Chief Justice, Deputy Minister, ADM and Attorney General involved as on what formal processes are available (e.g. joint judicial-executive committees).

2.3.4 The Impact of Divided Loyalties on the Part of Court Staff

“They are put in an impossible position serving two masters.”

One of the enduring dilemmas of the executive-judicial relationship in matters of court administration is the status of court staff. Most court staff formally report up a managerial chain of authority within courts to the registrar who in turn reports to an executive manager or assistant deputy minister. Functionally, however, some court staff operate under the direction of the Chief Justice. In several jurisdictions, a concern was raised with respect to senior court staff “serving two masters.” In some of those jurisdictions, disputes over job classifications and recruitment and retention of court staff have become significant sources of tension between judicial and executive leaders. On occasion, registrars reported having felt obliged to refuse direction from executive authorities where those directions contradicted the direction received from a Chief Justice.

This issue highlights the problems which arise when a Court is intent on moving in one direction, for example, on an issue affecting court reform, and the government is not. It also underscores the real problem: who is working to support the courts? And at a more fundamental level, who is running the courts? Without clear lines of authority, accountability of administrative and clerical support staff is difficult to achieve. Strikingly, in some jurisdictions, Court control over even the most basic support staff services is so limited that the judges have no say even on the secretarial staff hired to work for them.

As former Ontario Chief Justice Frank Callaghan wrote over a decade ago, change in court administration is needed because “co-management” has proven to be a failure. He added “It has failed because it inevitably gives rise to divided accountability on the part of those who provide

basic assistance to judges engaged in the process of adjudication. The court administrators are answerable to their superiors in the civil service, not the judges and hence are in a position of inherent conflict.”¹²

2.3.5 Resources

By far the most often cited concern of the judiciary regarding the state of the executive-judicial relationship related to the perception of insufficient funding for court administration. While in some jurisdictions this concern centres on significant capital initiatives such as a new courthouse, or renovating and retrofitting aging facilities, in other parts of the country, human resource issues dominate the agenda. Increasingly across the country, court staff vacancies are taking longer to be filled; and when they are filled, full-time experienced staff are often being replaced with part-time inexperienced staff with little training and high rates of turnover. The amounts of money involved in particular decisions may be significant or modest but the sense of being required to do more with less appears to be a widely shared impression across the country. It is also fair to say that the sense of having little or no control over allocation of resources is acutely felt in many courts across this country. Whether it is denying requests for media liaison staff, canceling subscriptions to case reporters, reducing the number of law clerks or failing to provide adequate funds for security or information technology, there are few jurisdictions which appear not to report significant unmet needs. The following issues approach the question of resources from distinct but interrelated perspectives bearing on the executive-judicial relationship.

a) “The model of the Attorney General as the ‘champion’ of the Courts’ budget at the cabinet table is eroding.”

Many participants suggest there was once a time when Attorneys General were viewed—and viewed themselves—as advocates for Courts in terms of resources. This was in fact part of the theory underlying the executive model of court administration. The rationale for the Attorney General as advocate for the Courts was twofold. First, unlike University presidents or Crown Corporation executives, judges cannot openly lobby for resources or be seen to be negotiating for budgets without compromising judicial independence. Second, courts do not garner the kind of community or public support in the political process that hospitals and schools routinely do. In short, support for courts does not attract votes. Therefore the Attorney General, as Chief Law Officer and member of cabinet, is in a unique position to represent fairly and fully the special place courts occupy in our legal and political system.¹³ In many jurisdictions in Canada, this fundamental underpinning of the executive model has been eroded to the point it no longer resonates.¹⁴

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¹² F. CALLAGHAN, “The Financing and Administration of the Courts: A Threat to Justice” *Advocates’ Society Journal*, March 1992. Note that prior to his appointment to the bench, Callaghan was Deputy Attorney General of Ontario.

¹³ See J. LL. J. EDWARDS, *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell, 1984).

¹⁴ In fact, the notion of an historically-rooted special role for provincial Attorneys General has enough notable exceptions to question its validity. During the 1930s and 1940s, three premiers simultaneously held the position of Attorney General, including Maurice Duplessis of Quebec and two westerners who were not even lawyers: E. C. Manning of Alberta and Duff Patullo of British Columbia, who compensated for his lack of legal background by having the provincial cabinet designate him a King’s Counsel. See C. BAAR, “Patterns and Strategies of Court Administration in Canada and the United States,” 20 *Canadian Public Administration* 242-74 (Summer 1977). Reprinted in 11 *Law Society Gazette* 79-110 (June 1977).

More than ever before, Attorneys General in several jurisdictions either are themselves openly critical of the courts or are supportive of courts but are encountering increasingly critical cabinets. Not only are courts seen as “no different” than hospitals, schools or even roads and highways when it comes to allocating scarce public resources, but they are also more than ever before expected to absorb cuts and where possible, generate revenue (for example, through court fees for civil proceedings or commercial operations on court premises). In some provinces, this trend has also manifested itself in decisions to close courthouses in areas of less demand. The effect of such cuts is all the more significant in jurisdictions where the court administration sector has already failed to keep pace with previous increases in government expenditures.

b) *“Too often I feel like the ‘Chief Beggar’ rather than the Chief Justice.”*

The office of Chief Justice is increasingly coming to embody a contradiction. The Chief Justice must act to meet the courts’ resource needs but must not engage in political negotiations with the government of the day. And yet government makes this unavoidable when it raises as a defence to funding courts the claimed priorities of other government departments. Chief Justices must then do what they can to try to secure the resources their courts require or simply to maintain the status quo and avoid further cuts in spending for court services. In smaller jurisdictions and smaller Courts (mostly Appellate Courts), it is still sometimes the case that a quiet phone call between a Chief Justice and Attorney General or Deputy Minister can smooth over resource concerns, providing government is willing to do so, but increasingly Chief Justices are turning to formal letters, public pronouncements and in extreme cases, threats of litigation, in their struggle to ensure the public has adequate access to justice services of high quality.

c) *The salaries and benefits of judges often distort perception of the level of support for the administrative resources of courts.*

In several jurisdictions, judges are perceived to enjoy high salaries and benefits. Judicial salaries are not set directly by government in the wake of the *Provincial Judges Reference* but rather are set by independent compensation commissions (one national commission dealing with salaries of federally appointed judges and provincial/territorial commissions dealing with provincially/territorially appointed judges). While not connected to budgets for court staff, facilities or court administration, there nonetheless appears to be a perception that the salaries of judges are indicative of generous funding for the courts more broadly.

2.3.6 Autonomy

Resources are not the only concern expressed regarding the executive-judicial relationship. Another widely cited concern involves the discretion and authority of Courts (and, in particular, Chief Justices) over the allocation of court administration budgets once the level of funding has been established. Most Chief Justices expressed the view that they wished to have fewer “line-items” over which executive approval must be sought, and more leeway to allocate budgets to meet the Court’s needs. The concern over autonomy was expressed when some participants contrasted the position of Courts with that of other independent public bodies. Two comparisons are elaborated below.

a) *Chief Justices have less independence than Parliamentary officers such as Auditors General, Information and Privacy Commissioners, or even boards and tribunals supervised by the Courts.*

A number of participants expressed puzzlement that Courts appear to enjoy less independence than Parliamentary offices such as Auditors General and Privacy Commissioners. These participants observe that while Courts must provide the ultimate check on executive authority, they remain vulnerable to the executive with respect to their administrative resources. Parliamentary offices typically prepare their own budgetary estimates for legislative authorization. Those budgets must then be administered in accordance with rules set out in the applicable *Financial Administration Act*. The Auditor General or Commissioner is responsible for developing and implementing personnel policies, staffing models, policy planning and so forth, and is required to submit annual reports to Parliament detailing administrative and financial practices. By contrast, Chief Justices typically have no formal role in the preparation of budget estimates, nor do they control human resources decision-making or other funding priorities within their courts.

In addition, a lengthy array of boards and tribunals enjoy a degree of administrative and operational independence routinely denied to Courts. That includes almost all the labour boards, utility and energy boards, and securities commissions, among others, in the provinces.

b) *Courts lack stable funding and discretion over expenditures within a global budget.*

Other participants pointed to the comparative lack of autonomy of Chief Justices as compared with Chairs of major administrative boards and tribunals. Those Chairs typically would receive stable multi-year funding envelopes which could be allocated to a variety of administrative needs as the Chair deemed appropriate. Courts, by contrast, rarely receive multi-year funding envelopes and often have little flexibility, if any, with respect to budgetary line-items, not to mention an absence of effective control over the limited funding available.

2.3.7 Accountability

Among executive participants in the consultations, by far the most frequent priority in terms of court administration is “accountability”. Interestingly, no consensus appears to exist among governments as to the scope or nature of accountability applicable to court administration or the proper instruments to measure accountability in this setting.

a) *The accountability of Courts for the expenditure of public funds is often invoked but rarely elaborated.*

Accountability for some observers means transparency—the ability to see and track precisely where public funds are disbursed. For others, it is a measure of democratic legitimacy, and is reflected in the legislative committees before which executive managers must appear to defend expenditures. Finally, still others have in mind something closer to value-for-money audits on public expenditures to ensure they are deployed in effective and efficient ways for public benefit. Regardless of the definition, the view shared by several executive participants is that the executive model is necessary in order to ensure appropriate accountability over court administration. Judicial independence, by contrast, is sometimes raised as an impediment

to accountability. This view of the Courts seems to ignore the fact that the Courts, as with boards or the Auditor-General or Ombudsman, can report directly to the Legislature on how funds have been spent. It also ignores the fact that the Courts can be required to comply with spending practices and procedures applicable to the public sector.

- b) *The measures of quality of justice and access to justice, by which to measure value for expenditures in court administration, are poorly articulated.***

Even among those who appear clear on what they mean by accountability, there is no clear consensus on how it ought to be evaluated. Should accountability for court administration expenditures be measured by tangible standards relating to backlogs, volume, and judge-staff ratios or by less tangible outcomes such as access to justice or quality justice services? Or by reference to general aspirational goals and objectives set by the Courts similar to the goals and objectives typically used today by many government departments? Or by another standard often applied to boards and tribunals; i.e. accounting for public monies spent?

2.3.8 Complexity and Equity

The final dimension of the executive-judicial relationship which arose in our preliminary consultations reflected concerns regarding complexity and equity. Together, these twin concerns highlight the adaptability (and limits) of the executive model, and map out the terrain which any alternative model must be capable of traversing.

- a) *Court systems are becoming increasingly complex (e.g. rise of municipal Courts in some provincial jurisdictions, development of “judicial” Justice of the Peace streams, introduction of case management masters).***

Virtually all participants agreed with the observation that managing courts is becoming more complex. This perspective was particularly strong among the provincially appointed judiciary in larger provinces where Justices of the Peace and municipal Courts greatly expand the number and variety of facilities and administrative dynamics which must be managed. Other examples of complexity include the emergence of case management systems, technological change such as e-filing and digitalizing court records, and new staffing needs such as media relations specialists and increasing resources for change management.

- b) *Courts do not lend themselves to one-size-fits-all administrative solutions.***

A majority of participants expressed the view that the executive model is not a single model at all but an umbrella for a wide range of models tailored to suit a wide range of court settings. Small Courts allow for types of personal executive-judicial relationships to develop which are not feasible in larger Courts, and so forth. However, while the size, needs and internal governance of Courts may differ substantially across jurisdictions and levels of Court, all Courts appear to share similar vulnerabilities with respect to budgets, personnel and policies which are under executive control.

c) ***There are perceptions of disparities between regions within some provinces in terms of administrative support.***

One of the more revealing insights from participants is how common it is for the provincially or federally appointed Court in a province to believe the other is more generously resourced by the executive. In most jurisdictions, the executive does not have a separate administrative structure in place for each Court—a regional manager, for example, will manage budgets for both federally and provincially appointed Courts in that region. That said, the Chief Justices for each Court will often reach separate arrangements with the Attorney General regarding facilities, staffing or other aspects of court administration.

In the provinces where federally appointed Courts appear to enjoy more generous funding, the reasons cited generally reflected the view that federally appointed Courts enjoyed more prestige. In the provinces where provincially appointed Courts appear to enjoy more generous funding, the reasons cited generally included the view that the Attorney General had greater “ownership” of the provincially appointed Court.

We were frequently reminded during our consultations that the executive model of court administration in Canada is not a static or monolithic framework. Not only does it change from jurisdiction to jurisdiction based on a matrix of geography, demography, history, resources, and political and legal culture, but it also has some scope for greater judicial autonomy and/or participation in court administration decision-making. Some of these innovations have been briefly outlined above. These are widely seen as strengths on which future and further alternative models should build. That said, these innovations also reflect the inherent limitations of judicial autonomy within an executive model.

2.4 CONCLUSIONS

Based on the above analysis, it is apparent that there is a widely held view that alternatives to the executive model of court administration should be explored and that the executive model is deficient in several key respects:

1. Courts lack stable funding and discretion over expenditures which create obstacles to strategic and long-term planning.
2. Court administrators often have divided loyalties to executive and judicial offices which can undermine the effectiveness of court administration.
3. The Attorneys Generals’ willingness and capacity to represent the Courts interests in government decision-making is eroding.
4. The mutual trust between judicial and executive leadership is jeopardized by the present climate of disputes over court administration budgets and the implementation of judicial compensation commission recommendations.

CHAPTER 3

HOW DID WE GET WHERE WE ARE NOW?

IMPLICATIONS FOR THE FUTURE

3.1 DISCUSSION

If one traces the historical development of the current model of court administration decision-making (i.e. the executive model), it becomes evident that the executive model was not designed to run the Courts as they are now, and the current form of the executive model has been neither as typical nor as long-established as most might assume. As well as providing historical information, this Chapter illustrates how other countries have moved beyond the type of administrative structures currently in place in Canada. This evidence supports not only the argument that periodic change has strong roots in the history of Canadian justice, but also the argument that a new cycle of positive change is possible and desirable.

For most of our history, court administration was a relatively undeveloped, even simple, task that called upon relatively inexperienced officials to provide clerical and courtroom support for judges presiding at trials and hearing appeals.¹⁵ As a result, these tasks typically fell within the larger administration of justice activities of provincial Attorneys General in their capacity as law officers of the Crown.

There were exceptions that seem ill-conceived by any standard today, however practical they proved to be at the time. For example, in British Columbia during its first century after entering confederation, the functions of local registrar of the Supreme Court and clerk of the County Court were exercised by “Government Agents” in each county. These officials were part of the provincial Ministry of Finance, and were also charged with revenue collection and the distribution of hunting licenses. It is interesting to note that the British Columbia Attorney General did not take over that province’s court services until 1974, and that step was controversial and contested as one of the more radical initiatives of British Columbia’s first NDP Government.

Meanwhile, Magistrate’s Courts were typically administered by local governments even as their functions and responsibilities grew in importance. As they were upgraded to Provincial Courts beginning in the 1960s in Quebec and Ontario, administration was shifted to the provincial executive (particularly the provincial Ministries of Justice/Attorney General). Funding was also shifted fully to the province, replacing a mix of local funding and even user fees, as magistrates were paid on a piece-work basis. In Ontario, even into the 1980s, some justices of the peace were paid according to the number of warrants they signed, so those looked upon with favour by local police departments earned more income. In the first half of the twentieth century in British Columbia, magistrates were paid per conviction, so that defence lawyers had to assure the judicial

¹⁵ See former Ontario Premier E. C. DRURY’s description of his patronage job as Sheriff and Local Registrar in Simcoe County in the 1940s: *Farmer Premier* (Toronto: McClelland and Stewart, 1966), pp. 187-93, quoted and discussed in chap. 6 of Perry S. MILLAR and Carl BAAR, *Judicial Administration in Canada* (Kingston and Montreal: McGill-Queens University Press, 1981).

officer that if their client was acquitted, they would match the amount that would have been received from the public purse.¹⁶

Whatever the historical mix of provincial or local administration of the courts, and involvement of ministries beyond those of Justice and Attorneys General, it has only been in the past generation that court administration has emerged as an important function requiring professional skills, and has attracted senior officials with substantially more management experience. And it was not until the emergence of court administration as a key responsibility of provincial government that the issue of judicial versus executive control emerged as a topic for debate. In fact, these two developments occurred side by side, and reflected the same trends.

Local administration of Magistrate's Courts often meant in practice that locally-paid court staff had no effective superior except the local judge, and those magistrates often managed their Court and immediate staff in an active way. These magistrates also relied on other functionaries in the local courthouse to assist them—police on the criminal side, social workers on the family side. Questions about the independence of the judiciary or the separation of powers were rarely raised; courthouse personnel perceived themselves to be part of an overall process of maintaining peace and order in their community; and in the process police officers might have direct access to court files, and Provincial Court judges could obtain support services from law enforcement staff.

Superior Courts at both trial and appellate level were able to function with less likelihood of direct conflict with law enforcement. The judges' immediate needs were most often met by making requests to counsel for information and assistance. Case volume was lower, so case scheduling could be done with less reliance on the ability of clerical staff to manipulate Court calendars. But as trial Courts grew in size, and judges realized that allowing counsel to schedule cases required Courts to rely in criminal cases on the staff of Crown attorneys' offices and police departments to perform sensitive and essential judicial functions, issues of management control that might previously have appeared to be matters of convenience and comfort were now matters that struck directly at the heart of impartial adjudication.

Once court administrative functions were consolidated under provincial Attorneys General and Ministers of Justice, issues of principle were more clearly defined. In the most frequently cited anomaly, management of the Courts was now the direct responsibility of the same minister who was responsible for prosecution of criminal cases in those Courts. More recently, the amount of civil litigation involving the government has been increasing significantly. Furthermore, any administrative change would henceforth be driven by the province—a recipe for conflict between central administration and local adjudication. Thus when the Ontario Law Reform Commission issued its *Report on Court Administration* in 1973, and recommended that priority be given to what would come to be called caseflow management, the resulting Central West pilot project was unsuccessful at least in part because of suspicions about its incompatibility with principles of judicial independence. Whatever the explanation for the demise of this project, it was quickly followed by a 1976 White Paper that centred on a proposal by the Attorney General of Ontario to turn court administration over to a council in which judges would play a leading role. Thus the difficulty of administering the Courts within a cabinet department arose virtually as soon as the executive began to exercise central control over operational innovation.

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¹⁶ See Alfred WATTS' history of the British Columbia Provincial Court, *Magistrate-Judge* (Victoria: Queen's Printer, 1986), pp. 79-82, quoted in Carl BAAR, "Trial Court Reorganization in Canada: Alternative Futures for Criminal Courts," 48 *Criminal Law Quarterly* 110 (2003).

Had all parties involved in the administration of justice recognized the need for a full-fledged management structure during the country's first century, a framework in which the Courts operated as a separate enterprise would have been a logical option: a judiciary at arms' length from government administered within an institutional framework at arms' length from government. The Courts might then have been administered as a coherent entity or system in which independent judges, organized both hierarchically and collegially, were supported by appropriately trained and qualified staff. The staff in turn would have been managed, for example, by a board or commission akin to the quasi-independent boards and commissions that proliferated throughout provincial governments in the 20th century.

In practice, however, the Courts of every province remained subdivisions of executive departments responsible for a wide array of other functions performed by legal professionals—prosecuting criminal cases, providing legal advice to the executive branch, analyzing policies related to the delivery of legal services. This departmental framework has meant that even as court administration has grown in complexity, the judiciary and court officials have been restricted in the options and authority they needed to develop management structures and processes to meet the priorities of an effective judicial system.

In the meantime, provincial civil services grew in size, scope and professionalism in a wide range of policy areas. Policy planning and later strategic planning became methodologies for increasing the coherence of initiatives to improve delivery of health, education and other critical services to the public that fell within provincial responsibility. Building the institutional competence of provincial governments became a means of enhancing their role in confederation. But justice functions in general and court services in particular lagged behind the developments in other parts of the public service. By the time these new initiatives penetrated court administration, the era of fiscal restraint had fallen upon the provinces, and new innovations in policy, planning and analysis of quantitative and qualitative information would too often have to be done on the cheap, and without sufficient personnel.

It is a credit to the professionals who administer Canadian Courts that the anomalous model of court administration that still exists in every province today has been able to operate at all. Local courthouse staff must juggle their desire to provide over-the-counter service to the public and in-court support to the judiciary with the demands and strictures of a large and diverse provincial government department. Senior managers are increasingly called upon to be part of ministry management teams whose competing priorities—universally including effective criminal prosecution and often extending to correctional administration—at least distract from and at worst conflict with the priorities of the Courts.

The fact that an anomalous model has continued is not only a reflection of the energy and dexterity of court managers, but also a reflection of the willingness of the judiciary in many provinces to go along with existing management systems. Some judges are concerned that a formally rational model for court administration would undermine some of the quiet but hard-won accommodations of the past. Others fear that an increase in overall management responsibility would take time and focus away from adjudication, and require management skills they may not possess. This overlooks the fact that emerging models of judicial control have in practice enhanced the responsibility of court administrative staff and enhanced the judiciary's confidence not only in their competence, but in their responsiveness and accountability.

Efforts to spell out new and appropriate models for court management have too often in the past been dismissed as efforts by the judiciary to enhance their power and even their personal comfort. As a result, joint efforts by governments, judiciary and court staff to develop workable models that reflect the distinctive objectives and complex environment of a modern court have been too limited in scope. Ways to organize court administration at arms length from government—and ways to conduct court administration so that judges play a central role without spending added hours away from their judicial tasks—remain absent throughout Canadian provinces, even after the federal government has taken steps to enhance the administrative autonomy of the Supreme Court of Canada and the Federal Court.

Experience in other democratic countries, including important changes brought about over the past 20 years, suggests that court systems are moving away slowly but surely from the anomalous models of the past. For example, the state of South Australia has established a Courts Administration Authority made up of the Chief Justice and Chief Judges of its three levels of Courts—Supreme Court, District Court and Magistrates Courts—that has full authority over court resources, both human and physical. Its budget comes directly from the Legislature of the state and can be managed with broad discretion to achieve results that are monitored from year to year against performance objectives set by the judiciary itself.

What conditions led to the emergence and success of the South Australian CAA? First, it evolved through two stages. In 1981, the Attorney General announced “[t]he formation of a separate Courts Department,” amalgamating functions that had been divided between three existing departments.¹⁷ That department was still within the executive, but its affairs were administered through a working partnership between the judiciary and executive. When the judiciary sought more autonomy a decade later, it was to anticipate potential problems, not to criticize existing arrangements.¹⁸ Second, it was championed by the state chief justice, who continued to press for an autonomous model even as he and his fellow chief justices played an active role in effectively managing the separate executive department. Third, the state government was open to a change that delegated greater administrative responsibility to the judiciary.¹⁹

In another well-known example, the Republic of Ireland has within the past decade established an Irish Courts Service to handle all court support functions independent of government.²⁰ The new Irish Courts Service has been praised by the judiciary and the bar, and also has the strong support of a wide range of court administrators who report that the Courts have at last been able to set their own priorities.

Other examples where the administrative autonomy of the Court is a foundational principle include: the Federal Court of Australia; the Family Court of Australia; all of the United States federal court system, with its dozen circuits and over 90 districts; and a wide variety of state court systems

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¹⁷ See Thomas W. CHURCH and Peter A. SALLMAN, *Governing Australia's Courts* (Carleton South, Victoria: Australian Institute of Judicial Administration, 1991) [CHURCH & SALLMAN], ch. 3, p. 31. One of the three departments was the Premier's Department.

¹⁸ *Ibid.*, p. 38.

¹⁹ A separate executive department for court administration was set up in New South Wales in 1991, but it did not survive, nor was it transformed into an autonomous model of court administration.

²⁰ The Courts Service is governed by a 16-member board consisting of 8 judges and 8 members representing the bar, the government, court administration, business, labour and consumer interests. Non-judicial members are appointed or selected by their constituent groups so that the cabinet does not exercise indirect control over the board's members. And judicial members are designated not only by their positions as chief justices or chief judges, but also by virtue of election by their colleagues (e.g. on the High Court, the District Courts and the Magistrate's Courts), diffusing responsibility and support more widely within the judiciary.

within the United States (in particular, those that have achieved a higher degree of administrative unification). Interestingly, one of the most persuasive arguments for Court administrative autonomy in Australia was made by Stephen Skehill in 1994, when he was Deputy Secretary of the Commonwealth Attorney General's Department (he later became Secretary).²¹ He criticized the traditional executive model, not only in terms of the lack of independence, but also in terms of inefficient administration, the inability to provide proper support, and unacceptable financial risk. And he cited the success of the Federal Court and the Family Court, characterizing them as "far healthier" and more effective organizations.

Successful new models of court administration in the common law world have emerged without a high degree of conflict with the governments in their jurisdictions.²² In fact, those governments have reformed their own administration in recent years to place more emphasis on managing by results and less emphasis on formal rules and procedures. In the process of enhancing overall administrative effectiveness, these governments have supported similar steps by their judiciaries to enhance Court effectiveness by allowing more flexible, goal-oriented court management.

These developments are in no way limited to the common law world. The Netherlands has taken important steps away from an executive model that have attracted widespread attention. Other changes in the same direction have been noted in France, Sweden and Norway among Western European nations, and in Bulgaria and Georgia among Eastern European nations.

Furthermore, Courts rather than governments have long possessed limited administrative autonomy over court staffing in countries as diverse as India, Pakistan, the Philippines and Singapore. In the past decade, even the Supreme Court in Fidel Castro's Cuba has taken over responsibility for court administration from that country's Ministry of Justice.

In these contexts—historical, cross-national, and contemporary Canadian—the purpose of this report is to facilitate the building of effective models of court administration that reflect the distinctive needs of individual Courts and Courts in general. Courts throughout the world share a need for independence from government while at the same time being able to manage their complex processes in an effective and accountable way.

3.2 CONCLUSIONS

The analysis of Chapter 3 provides considerable historical evidence supporting the possibility and feasibility of Canada moving forward from the current executive model to an alternative model. In particular these findings establish the following:

1. Current models were not designed to run the Courts as they are now.
2. Current models have not been around as long or as universally as most might assume.
3. The impetus for change is not only understandable, but that positive change is possible and desirable.

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²¹ Stephen SKEHILL, "Comment on Court Governance," (1994) 4 *Journal of Judicial Administration* 93, quoted recently in the September 2004 report of the Courts Strategic Directions Project in the state of Victoria.

²² Irish observers report that it was the government's desire to avoid conflict, particularly public pressure to discipline errant judges, that encouraged it to seek an alternative model of governance and administration.

CHAPTER 4

CONSTITUTIONAL FOUNDATIONS FOR CHANGE

Constitutional principles and requirements relating to judicial independence are necessarily key criteria in assessing alternative models of court administration. An analysis of the constitutional position regarding administrative autonomy reveals a complex and extremely dynamic normative context which calls for a fairly detailed review of the evolution of judicial independence both in Canada and internationally.

4.1 THE DYNAMIC NORMATIVE CONTEXT OF JUDICIAL INDEPENDENCE

The principle of judicial independence first took concrete form as a binding rule in the United Kingdom in the *Act of Settlement* of 1701. It was the result of the ceaseless tension and struggles in the 17th and 18th centuries between the King and Parliament to determine which of the two institutions would exercise sovereign legislative authority.²³ The King's judges of the time were caught in the crossfire between the supporters of these two positions. At that time, they were appointed *durante bene placido*, that is at the King's pleasure. For the King, this method of appointment was an important means of controlling the judiciary. Parliamentary control also existed through the impeachment procedure. Parliament would impeach judges with whose conduct it was not satisfied.²⁴ Parliament, which was often referred to by the phrase "High Court of Parliament", was seeking to act as a counterweight to royal power.

The 1688 Glorious Revolution guaranteed that Parliament would set the rules: its legislative sovereignty was no longer in dispute. It took the *Act of Settlement* to stabilize the position of judges by ensuring that they would henceforth be appointed during good behaviour and could only be removed on a joint address by both Houses of Parliament. The *Act of Settlement* did not come into effect until the death of Queen Anne in 1714.

The *Act of Settlement* did not apply outside the United Kingdom.²⁵ Accordingly, in Canada colonial justice remained a matter for the royal prerogative. In the 18th century, judges in Canada were appointed and removed by the colony's Governor, representing His Majesty. In 1834, Upper Canada adopted a statute providing that judges were appointed during good behaviour. This statute was not disallowed by London. Some three years following the 1840 *Act of Union*, this measure was extended to Lower Canada. This statute also provided that a judge could only be removed upon the address of the Legislative Council and Legislative Assembly.

²³ See Jeffrey GOLDSWORTHY, *The Sovereignty of Parliament. History and Philosophy*, (Oxford: Clarendon Press, 2001).

²⁴ "Parliamentary action against judges was in the main motivated by political considerations. Judicial activities were labelled 'illegal', 'contrary to fundamental laws' or 'corrupt', but in effect the judges were proceeded against by Parliament to protect the political interests at stake and to curb Royal powers", Shimon SHETREET, *Judges on Trial. A Study of the Appointment and Accountability of the English Judiciary*, (London: North Holland Publishing Company, 1976) at p. 7.

²⁵ Karim BENYKHLEF, *Les garanties constitutionnelles relatives à l'indépendance du pouvoir judiciaire au Canada*, (Cowansville, Qc: Yvon Blais, 1988), [BENYKHLEF] at pp. 12 ff.

This very short historical review simply provides the chief facts regarding the emergence of the principle of judicial independence. The sources of the principle are in fact bound up with a much more complex history, that of the growth of the modern state. Further, this review leads one to approach the question of the status of judges of the time with the conceptual tools of the 20th or the 21st century; and this does not help in appreciating the evolutionary nature of the principle of judicial independence. Why guarantee the judiciary's independence? Today, at one level, the answer is this: "The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a 'means' to this 'end'".²⁶ It is important to maintain public confidence in the impartiality of the Courts; but has it always been so? And if not, how and in what institutional circumstances did this principle emerge?

One may think that the answers to these questions are purely of historical interest. This is not so. The answers afford a clearer understanding of the formalization of relations between the executive, legislative and judicial branches of government, and thereby a grasp of the development of the principle of the separation of powers, to which "the institutional independence of the judiciary reflects a deeper commitment".²⁷ Additionally, understanding the historical background to the emergence of the principle of judicial independence enables one to see the ongoing evolution which is a feature of that principle and which continues today. What does that historical review reveal? Institutional relations in Canada change and adapt in accordance with social, economic and political circumstances. And constitutional law must reflect those changes.²⁸

In the *Remuneration Reference*, Lamer C.J. stated that "judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*"²⁹ and that its existence is confirmed by the preamble to the *Constitution Act, 1867*, which refers to the constitution of the United Kingdom. If judicial independence is an unwritten principle external to the text of the Constitution, the scope of the legal analysis must be broadened and the historical circumstances in which the principle has emerged and flourished must be considered. Since the preamble to the *Constitution Act, 1867* articulates the "political theory which the Act embodies,"³⁰ one must look briefly at the political circumstances surrounding the origins of judicial independence. It is therefore necessary to say a few words about the recognition of the judicial "power"; as an aid in understanding the principle underlying it and clarifying its development.

The ordering of modern governmental powers, in the classical form of the executive, legislative and judiciary,³¹ is the outcome of a very lengthy process of refinement of institutions. Initially, the sovereignty of the King took judicial form. The King was thus primarily the great dispenser of justice. His lawyers did their utmost to place this royal authority on a firm footing, by inserting into public discourse such maxims as "The King is the source of all justice" or "All justice comes from

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²⁶ *R. v. Lippé*, [1991] 2 S.C.R. 114, [Lippé] at p. 139.

²⁷ *Remuneration Reference*, at para. 125.

²⁸ In *L'Esprit des lois*, Montesquieu wrote: "History must be illustrated by the laws, and the laws by history".

²⁹ *Remuneration Reference*, at para. 83.

³⁰ *Ibid.*, at para. 95.

³¹ We use the word "government" in its modern sense, that is the sum of the executive, legislative and judicial powers. This has not always been the case, since in pre-democratic societies the government was vested in the single person of the sovereign, who embodied all the modern powers (executive, legislative and judicial); even in those societies, however, the functions of framing, applying and interpreting rules were gradually assigned to separate bodies. See, in particular, Harold BERMAN, *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge, Mass.: Harvard University Press, 1985).

the King”, and so on. In dispensing justice, the King was assisted by his court, the *Curia Regis*. This phrase has two meanings: “(i) the place where the king resided attended by the chief officials of his court and household; and (ii) the supreme central court where the business of government *in all its branches* was transacted”³²

The *Curia Regis* brought together the greatest figures in the kingdom, but increasingly it also included royal officials, often lawyers trained in Bologna and Paris, whose function was the day-to-day running of the kingdom. Some of these royal officers took the name of “justices in the *Curia Regis*”. The word “justice” is thus a generic expression for such officers, since they exercised a broad range of functions:

They were therefore much more than judges, since they took part in all the miscellaneous functions of government which, as we shall see, were performed by the *Curia Regis*. Naturally they became prominent when the work of the *Curia* expanded in the reign of Henry II. They acted either in the *Curia Regis*, at the Exchequer, or as itinerant commissioners. Often they were recruited from the staff of the Exchequer; and, as their training there gave experience of and facilities for dealing with judicial business, they were especially useful in conducting both the judicial work of the *Curia* and the business of those judicial tribunals which were beginning, at the end of Henry II’s reign, to disengage themselves from the *Curia*.³³

From then on, the emergence of a purely judicial body becomes apparent. However, the officers responsible for the daily management of the kingdom’s affairs also performed tasks of a legislative, administrative and judicial nature at their meetings. The burden of work quickly became too large for a diffuse body such as the *Curia Regis*.³⁴

Thus, in the 12th century, the *Curia Regis* began to break up into separate departments and distinct courts of law.³⁵ This process was initiated with finance and judicial affairs, two matters of critical importance to the Norman and Angevin kings, for whom good financial management was essential to a strong government, and control over judicial affairs the best way of avoiding internal disorder. More formal courts were established in the Middle Ages, such as the Court of Common Pleas and, later, the Court of King’s Bench. Of course, these courts were still not completely autonomous.

It was during the 14th and 15th centuries that the courts really took shape and became more autonomous, constituting the common law courts. At the same time as these courts were developing, another offshoot of the *Curia Regis* grew in importance: the Council in Parliament, which also performed functions of a judicial nature. In the 14th and 15th centuries, Parliament broke up into two separate houses: the House of Lords and the House of Commons. The splitting up of the *Curia Regis* into several entities — the judges of the central courts of common law, the House of Lords and the House of Commons — was an indication of the form modern government would take. This process underwent a tumultuous acceleration in the 16th and 17th centuries, which ended in the Restoration. The reign of James II saw major constitutional disputes between

³² William HOLDSWORTH, *A History of English Law* (Vol. 1, 7th ed.), (London: Methuen & Co., 1956), [HOLDSWORTH] at p. 32 (emphasis added).

³³ *Ibid.*, at p. 38.

³⁴ “The *Curia Regis* as a law court was only one aspect of a single body which carried on the whole central government”: RADCLIFFE and CROSS, *The English Legal System* (6th ed.), (London: Butterworths, 1977), at p. 24.

³⁵ HOLDSWORTH, at p. 41.

Parliament and the Monarch, which were finally resolved in Parliament's favour and led to the adoption of the *Bill of Rights* in 1689 and, in 1701, the *Act of Settlement*, which dealt first with the question of the succession to William and Mary.³⁶

This very broad overview shows that the functions of government were at first performed in common by the same institution, the *Curia Regis*, and that a process of subdividing the latter slowly took shape in the late Middle Ages. Separate institutions emerged at that time, but their members did not have exclusive functions. Thus, judges often performed functions of an administrative or financial nature in the Chancery or the Exchequer. Similarly, Parliament performed functions which might be described as judicial. Until Montesquieu and Locke, and even after, therefore, there was significant overlapping of the executive, legislative and judicial functions.

The appearance of a modern judiciary is thus the outcome of a lengthy process of refinement and formalization of institutions and functions: the judicial institution gradually differentiating itself from other institutions with which it shared powers, and the judicial function gradually becoming exclusive and retaining few areas in common with the executive and legislative powers. The *Act of Settlement* was a further stage in this differentiation process, as that Act created a previously unknown institutional autonomy. It was then necessary to wait for a time before an organizational principle of exclusivity was established, since until the 19th century, in Canada for example, judges were often members of the Executive Council, and even of the House of Commons.³⁷

The need to protect the judiciary gradually became apparent together with the latter's primary duty: deciding controversies according to law. Judicial independence was then an essential element in this functional and institutional evolution: "the institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive and judicial organs of government."³⁸ The judicial independence of the 18th century, that of the *Act of Settlement*, was but the seed of the contemporary concept. It has been refined over time along with concepts which are the basis for the executive and legislative powers.

This process of institutional and functional differentiation, which is one of defining the different branches of the State as well as the appropriate relation between those branches, has by no means come to an end. For example, the oldest institution of the British constitutional system, the office of the Lord Chancellor, has been redesigned in an effort to bring about a clearer separation between the branches of the State.³⁹ In Canada, the consequences of the "patriation" of the Constitution and the adoption of a charter of rights that prevails over legislative enactments

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³⁶ "The chief consequences of the legislation from 1689 to 1701 concerning kingship were therefore to prohibit certain kinds of persons from succeeding to the throne or remaining on it, to define the powers of the king in regard to altering the law, to limit his right to keep a standing army, to bind him to govern according to the law, to limit his freedom to leave England, and to limit use of his power to pardon in cases of impeachment and his power to dismiss judges": Frederick G. MARCHAM, *A Constitutional History of Modern England (1485 to the Present)*, (New York: Harper & Brothers, 1960), at p. 185.

³⁷ Martin FRIEDLAND, "Judicial Independence and Accountability: A Canadian Perspective", *Crim. L.F.* (1996) 7, Iss. 605, at p. 611.

³⁸ *Remuneration Reference*, at para. 125.

³⁹ The *Constitutional Reform Act, 2005* received royal assent on March 24, 2005. Among other things, the Act transfers judicial functions from the Lord Chancellor to a new President of the Courts and appellate jurisdiction from the House of Lords to a new Supreme Court. For a review of the Lord Chancellor's history and the development of the judicial functions of the House of Lords, see: Lord Chancellor's Department (now Department for Constitutional Affairs), "The Law Lords and the Lord Chancellor: Historical Background", December 1999. Available at: www.dca.gov.uk/constitution/reform/.

are gradually being worked out by the Supreme Court.⁴⁰ The Court takes a principled and evolutionary approach to constitutional adjudication: the principles underlying the constitution are said to be essential to the “ongoing process of constitutional development and evolution.”⁴¹ It would be a mistake to assume that the end of the process of defining the constitutional requirements of judicial independence has been reached. That process is essential to understanding the dynamic normative context in which models of court administration must be analysed. As government has continued to develop in the 20th century and today, the contemporary transformations in the principle of judicial independence must now be considered.

4.2 CONTEMPORARY EVOLUTION IN CANADA

Before the *Charter* could make its way to the Supreme Court of Canada, it was established that Part VII of the *Constitution Act, 1867*⁴² (“Judicature”), ss. 96 to 100, determined the limits of judicial independence for superior courts in Canada: “The judicature sections of the *Constitution Act, 1867* guarantee the independence of the superior courts; they apply to Parliament as well as to the Provincial Legislatures.”⁴³ Additionally, the Privy Council had held that s. 96 of the *Constitution Act, 1867* was one of the “three principal pillars in the temple of justice . . . not to be undermined.”⁴⁴ Part VII contains the operative portions of the *Act of Settlement* dealing with the judiciary, namely the appointment of judges of the superior courts during good behaviour and their removal on a joint address by the Houses of Parliament. Having said that, prior to adoption of the *Charter*, Canadian courts had not dealt directly with the question of judicial independence. They had simply referred to it in cases involving the interpretation of s. 96 and the assignment to the lower courts or to administrative tribunals of powers which were within the authority of the superior courts.⁴⁵

4.2.1 The *Valente* Period

The situation changed fundamentally with the adoption of the *Charter* in 1982. In 1985 the Supreme Court of Canada had occasion to rule on the interpretation of s. 11(d) of the *Charter*, which states that “any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” In *Valente*,⁴⁶ the Supreme Court had to rule on the status of the Criminal Division of the Ontario Provincial Court. The appellant *Valente* argued that Provincial Court judges were not independent within the meaning of s. 11(d) of the *Charter*. Le Dain J. identified the three essential conditions of judicial independence in Canada: security of tenure, financial security and administrative independence.

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⁴⁰ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴¹ *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, [Secession Reference] at para. 52.

⁴² R.S.C. 1970, App. II, No. 5.

⁴³ *McEvoy v. Attorney General of New Brunswick and Attorney General of Canada*, [1983] 1 S.C.R. 704.

⁴⁴ *Toronto Corporation v. York Corporation*, [1938] A.C. 415, at p. 426.

⁴⁵ Peter HOGG, *Constitutional Law of Canada*, (Toronto: Carswell (looseleaf edition)), [HOGG] at para. 7(3).

⁴⁶ *Valente v. The Queen*, [1985] 2 S.C.R. 673. [*Valente*]

Security of tenure is seen as the first condition of judicial independence. In *Valente* Le Dain J. noted that security of tenure is the opposite of the system of appointment during pleasure. Accordingly, it is necessary to ensure:

... that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.⁴⁷

Those are the minimal requirements for security of tenure. They reject any possibility of discretionary removal and underpin a degree of employment security which is considerable. Le Dain J. condemned the system of appointment during pleasure, as in the case of a provincial court judge who has reached retirement age without having accumulated sufficient years of service to be entitled to a pension but who may be “re-appointed” during pleasure by the Lieutenant Governor in Council on the recommendation of the Attorney General. Le Dain J. considered that holding office during pleasure could not “reasonably be perceived as meeting the essential requirement of security of tenure for purposes of s. 11(d) of the *Charter*.”⁴⁸ Consequently, a judge who holds office during pleasure cannot be an independent tribunal within the meaning of s. 11(d).

The second condition has to do with the financial security of judges. In *Valente* Le Dain J. wrote, about this second essential requirement:

The second essential condition of judicial independence for purposes of s. 11(d) of the *Charter* is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is that between a right to a pension and a pension that depends on the grace or favour of the Executive.⁴⁹

The financial security aspect of the principle of judicial independence was expanded on further in the *Remuneration Reference*. For the moment, it may be noted that one year after handing down the judgment in *Valente*, the Supreme Court again ruled on the question of financial security in *Beauregard*.⁵⁰ Mr. Beauregard was a judge of the Superior Court, and a statute required Superior Court judges appointed after a certain date to contribute from their salaries to the pension plan from which they would benefit. The question of reduction of salary arose incidentally. Ultimately, therefore, the Court had to interpret s. 100 of the *Constitution Act, 1867*.⁵¹ The Supreme Court, *per* Dickson C.J., recognized that the federal legislature had a certain latitude in determining and paying salaries and pensions. The legislation in dispute placed judges on the same footing as

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⁴⁷ *Ibid.*, at para 31.

⁴⁸ *Ibid.*, at para 37.

⁴⁹ *Ibid.*, at para 40.

⁵⁰ *Beauregard v. Canada*, [1986] 2 S.C.R. 56. [*Beauregard*]

⁵¹ “The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts . . . shall be fixed and provided by the Parliament of Canada.”

other Canadians regarding contribution to pension plans.⁵² By implication, therefore, Dickson C.J. recognized that Parliament had the right to alter the retirement plans of judges of the superior courts. Nevertheless, he pointed out that this right to set not only pensions but salaries was not unlimited:

The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s. 100 of the *Constitution Act, 1867*.⁵³

Salary decisions could not be made on the basis of improper or colourable considerations that could undermine the principle of judicial independence.

The third condition of judicial independence identified by Le Dain J., namely administrative independence, affects the relations between the judiciary and the other constituent branches of government. Those relations are thus in nature what is described as institutional. In *Valente*, Le Dain J. wrote regarding this third minimum requirement:

Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it, may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(d) of the *Charter*. The essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(d) must, I think, be those referred to by Howland C.J.O. They may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function. To the extent that the distinction between administrative independence and adjudicative independence is intended to reflect that limitation, I can see no objection to it.⁵⁴

Le Dain J. was more explicit regarding the exact nature of this control by the courts over administrative decisions that might have an effect on the performance of their judicial duties, when he explained:

Judicial control over the matters referred to by Howland C.J.O.—assignment of judges, sittings of the court, and court lists—as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or “collective” independence.⁵⁵

In *Généreux*, Lamer C.J. appeared to support this approach when he wrote:

The third essential condition of judicial independence is institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal’s judicial function. It is unacceptable that an external force be in a position to interfere in

.....
⁵² *Beauregard*, at para. 39.

⁵³ *Ibidem*.

⁵⁴ *Valente*, at para 52.

⁵⁵ *Ibid.*, at para 49.

matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution.⁵⁶

These three conditions are thus the basis on which the principle of judicial independence rests. They are its pillars. In *Valente*, Le Dain J. also made a fundamental distinction between individual independence and institutional independence. That distinction was reiterated by Dickson C.J. in *Beauregard*. In *Valente*, Le Dain J. said that "It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government."⁵⁷

Individual independence includes what is commonly referred to as the judge's adjudicative independence. It is the complete autonomy which the judge must have when he or she is called on to render a decision in a specific case. There must be no interference with this freedom of conscience, and ideally it should function without fear or apprehension. "Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider . . . should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision."⁵⁸ Dickson C.J. goes on to say that this core continues to be central to judicial independence.⁵⁹

On the institutional dimension of judicial independence, Dickson C.J. wrote:

The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.⁶⁰

He continued his reasoning by saying that "on the institutional plane, judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusions by, or even intertwining with, the legislative and executive branches."⁶¹ These comments reaffirm the reasoning of Le Dain J., who said that "the relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he

.....
⁵⁶ *The Queen v. Généreux*, [1992] 1 S.C.R. 259, [*Généreux*] at para 44.

⁵⁷ *Valente*, at para. 20.

⁵⁸ *Beauregard*, at para. 21.

⁵⁹ *Ibidem*.

⁶⁰ *Ibid.*, at para. 24.

⁶¹ *Ibid.*, at para. 38.

or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal”.⁶² This fundamental distinction between individual and institutional independence was a legacy of *Valente* and *Beauregard*, and is still fully relevant today.

Valente also clarified the distinction between impartiality and independence, both guaranteed by s. 11(d) of the *Charter*. Le Dain J.’s reasons are clear in this regard:

Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “impartial” as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word “independent” in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.⁶³

Finally, *Valente* suggested a test for determining whether, in a given situation, a court meets the three essential requirements for judicial independence pursuant to s. 11(d) of the *Charter*. Le Dain J. described this test as follows:

Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(d) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent . . . It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.⁶⁴

Généreux illustrates this recourse to the reasonable and informed person assumed by the test suggested by Le Dain J. In that case, Lamer C.J. stated:

With respect to the case at bar, therefore, the question is not whether the General Court Martial actually acted in a manner that may be characterized as independent and impartial. The appropriate question is whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence.⁶⁵

The logic behind this reference to perception is that judicial independence serves notably as a means “to maintain public confidence in the administration of justice”.⁶⁶ *Valente* was decided in 1985. As already indicated, it would appear to have been the first opportunity the Supreme Court had to rule expressly and directly on the question of judicial independence in Canada.

.....
⁶² *Valente*, at para. 20.

⁶³ *Ibid.*, at para. 15.

⁶⁴ *Ibid.*, at para. 22.

⁶⁵ *Généreux*, at para. 47.

⁶⁶ *Ell v. Alberta*, [2003] 1 S.C.R. 857, at para 29.

Some 20 years have gone by since *Valente* and *Beauregard*. The time has now come to assess the changes which the principle of judicial independence has undergone in these years, when more than ever before the judiciary has been called upon not as a transmission belt or tool for implementing legislative policy but as an institution which is part of the government, as “the lifeblood of constitutionalism in democratic societies.”⁶⁷

4.2.2 Post-*Valente* Developments

The adoption of the *Charter*, and with it an enhanced role for the judiciary in Canadian constitutional democracy has made more transparent a twofold evolution: on the one hand, a focused evolution in the general assessment of the conditions for judicial independence, and on the other, a more diffuse evolution characterizing the conditions in which the law is produced and interpreted.

Beginning with the latter, the *Charter* was barely three years old when *Valente* was decided. The outlines of the constitutional document and its effects had hardly begun to be felt. Twenty years later, the role of the judiciary has changed considerably. Its role in the area of constitutional review has certainly increased: the range of constitutional interpretation is no longer limited primarily to the division of powers, but now covers a very wide spectrum of questions that affect many activities of the executive and the legislature. In particular, the courts now render constitutional judgments which have financial effects that are far from negligible. A court may impose on various levels of government a range of legal obligations with serious consequences for public finances. These judgments are not chance occurrences: they are the outcome of the powers and competences conferred on the courts not only by the *Charter* but also by statutes protecting rights and freedoms. All these legislative instruments are themselves the result of political choices made by successive governments. This widening of court jurisdiction to the political sphere is also not limited to Canada.

The political arm of government here as elsewhere tends to pass on to judges responsibility for resolving extremely delicate social questions (abortion, euthanasia, same-sex marriage and so on). In Western societies, there is a turmoil of subjective rights, to use an expression of Dean Carbonnier, which can only lead to increased reliance on the law. To this should be added the almost universal tendency to treat the legal apparatus as a necessary system for controlling not only the executive but the legislature as well. This approach has not been without consequences for the work of the courts. In short, the last 25 years have brought a formidable increase in judicial responsibilities and an ever-growing involvement of the courts in the resolution of socio-economic questions. This much greater emphasis on the political role of the courts in Western societies has had its effect on the relations which they may have with the legislature and executive. Normally, one would expect such new responsibilities to give rise to new arrangements of the relations between the judiciary and the other branches of government.

Throughout the West, one is witnessing the arrival of a society of law. The crisis in the welfare state has certainly not resulted in a diminution of law: quite the contrary. Everywhere one is seeing a proliferation of legislation and an explosion of litigation.⁶⁸ The proliferation of legislation is itself a response to an ever more insistent demand for law.⁶⁹ Professor Chevallier writes:

.....

⁶⁷ *Beauregard*, at para. 24.

⁶⁸ Jacques CHEVALLIER, *L'État post-moderne*, (Paris: L.G.D.J., 2003), at pp. 100-05.

⁶⁹ *Ibid.*, p. 102.

[TRANSLATION]

This need for regulation is felt all the more acutely in contemporary societies as they have become “risk societies”: new threats appear (contaminated blood, mad cow disease, pollution) and scientific and technical developments are fraught with uncertainty (the explosion of biotechnologies and of information and communication technologies); the setting of rules is essential to re-establish “trust” . . . which has become brittle but is indispensable to life in society.⁷⁰

The explosion of litigation entails a considerable increase in the responsibilities of judges:

[TRANSLATION]

[H]enceforward in contemporary societies judges will be responsible for resolving conflicts of all kinds and maintaining social equilibrium: they are given responsibility for undoing the Gordian knots of history, of morality, of economics: it is up to the judges to weigh the interests and define socially acceptable solutions.⁷¹

This is the broad background to the evolution in the general conditions of judicial independence in Canada. Since *Valente*, this evolution has been focused and intense. The most noteworthy development is the *Remuneration Reference* handed down by the Supreme Court in 1997. In that case, the Court had to determine, with more specifics than was the case in *Valente* and *Beauregard*, the means of implementing the essential requirement of financial security, as this had already been identified. In three provinces, Prince Edward Island, Alberta and Manitoba, provincially-appointed judges were faced with salary reductions enacted by law. The three cases, joined for purposes of the reference, had this issue in common: “whether and how the guarantee of judicial independence in s. 11(d) of the *Canadian Charter of Rights and Freedoms* restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges.”⁷² Without going into all the details of that very important case, it should be noted that Lamer C.J. did not confine himself simply to considering s. 11(d) of the *Charter*. Since that section is limited in its application to accused persons,⁷³ it was useful to reflect on other sources of the principle of judicial independence in the Canadian Constitution.

Lamer C.J. noted that in *Beauregard*, Dickson C.J. had identified several sources of the principle of judicial independence:

Beauregard identified a number of sources for judicial independence which are constitutional in nature. As a result, these sources additionally ground the *institutional* independence of the courts. The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government. Institutional independence also inheres in adjudication under the *Charter*, because the rights protected by that document are rights against the state. As well, the Court pointed

.....
⁷⁰ *Ibid.*, p. 102.

⁷¹ *Ibid.*, p. 103.

⁷² *Remuneration Reference*, at para. 1.

⁷³ *BENYEKHLEF*, at pp. 135 ff.

to the preamble and judicature provisions of the *Constitution Act, 1867*, as additional sources of judicial independence; I also consider those sources to ground the judiciary's institutional independence. Taken together, it is clear that the institutional independence of the judiciary is "definitional to the Canadian understanding of constitutionalism" . . .⁷⁴

Lamer C.J. considered that, in addition to the sources already identified in *Beauregard* and s. 11(d) of the *Charter*, an interpreter of the Constitution should look at the preamble to the *Constitution Act, 1867* to find a fundamental support for the principle of judicial independence. Judicial independence "is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*".⁷⁵ This resort to the preamble can be explained in particular by the fact that "the range of courts whose independence is protected by the written provisions of the Constitution contains large gaps".⁷⁶ Thus, it appears that "the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located".⁷⁷

Lamer C.J. then turned his attention to the question of the individual and institutional aspects of judicial independence. He recalled the distinction made in *Valente*, but considered that the explanation given by Le Dain J. in this regard was incomplete:

However, the core characteristics of judicial independence, and the dimensions of judicial independence, are two very different concepts. The core characteristics of judicial independence are distinct facets of the definition of judicial independence. Security of tenure, financial security, and administrative independence come together to constitute judicial independence. By contrast, the dimensions of judicial independence indicate which entity—the individual judge or the court or tribunal to which he or she belongs—is protected by a particular core characteristic.

The conceptual distinction between the core characteristics and the dimensions of judicial independence suggests that it may be possible for a core characteristic to have *both* an individual *and* an institutional or collective dimension.⁷⁸

Thus, in *Valente* the Court dealt only with the *individual* dimension of financial security,⁷⁹ an essential characteristic identified in the judgment. Financial security also has an *institutional* dimension, and it is that which the Supreme Court sought to develop and support in its judgment.

.....
⁷⁴ *Remuneration Reference*, at para. 124.

⁷⁵ *Ibid.*, at para. 83.

⁷⁶ *Ibid.*, at para. 85.

⁷⁷ *Ibid.*, at para. 109.

⁷⁸ *Ibid.*, at paras 119-20.

⁷⁹ "*Valente* only talked about the individual dimension of financial security, when it stated that salaries must be established by law and not allow for executive interference in a manner which could affect the independence of the individual judge": *Ibid.*, at para. 121.

There are three components to the institutional dimension of financial security:

[TRANSLATION]

- the salaries of judges of provincial courts may be reduced, but the provinces have a constitutional obligation to establish independent, effective and objective bodies to make recommendations in this regard which can only be disregarded on rational grounds;
- the judiciary cannot collectively or individually engage in negotiations in this regard with the executive or the legislature;
- the effect of such reductions cannot be to take salaries below the minimum level required by the judge's responsibilities.⁸⁰

The *Remuneration Reference* is a fundamental decision in the interpretation and understanding of the principle of judicial independence in Canada. It goes beyond *Valente*, since it moves forward the nature and characteristics of financial security, an essential requirement for the independence of the judiciary. The Supreme Court of Canada noted that the Constitution had evolved⁸¹ and with it, of course, the principle of judicial independence.

This evolution of the principle since *Valente* has also had other dimensions of considerable importance.

Firstly, the concept of institutional impartiality was developed. In *Valente* the Court had made an important distinction between the concepts of impartiality and independence in interpreting s. 11(d) of the *Charter*. In *Lippé*, the Supreme Court took further the analysis of the relationship between independence and impartiality:

The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.⁸²

Then, the Supreme Court developed the new concept of institutional impartiality:

Notwithstanding judicial independence, there may also exist a reasonable apprehension of bias on an institutional or structural level. Although the concept of institutional impartiality has never before been recognized by this Court, the constitutional guarantee of an "independent and impartial tribunal" has to be broad enough to encompass this. Just as the requirement of judicial independence has both an individual and institutional aspect . . . so too must the requirement of judicial impartiality . . .

.....
⁸⁰ Michel ROBERT, *L'indépendance judiciaire de Valente à aujourd'hui: les zones claires et les zones grises*, (Montréal: Éditions Thémis, 2003), at p. 26.

⁸¹ *Remuneration Reference*, at para. 106.

⁸² *Lippé*, at p. 139. The reasoning appears to be the same in the United States: "Decisional independence is the sine qua non of judicial independence. It is important to remember, nevertheless, that decisional independence is an instrumental, not a fundamental value. Courts do not exist to provide judges with independence. The Constitution protects judges' independence, so that they can provide justice impartially": Gordon BERMANT and Russell R. WHEELER, "Federal Judges and the Judicial Branch: Their Independence and Accountability" *Mercer L.Rev.* (1995), 46, 835, [BERMANT and WHEELER], at p. 838.

The objective *status* of the tribunal can be as relevant for the “impartiality” requirement as it is for “independence.” Therefore, whether or not any particular judge harboured pre-conceived ideas of biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.⁸³

This new concept complements the protection offered by the principle of judicial independence.

Secondly, in *Mackeigan*, the Supreme Court pointed out that the essential features of judicial independence identified by Le Dain J. in *Valente* were not “an exhaustive codification of the elements necessary for judicial independence.”⁸⁴ The Court went on to say that “the conditions themselves may vary and evolve with time and circumstances.”⁸⁵ Thus, in *Mackeigan*, the Court acknowledged that the principle of judicial independence included an immunity (or privilege) by which a judge might refuse “to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion.”⁸⁶

Thirdly, until the *Remuneration Reference*, the judges of the lower courts, that is, essentially, the provincially-appointed judges, received only a limited measure of protection of their judicial independence. They were not covered by ss. 96 to 100 of the *Constitution Act, 1867* and s. 11(d) only applied to courts exercising criminal and penal jurisdiction. There has thus been a marked change, since “judicial independence [has] grown into a principle that now extends to all courts, not just the superior courts of this country.”⁸⁷ Nevertheless, it would be worthwhile briefly to look at the impact of inherent jurisdiction in the context of judicial independence.

4.2.3 The Inherent Powers Doctrine

Based on experience in the United States, the inherent jurisdiction of the courts—often expressed in terms of the inherent powers doctrine—is sometimes considered as a potential basis for claim to, and especially the exercise of, the judiciary’s administrative independence. In Canada, one speaks of inherent jurisdiction; in the United States, reference is to the inherent powers of courts of law. The phrases “inherent power” and “inherent jurisdiction” will be used interchangeably.

What is the status of the inherent power of United States courts in relation to the question of administrative autonomy? It is difficult to arrive at a precise definition of this concept in United States law on account of the very large number of definitions suggested by case law, use of the phrase in ways that are not always judicious and the fact that the state constitutions differ on many points. Felix F. Stumpf, who wrote a leading text on this subject, concludes that there is no “concrete body of inherent power law that is nationally recognized or applied.”⁸⁸ Two possible definitions emerge, however, one drawn from legal theory and the other from case law:

.....
⁸³ *Lippé*, at para. 140.

⁸⁴ *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796, [*Mackeigan*] at para. 56.

⁸⁵ *Ibidem*.

⁸⁶ *Ibid.*, at para. 65. Of course, this is not to say that the judge is under no duty to provide reasons (to the litigants).

⁸⁷ *Remuneration Reference*, at para. 106.

⁸⁸ Felix F. STUMPF, *Inherent Powers of the Courts. Sword and Shield of the Judiciary*, (The National Judicial College, 1994) [Stumpf], at pp. 3-4. “Another, perhaps even more important explanation for the variety of statements or definitions of ‘inherent powers’ is indiscriminate use of the term. Some inherent powers do not involve the courts’ adjudicative functions, and there are separate sets of applications for particular juridical areas ...”

The doctrine of inherent power runs essentially as follows: the courts are a constitutionally created branch of government whose continued effective functioning is indispensable; performance of that constitutional function is a responsibility committed to the courts; this responsibility implies the authority necessary to carry it out; therefore the courts have the authority to raise money to sustain their essential functions. (Hazard, McNamara and Sentilles, "Court Finance and Unitary Budgeting," 81 *Yale L.J.* 1286, at 1287 (1972)).⁸⁹

The definition suggested by a judicial decision reads as follows:

The term inherent powers has been employed in three general fashions. The first . . . use of inherent powers, which might be termed irreducible inherent authority, encompasses an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'courts' and 'judicial power' . . . The second, and most common, use of the term 'inherent power' encompasses those powers sometimes said to arise from the nature of the court, . . . but more often thought to be powers implied from strict functional necessity . . . Historically, [the Supreme Court] has viewed this particular power as 'essential to the administration of justice,' and 'absolutely essential' for the functioning of the judiciary . . . The third form of authority subsumed under the general term inherent power implicates powers necessary only in the practical sense of being useful . . . in the pursuit of a just result. (*Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562-563 [3d Cir. 1985]).⁹⁰

The theoretical bases of the concept of inherent power in the United States are twofold: the separation of powers and the very nature of courts of law. The separation of powers enables a court to rely on its inherent powers in carrying out "its constitutionally mandated functions and to enable it to acquire the necessary support and resources for achieving these functions."⁹¹

On the second basis, Stumpf notes:

The second theoretical basis of inherent powers is that which arises from the fact of the court's existence as a court . . . All courts must have, it is reasoned, "from structural necessity" the inherent powers to do those things that are reasonable and necessary for the administration of justice within the scope of their jurisdiction, absent contrary legislation or constitutional limitations.⁹²

The concept of inherent powers has been used primarily by state courts, presumably because the federal courts have long enjoyed administrative and operational independence and have been relatively well-funded. The nature of such powers is quite varied. However, inherent powers may be grouped into two major categories: questions of procedure and judicial governance, and administrative questions. In the first category are powers to punish for contempt of court, to draw up rules of practice, to regulate the practice of law, including the Bar, to ensure a fair and equitable trial, to administer cases and judicial schedules, to exclude evidence, to designate experts, to

.....
⁸⁹ *Ibid.*, at p. 4.

⁹⁰ *Ibid.*, at pp. 4-5.

⁹¹ *Ibid.*, at p. 6.

⁹² *Ibid.*, at p. 8.

amend judicial records and judgments, to decide on witnesses' costs, to ensure order and dignity in the courtroom and so on.⁹³ Accordingly, the concept of inherent power gives judges the power to regulate all questions relating to the holding of a trial.

The second category of inherent powers seems more controversial, since it has to do with the judge's power to direct the executive to assume liability for court costs. Stumpf lists a series of administrative matters which have been the subject of exercise of the inherent power: the hiring and firing of employees (registrars, secretaries, stenographers, ushers, research officers and so on), the maintenance of adequate premises for judicial functions and their upkeep (courtrooms: air conditioning, heating, chairs, cleanliness and so on; courthouse: construction, decoration, improvement, soundproofing and so on), the purchase of equipment and services (telephone system, furniture and carpets, air conditioners, tape recorders, elevators, calendars and so on).

Hazard, McNamara and Sentilles III note that "most of the reported decisions involved marginal appropriations for ancillary personnel and facilities rather than basic fiscal underwriting."⁹⁴ Stumpf also notes that most disputes in which there was recourse to the inherent power involved "trial courts and local authorities such as county or municipal fiscal agencies."⁹⁵ The concept of inherent powers has been relied upon chiefly by the state courts, since, as noted, federal courts enjoy a high degree of administrative autonomy. In order to avoid trial courts abusing the inherent powers doctrine, state courts of appeal have imposed "a number of judicially created restrictions and standards."⁹⁶ Appellate courts in certain states have thus developed a test requiring trial courts to go through the usual channels before ordering an item of expenditure:

When ... [established] methods fail, and the court shall determine that by observing them the assistance necessary for the due and effective exercise of its own functions cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not till then does the occasion arise for the exercise of the inherent power.⁹⁷ (*State ex rel. Hillis v. Sullivan*, 137 P. 392, 395 (Mont. 1913))

According to the case law reported by Stumpf, this test has been applied in several more recent cases. Similarly, state supreme courts "have promulgated administrative rules or orders that require specific procedures that must be pursued to resolve such disputes." Stumpf explains:

By adopting such rules, the courts of last resort seek to minimize and reduce the likelihood that individual trial judges may use inherent powers in situations that eventually turn out to be inflammatory and controversial. In essence, the invocation of inherent powers is put in the larger framework of the appellate court's overall supervision of the state's judiciary rather than particular judge's assertions of authority. The rules provide a systemic approach to controlling the sporadic use of inherent powers by individual trial judges. It also recognizes the concern of appellate courts that the judiciary should not usurp the fiscal authority's legitimate role in balancing and establishing governmental priorities for public funds.⁹⁸

.....
⁹³ *Ibid.*, at pp. 15 to 46.

⁹⁴ G.C. HAZARD Jr., M.B. McNAMARA and I.F. SENTILLES III, "Court Finance and Unitary Budgeting," in Russell R. WHEELER and Howard R. WHITCOMB, *Judicial Administration. Text and Readings*, (Englewood Cliffs, N.J.: Prentice-Hall, 1977) [Hazard, McNamara & Sentilles], at p. 112.

⁹⁵ *Stumpf*, at p. 47.

⁹⁶ *Ibid.*, at p. 67.

⁹⁷ *Ibid.*, at p. 68.

⁹⁸ *Ibid.*, at p. 69.

Additionally, for courts to rely on the concept of inherent powers, appellate courts require “a showing of ‘reasonable necessity’; or powers ‘reasonably necessary’, to achieve the specific purpose for which the exercise is sought.”⁹⁹ Appellate courts may also place a very heavy burden on trial courts seeking to use their inherent powers. One test that has been used requires “clear, cogent and convincing evidence.”¹⁰⁰

It may be seen from this review of the United States concept of inherent powers that they are used for well-defined purposes which have some connection with the holding of a trial (questions of procedure and judicial governance) or with administrative questions that have a direct and immediate impact on the functioning of the judicial process.

In the final analysis, the scope of this concept with regard to administrative matters seems to be limited to isolated actions, which may represent large sums of money but which clearly do not cast doubt on the constitutional division of functions. This concept cannot be relied on as a means of divesting the executive of all administrative duties which have judicial ramifications and drawing up a budget for judicial affairs in its place, replacing the executive and exercising complete control over the administrative staff assigned to the courts. Rather, “the doctrine . . . is of modest practical consequence, capable of dealing effectively with some small problems but unable to solve the big ones.”¹⁰¹ Given the significant limitations placed by the courts on use of the doctrine of inherent powers, the concept seems very useful in resolving limited and defined administrative problems. But it appears to have limited potential for wider use.

What is the situation in Canada? In a now classic article, the English writer I.H. Jacob defined the concept of inherent jurisdiction as follows:

In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.¹⁰²

As in the United States, inherent jurisdiction has to do with questions of procedure and judicial administration. Thus, inherent jurisdiction assumes that the court has the power to control access to courthouses and give individuals access to them;¹⁰³ that the court can control its procedure by ensuring that its hearings are public or by excluding certain persons, dismissing frivolous and vexatious applications, correcting procedural inequities, suspending proceedings regarded as

.....
⁹⁹ *Ibid.*, at p. 70.

¹⁰⁰ *Ibid.*, at p. 74. On the limitations imposed on the use of inherent powers see also Howard B. GLASER, “Wachtler v. Cuomo: the Limits of Inherent Powers”, (1994) 78 *Judicature*, at pp. 20-21.

¹⁰¹ HAZARD, MCNAMARA & SENTILLES, at p. 114.

¹⁰² I.H. JACOB, “The Inherent Jurisdiction of the Court”, *Current Legal Problems* (1970) 23, [JACOB] at p. 51. Luc Huppé suggests the following definition: [TRANSLATION] “An inherent power may be defined as a power the origin of which is not to be found in any formal rule of law and only the extent of which can be circumscribed by rules of law. The existence of inherent powers in the courts results from the need to effectively perform the duties assigned to them, to make such performance possible. It has to do with the very nature of the judicial function, so much so that an ordinary court of law would lose its identity if it was deprived of such an essential attribute”: Luc HUPPÉ, *Le régime juridique du pouvoir judiciaire*, (Montreal: Wilson & Lafleur, 2000), [HUPPÉ] at pp. 19-20.

¹⁰³ *British Columbia Government Employees’ Union v. Attorney General of British Columbia*, [1988] 2 S.C.R. 214.

wrongful, adopting rules of practice,¹⁰⁴ or determining in a case of two conflicting decisions of administrative courts involving the same two parties which shall take priority, and so on.¹⁰⁵

Inherent jurisdiction, associated with the status of a court of record, also gives the court the power to punish for contempt of court.¹⁰⁶ The origins of inherent jurisdiction confirm the two areas of application just identified:

It will, I think, be found that the superior courts of common law have exercised the power which has come to be called “inherent jurisdiction” from the earliest times, and that the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.¹⁰⁷

Inherent jurisdiction in Canada has not typically been considered as including the power to resolve purely administrative questions that have a direct and immediate impact on the functioning of the judicial process. Nonetheless, there is a line of authority in Quebec in which the courts have used their power to require of the executive the presence of an usher in courtrooms,¹⁰⁸ to maintain judges’ secretaries in their positions¹⁰⁹ or to keep judges’ parking places at the Montreal Courthouse at a set price.¹¹⁰ These cases contain no analysis relating to inherent jurisdiction, or indeed the slightest mention of the concept. This is undoubtedly explained by the presence in Quebec of art. 46 of the *Code of Civil Procedure*, which appears partly to codify the concept. It reads as follows:

The courts and the judges have all the powers necessary for the exercise of their jurisdiction. They may, in the cases brought before them, even of their own motion, pronounce orders or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to cover cases where no specific remedy is provided by law.

These judgments were rendered on the basis of this provision. Some cases have also referred to *Valente*, and in particular to the administrative independence described by Le Dain J. Although inherent jurisdiction is not the basis of these judgments, the definition of administrative independence in *Valente*, though limiting, seems broad enough to cover these particular cases.

It is crucial to bear in mind that inherent powers, by definition, inhere in courts and their jurisdiction and so cannot be analysed independently of the role the judiciary is expected to play in the constitutional structure. The codification of the doctrine, noted above, is a good reminder of its rationale: *The courts and the judges have all the powers necessary for the exercise of their jurisdiction*. Given the very significant evolution of the past 25 years in this respect, this means that inherent powers are now inherent in a judiciary with a significantly increased role. The fact that the Quebec

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¹⁰⁴ HUPPÉ, at pp. 21-23.

¹⁰⁵ *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739.

¹⁰⁶ Karim BENYEKHLEF, “La notion de cour d’archives et les tribunaux administratifs” *R.J.T.* (1988), 22, 61, at p. 71. See also JACOB, at p. 27.

¹⁰⁷ JACOB, at p. 25. It will be seen that the lower courts also have inherent jurisdiction: see Shalin M. SUGUNASIRI, “The Inherent Jurisdiction of Inferior Courts” *The Advocates’ Quarterly*, (1990-91), 12, 215.

¹⁰⁸ *Shatilla v. Shatilla*, [1982] C.A. 511 and *Gold v. Attorney General of Quebec*, [1986] R.J.Q. 2924 (S.C.) [*Gold*].

¹⁰⁹ *Poirier v. Québec*, [1994] R.J.Q. 2299 (S.C.) and *Gold*.

¹¹⁰ *Bisson v. Québec*, [1993] R.J.Q. 2581 (S.C.).

decisions can be explained as an application of *Valente* can be taken as an indication that the general constitutional principle of judicial independence is tied to the very same evolution in the role and functions played by the judiciary, including the attendant evolution in public perceptions and expectations. In other words, as long as constitutional principles are in tune with this evolution, inherent powers cannot add much to the equation. They remain a valuable safeguard, but one which should not be expected to form the basis of fundamental changes in institutional arrangements.

4.3 ADMINISTRATIVE INDEPENDENCE AND THE IMPERATIVE OF DEPOLITICIZATION

The third essential characteristic of the principle of judicial independence, administrative independence, as identified by Le Dain J. in *Valente*, has not been the subject of further decisions by the courts as in the case of financial security or security of tenure.¹¹¹ In *Valente*, Le Dain J. referred to the growing demands for administrative autonomy of the courts, as expressed, for example, in the Deschênes report, *Masters in Their Own House*. He noted that “Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it, may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(d) of the *Charter*.”¹¹² Le Dain J. also indicated that the case before him concerned the judge’s independence in making decisions (adjudicative independence) as opposed to independence in matters of administration.¹¹³

Consequently, the scope of Le Dain J.’s opinion may be circumscribed with regard to this third characteristic of judicial independence, especially as that opinion dealt only with the interpretation of s. 11(d). Indeed, Le Dain J. wrote in this regard that “The essentials of institutional independence which may be reasonably perceived as sufficient *for purposes of s. 11(d)* must, I think, be . . . judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.”¹¹⁴

The principle of judicial independence derives from several sources, including the preamble to the *Constitution Act, 1867*, which gives it a much wider scope. It would thus appear that the question of administrative independence has not yet been closely studied by Canadian courts. Pronouncements by the Supreme Court at the level of general principle, however, may well have a direct bearing on the issue, as would appear to be the case with the imperative of depoliticization put forward by the Court in the *Remuneration Reference*. In other words, it remains to be seen what essential elements are included within the scope of administrative independence. Before the *Reference*, the then Chief Justice, Brian Dickson, had this to say about the requirements of administrative independence for the courts:

Independence of the judicial power must be based on a solid foundation of judicial control over the various components facilitative and supportive of its exercise . . . Effectively, the financial and administrative requirements of the judiciary for the

.....
¹¹¹ See *Lippé*.

¹¹² *Valente* at para. 52.

¹¹³ *Ibid.*, at para. 47.

¹¹⁴ *Ibid.*, at para 52 (emphasis added).

dispensing of justice are in the hands of the very ministers who are responsible for defending the Crown's interests before the courts . . . Preparation of judicial budgets and distribution of allocated resources should be under the control of the chief justices of the various courts, not the ministers of justice. Control over finance and administration must be accompanied by control over the adequacy and direction of support staff.¹¹⁵

This should be helpful in considering how the *Remuneration Reference* bears upon administrative independence.

4.3.1 Implications of the Imperative of Depoliticization

As already explained, the nature and scope of the principle of judicial independence in Canada has evolved significantly since *Valente*. The *Remuneration Reference* is in this regard a fundamental step in this evolution since it provides new benchmarks for assessing judicial independence. In that case, the Court firmly asserted that relations between the judiciary on the one hand and the legislature and executive on the other should be depoliticized:

What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be *depoliticized*. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.¹¹⁶

To this requirement should also be added the formal prohibition issued by the Court to judges from individually or collectively engaging in negotiations of their remuneration with the executive or with representatives of the legislature.¹¹⁷ The depoliticization of relations between the judiciary and the two other branches of government undoubtedly appears to be one of the principal grounds of the *Remuneration Reference*. Negotiations between the parties should be avoided since the principle of negotiation entails a need to engage in compromises and to barter accommodations which may lead to a perception among the public that the judiciary is open to any compromise, if the situation requires it. This depoliticization requires a formalization of relations between the judiciary and the other two branches of government, and hence the use of independent and neutral commissions.

The reasons of the Supreme Court are especially relevant when it comes to the question of the administrative independence of the judiciary. Here too the requirement of depoliticization applies to the ever-increasing responsibilities of the judiciary noted earlier. The ever-widening impact of

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¹¹⁵ Address delivered at the Canadian Bar Association Conference in Halifax on August 21, 1985, as cited in Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1985), at 179.

¹¹⁶ *Remuneration Reference*, at para. 140.

¹¹⁷ *Ibid.*, at para. 134. The Chief Justice explained the scope of this prohibition: "The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration."

court judgments on the government's budget cannot fail to have an effect on the perception of relations between the judiciary and the executive when the time comes for the latter to prepare and approve the courts' budget. Nor can there be any doubt that chief justices today are increasingly embroiled in ongoing negotiations with governments on court needs and budgets. Under these circumstances, is there not a risk that the judiciary's independence is being compromised in the eyes of an informed observer? Some may reasonably believe that the judiciary might be tempted to defer a decision or limit its scope in order to avoid seeing its budget or human resources shrink. There is cause for concern even if this has never happened. For in these matters it is appearances that count, not reality.

Aside from purely financial questions, the increasing role of the courts in defining Canadian values (and those of Western societies in general) argues for a clearer administrative separation between the judiciary and the executive. In Canada, the question of adjudicative independence, that is, the judge's freedom of conscience to decide by himself or herself, without interference or constraint, on the outcome of the case, is no longer in doubt. A Canadian judge legally enjoys individual independence. The various judgments of the courts considered earlier have marked out the field of individual independence.

However, administrative independence, the fundamental aspect of the institutional dimension of judicial independence, has not yet been given more formal recognition, as if judicial independence were to continue to be articulated around the model of the solitary, isolated judge. Adjudicative independence is certainly essential, but ultimately it can only be an illusion if the informed public comes to believe that the judiciary as a whole is subject to the will, even the whims or pressures, of the executive in determining its operating budget and day-to-day administration. Since the growing role of the courts has attracted more searching review of the judiciary's actions, the time is not far distant when such relations will be subject to significant media attention and may even arouse suspicion, as has already been the case with the judicial appointment process. In *Mackeigan*, McLachlin J. noted the importance of these two aspects of independence, and the need to avoid relations between the judiciary and the other two branches of government that could detract from the appearance of judicial independence:

What is required, as I read *Beauregard v. Canada*, is avoidance of incidents and relationships which could affect the independence of the judiciary in relation to the two critical judicial functions—judicial impartiality in adjudication and the judiciary's role as arbiter and protector of the Constitution.¹¹⁸

Since the conditions of judicial independence can “vary and evolve with time and circumstances,”¹¹⁹ one can readily discern the direction taken by the Supreme Court's rulings, to the extent that they follow logically from decisions already rendered.

The way in which the direction taken by the Supreme Court may be seen as logically implied by previous rulings can be explained as follows. In addition to security of tenure, independence entails two essentials: financial security and administrative independence. Financial security has an institutional dimension which, according to the Supreme Court, has three components: the requirement of independent commissions, a prohibition of negotiation and a minimum salary

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¹¹⁸ *Mackeigan*, at para. 60 (emphasis added).

¹¹⁹ *Ibid.*, at para. 56.

level. What matters in relation to administrative independence is the general rule from which these three components are derived: they “all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized”.¹²⁰ The legislature and the executive “cannot, and cannot appear to, exert political pressure on the judiciary”.¹²¹ It is clear that administrative independence has an institutional dimension and that the administration of the courts gives rise to relations which are just as “politicized” between the political branches on the one hand and the judiciary on the other. It will be recalled that institutional independence depends on the “perception”¹²² of a “reasonable and informed person”.¹²³ Such a person would find it difficult to understand why depoliticization should not be required in respect of administration and resources if it is in matters of remuneration. The Supreme Court explained the *Remuneration Reference* as follows:

The often spirited wage negotiations and the resulting public rhetoric had the potential to deleteriously affect the public perception of judicial independence. However independent judges were in fact, the danger existed that the public might think they could be influenced either for or against the government because of issues arising from salary negotiations.¹²⁴

It seems unquestionable that negotiations over administrative and budgetary matters have the same potential to affect the public perception of judicial independence.

This constitutional imperative of depoliticization needs fleshing out. In the area of financial independence, the constitutional imperative demands that independent remuneration commissions be established and that their recommendations normally be followed.¹²⁵ In the area of administrative autonomy, the detailed consequences of the constitutional imperative remain to be defined. But there can be no question that the executive model of judicial administration raises very serious issues. In view of the institutional dimension of independence stressed in the *Remuneration Reference*, it would seem logical to assume that the constitutional imperative of depoliticization warrants the granting of a greater degree of administrative autonomy for the judiciary. Irrespective of whether the executive and the legislature actually exert political pressure on the judiciary (taken as an institution), they clearly appear in this regard to be in a position to do so. For if pressure can be exerted on the judiciary through political control of salary adjustments and other benefits, as the *Remuneration Reference* established, it is quite clear that pressure can also be exerted through political control of court administration and budgets.

The implication of the *Remuneration Reference* should now be considered against the broader institutional context of the Canadian constitutional system, which may be perceived as creating potential obstacles to the recognition of a greater degree of administrative independence beyond the federal courts.

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¹²⁰ *Remuneration Reference*, at para. 131.

¹²¹ *Ibid.*, at para. 140. Political input is of course welcome through the formal channels: legislation and litigation.

¹²² *Valente*, at p. 689.

¹²³ *Généreux*, at p. 287.

¹²⁴ *Remuneration Commissions Decision*, at para 10.

¹²⁵ *Ibid.*, at paras. 166, 180.

4.3.2 Perceived Institutional Obstacles to Administrative Independence

If the constitutional imperative of depoliticization appears to be inconsistent with an executive model of court administration, it can also be argued that this model is an implication of Canada's federal and parliamentary structures, which might not accommodate the application of the separation of powers doctrine to issues of court administration.

a) *The Federal Dimension*

Canada's federal structure and the federal principle which underlies it have greatly contributed to the shaping of the judiciary's position under the constitution. Historically speaking, the need for a neutral mechanism for resolving federal issues was the first institutional reason for the constitutional role entrusted to the judiciary. The institutional independence of the courts emerged "from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government."¹²⁶ But federalism may also be said to impose limitations on the development of a unified conception of administrative autonomy.

The first question one might raise about the impact of Canada's federal structure is the extent to which constitutional requirements have a harmonizing effect upon models of court administration throughout Canada.

The first prong of the answer lies in the provisions of the *Constitution Act, 1867* that bear upon court administration. Section 92(14) of the *Act* provides as follows:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[. . .]

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

It is therefore clear that legislative power over court administration generally lies with provincial legislatures. At the same time, the judicature provisions of the *Act* serve as a legitimate basis for a measure of federal intervention in the administrative environment in which section 96 judges perform their functions. Various allowances and continuing education programmes, for example, may be seen as falling under section 100 of the *Act*. Also, section 101 clearly puts legislative power over the administration of federal courts, including the Supreme Court, in the hands of Parliament. Legislative power over penitentiaries (section 91(26)), though not over prisons (section 92(6)), also lies with Parliament. These various heads of jurisdiction create points of contact with provincial powers.

The second prong of the answer is the level of generality at which constitutional requirements are cast in the evolving constitutional case law. To take the example of the requirement of independent commissions defined in the *Remuneration Reference*, a constitutional standard is established (as an instantiation of the general imperative of depoliticization) which could be, and was, met by legislatures in differing ways. This shows that constitutional requirements of judicial independence may materialize in different ways across provincial lines. The harmonizing effect of constitutional requirements can be said to be taking place at the level of principles only,

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¹²⁶ *Remuneration Reference*, at para. 124.

leaving space for the provinces to take account of local circumstances in the organization of court administration.

Another question may be raised about the impact of the *Constitution Act 1867* on the evolution of models of court administration in Canada. Upon a cursory reading of section 92(14), it might conceivably be thought that court administration is entrusted to provincial legislatures and therefore not to courts. However, the short answer to this is that Part VI of the *Constitution Act 1867*, entitled “Distribution of Legislative Powers”, deals with precisely that, namely the distribution of legislative powers between the only two existing possibilities: the federal legislature (Parliament) on the one hand, and the provincial legislatures on the other. In other words, Part VI addresses the division of powers as between the provincial and federal orders of governance only; it says nothing about the distribution of powers as between branches within these orders and certainly not as between the Courts and either level of government.

The long answer involves a reminder that all legislative powers exercised under sections 91 and 92 of the *Constitution Act 1867* are subject to constitutional requirements. The undoubted provincial power over the remuneration of provincial judges, for example, does not empower provinces to ignore the constitutional requirements of financial independence. It is true of course that the judicature section (Part VII) of the *Constitution Act 1867* is silent on the independence of provincial judges and courts. But constitutional requirements have evolved since 1867 and the power of provinces over the administration of justice is now subject to these requirements under Canadian constitutional law. As the Supreme Court clearly put it, “the jurisdiction of the provinces over ‘courts’, as that term is used in s. 92(14) of the *Constitution Act, 1867*, contains within it an implied limitation that the independence of those courts cannot be undermined.”¹²⁷

The issue of the distribution of powers between branches brings one to the separation of powers doctrine.

b) The Separation of Powers

One would not be overly surprised to find in a Canadian constitutional law textbook a statement to the effect that there is no general separation of powers in the Canadian Constitution,¹²⁸ possibly followed by an explanation that as “between the executive and legislative branches, any separation of powers would make little sense in a system of responsible government”¹²⁹ This is because responsible government in the British parliamentary tradition demands that members of the executive branch generally be drawn from, and enjoy the confidence of, the elected assembly. In turn, the rule of confidence implies a form of political control of the elected assembly by the government which makes separation limited in the important sense that the executive controls the agenda of the legislative branch.¹³⁰ At the same time, the executive controls the agenda only so long as it enjoys the confidence of the assembly and therefore is under the constant threat of removal. This is not to say, however, that the separation of powers doctrine can have no place in a system of parliamentary democracy, or in Canadian constitutional law.

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¹²⁷ *Remuneration Reference*, at para. 108.

¹²⁸ See for instance Barry L. STRAYER, *The Canadian Constitution and the Courts*, 3rd ed., (Toronto: Butterworths, 1988), at p. 137.

¹²⁹ HOGG, at para. 7.3(a).

¹³⁰ This was recognized in no uncertain terms in *Wells v. Newfoundland* [1999] 3 S.C.R. 199, where the government had relied on the doctrine of the separation of powers in an attempt to characterize as a frustrating act beyond its control a statute terminating a government employment contract without compensation. The Supreme Court stated that the “government cannot rely on the doctrine of the separation of powers to avoid the consequences of its own actions. [...] it is disingenuous for the executive to assert that the legislative enactment of its own agenda constitutes a frustrating act beyond its control.” at para. 52.

With respect to parliamentary democracy, it is helpful to recall that Montesquieu, who is the main reference point on the separation of powers and whose writings greatly influenced the framers of the United States constitution, saw the British constitution as the mirror of liberty. James Madison's interpretation of the separation of powers as expounded by Montesquieu is instructive in this respect:

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.¹³¹

Madison went on to show that the necessary separation between "departments" cannot in practice be sustained unless they are "so far connected . . . as to give to each a constitutional control over the other,"¹³² and that in order for "checks and balances" to function, it is fundamental that "each department should have a will of its own."¹³³

In this light, it becomes easier to grasp how a commitment to the separation of powers can be said to have been incorporated into the Canadian Constitution through the preamble to the *Constitution Act, 1867*, which refers to a constitution "similar in Principle to that of the United Kingdom."¹³⁴ It also becomes easier to grasp how a complete separation of *functions* was never part of any of the well-known constitutional designs. "In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy."¹³⁵ But it is easily understood that legislative functions may be vested in the executive, that judicial functions, including the interpretation of law, may be vested in non-judicial bodies such as administrative tribunals,¹³⁶ and that the judiciary may be vested with non-judicial functions, such as the advisory function.¹³⁷

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¹³¹ James MADISON, "The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts," *The Federalist* No. 47.

¹³² James MADISON, "These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other," *The Federalist* No. 48.

¹³³ James MADISON, "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments," *The Federalist* No. 51.

¹³⁴ *Cooper v. Canada (Human Rights Commission)* [1996] 3 S.C.R. 854, [Cooper] at para. 22.

¹³⁵ *Fraser v. Public Service Staff Relations Board* [1985] 2 S.C.R. 455 at para. 39 (per Dickson C.J.).

¹³⁶ *Re Residential Tenancies Act, 1979* [1981] 1 S.C.R. 714, at p. 728.

¹³⁷ This last example is often used to contrast the Canadian position. In the United States, it was decided in *Muskrat v. United States* (1911), 219 U.S. 346, 356, that Congress cannot validly confer on the United States Supreme Court the power and duty to render advisory opinions. But this is the result of the constitution's "cases and controversies" requirement (Article III), which applies to federal courts, rather than a general imperative of the separation of powers. There is an old tradition of advisory opinions in the judiciaries of the States: Manley O. HUDSON, "Advisory Opinions of National and International Courts" *Harv. L. Rev.* (1924) 37, 1302. In Canada, the federal advisory opinion mechanism was declared valid by the Judicial Committee of the Privy Council in *A.G. Ont. v. A.G. Can.*, [1912] A.C. 571 (P.C.).

Today, in Canada, the separation of powers is recognized as a fundamental constitutional principle.¹³⁸ As between the political branches, the separation of powers has been relied upon, together with parliamentary democracy, to provide a legal basis for the hierarchical relationship between the executive and the legislative branches. It is thus an aspect of the separation doctrine that the executive branch is subordinate to the legislative branch in the sense that it must carry out the latter's intent when validly expressed in a statute.¹³⁹

But it is in contexts involving the judiciary in relation to the political branches that the separation of powers has most often been relied upon. Institutional aspects of judicial independence, for example, are said to be “bound up with” and to “inhere” in the separation of powers.¹⁴⁰ At the same time, it is clear that there is more to judicial independence than what the separation of powers may require, since judicial independence speaks to relationships not only between branches of the state but also between judges and private parties.¹⁴¹ Conversely, there is clearly more to the separation of powers than judicial independence, even in the context of the institutional place of judicial power. For example, the separation of powers is seen as protecting the core jurisdiction of superior courts from legislative encroachment.¹⁴²

The doctrine of the separation of powers is otherwise referred to as a reminder that no branch of government should overstep its bounds and that each show proper deference to the legitimate sphere of activity of the other.¹⁴³ As the Supreme Court recently stated, “No one doubts that the courts and the legislatures have different roles to play, and that our system works best when constitutional actors respect the role and mandate of other constitutional actors.”¹⁴⁴ The role and mandate of each constitutional actor of course remains unclear to a significant extent. From the perspective of political branches, one might legitimately look for evidence of the “bounds” which the judicial branch would not overstep. Courts frequently point out that the *Charter* “has changed the balance of power between the legislative branch and the executive on the one hand, and the courts on the other hand, by requiring that all laws and government action must conform to the fundamental principles laid down in the *Charter*.”¹⁴⁵

Where are the limits of judicial power in this context? The short answer is that courts would follow a constitutional amendment just as they are applying the *Charter*, and that they would respect a section 33 derogation just as they have in the past. A longer answer would point to the most basic—but often overlooked—check on any judicial power, which is a result of its being procedurally passive: courts generally have no power but that of deciding issues that others put before them. A longer answer would also point to another fundamental check on judicial power, which is that judicial decisions largely depend on the executive branch for enforcement. These are some of the checks and balances that are built into the system.

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¹³⁸ *Remuneration Reference*, at para 139.

¹³⁹ *Cooper*, at para. 24.

¹⁴⁰ *Ibid.*

¹⁴¹ See notably *Beauregard*, at p. 69.

¹⁴² See *Cooper*, at para 11.

¹⁴³ See particularly *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319, [New Brunswick Broadcasting] at p. 389 (per McLachlin J.). See also *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3 at para 32 ff.

¹⁴⁴ *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381, at para 104.

¹⁴⁵ *New Brunswick Broadcasting*, at p. 389 (per McLachlin J.).

Against this backdrop, the question becomes whether an evolving principle of separation can say anything about administrative autonomy for courts. Looking back to James Madison's imperative that each branch should have "a will of its own," it is easy to see that the separation principle might indeed point in the direction of greater administrative autonomy. In the context of judicial independence, the constitutional imperative of depoliticization established in the *Remuneration Reference* exists to ensure that the political branches are not seen as being in a position to influence the judiciary outside the regular channels of legislation and litigation. The possibility of such influence was recognized in the context of financial independence and could logically be recognized in the context of administrative autonomy. The imperative to remove all institutional sources of influence through depoliticization, after all, is at least partly about guaranteeing the conditions in which it is possible for the judiciary to "have a will of its own."

c) *Responsible Government and Financial Accountability*

The third and last cluster of concepts that has sometimes been raised as an obstacle to the evolution of administrative autonomy revolves around responsible government and financial accountability. Responsible government has already been discussed in the context of the separation of powers; it should now be considered in terms of the role of the political branches in ensuring financial accountability.

The role of the executive in the financial process today is still marked by its medieval origin, when the King was expected to meet public expenses out of his own revenues. As public expenses grew and the ability of the King to meet them diminished, the Crown was obliged to seek funds by summoning a council—an early form of parliament—to discuss what aids should be given. Under rules of parliamentary procedure, requests to the elected assembly for funds still originate with the Crown, which now acts on the advice of cabinet. The fund is of course made up of revenue generated through taxation measures initiated by a Minister of the Crown in the elected assembly.¹⁴⁶ With the evolution of responsible government, first in Great Britain and much later in Canada,¹⁴⁷ the role of the executive in the financial process and the rule requiring parliamentary authorization came to be loosely associated with the convention that the government must enjoy the confidence of the elected assembly. But, contrary to popular belief, a convention clearly linking financial matters to confidence was never firmly established in Canada.¹⁴⁸

The role of the executive in financial matters is at any rate entirely a matter of conventions, parliamentary rules of procedure, and, to an extent, statute. The legislative branch is therefore at liberty to alter this role and has done so in many jurisdictions. It has done so with a view notably to conferring a measure of financial independence on various officers such as ethics commissioners and auditors general. That the lines of budgetary accountability may in some cases not go through the Crown or one of its ministers is now a well accepted fact in parliamentary systems. It is widely considered necessary to sound governance and was never considered a threat to principles of democratic accountability. Accountability is ensured through direct parliamentary authorization, based on estimates put directly to the elected assembly. Hence, there is no reason of principle for opposing similar arrangements for the judiciary.

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¹⁴⁶ Canada, House of Commons (Table Research Branch), *Précis of Procedure*, November 2003: <http://www.parl.gc.ca/information>

¹⁴⁷ In Great Britain, it has been clear since the resignation of Walpole in 1742 that the Crown could not continue to govern for any prolonged period without the support of ministers who had the confidence of a majority of the House of Commons. In Canada the convention was first established in Nova Scotia with the resignation of Johnston in 1848.

¹⁴⁸ See generally Andrew HEARD, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, (Toronto: O.U.P., 1991), at 68 ff.

The rule that no money can be taken out of the consolidated revenue fund without parliamentary authorization is more embedded in our system. It is one of the most deeply rooted principles in the British constitutional tradition. It belatedly followed the relinquishment by the Crown of all powers pertaining to taxation, which the parliament at Westminster can arguably be said to have obtained towards the end of the 14th century, but which remained a matter for legal and political controversy well into the 17th century. The constitutional pedigree of this principle lies in its being inextricably bound up with the democratic evolution that led to the adoption of the *Bill of Rights* in 1689.¹⁴⁹ It is one of the rules that most clearly embody the notion of democratic accountability and it is legal, not merely conventional.¹⁵⁰

Yet, there is no doubt that this principle was altered at least partially by the mandate which courts were given in 1982 upon adoption of the *Charter*. As pointed out earlier, judicial decisions now have unprecedented economic impact. It has come to be accepted that a constitutional requirement may result in the government being required to spend hundreds of millions of dollars in order to implement a court decision. This involves a parliamentary authorization which may be given based on an external imposition, thereby altering the logic behind the principle. Democratic accountability in this context has therefore taken on a texture richer than that of majority rule and recognizes that “democracy in any real sense of the word cannot exist without the rule of law.”¹⁵¹ Democratic accountability is now understood as a broader concept which incorporates the constitutional constraints related notably to the protection of individual rights and freedoms by an independent judiciary.

To be sure, the “legislature’s exclusive jurisdiction to allocate funds from the public purse”¹⁵² is still recognized today and parliamentary authorization is still required. But in some circumstances its denial by the elected assembly would amount to the exercise of a last resort political power to censor the judiciary, and to a constitutional crisis. It is precisely with the avoidance of such constitutional crisis in mind that a new, flexible form of judicial review was devised in the context of the independent remuneration commissions’ recommendations.¹⁵³ Governments and legislatures are bound to follow these recommendations unless they can rationally justify a decision to depart from them.¹⁵⁴ The last word on rationality remains with the courts, which in turn remain largely powerless should a question arise as to implementation. Should the establishment of independent commissions become a requirement in the context of court administration, it is very likely that the same balance would be struck and that similar arrangements would be put in place.

.....
¹⁴⁹ The legislative expression of the principle that the Crown cannot tax without Parliament can be found in the fourth clause of the *Bill of Rights*, 1689.

¹⁵⁰ This was most clearly expounded by the Judicial Committee of the Privy Council in a New Zealand case: *Auckland Harbour Board v. R.* [1924] A.C. 318 (P.C.), at 326.

¹⁵¹ *Secession Reference*, at para. 67.

¹⁵² *Remuneration Commissions Decision*, at para. 42.

¹⁵³ *Remuneration Reference*, at para. 180.

¹⁵⁴ For the latest definition of rationality in this context, see: *Remuneration Commissions Decision*, at paras. 14-41.

4.4 ADMINISTRATIVE INDEPENDENCE OF COURTS IN COMPARATIVE LEGAL PERSPECTIVE

A brief look at the question of the administrative independence of the courts in certain foreign jurisdictions is warranted, to provide some background for the analysis of this question in Canada.

In principle, the independence of the judiciary is guaranteed by all systems normally used for comparative reference purposes by the Supreme Court in its ongoing interpretation of the Canadian Constitution. However, when it comes to defining the consequences of the principle of independence in practice and in detail, one finds that evolution may be prompted by political concern with the need for change rather than the evolution of constitutional case law.

A brief review of the usual reference jurisdictions, the United Kingdom, the United States and Australia, will suffice to show a clear trend toward the granting of greater administrative autonomy to the courts. In countries with a formal constitution (the United States and Australia), this is a legislative trend which anticipates and to some extent forestalls evolution in constitutional decisions. In the United Kingdom, reforms have been drastic given the historical importance of the Lord Chancellor in the constitutional structure. Even though the executive model of court administration is still prevalent, the transfer of judicial functions from the office of the Lord Chancellor and the relative administrative independence of the new Supreme Court evidences a similar legislative trend. In other words, the political branches in the reference countries have all taken cognizance of, and, to various extents, have acted upon, the imperative of depoliticization.

4.4.1 The United Kingdom

From a constitutional perspective, the United Kingdom is different from the other reference countries because parliament could theoretically abolish all legal protections relating to judicial independence. To be sure, this would be unconstitutional in the conventional sense at least to an extent. But the conventions in this area are unclear and the sanction for the violation of any convention said to be binding on parliament remains uncertain. The protection of judicial independence under this traditional position is therefore limited and uncertain.

The balance between the political branches and the judiciary reflected by the traditional position, however, has changed significantly over the the past 25 years. As was noted earlier, the judiciary has come to play an increasingly important and prominent role in society. In the United Kingdom, part of this stems from the body of supranational jurisprudence growing out of the the country's entry into the European Union.

The *Human Rights Act 1998*, by incorporating the European Convention on Human Rights, has had a substantial impact in this sense. By requiring judges to interpret domestic law consistently with the Convention, the Act has given rise to court interpretations that are openly in conflict with the government's intentions, as far as these are apparent from a review of *Hansard*.¹⁵⁵ Also, by giving judges the power to declare that legislation is incompatible with the Convention while leaving

.....
¹⁵⁵ Reference to *Hansard* in this context is governed by the rule in *Pepper v. Hart* ([1993] 1 All ER 42).

correctives with the political branches, the Act has partially altered the doctrine of parliamentary sovereignty, introducing a form of parallel constitutional law.¹⁵⁶ Courts now have to judge acts of parliament under broad human rights standards.¹⁵⁷

It is in this context that, in 2003, the government announced sweeping plans to reform the judicial system. Constitutional reformers had long held the post of Lord Chancellor to be anomalous in a modern democracy and the fusion of powers it embodies unacceptable.¹⁵⁸ The same was said about the judicial role of the House of Lords and the political process of judicial appointments. The Constitutional Reform Bill was published in February 2004. In July 2004, following public consultations and committee review, the House of Lords overturned the provisions meant to abolish the post of Lord Chancellor but accepted those elements of the Bill relating to the creation of the Supreme Court, the appointments commission, and the termination of the judicial roles played by the House of Lords and its speaker, the Lord Chancellor. The *Constitutional Reform Act* received Royal Assent on March 24, 2005.¹⁵⁹

As suggested above, the constitutional reforms leave intact the traditional system of court administration which was unified in 2003 by the creation of “Her Majesty’s Courts Service” within the Constitutional Affairs Department.¹⁶⁰ This system, which applies to the courts of England and Wales (to the exclusion of the new Supreme Court) basically implements a centralized executive model of court administration. The evolution brought forth by the reform lies in the recognition that a separation of powers should be encouraged and that the Supreme Court should enjoy a measure of administrative autonomy. Constitutional Affairs Secretary Lord Falconer declared, upon the publication of the reform bill:

Limiting the power of patronage and severely curtailing the ability of ministers to appoint and discipline judges are important safeguards to judicial independence.

It is right that politicians should not seek to influence the smooth running of the judicial system. The duty to uphold judicial independence further underlines that.

In a modern democracy, judges have no place in Parliament and politicians no place in the courtroom. Separating the powers of judges and politicians, while keeping the balance between them, is the best means of maintaining clarity and confidence in our constitution.¹⁶¹

The reform was thus clearly informed by both the independence of the judiciary and the separation of powers. One of the central and much publicized concerns was with the judicial appointments process, which was to be as far removed from the risk of political influence as possible. Less noted but equally important in the context of both judicial independence and the separation of powers was a concern for administrative autonomy. It is clear that for the purpose of implementation of both principles, the new Supreme Court, which takes appellate jurisdiction over

.....
¹⁵⁶ See notably Dawn OLIVER, *Constitutional Reform in the UK*, (Oxford: O.U.P., 2003), at pp. 114-15.

¹⁵⁷ Those standards include judicial independence (article 6(1)), but the case law of the European Court of Human Rights has yet to address the issue of administrative independence in any meaningful way. The criteria developed thus far, however, include “the existence of guarantees against outside pressures” and “whether the body presents an appearance of independence”: *Cooper v. The United Kingdom*, ECHR no. 48843/99, December 16, 2003, at para. 104.

¹⁵⁸ See generally Ian WARD, *The English Constitution—Myths and Realities*, (Oxford: Hart Publishing, 2004), at pp. 20-22.

¹⁵⁹ 2005, c.4 [*Constitutional Reform Act*].

¹⁶⁰ This was introduced by the *Courts Act, 2003* (c. 39). Her Majesty’s Courts Service became effective in April 2005.

¹⁶¹ Department for Constitutional Affairs, February 25, 2004: www.dca.gov.uk/legist/constreform.htm.

the whole Kingdom from the House of Lords and “devolution” jurisdiction from the Judicial Committee of the Privy Council, was conceived as the fundamental embodiment of the judiciary. The Supreme Court was thus singled out in respect of both the appointment process, which will not be discussed here, and the introduction of administrative autonomy.

The Act makes provision for the resourcing and funding arrangements for the Supreme Court. It creates the post of Chief Executive of the Supreme Court within a statutory framework. The Chief Executive is made responsible for the non-judicial functions of the Court and anything delegated to him by the President (who takes over the judicial functions and responsibilities of the Lord Chancellor). In effect, this allows the Chief Executive to become responsible under the President for appointing staff to the Court. The Chief Executive is answerable to the President and must carry out his functions in accordance with the President’s directions. The Chief Executive is responsible for ensuring that the court’s resources are used to provide an efficient and effective system to support the Court in carrying on its business. The Minister has a corresponding duty under the Act to provide accommodation for the Court and to provide other resources to allow the Chief Executive to carry out his responsibilities.¹⁶²

The Explanatory Note to the Act details the operation of the resourcing arrangements as follows:

- The administrative service for the Supreme Court will be headed by a Chief Executive, a civil servant appointed by a process involving an ad hoc commission.
- The staff of the Court will be civil servants, accountable to the Chief Executive and not to the Lord Chancellor.
- The Chief Executive will be principally answerable to, and operating under the day-to-day guidance of, the President of the Court.
- The President of the Supreme Court and the Chief Executive will determine the bid for resources for the Court in line with Governmental spending review timescales.
- The bid will be passed to the Lord Chancellor, who will include it as a separate line in the overall [Department for Constitutional Affairs] bid submitted to the Treasury.
- The Lord Chancellor will be responsible for directly dealing with the Treasury to secure resources for the Court during the Spending Review process.
- The Treasury will scrutinise the overall [Department for Constitutional Affairs] bid and approve the overall financial expenditure for the [Department for Constitutional Affairs] group in the Spending Review period including the Supreme Court.
- Following the settlement the [Department for Constitutional Affairs] will give a separate Departmental Expenditure Limit (DEL) to the UK Supreme Court.
- The Chief Executive of the Supreme Court will submit an estimate to HM Treasury which will then be presented before the House of Commons as part of the overall estimates.
- The House of Commons will approve the overall estimates and transfer resources accordingly.

.....
¹⁶² See *Constitutional Reform Act*, sections 48 to 51.

- Because the Supreme Court will have its own estimate, the funds approved will be transferred to the Court direct from the Consolidated Fund, not via the [Department for Constitutional Affairs].
- The Chief Executive will be the Accounting Officer for the Supreme Court and so directly accountable to the Court and to Parliament, rather than being subject to the [Department for Constitutional Affairs] Permanent Secretary as Principal Accounting Officer.¹⁶³

As the Explanatory note points out, “[t]he Chief Executive will not be able to carry out his duties if the Lord Chancellor does not provide appropriate resources.”¹⁶⁴ This is the result of the decision to maintain the ministerial channel for budgetary purposes which, as will be seen below, is also a feature of the Federal Court and the High Court regimes in Australia. The new Supreme Court regime introduces an innovative safeguard in this respect: a chief justice is given the possibility to lay written representations directly before Parliament.¹⁶⁵ Overall, the new arrangements represent a tremendous increase in administrative and budgetary autonomy, an increase which was clearly grounded in the notions of judicial independence and the separation of powers.

4.4.2 The United States

In terms of administrative independence, the legal situation of federal courts in the United States (Article III) is not the result of constitutional decisions by the courts. In fact, this question has not given rise to constitutional litigation. Rather, it is the outcome of administrative arrangements between the various players involved:

The federal judicial administrative arrangement is a product of accretion rather than systematic design, but it is an arrangement that members of the governance and administrative agencies have affirmed several times, most recently when the Judicial Conference stated that “[i]n the interests of administrative efficiency, accountable resource utilization, and effective external relations, the present distribution of governance authority among the national, regional (circuit), and individual court levels should be preserved.”¹⁶⁶

Thus, administrative autonomy does not appear to depend on constitutional foundations as such: “Compared to the matter of decisional independence, the claim for branch independence¹⁶⁷ has a much more tenuous grounding in constitutional history.”¹⁶⁸ Indeed, the framers of the United States Constitution had absolutely no thought of the question of judicial administrative autonomy:

.....
¹⁶³ Department for Constitutional Affairs, Explanatory note to the *Constitutional Reform Act*, at para. 184.

¹⁶⁴ *Ibid.*, at para. 187.

¹⁶⁵ *Constitutional Reform Act*, section 5.

¹⁶⁶ Russell WHEELER, “The Administration of the Federal Courts: Understanding the Entities and Inter-relationships that Make Federal Courts Work”, in Gordon M. GRILLER and E. Keith STOTT, Jr. (ed.), *The Improvement of the Administration of Justice* (7th ed.), Lawyers Conference, Judicial Division, American Bar Association, (2002), [WHEELER] at p. 51.

¹⁶⁷ “The term ‘branch independence’, comprising procedural and administrative independence, identifies the locus, but not the source, of the concern. Judicial branch independence refers to the freedom of the branch to operate according to procedural rules and administrative machinery that it fashions for itself through its own governance structures”: BERMANT and WHEELER, at p. 845.

¹⁶⁸ *Ibid.*, at pp. 852-853.

The judicial power, to be sure, was a power separate from the legislative and executive power—Hamilton referred to ‘the different departments of power’—but the concept of a separate, independent judicial branch as an administrative entity was not present. The first federal judicial system had no independent administrative apparatus except for the authority of each court to appoint its own clerk.¹⁶⁹

Until 1840, the federal judicial system was administratively responsible to the Department of the Treasury, then to the Department of the Interior, and finally to the Department of Justice when the latter was created in 1870.¹⁷⁰ Additionally, Congress “made federal district judges, in effect, agents of the executive departments. They evidently complied, in one way or another . . . with other statutes that, in effect, made federal judges hearing examiners for non-judicial officials in the nation’s capital.”¹⁷¹ So, as in Canada, federal judges in the late 18th century were required to perform duties that were not strictly speaking judicial. This is another example of the long, gradual and difficult progress toward differentiation in governmental functions. Even the framers of the United States Constitution, though imbued with the writings of Montesquieu and Locke and aware of the theory of the separation of powers, were still to some extent subject to monarchical designs for the performance of duties and the establishment of institutions.

The principle of real administrative autonomy for the judiciary emerged in the United States in the 20th century:

The idea of a truly independent judicial branch, administratively responsible and competent, even if not administratively autonomous, emerged only in the twentieth century as a product of the Progressive Movement’s effort to rationalize government and make it more efficient. To that end, wrote Roscoe Pound, Louis Brandeis, and others, in 1914, “the court should be given control of the clerical and administrative force through a chief clerk, appointed by and responsible to the court for the conduct of this part of the work.” The notion of a separate administrative governance machinery for the courts emerged gradually from those beginnings.¹⁷²

In 1939, Congress withdrew administrative control of the federal courts from the Department of Justice and assigned it to a new agency which was to perform its function under “the direction and supervision of what is now called the Judicial Conference of the United States.”¹⁷³ The Attorney General of that time, Homer Cummings, who had piloted this reform through Congress, supposedly told the latter “Let the judges run the judiciary.”¹⁷⁴ This important reform, which will be describe briefly below, illustrates in the United States context the inexorably changing nature of the principle of judicial independence. Its evolution is evident in view of the fact that the question of administrative autonomy was largely ignored until the 20th century:

That the creators of the federal judiciary fashioned the institution as they did hardly means that those late eighteenth century elements are consistent with an independent judiciary in the twenty-first century. It only means that we can find little guidance in the

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¹⁶⁹ *Ibid.*, at p. 853.

¹⁷⁰ *Ibid.*, at p. 854.

¹⁷¹ *Ibid.*, at p. 854.

¹⁷² *Ibid.*, at p. 855.

¹⁷³ *Ibid.*, at p. 845.

¹⁷⁴ *Ibid.*, at p. 845.

views of the founders for the concept and elements of administrative judicial independence as they present themselves to us today. Rather, it might be better to argue that the 20th century has *completed the evolution* of judicial administration protections begun with the Constitution's tenure and salary clauses, an evolution that was largely dormant through the entire nineteenth century and some of the twentieth.¹⁷⁵

It was thus up to the principal players, Congress, the Department of Justice and the federal judges, to understand the need to develop the judicial institution so as to adapt it to the new challenges of the 20th century.

In 1939, therefore, Congress created, by legislation,¹⁷⁶ the Administrative Office of the United States Courts, responsible for determining the budget for federal courts and for administering them. This agency acts under the control and supervision of the Judicial Conference of the United States. The latter is composed exclusively of federally-appointed judges and presided over by the Chief Justice of the United States Supreme Court. He performs an essentially administrative function and is not expected to become involved in the judicial appointment process or to deal with questions relating to the removal of judges.¹⁷⁷ The Judicial Conference appears to be an important agency in the general assessment of the administrative autonomy of federal judges:

The Conference's broad authority arises mainly from the primary statute of the Administrative Office of the United States Courts, which directs the Administrative Office to exercise its responsibilities "under the supervision and direction of the Judicial Conference". Those responsibilities have accreted over the years into a large corpus of functions, including developing the annual judicial branch appropriations request, fixing the compensation of non-judicial personnel, maintaining the statistical reporting systems, and numerous other duties. Many of the duties stem, directly or indirectly, from the responsibility to administer the judicial branch appropriation.¹⁷⁸

The Office prepares a budget, working closely with the appropriate Conference committees. This budget is then reviewed and approved by the Judicial Conference and forwarded to the Office of Management and Budget, in the Office of the President, "for inclusion, as a matter of convenience, into the overall proposed budget that the President sends to Congress".¹⁷⁹ It is worth noting that "the President has a statutory obligation to forward the judiciary's budget request to Congress *without change*".¹⁸⁰ Additionally, there is in the United States "a long tradition that executive branch officials will not 'comment' to Congress on the judiciary's request".¹⁸¹

The administrative autonomy of federal judges, therefore, is the result of an agreement between the principal players which led to legislative recognition of the importance of giving the judiciary

.....
¹⁷⁵ *Ibid.*, at p. 855 (emphasis added).

¹⁷⁶ *An Act to Provide for the Administration of the United States Courts, and for Other Purposes*, c. 501, 53 Stat. 1223 (1939).

¹⁷⁷ WHEELER, at pp. 54-55. This agency is an extension of the Conference of Senior Circuit Judges created in 1922 at the instigation of Taft C.J., "to provide an annual forum where the presiding judges of the courts of appeal could try to impose district court performance by developing plans for intercourt assignments and recommending changes in court operations": *ibid.*, at p. 55.

¹⁷⁸ *Ibid.*, at p. 56.

¹⁷⁹ BERMANT and WHEELER, at p. 848.

¹⁸⁰ *Ibid.*, at pp. 848-849 (emphasis added).

¹⁸¹ *Ibid.*, at p. 849.

control over its administrative destiny.¹⁸² This recognition was not the result of constitutional litigation, although arguments of a constitutional nature, such as judicial independence and the theory of the separation of powers, were put forward to justify this new ordering of administrative responsibilities. In particular, the re-ordering was the outcome of the significant evolution in the duties assigned to the judiciary. Recognizing the multiplication of such duties and their relative complexity, Congress acknowledged that judicial independence could no longer be limited to adjudicative independence:

The argument that administrative independence is a necessary condition for the exercise of decisional independence is a forceful one, but support for it comes from sources other than the text of the Constitution and the history of federal judicial administration. We have provided historical information to show that the administrative independence of the courts from the other branches was not a feature, in theory or fact, of the original organization of the three branches. The progressive amount of independence of the courts from the other branches was *a response to the growing size and complexity of court operations* and to the threat to decisional independence that many judges saw as a by-product of external administration.¹⁸³

This quotation is entirely consistent with the reasoning developed earlier regarding the inevitable evolution of the principle of judicial independence in Canada, based on the formidable expansion of the quantitative as well as qualitative aspects of judicial duties. That expansion necessarily means greater administrative autonomy, as it is understood in the United States and is gradually being understood elsewhere.

4.4.3 Australia

Even a brief review of the situation in Australia requires a distinction to be made between, first, the federal system and the system of states, and between the established constitutional guarantees and the reality of administrative independence in the purely legislative sense.

At the federal level, the Australian constitutional system recognizes the judiciary as one of the principal powers in government, which places the latter in a privileged position as compared to the courts of states in the federation. The provisions dealing with the appointment of federal judges are similar to those in the *Constitution Act, 1867* in Canada, in that judges are appointed by the Governor General in Council, their pay is determined by Parliament and they hold their tenure “during good behaviour”; but with the difference that reduction of a judge’s remuneration is expressly prohibited.¹⁸⁴ The limited protection offered by the Constitution of the Commonwealth, albeit limited, is entrenched and so cannot be altered simply by legislation.¹⁸⁵ This includes certain constitutional principles that may have an impact on judicial independence, such as *nemo iudex in causa sua* (a traditional requirement of impartiality), and certain fundamental legislative documents inherited from the British system, such as the *Act of Settlement, 1701* and the *Commissions and Salaries of Judges Act, 1760*.

.....
¹⁸² This is not to say that the reform was not partially triggered by political tension between the executive and judicial branches. The reform in fact closely followed F.D. Roosevelt’s court packing plan, which he had failed to get through Congress two years earlier.

¹⁸³ *Ibid.*, at p. 860 (emphasis added).

¹⁸⁴ *An Act to constitute the Commonwealth of Australia, 1900* (63 & 64 Vict., c. 12), ss. 71 to 80.

¹⁸⁵ *Ibid.*, s. 128.

These constitutional principles and fundamental documents are relevant in analyzing the independence of the state judiciary, but with the caution that traditionally the state judiciary was not regarded as a “judicial power” in the broad sense resulting, at the federal level, from the separation of powers doctrine. This is the reason why, for example, the principle stated in the leading case *Liyanage*¹⁸⁶ is regarded as not applying to relations between state legislatures and the state judiciary.¹⁸⁷ The constitutions or fundamental laws of the states provide unequal protection for various aspects of the principle of judicial independence. In some cases, this protection is entrenched through a “manner and form” requirement which binds future legislatures.¹⁸⁸ Judges of the state superior courts have greater protection than their colleagues in the lower courts, whose removal is in some cases “at the pleasure” of the executive.¹⁸⁹ In terms of formal constitutional protection, aside from the considerable guarantees provided in certain cases by tradition and convention, it can be said that the judicial independence of state judges in Australia is not very great.

The trend towards an increased degree of independence is however well under way. This movement towards reinforcing the independence of state judges has found considerable support from a landmark judgment of the High Court, which drew certain consequences for independence from the exercise of federal judicial functions by state courts. Following this judgment, legislatures are no longer free to assign to state courts exercising federal jurisdiction duties that would be inconsistent with the “judicial power” as conceived by the Constitution of the Commonwealth.¹⁹⁰ In *Kable*, a majority of four out of six judges ruled that an “integrated judicial system” existed,¹⁹¹ an idea which might in due course result in the courts bringing the independence of state judges to a level comparable to that of federal courts.¹⁹² However, this move toward levelling the constitutional protection of judicial independence is based on the Constitution of the Commonwealth, which refers expressly to security of tenure and financial independence.

What then is the position with respect to administrative independence? Once again, a trend towards increased protection is noticeable. Based partly on an analogy with judicial protection in matters of salary, a significant number of judges have already publicly taken a position in favour of a measure of administrative independence for the courts.¹⁹³ There is no longer any hesitation in treating administrative independence as an essential feature of judicial independence.

.....

¹⁸⁶ *Liyanage v. The Queen*, [1977] 1 A.C. 259, at pp. 289-90.

¹⁸⁷ *Building Construction Employees & BLF v. Minister for Industrial Relations* (1986), 7 NSWLR 352 (New South Wales), *City of Collingwood v. Victoria* (No. 2), [1994] 1 VR 652, 659-664 and 670 (Victoria).

¹⁸⁸ See P.H. LANE, “Constitutional Aspects of Judicial Independence”, in Helen CUNNINGHAM (ed.), *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, (Sydney: Judicial Commission of New South Wales, 2000), at p. 53.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Kable v. Director of Public Prosecutions for New South Wales (NSW)* (1996), 189 C.L.R. 51.

¹⁹¹ Toohey, Gaudron, McHugh and Gummow JJ. The consequences for each judge were slightly different. Also: Kirby J. in *Gould v. Brown*, [1998] H.C.A. 6.

¹⁹² Note, however, that post-*Kable* case law requires a fairly high degree of incompatibility to find that public confidence in state courts was undermined. See for example: *R. v. Moffatt* (1997) 91 ACrimR 557 (open-ended sentencing does not fall outside “judicial” functions) and *Wynbyne v. Marshall* (1997) 117 NTR (legislatively determined jail sentence for absolute liability offence not usurping judicial power).

¹⁹³ Chief Judge of New South Wales Compensation Court: F. MCGRATH, “Judicial Independence”, *ALJ*, (1994), 68, 323; Chief Justice of Tasmanian Supreme Court: Guy GREEN, “The Rationale and Some Aspects of Judicial Independence”, *ALJ*, (1985), 59, 135, at pp. 143-148; Chief Justice of South Australia Supreme Court, L.F. KING, “Minimum Standards of Judicial Independence”, *ALJ*, (1984), 58, 340, at pp. 341-334; also K. MARKS, a former judge of the Victoria Supreme Court: “Judicial Independence”, *ALJ*, (1994), 68 173, at pp. 174-175.

The High Court's judgment in *Kable* also gave a certain conceptual impetus to the development of administrative independence, emphasizing the concept of "public confidence in the independence of the judiciary or of a judge" as a reference point in analyzing duties which it would be unconstitutional for a judge to perform (and which accordingly the legislature cannot assign).¹⁹⁴

With the courts relying on a principle of such a general nature in their approach to the imperatives underlying the constitutional protection of judicial independence, the analogy with financial security becomes all the more applicable. If the remuneration of judges must be guaranteed to preserve their independence in the view of the public, it is hard to argue that a large number of administrative questions should be regarded in any other way.¹⁹⁵ The need is to meet the same imperative, which must be measured in accordance with the public's perception. The case-by-case definition of the consequences of this imperative by the courts is only impeded by interpretative formalism which is rapidly diminishing. From this reference by the High Court to the "public confidence in the independence of judges and the judiciary", it may also be concluded that the relevance of the institutional dimension of judicial independence has become established in Australian constitutional law.

That being said, federal legislation has long been in advance of decisions by the courts on administrative independence, since the federal courts are in general self-administered. Due undoubtedly to its place in the structure of the Constitution of the Commonwealth, it is the High Court of Australia which first enjoyed comprehensive administrative independence.¹⁹⁶ This independence is the result of reforms undertaken and carried out in the seventies and makes the High Court a separate legal person which controls in its own name not only its staff but also the real property that it uses.¹⁹⁷ The Court is administered by an executive director and registrar, who act on behalf of the judges.¹⁹⁸ In the area of finance, the Court gives the Minister of Finance its budgetary forecasts and he or she makes recommendations to Parliament.¹⁹⁹ Forecasts which have been approved by the Minister of Finance must be observed by the Court.²⁰⁰ On these last two points, the principle of ministerial responsibility extends to the budget of the Court and the latter has limited freedom of manoeuvre in using the monies allocated. It is worth noting again in this context that a British-style parliamentary setup can accommodate a system of budget preparation and allocation of funds which would only involve Parliament, without going through the ministerial channel.

It should be mentioned before concluding that the Federal Court and the Family Court also enjoy comprehensive administrative independence, which will not be considered here.²⁰¹

.....
¹⁹⁴ This test of incompatibility derives from *Grollo v. Palmer* (1995), 184 C.L.R. 348. The notion of public confidence is relied upon by three judges, notably McHugh and Gaudron JJ.

¹⁹⁵ However, it should be recalled that in Australia the financial security of the state judiciary remains uncertain. See P. JOHNSON & R. HARDCASTLE, "The Limits of *Kable*" (1998), 20 *Sydney Law Review* 216.

¹⁹⁶ *High Court of Australia Act*, 1979 (No. 137, as amended).

¹⁹⁷ *Ibid.*, Part III.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*, Part V.

²⁰⁰ *Ibid.*

²⁰¹ *Federal Court of Australia Act*, 1976 (No. 156, as amended); *Family Law Act*, 1975 (No. 53, as amended).

The above review of the United Kingdom, the United States and Australia has shown a trend toward the granting of greater administrative autonomy to the courts, particularly in respect of the courts with greater political responsibilities. The political branches in the reference countries have all recognised through legislation the need for greater administrative autonomy based on judicial independence and the separation of powers. In this respect, the evolution of constitutional norms through case law was noticeable only in situations where the executive model of court administration had been retained. The trend noted here is hardly surprising given the international evolution of the concept of judicial independence, which is the subject of the next section.

4.5 THE INTERNATIONAL NORMATIVE CONTEXT OF JUDICIAL INDEPENDENCE

The constitutional requirements regarding judicial independence have changed significantly in Canada since *Valente*, and there is no indication that these changes have come to an end. As the Supreme Court of Canada noted in *Mackeigan*, the essential characteristics of judicial independence defined in *Valente* are not “an exhaustive codification of the elements necessary for judicial independence”, as “the conditions themselves may vary and evolve with time and circumstances”.²⁰² The *Remuneration Reference* puts forward a constitutional imperative that the judiciary’s relations with the other branches of government should be depoliticized. The way in which this imperative will work in practice has still to be defined and that definition will only come from court decisions on constitutional matters if the political branch of government decides not to take the initiative. Either way, for the purposes of our analysis, it is worth looking at the evolution of the norms that have been adopted internationally on the question of judicial independence.

To begin with, it should be noted the *Universal Declaration of Human Rights*, in article 10, and the *International Covenant on Civil and Political Rights*, in article 14, guarantee judicial independence. These fundamental provisions of international treaty law, largely regarded as forming part of the *jus cogens*, guarantee judicial independence beyond the particular context of criminal proceedings. The Supreme Court’s judgments in *Beauregard* and the *Remuneration Reference*, which establish that the guarantee expressed in the *Charter* is only an example of a broader principle, are thus very much in keeping with international law.

However, beyond this universally recognized general rule, international legal instruments do not provide much guidance. In order to interpret and bring these fundamental documents to life, therefore, it is natural to turn to what is now often called “soft law”, that is statements of principle which are regarded by the courts as having persuasive force. These international statements take the form of various instruments such as declarations, directions and principles, based on comprehensive and quasi-universal reflection on the requirements of judicial independence. There has been a significant acceleration in the evolution of research and analysis in this area in the last 25 years. The result of this analysis is a valuable normative heritage that cannot be ignored.

.....
²⁰² *Mackeigan*, at para 56.

These soft law instruments have recognized the importance of court administration in fleshing out the general principle of judicial independence. These instruments include the *Syracuse Draft Principles on the Independence of the Judiciary, 1981* (International Association of Penal Law and International Commission of Jurists), the *Tokyo Principles on the Independence of the Judiciary in the Lawasia Region, 1982* (LAWASIA Human Rights Standing Committee), the *International Bar Association Code of Minimum Standards of Judicial Independence, New Delhi 1982* (International Bar Association); the *Montreal Universal Declaration on the Independence of Justice, 1983* (World Conference on the Independence of Justice), the *UN Basic Principles on the Independence of the Judiciary, 1985* (General Assembly endorsement), the *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, 1995* (Conference of Chief Justices of Asia and the Pacific Region), the *Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, 1998* (Commonwealth Parliamentary Association, Commonwealth Magistrates' and Judges' Association, Commonwealth Lawyers' Association and Commonwealth Legal Education Association), the *European Charter on the statute for judges, 1998* (Council of Europe), the *Beirut Declaration 1999* (First Arab Justice Conference, Arab Center for the Independence of the Judiciary and the Legal Profession, in cooperation with the Center for the Independence of Judges and Lawyers) and the *Cairo Declaration on Judicial Independence 2003* (Second Arab Justice Conference, Arab Center for the Independence of the Judiciary and the Legal Profession, in cooperation with the United Nations High Commissioner for Human Rights and the United Nations Development Program).

These international instruments all recognize the importance of administrative autonomy and consider at least some aspects thereof to be requirements of judicial independence. Figure 4.1 provides the details of such requirements, which concern court financing, budgeting and administration.

The persuasive force of these international documents is recognized not only by international courts applying international law but also by Canadian courts applying domestic law, especially constitutional law. The Supreme Court actually refers to such documents when determining the content of the principle of judicial independence. In the *Remuneration Reference*, the Supreme Court referred to the *Draft United Nations Universal Declaration of the Independence of Justice*.²⁰³ More recently, in *Mackin*, the Supreme Court referred to the *Montreal Universal Declaration on the Independence of Justice*.²⁰⁴ The phenomenon is easily explained, since the reasons for defending and protecting judicial independence usually transcend domestic legal systems.²⁰⁵

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²⁰³ *Remuneration Reference*, at para 194.

²⁰⁴ *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, at para 35.

²⁰⁵ Note that it will be unnecessary to address the issue of the relationship between Canadian domestic law and international law, which has been the object of much debate since the decisions in *Baker and Suresh (Baker v. Canada (Minister of Citizenship and Immigration))*, [1999] 2 S.C.R. 817; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3. The position taken here is that judicial independence in any system is grounded in legal principles that are all undoubtedly part of Canadian constitutional law.

Figure 4.1 International Soft-Law Requirements

| | |
|----------------|--|
| Financing | <ul style="list-style-type: none"> • Must be sufficient to enable the judiciary to perform its functions (<i>Syracuse 24, European Charter 1.6, UN Principles 7</i>) . . . to the highest standards (<i>Latimer House II 2</i>); • It is a priority of the highest order for the state to provide adequate resources to allow for the due administration of justice (<i>Tokyo 13, Montreal II ix 2.41</i>); • The amount allotted should be sufficient to enable each court to function without an excessive workload (<i>Syracuse 25, Beijing 37</i>); • The judiciary must have an opportunity to be heard or must participate in the determination of the envelope (<i>Syracuse 25, European Charter 1.8</i>); • The State shall guarantee an independent budget for the judiciary (<i>Beirut 2, Cairo 1</i>); |
| Budgeting | <ul style="list-style-type: none"> • The budget of the courts shall be prepared by, in collaboration with or upon the advice of the judiciary (<i>Beijing 37, Montreal II ix 2.42, European Charter 1.8, Beirut 2, Cairo 1</i>); |
| Administration | <ul style="list-style-type: none"> • The main responsibility for Court administration shall vest in the judiciary (<i>Montreal II ix 2.40</i>) or in a joint body (<i>New Delhi 9, Beijing 36</i>); • This includes appointment, supervision and disciplinary control of administrative personnel and support staff (<i>Beijing 36</i>) and control of the monies allocated to the judiciary (<i>Latimer House II 2</i>); |

In several constitutional systems, federalism has played an important part in the development of judicial independence, simply because of the need felt by the political branch of government to entrust litigation involving the division of powers to an independent arbiter. The concept of the separation of powers has also played an important role in several systems, when it is necessary to determine the relations between the courts and other branches of government. The concept of separation of powers, which does not require a dogmatic separation of functions, relies on the assumption that only power is able to control power. Power depends, among other things, on independence. In all systems universally, the rule of law and the protection of human rights have provided sufficient reasons for establishing and protecting an independent judiciary. Without an independent judiciary there can be no rule of law, even in the most limited understanding of the concept.

In reviewing the reasons underlying the very idea of protection for judicial independence, (i.e.: federalism, the separation of powers, the rule of law or constitutionalism, and the protection of human rights), one sees that these are fundamental principles of the Canadian Constitution, to which the Supreme Court unhesitatingly attaches legal consequences.²⁰⁶ According to the Supreme Court, “observance and respect for these principles is essential to the ongoing process

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²⁰⁶ See generally *Secession Reference*, at paras 49-54. On the separation of powers under the Canadian Constitution, see *New Brunswick Broadcasting*, at p. 389 and *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70.

of constitutional development and evolution of our Constitution as a ‘living tree’.²⁰⁷ In the context of judicial independence, “soft law” offers ways of giving concrete form to these general principles. The general principles give rise to the constitutional imperative of depoliticizing the judiciary’s relations. These normative positions offer ways of giving effect to this imperative. The primary responsibility for deciding how the imperative will be implemented belongs to the political branches of government. But it is the courts which ultimately have to decide whether a particular legislative arrangement is constitutionally acceptable.

4.6 CONCLUSION

From the foregoing analysis of the constitutional position, seven conclusions may be drawn which can serve as guiding principles in the context of alternative models of court administration:

1. The constitutional position can only be analysed in the dynamic context of the evolution of the role of the judiciary under the Canadian constitution. Over the last 25 years, there has been a formidable increase in judicial responsibilities and an ever-growing involvement of courts in the resolution of socio-economic questions. Institutional arrangements in matters of court administration have not followed suit.
2. The inherent jurisdiction of courts of law should not be expected to form the basis of fundamental changes in institutional arrangements. However, inherent jurisdiction is based on the rationale that courts must have all the powers necessary for the exercise of their jurisdiction. Inherent powers can therefore be expected to evolve with judicial responsibilities, along with the constitutional requirements of judicial independence.
3. There are no constitutional impediments to the adoption of models of court administration that involve a high degree of judicial autonomy. The federal distribution of powers, the institutional arrangements peculiar to the parliamentary tradition and the conventions of responsible government create no obstacle to the adoption of such models.
4. Even though constitutional requirements do have a harmonizing effect at the level of principles, federalism does allow for a measure of provincial autonomy in the design of models of court administration.
5. The constitutional imperative of depoliticization of the relations between the political branches and the judicial branch very likely calls for a greater measure of administrative independence than is afforded by the models currently in place.
6. A brief comparative review of the usual reference jurisdictions, the United Kingdom, the United States and Australia, shows a clear trend toward governments granting greater administrative autonomy to the courts.
7. Finally, statements of principle from the last 25 years of international “soft law” instruments have recognized the importance of administrative autonomy in promoting and preserving judicial independence and clearly support a move in Canada toward a limited judicial autonomy model of court administration.

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²⁰⁷ *Secession Reference*, at para. 52.

CHAPTER 5

WHAT CRITERIA SHOULD BE USED FOR ASSESSING ALTERNATIVE MODELS?

The Models of Court Administration project had its genesis in three related concerns and assumptions of members of the Canadian Judicial Council:

1. That the abilities of Canadian trial and appellate Courts to carry out their responsibilities and objectives in an effective and efficient manner are negatively impacted by both the levels of resources available for court administration and the manner in which those resources are utilized;
2. That improvements could be made to both the levels of court resources and the manner in which they are utilized; and
3. That many of the required improvements could be most effectively and efficiently achieved if there were a change in the role of the judiciary in decision-making related to court administration.

An important purpose of the first round of interviews was to get a first impression of whether or not the interviewees considered the above assertions to be valid. It is important to note that—although there was considerable variation in opinions expressed in the first round of interviews—there was considerable concern and agreement expressed regarding the above three premises, certainly enough to warrant further effort to improve on the current situation.

It is also important to note that much of the discussion—particularly discussion of how the current “executive” model negatively impacts the ability of the Courts to carry out their responsibilities—was phrased in fairly general terms. In the second round of consultations, which was intended to assist in developing clear and practical conclusions and recommendations, it was necessary to delve deeper using a more specific set of questions and a more specific framework and language for describing the specific nature of those impacts.

In particular, it was critical to clarify the actual and likely impacts of current and alternative decision-making models in each of the areas of court responsibility and performance that are listed in Figure 5.1.

The goals and objectives shown in Figure 5.1 have been identified through our review of the international literature, the related experience of the authors of this report, and the recent interviews within Canada.

Figure 5.1**Key Institutional Goals and Objectives**

1. To better preserve judicial independence and the institutional integrity of the judiciary as a separate branch of government
2. To enhance public trust and confidence in the judicial system
3. To improve the quality and delivery of judicial services, more specifically:
 - a) To make court dispute resolution more accessible (esp. re: reduced costs, more familiar and effective process, more timely)
 - b) To ensure a more timely pace of litigation (all stages)
 - c) To enhance the quality of dispute resolution (equality, fairness and integrity—process and outcomes)
 - d) To enhance court transparency
 - e) To enhance the environment for conducting the work of the Court (litigants, judiciary, lawyers, mediators, other participants)
4. To develop within the Court an enhanced capability and culture of continuous improvement and reform, more specifically, by ensuring:
 - a) Clear direction and leadership (including setting of objectives and measuring performance and evaluation)
 - b) Clear accountabilities and strong partnerships (including partnerships with the bar and external service providers)
 - c) Effective and efficient operational strategies, tools and practices (including: rules, practice directions, procedures)
 - d) Sufficient well-trained personnel and adequate resources (including: judiciary, advocates, mediators, parties, registry staff, general public)
 - e) Effective support systems (including: court management information systems, communications systems, financial systems)

The first three objectives focus on the Courts as distinctive institutions serving fundamental purposes of democratic government (objective #1) and doing justice in individual cases (objective #3). The second objective recognizes the need to secure and maintain public support for the administration of justice. All three objectives relate to the Courts' impact on society and other aspects of their external environment. In the terminology employed by studies to evaluate alternatives, these are typically called output measures.

The fourth objective—including all five of its components—relates to what are called process measures. They identify whether and how well the Courts perform the full set of management functions and processes that are common to all effectively operating modern organizations. This fourth set of objectives is particularly important given the current ever-changing social, technological, economic and political environment. Even more than before, Courts must develop the internal capacity to quickly recognize the need for change and to respond to that need effectively and efficiently—all the while protecting the longer term values and functions for which they have particular responsibility.

It is important to note that the objectives in Figure 5.1 constitute the criteria to be used within the project to evaluate the proposed alternative models of the judicial role in court administration decision-making. More specifically, models will be evaluated in terms of which one best facilitates attainment of these objectives.

In particular, the first round of interviews identified a number of concerns that the current (executive) administrative model undermined the achievement of Objective #1 (preserving the independence of the judiciary). For instance:

A number of participants expressed puzzlement that Courts experience less independence than legislative²⁰⁸ offices such as Auditors General and Privacy Commissioners. These participants observe that while Courts must provide the ultimate check on executive authority, they remain vulnerable to the executive with respect to their administrative resources.

The round one interviews also elicited specific comments about the need for alternative models to better facilitate the achievement of Objective #2 (enhance public trust and confidence) and Objective #3 (improve the quality and delivery of judicial services). For instance, many chief justices felt that Courts need enhanced planning capacity in order to determine if they are providing sufficient/ optimal access to communities. However, there were considerably fewer comments made about the likely impacts of new models on the Courts' ability to achieve objectives #2 and #3. This result may have occurred because the questions in the interviews did not specifically address the distinct types of court objectives shown in Figure 5.1. It is also possible that, because the executive model rarely provides judges with the authority or capacity to achieve the objectives listed in #3, comments regarding these objectives were less common.

Similarly, specific examples were forthcoming about the deficiencies of the current model in ensuring the desired level of judicial involvement in administrative processes identified within Objective #4 (for instance, setting clear direction and leadership, determining the size and distribution of the court budget, designing court facilities).

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²⁰⁸ In this report, the terms "legislature" and "Legislative" are used in a general sense to refer to Legislatures, Parliament and the National Assembly.

5.1 ADDITIONAL CONSIDERATIONS RELEVANT FOR CHANGE— AND FOR CHOOSING ONE MODEL OVER ANOTHER

The key criteria for choosing one model or another, as indicated above, is whether it does a better job of achieving the goals and objectives of court administration. That said, we have identified a number of additional general considerations directly relevant to, first, whether a change should be contemplated, and second, which model should be chosen over others. The most important are listed here:

- Innovation in court administration is a function of institutional confidence and administrative competence.
- The willingness to innovate increases with the Courts' confidence that they can achieve innovations and control their direction.
- As a result, innovation in the courts is more readily observed in systems as the length of time that they have been administratively autonomous increases. Thus for example,
 - The South Australian Courts have gone further in setting their own administrative performance targets now that they have operated for several years under an autonomous Courts Administration Authority.
 - American state Courts have been more innovative when they are able to set their own priorities (e.g. gender bias and racial bias task forces were set up within the court systems of many states, while this was not an option in Canada where law societies and bar associations typically took on this work).
 - The Singapore court administrative system is highly innovative (not only technologically but in ways associated with responsiveness to clients and the public) even while its legal system is more conservative.
- Transparency is greater when innovation is developed by an administratively autonomous system. Since innovation does not require direct negotiation with government officials to whom court administration is subordinate, the appearance of justice is not compromised—but in fact enhanced—by innovation efforts.
- As a result, Courts can publicize their innovation initiatives, increasing public knowledge of these efforts.
- Real accountability is therefore greater under more autonomous models of court administration. The public is in a position to assess the effectiveness of court administrative activity in general and innovation in particular, so that issues can be brought to the attention of the Legislature. This approach to accountability is very different from the classical theory of public management through a chain of command (Legislature to cabinet to minister to deputy minister).
- Given the complexity of court administration, and the delicate relationship between government and judiciary derived from the principle of judicial independence, the existence of greater accountability through a more open and autonomous model should not be surprising to observers of modern management processes.

- Initial adoption of new organizational or structural frameworks often emphasizes the need to maintain stable operations as broad reorganization occurs. Thus for example the test of successful court administrative reorganization is whether parties and counsel are able to access the services of counter clerks without disruption (“without noticing anything different”).
- However, if court administrative reorganization does not yield medium- or long-term changes that enhance effectiveness and/or efficiency, participants and stakeholders will question the value of the effort.
- Therefore, the onus is on those advocating changing models of court administration to ensure that the effort has been worthwhile.
- At the same time, change can produce benefits regardless of the direction of change, because openness to change is often more important than the specific changes themselves.²⁰⁹
- The most important benefit of a separate and independent court administration service is the ability of the Courts to set their own priorities. This was the main message conveyed in Ireland by career court administrators who worked under the executive model and under a Courts Service created in the 1990s.
- This ability to set priorities enhances the willingness as well as the capacity of the Courts to collaborate with other key actors in the justice system. Thus independent court administration does not isolate the Courts, but enhances the confidence of the judiciary and court personnel that external linkages can be created in ways that do not compromise the court system.

And finally,

- To minimize the uncertainty and risk associated with any restructuring initiative and thereby encourage support for positive change, it is important that developing and implementing the recommended model build on lessons learned from the innovation in court administration ongoing in Canada and that has taken place around the world.

5.2 CONCLUSION

Three conclusions follow closely on the discussion set out above:

1. First, increased use of court performance goals would enhance court administrative *efficiency and effectiveness* under any of the models.
2. Second, setting clear administrative goals and objectives—and regularly monitoring and openly reporting performance in terms of those goals and objectives would provide an effective process for ensuring *accountability* under any of the alternative models; and
3. In particular, by providing an effective accountability mechanism, administrative goals and objectives would provide the strong mechanism need for ensuring effective accountability to a broad range of communities under judicial led-models of decision-making.

While establishing the criteria for evaluating models of court administration is a necessary step in the analysis, such criteria take on meaning only when the various decision-making settings and stages of court administration are clarified. It is to that task that we now turn.

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²⁰⁹ We owe this observation to Maureen Solomon, one of the most experienced caseflow management consultants in the United States.

CHAPTER 6

WHAT IS THE SCOPE OF COURT ADMINISTRATION DECISION-MAKING?

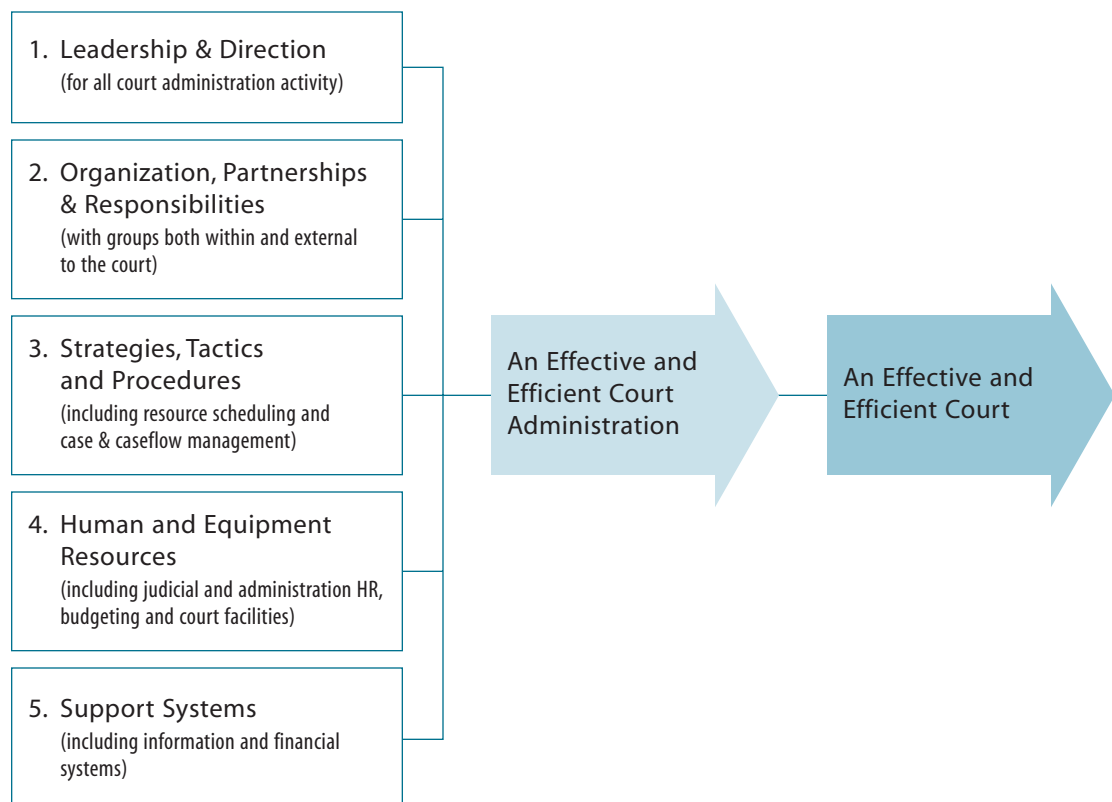
From our earlier interviews, it was also clear that different respondents have different definitions of what constitutes “court administration” decision-making. At the very least, they understandably emphasize certain key areas, such as court budgeting. However, this focus may well result in less attention being paid to other important areas that are required for effective and efficient court administration.

In the second round of interviews, it was important to ensure that a consistent definition of the scope of court administration was employed. It was also important that this definition include the full range of decision-making and activities within the area.

6.1 DECISIONS AND ACTIVITIES WITHIN FIVE KEY AREAS

For a Court to achieve the objectives stated in the previous Chapter, it must develop and maintain effective and efficient administration activities in the five areas shown in summary fashion in Figure 6.1 and in more detail in Figure 6.2.

Figure 6.1: Five Elements of an Effective and Efficient Court Administration



6.1.1 Leadership and Direction

Clear and strong leadership is a key to developing an effective and efficient court administration. In particular, leadership is required to develop within all groups a commitment to working toward a shared vision and set of objectives. This leadership would, for instance, set the standards the Court should achieve regarding access to justice, time limits for disposing of different types of cases, other case management time standards, and workplace standards for judicial and administrative staff and the public. The leadership would also review performance, continuously assess changes in the level and nature of caseloads and the developing alternatives for dealing with those cases, and ensure the carrying out of the other types of change-management activities necessary to ensure the creation of a learning environment and a culture of continuous improvement.

6.1.2 Organization and Responsibilities

Within an effective court administration, accountabilities and responsibilities for all essential tasks would be clearly defined and allocated to the appropriate groups. Of particular interest would be defining the appropriate organizational structures within the Courts (e.g. a Unified Family Court) and the creation and maintenance of partnerships with external public and private groups (e.g. law enforcement, corrections, court workers, diversion and alternative measures, mediators, social and health support groups, community care and supervision groups). This area would also include defining and ensuring an appropriate role for different public groups in identifying needs and reviewing court administration responses.

6.1.3 Effective Strategies, Tactics and Procedures

Continuous efforts would be made to facilitate and improve measures to ensure that court administrative units combine and utilize all available resources in ways that best provide the services required to achieve objectives. This will include ensuring that significant resources are made available for development and implementation—at the corporate, management and individual level—of change and re-engineering efforts to ensure a responsible and accessible court system. These may include, for example, adoption and modification of effective case and caseload management practices, rules of Court, and strategies (e.g. court connected mediation, settlement weeks), and the focusing of resources on priority court functions and case requirements.

6.1.4 Resources

Having available adequate levels and types of resources is critical to an effective court administration. This would include developing a professional court administration staff through appropriate hiring, training, supervision and development of systems and environments for rewarding positive performance. Considerable attention would also be paid to developing court facilities that support the particular judicial and administrative processes chosen and planned for the Court. Care would also be given to ensure the availability and maintenance of the general and special types of equipment (e.g. modern automated court management information systems) needed to support the work of the Court.

Of particular concern in this area would be court administrative decisions and activities at all stages of court budgeting processes that result in the availability of sufficient resources of all types to achieve court objectives.

6.1.5 Support Systems

Finally, the work of the court administrative units must be facilitated by efficient management and administrative support systems, all of which are designed to best support court decision-making processes. This will require the development and maintenance of, for instance: case and caseload management information systems (manual and automated); communications and media systems, and financial accounting systems.

Effective and efficient processes in each of these areas are essential for a Court to achieve its goals and objectives. In addition, decisions and activities in each area often have significant impacts on the results of decisions and activities in other areas. For instance, case and caseload management strategies can have a significant impact on the level and types of judicial, facilities and financial resources required by a Court. Similarly, committed leadership is recognized as an essential foundation of caseload management systems. At the same time, the success of any case management system is directly dependent on the availability of timely and complete information from automated information systems—systems which, in turn, cannot be developed without adequate financial resources. All elements are essential to an effective court administration.²¹⁰

In considering how and whether Courts might benefit from alternative models of administrative decision-making, it is important to consider possibilities in all five areas. In particular, it is important to go beyond the budget negotiation or budget expenditure activities that have often been the focus of earlier and current discussions. As shown in Figure 6.2—which lists some of the more prominent specific processes, functions and areas of decision-making within each of the five elements—court budgeting comprises only one of many areas of “court administration” decision-making.

.....
²¹⁰ It is recognized that while these five elements are necessary for the most efficient and effective organization, they are often missing (in whole or in part) from many organizations with which we come into contact every day, whether public or private, charitable or profit-making. An organization may have a clear idea of its objectives but lack effective strategies and procedures for putting them into practice. Another organization may have lost sight of its objectives amidst the pressure of daily operations. Still others may lack the support systems to evaluate their performance, or the partnerships necessary to achieve their objectives. For our purposes, these five elements provide a check list to evaluate not only the effectiveness of current court administration, but also a means to assess the participation of judiciary and government in both the current model and possible alternatives.

Figure 6.2: Processes and Functions within Each of the Five Key Elements of Effective Court Administration: Detailed Description

1. Leadership and Direction

Including:

- developing a clear and shared vision
 - setting specific objectives and standards in all areas
 - ensuring visible support from all groups on which the success of court administration depends
 - maintaining an awareness of developments in the environment that might facilitate or hinder court administration activities
 - monitoring and evaluating progress made toward those objectives
 - strategic planning
 - adjusting policies and operations to ensure continuous improvement and effective change management.
-

2. Organization and Responsibilities

Including development and implementation of:

- identification of which groups and individuals within and outside court administration and judiciary can most effectively contribute to the achievement of court administration objectives
 - clear accountability and reporting structures within the court administrative units
 - clear statements of responsibilities within the court administrative units and judiciary
 - developing partnerships within the Court (e.g. between and among the various levels of Court: e.g. defining role of the puisne judges in policy development)
 - effective partnerships with external groups (e.g. bar, Attorney General, government IT and HR groups, NGO's)
 - effective division of work between internal and external persons and groups based on relative effectiveness and efficiency in achieving court administration objectives—and building on existing and previous competencies and experience
 - effective contributions from groups outside the court administration and judiciary
-

3. Effective Strategies, Tactics and Procedures

Including identifying, developing and implementing:

- the services that should be offered (both traditional and innovative)
 - the processes and functions that must be formed to provide those services
 - case and caseload management policies and procedures
 - the most effective tactics and procedures for delivering those services (including business re-engineering, best practices, learning environments and cultures of continuous improvement)
 - methods to focus services and resources on priority areas of need
 - processes to tailor tactics and procedures to the particular needs of different types of clients and cases
 - Rules of Court and Practice Directions
-

Figure 6.2: Processes and Functions within Each of the Five Key Elements of Effective Court Administration: Detailed Description (continued)

4. Resources

Including development and maintenance of:

- Human Resource Management
 - adequate staffing levels
 - identifying gaps in the competencies of staff in relevant areas
 - improving competencies where required (including e.g. training, mentoring)
 - succession planning
 - ongoing supervision
 - payroll
 - Other Equipment and Facilities
 - office space
 - office equipment
 - transportation
 - court physical security
 - Budgeting Systems
 - budgeting
 - budget preparation processes linked to objectives
 - budgets structured to reflect policies and priorities
-

5. Support Systems

Including development and maintenance of:

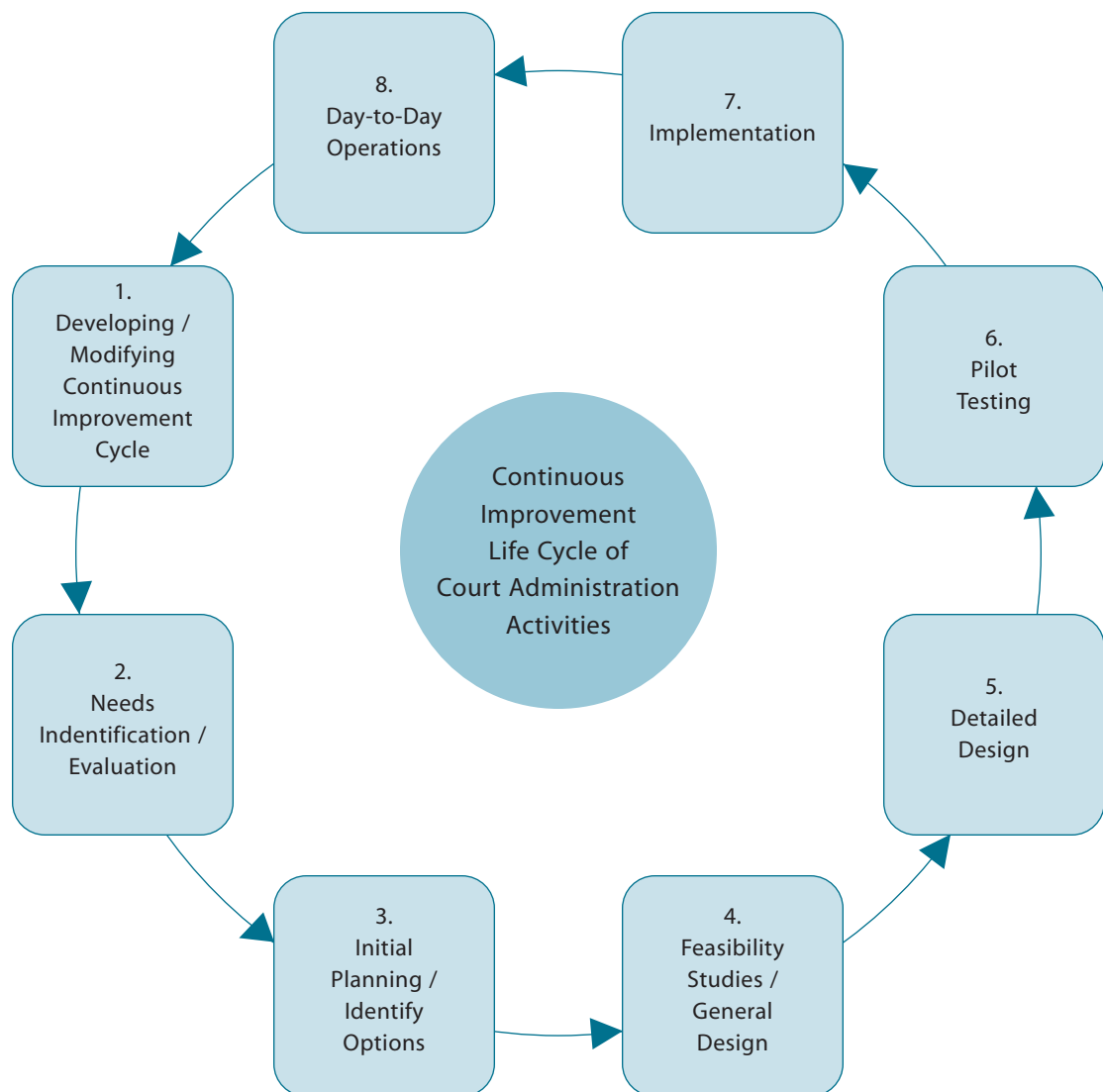
- Financial Systems
 - accounting
 - encumbrance accounting reports
 - financial controls
 - Management Information Systems
 - Communications and Media Systems
 - within court administration
 - between court administration and judiciary
 - among different Courts
 - between the Court and partners inside and outside the Court
-

6.2 CONTROL OF DECISIONS AT WHAT STAGE OF THE PLANNING/OPERATIONS CONTINUUM

Each of the activities shown in Figure 6.2 has a second dimension which is important to consider when determining the appropriate role of the judiciary in decision-making regarding that activity. That dimension relates to the different “stages” of decision-making that could be involved in each of those activities.

Figure 6.3 presents a generic visual description of the different stages of the continuous improvement cycle of planning/design/implementation/operations/evaluation that could apply to most court activities.

Figure 6.3 Stages of Decision-Making



Different court administrative areas will typically follow variations on these steps. For instance, steps relevant to the court budgeting/expenditure area might include those listed in Figure 6.4.

Figure 6.4

Example Steps in the Budgeting/ Expenditure Life Cycle

1. Developing/improving the process to be used in preparing and managing a Court's budget (including: what should be the involvement of the judiciary, Attorney General, other government officials and the public in decision-making at each step; what information should be considered at each step; the timing of each step; and what types of manual and operational systems are to be used)

2. Identifying needs for financial and other resources (including: reaching a consensus on future developments likely to affect court caseloads and workloads, likely future changes to court case and caseload management practices, potential impacts of new technology, potential new partnerships for delivering services, performance levels to be achieved)

3. Initial exploration of general budgetary approaches and options (including: whether to restrict options to those involving limited or no growth or growth to a specified maximum percentage; whether to explore a number of options)

4. Preparation of draft scenarios (including: the discussion of priorities and determining preliminary options)

5. Setting of priorities and the preparation of detailed prioritized budgets

6. Final review and approval of the budget

7. Modifying and deciding on the size and composition of the budget

8. Approving and making expenditures within the budget

9. Bookkeeping and other accounting practices to document expenditures

10. Reviewing priorities, preparing supplementary budgets and making expenditures outside the budget (including in emergencies)

11. Monitoring actual and budgeted financial performance

The steps that are used will, of course, vary from one jurisdiction to another (and perhaps between different court systems within the same jurisdiction). The important point to consider is, however, what decision-making role the judiciary should properly play at each stage, including whether different decision-making roles for the judiciary are appropriate for different steps. The appropriate model of judicial involvement in decision-making might, for instance, vary depending on broad criteria such as whether the stage of decision-making can be characterized as: policy vs. operations or general design vs. detailed design. For instance, in the above budgeting example, it might be appropriate for the judiciary to control some stages, while a more joint decision-making process might be appropriate for other stages (being less contentious); in turn, roles for other parties (e.g. the Legislature or a government official or an independent commission) in the decision-making process might be seen as appropriate at other stages.

6.3 CONCLUSION

The analysis above leads to several key conclusions. In particular:

1. Different types of court administrative decision-making might be best made under different “pure” models. The possibility was therefore opened to having the optimal model for the totality of court administrative decisions be a combination of different “pure” models.
2. More specifically, if a model with increased judicial control were the most appropriate for many areas or stages of court administrative decision-making, it would be unlikely to be most appropriate for all. That being the case, the most likely option would be a “limited” judicial autonomy model (i.e. one in which other (non judicial autonomy) models of decision-making would apply to court administration decisions outside certain limits).
3. The existence of different stages of court administration decision-making also opened up the possibility of improving the optimal (set of) models by incorporating yet another type of alternative model for certain stages of decision-making. As will be seen later, our recommended solution does just that, by adding a “commission” model to handle disputes between the judiciary and other groups.
4. Finally, given the wide variation in the levels and nature of different types of court administrative activities from one jurisdiction to another, different court jurisdictions may find it appropriate to adopt variations of the model(s) felt most appropriate in other jurisdictions.

CHAPTER 7

WHAT ROLES DO OTHER GROUPS HAVE IN COURT ADMINISTRATION?

7.1 DISCUSSION

Much of the attention historically has been placed on the decision-making role of the judiciary in court administration vis-à-vis the role of the Attorney General—with the role of the Attorney General deriving from both his or her special role *qua* Attorney General with responsibility for court administration and his or her general role as representative of the government with respect to matters that affect all parts of government. This focus results, for instance, in discussion of whether the Attorney General represents an effective advocate for court administration matters either “at the cabinet table” or at the most senior government-wide committee. Discussions therefore most often considered how to divide up control of decision-making in administrative matters between only two groups: the judiciary and the Attorney General.

However, in the last decade or two, this dual decision-maker framework has lost much of its relevance. Instead, changes in government organizational policies, changes in technology and changes in the types of services offered within the court arena have resulted in many more stakeholders demanding a role in decision-making.

First, consider the special “justice/social policy” role of the Attorney General. Clearly, whatever court administration model is chosen, that model must respect the importance of the Attorney General’s important policy and operational responsibilities in fulfilling the government’s social justice agenda. However, from an administrative and functional perspective, governments and society increasingly see benefits in treating crime prevention, private security, law enforcement, access to justice, prosecution, Courts, prisons and various forms of community-based treatment and corrections as all being part of a larger *criminal justice system*. Similarly, civil Courts are seen as only one element of a broader *civil justice system* that includes various forms of compliance-enforcement mechanisms and many private and court-connected ADR mechanisms. Finally, Family Courts, especially Unified Family Courts, are seen as best fulfilling their role if they are more closely related to the social and community services traditionally offered by other agencies. The result is that what once were seen as solely “court” administrative decisions are now more likely to be seen as criminal justice “system”, civil justice “system” or family justice “system” decisions.

Since many of the other groups involved in these systems do not report to the Attorney General (or even the provincial government), the Attorney General often finds himself or herself as one of many senior officials (e.g. Solicitor General, Correctional Services, Justice, Community Services, Consumer and Commercial Relations) at the table in Cabinet and in senior government meetings to discuss key policy issues and operational issues—such as what “justice system” policy objectives should be emphasized in setting criteria for allocating the percentage of the available budget that should go to the Courts and the percentage that should go to other components of the “system”,

or whether it would be best to build a court management information system or an “integrated justice” information system. Additional decision-makers are brought into the discussion when court administrative matters affect or require changes to the local operations of groups such as the police—for instance, when considering changes to the scheduling of criminal cases.

Second, there have been major changes with respect to the broader role of the Attorney General as responsible for representing (to the Courts) government policies and practices that have direct impacts on court administration. A number of governments some time ago took responsibility for setting certain policies and operational guidelines away from Attorneys General and gave them to central government agencies. The most prominent examples were in the areas of human resource management (e.g. the setting of job classifications, pay scales of staff, screening appointments), information systems (e.g. whether or not to automate, and if so, whether to build separate or integrated justice systems), communications systems (e.g. internet access policy), facilities (e.g. whether or not to plan and build courthouses, including possible use of public/private partnership strategies) and budgeting processes. Although the Attorneys General were responsible for implementing the policies and guidelines, any influence the Court might have had on what policies and guidelines were being set would have been indirect if the Courts had interacted only with the Attorney General. To have a more significant impact, the Courts would have had to interact with officials from the central agencies. This is certainly relevant to the question whether general government policies regarding overall budget restrictions should apply in equal measure, or at all, to the Courts.

More recently, however, many governments have extended the direct influence of central agencies on court administration matters by giving those agencies a direct role in more operational activities. Thus, meetings to discuss operational issues related to court administration are more and more likely to be attended—and in some cases, led—by officials from central agencies. For instance, in some jurisdictions courthouse planning committees are chaired by a centralized facilities/infrastructure development agency, with the Attorney General being one of many interests at the table. Similar situations often result with information systems planning and development committees. Of further concern is that at times the third party agency is seen as treating groups (particularly other groups within government) other than the judiciary as the primary client to be satisfied. In certain instances, they may even refuse to recognize that the judiciary is in fact a client.

The increasing complexity and globalization of certain administrative functions has also to some extent been responsible for the centralization of decision-making within governments with regard to general policies and guidelines affecting court administration. For instance, the increased costs and complexity of developing automated information systems requires the following of particular best practice procedures and the incorporation of global standards in planning and developing such systems. This has made it much more difficult for an individual Court to “go its own way” in choosing its own computer software or hardware. However, it has also made it more critical that Courts develop mechanisms to understand the IT development process, to be keenly aware of the points in the development process at which influence can be directed, and to take advantage of those opportunities. To do all of these tasks will require more direct communication with the groups within central government agencies responsible for designing and implementing the IT development process. Indeed, it may be necessary for Courts to take control of certain, if not all, aspects of IT development and operations, particularly given security and confidentiality concerns.

At a minimum, better communication would result in improvements to the process that would ensure that judicial input is more appropriately incorporated at key points—in particular, during the early stages of system development when key decisions are made that have a significant impact on all future decisions. (For instance, should the e-filing component be developed before the case management component, or the judgment enforcement tracking component?)

Finally, Courts themselves are evolving into organizations that best achieve their objectives through mechanisms that involve groups that traditionally were seen as outside either the Courts or the Attorney General's purview. Courts are increasingly seeing the advantages in certain areas of utilizing decision-making processes that involve more co-operative and consultative processes—for instance, with the Bar on various “operations” committees. At the same time, civil and family Courts are increasingly incorporating mediation and other forms of ADR as new steps in the dispute resolution process. Criminal Courts are increasingly experimenting with sentencing processes (e.g. circle sentencing) and different types of sentences (e.g. conditional sentences and treatment options) and different kinds of Courts (e.g. Drug Courts, Mental Health Courts, Family Violence Courts) that require for their success direct involvement of groups that do not fall within the ambit of the Attorney General's department, and often are not part of government at all. The most obvious examples are individuals and firms and associations offering mediation and arbitration services, Aboriginal groups, and community treatment agencies.²¹¹

In conclusion, one cannot help but have concerns that the influence of the judiciary over key *court* administrative policy and operational decisions made within government—as exercised through the Attorney General—has diminished. It is also clear that changes in the technical environment and changes in the evolving way in which Courts perform their functions require consideration of a decision-making model that addresses the role of many public and private groups other than the Attorney General.

Figure 7.1 presents examples of groups whose roles in interacting with the courts must be addressed in any model.

Figure 7.1

Groups with Potential Roles in Interacting with the Courts

- | | |
|--|--|
| • Judiciary | • Victims', children's and other advocacy groups |
| • Attorney General | • Treatment providers |
| • The bar | • Correctional officials (for both remand and sentenced offenders) |
| • Central Government Agencies <ul style="list-style-type: none"> – Information Technology – Budgeting – Human Resources – Facilities | • Providers of ADR services (incl. mediation and arbitration) |
| • Law enforcement officials | • The general public and specific groups within the general public—especially with regards to identifying needs and assessing administrative response. |
-

.....
²¹¹ However, here it should be noted that continuing participation of such groups in consultative processes is often contingent on continuing government funding supporting their operations.

7.2 CONCLUSIONS

The analysis of Chapter 7 is important to any consideration of models other than the executive model. Based on the analysis in this Chapter, we have concluded as follows:

1. Given the increased role of other government departments and others in court administration decision-making, it is inappropriate to assume that the Attorney General exerts as strong a role in court administration decisions as before. This has implications for the degree to which the executive model (with the Attorney General representing the executive) should be seen as continuing to be the most appropriate.
2. Similarly, given the increasing influences of other groups, the ability of the Attorney General to argue on behalf of the courts (under the executive model) is reduced.
3. The ability of the Courts to develop direct relationships with key stakeholder groups has been impaired by the executive model of court administration.

CHAPTER 8

ALTERNATIVE MODELS: DIFFERENT LEVELS OF CONTROL OVER DECISIONS

Chapter 3 demonstrated that, far from facing an environment in which one model has been entrenched for a long period of time, those willing to explore improved models of administration decision-making are dealing with a relatively new model and with a recognized need for reform. Chapter 4 then mapped out the constitutional terrain which suggests that alternatives to the executive model of court administration could be constitutionally permissible and in some cases may be more consistent with some constitutional norms. After a discussion in Chapter 5 of the criteria by which different models should be assessed, Chapter 6 then identified the potential range of types (Figures 6.1 and 6.2) and stages (Figure 6.3) of court administration decisions over which the judiciary could exercise different kinds and degrees of control. Chapter 7 then identified the other stakeholder groups that are likely to lay claim to a significant role in making those decisions.

This Chapter now addresses the question: how can one improve on the current situation and, more specifically, what changes (if any) should be made to the role the judiciary in court administration decision-making?

In responding to that question, it is helpful to have a simplified categorization of “model” decision-making roles for court administration. We consider a high level categorization that defines the current executive model and six main alternatives to that model, each of which represents a different clustering of possible roles of the branches of government, and in particular the Court, in relation to:

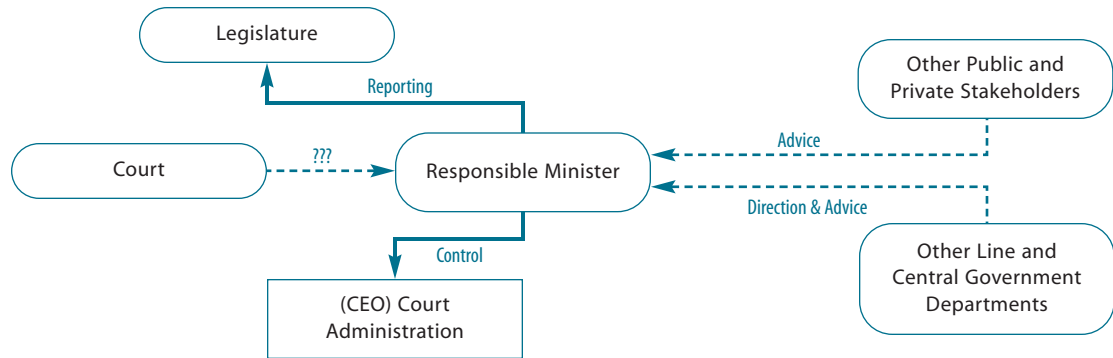
- The Legislature
- The Attorney General
- The executive head of court administration
- Other governmental officials and bodies (e.g. IT standard setting groups)
- Other non-governmental groups (e.g. the bar, victim’s rights groups, mediators).

The seven models that are shown in Figure 8.1 summarize the existing model and six distinct options:

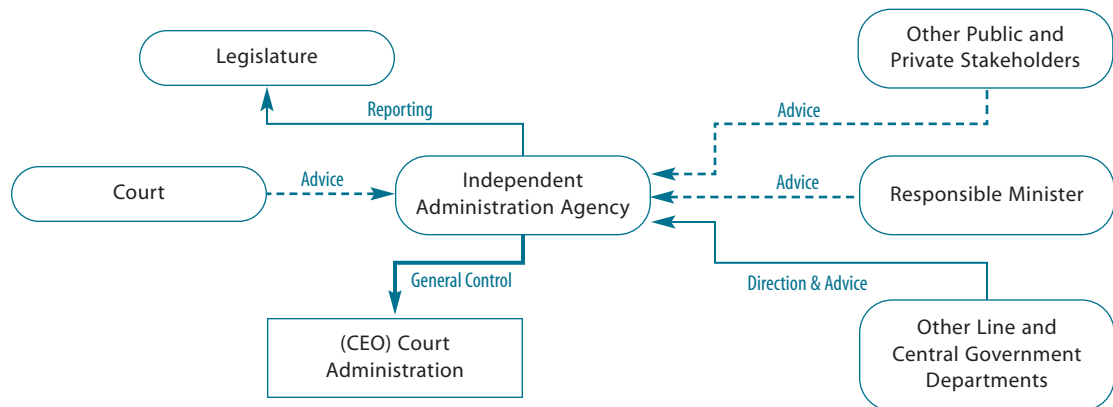
1. Executive Model
2. Independent Commission Model
3. Partnership Model
4. Executive/ Guardian Model
5. Limited Autonomy Model
6. Limited Autonomy & Commission Model
7. Judicial Model

Figure 8.1: Alternative Models of Court Administration Decision-Making

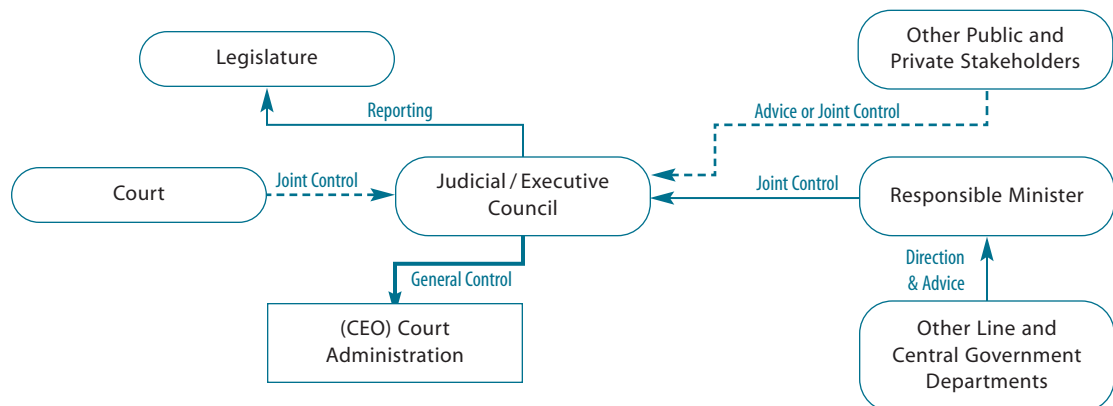
1. Executive Model



2. Independent Commission Model



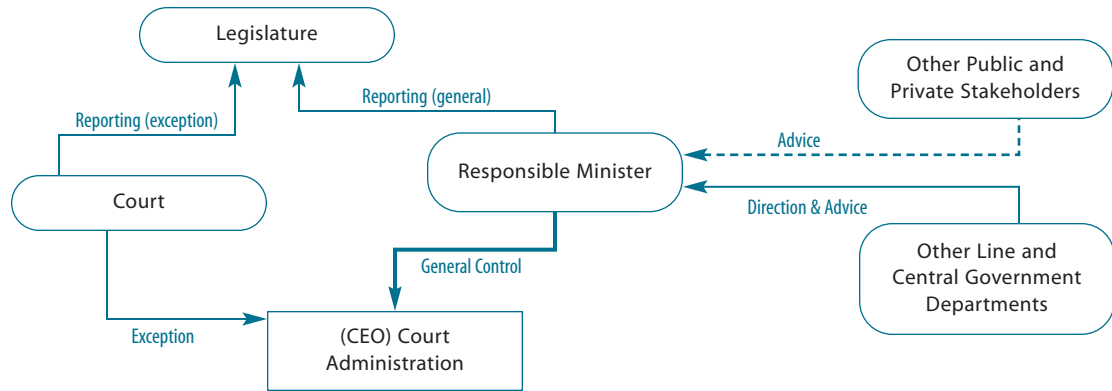
3. Partnership Model



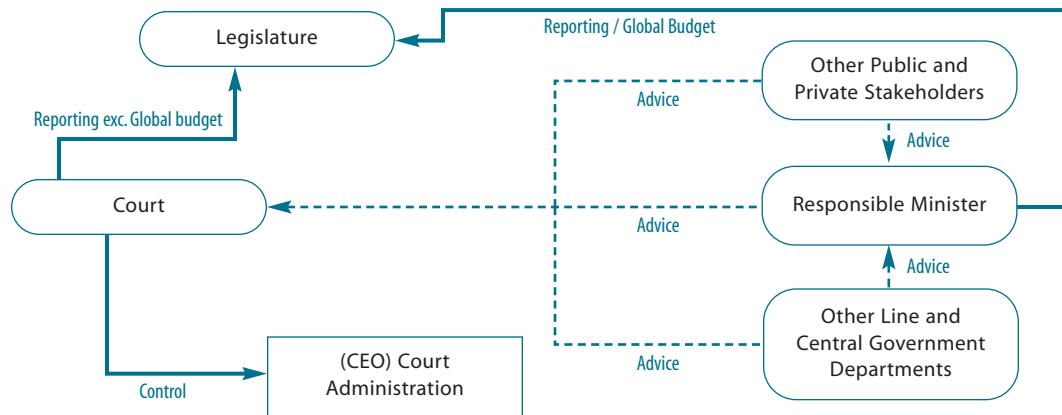
* Responsible Minister = Attorney General, Minister of Justice, etc.

Figure 8.1: Alternative Models of Court Administration Decision-Making (continued)

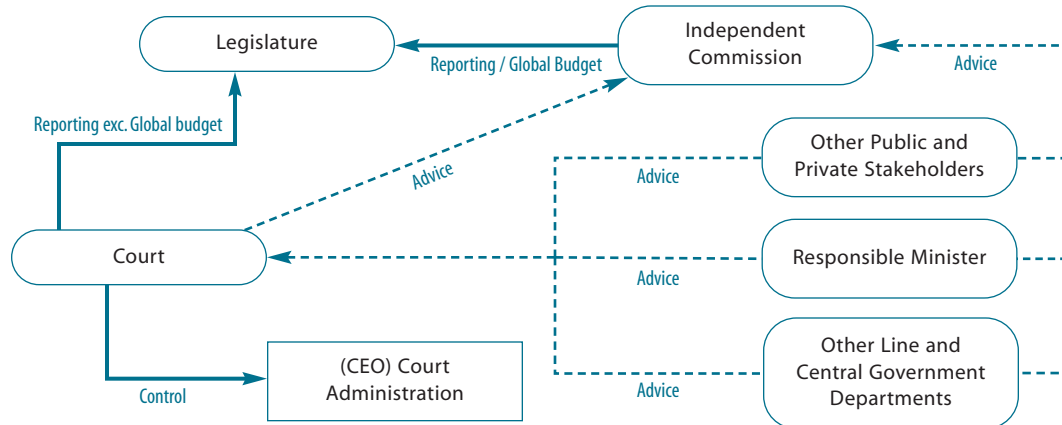
4. Executive / Guardian Model



5. Limited Autonomy Model



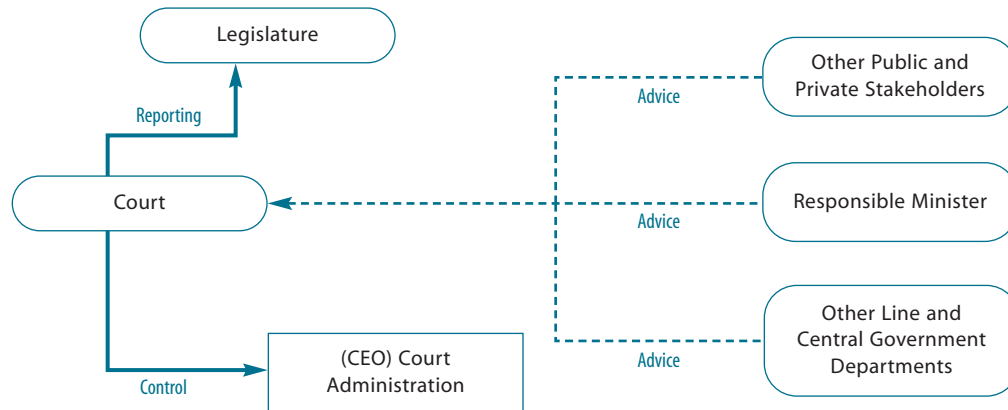
6. Limited Autonomy & Commission Model



* Responsible Minister = Attorney General, Minister of Justice, etc.

Figure 8.1: Alternative Models of Court Administration Decision-Making (continued)

7. Judicial Model



* Responsible Minister = Attorney General, Minister of Justice, etc.

In each of the models summarized in Figure 8.1, the relationship between the Court and the Legislature and/or government is different.

This Chapter provides a description and discussion for each of the seven models. The description of each of these models attempts also to take into consideration specific variations within each model and examples domestically and internationally where such models operate. The analyses of the seven models are intended to focus on the relationship between the judiciary and the executive branch of government and how this relationship shapes, and is shaped by, the various different models. Other key relationships play a significant role in court administration and will fall to the courts to address through internal mechanisms, including the relationship between various levels of court in a jurisdiction (i.e. the relationship between trial and appellate courts and the relationship between courts with federally-appointed and provincially-appointed judges); intra court relationships between the Chief Justice, Associate Chief Justices and puisne justices; relationships between the judiciary and court staff, between the judiciary and the bar, and so forth. While these relationships are all significant, it is apparent from our constitutional analysis, from our analysis of administrative effectiveness and efficiency and from our consultations that the relationship between the judiciary and the executive remains the defining framework for discussing court administration in Canada.

The discussion and analysis of each model builds on the extensive consultations undertaken both with judicial and executive respondents as well as other participants in court administration as part of this project. The consultations took place in two stages. The first stage focused on respondents' experience with the executive model of court administration, including various innovations within that model which have facilitated a range of roles for judges in different stages of court administration decision-making. The second stage was comprised of a more detailed set of consultations focusing on respondents' preference for a particular model or models over others. In support of the second round of consultations, respondents were provided with a discussion paper which included model descriptions which were substantially similar to the descriptions provided below.

What emerged from these consultations, as discussed below, is a widespread degree of concern and dissatisfaction with the executive model of court administration and a widespread consensus on moving toward a model of limited autonomy and an independent commission for dispute resolution.

It should be emphasized, once again, that the discussion of preferences for a particular model takes place against the backdrop of the various key court administration functions set out in Figures 6.1 and 6.2 in Chapter 6. While some respondents felt a particular model was appropriate for all court administration functions, other respondents felt different models were appropriate for different court administration functions. For example, one judicial respondent concluded that the Limited Autonomy model was appropriate for human resource decision-making but that an Executive Guardian model made more sense for decision-making relating to information technology. Other respondents felt particular models were more appropriate for specific courts. For example, some respondents indicated they would be comfortable seeing greater judicial control over appellate courts but not trial courts.

This discussion on the consultations is not intended to provide a statistical breakdown of responses nor will it capture all the nuance of respondents' linkages of particular models to particular courts or court administration functions. Rather, the aim is to describe the various models, provide examples of where those models operate, and an overview of the responses relating to each model arising from the second round of consultations.

Before turning to the discussion of each model, however, it should be made clear that the alternatives to the current executive model, while they spell out quite different roles for the judiciary and for the government, are similar to each other and different from any current executive model in the provinces or territories in two fundamental ways.

- ***A Separate and Complete Court Administration Unit***

First, each alternative model assumes that the courts will be administered as a separate and self-contained organization.

In fact, this in itself is a distinct step away from the traditional operation of the executive model in the provinces, regardless of any current formal or informal role of the judiciary in court administration. Under current provincial practice, items that would normally be part of the court budget have in some jurisdictions been transferred away from the Courts to another part of the ministry or department in which court administration resides (e.g. to prosecution or central legal services) without the approval of the chief justices of the affected courts. Similarly, personnel policies and processes for the appointment of court administrative officials are at times under the supervision of human resource sections separate from court administration. Finally, as discussed in Chapter 7, Courts have been required to participate in development of automated information systems under the direction of officials from either a central government agency or even a separate ministry with potentially conflicting goals and roles in the justice system. Even more troubling, in certain of these situations those officials have not given the judiciary a meaningful opportunity to participate.

- ***Clear Expectations for Court Administration***

Second, it is assumed that both the judiciary and the executive— not to mention other stakeholder groups— recognize the need for developing a clear consensus on what is expected from court administration planning and operations. As noted in Chapter 5, a consensus on expectations regarding court administrative performance is essential for assessing which of the models should govern decision-making— so one can assess which model best meets those expectations. However, equally important, no matter which decision-making model is chosen, a consensus on how court administrative performance should be measured—and what levels of performance are expected— will be essential for measuring administrative performance and thereby demonstrating accountability and transparency of administrative decision-making. This applies whether the decision-making model designates the Court, the Attorney General, or some other body as responsible for that decision-making.

The following discussion of different models therefore assumes that Canada follows the lead of a number of other jurisdictions in establishing a consensus on specific expectations regarding the key areas of court administration performance— more specifically, in those areas of performance listed in Figure 5.1.²¹²

8.1 THE EXECUTIVE MODEL

8.1.1 Summary Description of Analysis of Executive Model from Chapter 2

As discussed in Chapter 2, there are significant deficiencies with the Executive Model, which now characterizes, with some variation, the model of court administration in Canada. Based on the analysis in Chapter 2, it is evident that alternatives to the executive model of court administration should be explored. The executive model was found to be deficient in several key respects:

1. Courts lack stable funding and discretion over expenditures which create obstacles to strategic and long-term planning;
2. Court administrators often have divided loyalties to executive and judicial offices which can undermine the effectiveness of court administration;
3. The Attorneys General's willingness and capacity to represent the courts interests in Government decision-making is eroding; and
4. The mutual trust between judicial and executive leadership is jeopardized by the present climate of disputes over court administration budgets and the implementation of judicial compensation commission recommendations.

.....
²¹² The development of court administration performance goals and objectives for Canada— or for individual Courts within Canada— will, of course, require a significant effort involving a number of key stakeholders. However, some efforts have already begun in certain Canadian jurisdictions, and there are a number of precedents and lessons learned from other jurisdictions that will be helpful in that exercise. These include: the five main categories addressed in the "Trial Court Performance Standards (TCPS) and Measurement System," developed by the National Center for State Courts in the United States after considerable consultation with a large number of state Courts throughout the USA; and the 30 categories addressed in the "Judicial Reform Index" developed by ABA-CEELI (Central and East European Law Initiative of the American Bar Association). The TCPS has already been adapted for use in New South Wales, Australia.

While the analysis above focused on the executive model per se, below the executive model is revisited in a comparative context as part of the second round of consultations, and is evaluated in relation to the alternative models of court administration identified and developed in this Chapter.

8.1.2 Second Round of Consultations

In the second round of consultations, respondents were asked to indicate their preferred model of court administration after being presented with a discussion paper describing the executive model and the six alternative models.

In this context, few judicial respondents expressed a preference for the executive model. Many though not all representatives of the executive branch of government expressed this preference, and associated the executive model strongly with what they characterized as the “status quo”. In some cases, this meant a degree of support for arrangements which in fact have already contemplated a greater role for the judiciary in court administration, as presented above. For example, some respondents justified their support for the executive model on the basis it has been able to accommodate greater judicial input in decision-making and greater judicial control over court staff and court resources. Some executive respondents distinguished the executive model as one based on “mutual respect” rather than “a fixed governance model”. Other executive respondents acknowledged that the executive model is “imperfect” but asserted it remains preferable to the alternatives. Rarely, though, was this accompanied by any analysis of the alternatives. Rather, to some of the executive respondents, the search for preferred models of court administration suggested a solution in search of a problem.

Executive respondents tended more to view court administration from the vantage of accountability and responsibility in a parliamentary cabinet system. While judicial independence is an obvious and agreed augmentation to this principle, most executive officials expressed the view that judicial independence is limited to adjudication and does not extend to administrative support for the courts. In the past, this attempt to draw the line between what is governed by the principle of judicial independence and what is governed by the principle of responsible government has led to making small exceptions to the latter principle to ensure the former (e.g. Justice Le Dain’s carving out in *Valente* (discussed in Chapter 2) of case assignment as an administrative function belonging exclusively to judges), or of allowing exceptions to the latter principle as a way of acknowledging limited administrative competence of the judiciary (e.g. the B.C. provincial court executive-judicial protocols).

Thus the debate has traditionally focused on either win-lose strategies or compromises that show some give on the part of the executive but retain the established framework. What are beginning to emerge are signs of a win-win approach, one that develops accountability mechanisms and administrative structures that respect both the prerogatives of parliament and the independence of the judiciary (for example, the Ontario Court of Justice MOU, discussed above).

What is missing is an acknowledgement by governments that their existing ability to manage the courts in the public interest is severely limited. They are in a position to say no when courts make specific requests for personnel and services, acting in the name of fiscal constraint. But they are not in an effective position to facilitate basic choices among competing court priorities, so that the courts can evolve effective responses to public needs.

Some executive respondents focused more on the relative inexperience and lack of capacity on the part of the judiciary to take over the functions now performed by executive managers. However, this approach risks turning the consequences of the executive model into the rationale for that model. One respondent cited as an example an incident where an executive manager intervened to correct a judge who had made what he considered inappropriate expenditure requests. The respondent's point was that, absent the professionalism of the manager, the judge and the court could have been exposed to negative publicity and an embarrassing episode. The emphasis of these respondents on the skills and sophistication of court administration managers is important and constructive. But the lack of respect for the administrative capacities of the judiciary reflected in some of the executive respondents highlights the deficiencies of the executive-judicial relationship in the executive model.

A number of executive respondents raised the importance of court administration having a "seat at the cabinet table" through the Attorney General or Minister of Justice. This argument reflects a circular logic. Executive control over court administration is justified on the basis that the judiciary has no control over executive decisions, such as the allocation of resources for court administration, and therefore courts will be "worse off" without an Attorney General or Minister of Justice present to advocate on their behalf. If an alternative to the executive model were in place, however, the vicissitudes of the cabinet table would arguably have far less impact on court administration. Consequently, with an alternative model, for example, direct funding by the Legislature, a seat at the cabinet table would have considerably less significance. As indicated by the judicial respondents to the preliminary consultations, the failure of Attorneys General to champion the courts' concerns and priorities is increasingly seen as a barrier to securing appropriate resources to achieve the goals and objectives of court administration. The minister's advocacy and understanding is critical. But why should this only occur when subordinate officials within the ministry control court administration? If a minister takes seriously his/her role as "law officer of the crown" and source of independent legal advice to cabinet, advocacy should not depend on the formal court management structure. Obviously, in practice it requires good communication between the minister and the judiciary and court officials, but this is true under any model.

A small group of judicial respondents acknowledged the concerns over the executive model but expressed concerns over a greater role for the judiciary in court administration as well. Some believed that judges are appointed to adjudicate and have neither the skills nor mandate to control the administration of courts. Others from this group of respondents expressed the view that it could be unseemly and inappropriate for a Chief Justice to engage in political negotiations with the executive over resources.

A decisive majority of judicial respondents and some executive respondents, however, indicated the strong view that an alternative model of court administration was preferable. They generally viewed the present system as one requiring significant reform and it is fair to say that there is a widely held view that the executive model, despite its various iterations, is failing. Its evident problems are not confined to any one Court. One Chief Judge indicated in a letter concerns over how governments set budgets, how classification decisions are made and how consultations are carried out. A Deputy Minister from that province, who was copied on the letter, commented that

...if you were to survey Deputy Ministers and Assistant Deputy Ministers across Canada about their issues and concerns, I suspect that the letters they would write would express the same kind of concerns the Chief Judge raises...

Just as some Deputy Ministers saw the flaws in the current executive practices as not justifying the search for alternatives, other respondents did not see concerns about alleged inexperience of the judiciary in management and administration as a barrier to change.

Those supporting change emphasized that in the alternative models, Courts would still rely on professional court management and managers. The one change however would be that the court managers would no longer be placed in a conflict of interest; instead, their reporting relationships and obligations would be to the Courts for whom they would be performing their duties. They recognized that while some members of the bureaucracy might be concerned about the impact of change on them personally and while those officials feared loss of control, this ought not to be used as a justification for opposing needed changes. In their view, compelling reasons existed for departing from the executive model even though implementing such change will be challenging. One judicial respondent reacted to the discussion paper setting out the seven models in the following terms:

Reading the descriptions of the various models in detail reminded me of just how challenging it will be to move beyond executive control of court administration. It will mean not just changing structures but also changing mindsets. Seeing the other models also reminded me, however, that it is possible to move beyond the executive way and also reminded me why it is necessary to do so.

Many judicial respondents to the second round of consultations echoed the concerns with the executive model elicited during the first round of consultations and set out above. Continuing concerns with the “separate realities” of the judiciary and the executive characterized these responses.

8.2 THE INDEPENDENT COMMISSION MODEL

8.2.1 Description

Although the “independent commission” model does not enhance judicial involvement in administration decision-making, it does take a fundamental step away from the executive model. The independent commission model also demonstrates that there is not necessarily a direct trade-off between judiciary and executive: a decrease in the authority of the executive need not lead to a concomitant increase in the authority of the judiciary.

In the Independent Commission Model, a separate body (the commission) is established with responsibility for certain types and stages of court administration decisions. That commission, whose size and structure would depend on its specific mandate, would be at arms length from government, in the tradition of independent boards and agencies, Crown corporations, or bodies such as Provincial Auditors, Ombudsmen, or Information and Privacy Commissioners. There would still be a process of reporting to the Legislature, either directly or through a minister, but the emphasis would be on reporting for the purposes of transparency and openness, reflecting a modern view of accountability to the public rather than to political superiors. Thus the commission, not the minister, would be accountable for actions of the commission.

Members appointed to the commission would not sit as representatives of those who appointed them. Members of the Court (i.e. the judiciary) would not sit on any governing body of the commission, and as with the executive model, the Court (i.e. the judiciary) would have no policy or operational control over the commission. The difference with the executive model is that the Attorney General (and other government departments) would have a similar lack of policy or operational control over the commission. The commission would be functionally independent of both. To ensure that this is so, the commission would have to be named by joint agreement of the judiciary and government.

Given this independence, and given that at least implicitly the government and the judiciary are delegating important powers to the commission, the appropriateness and viability of this Independent Commission Model critically depends on the existence of a consensus on a set of clearly defined and measurable goals and objectives of the commission—especially for reasons of transparency and accountability. Further, under this model, the extent to which both the judiciary and the Attorney General (or other government ministries) would have an influence on court administration (through advisory mechanisms and other means) would depend on policies and procedures determined when the commission was set up.

There can be a number of variations of this model, depending on the scope of the commission's mandate. For ease of reference, we have identified three such variations.

- Dispute Resolution Mandate
- Restricted Policy and/or Operational Mandate
- Full Administrative Services Commission

Each will be dealt with in turn.

- ***Dispute Resolution Mandate***

First and at one end of the continuum, is a variation of the Independent Commission Model in which the commission's mandate restricts it to a dispute resolution role in specific areas of administration decisions. No matter which of the models presented later in this section were chosen to govern decision-making in all or some of the court administration areas, disputes can and likely will arise between the executive and the Courts/judiciary—and perhaps other bodies. Whoever is in charge of that area of administration could have the authority to dictate the resolution of the dispute, but doing so either:

- a) produces bitterness and suspicion within the Court or executive that will disrupt the kind of day-to-day working relations necessary for the effective administration of justice, and/or
- b) leads to a tentative and hesitant response by the executive or Court that avoids bitterness but undermines needed innovation.

One way to address this difficulty would be through a dispute resolution mechanism independent of both Courts and government. Legislation could spell out the circumstances under which this mechanism could be invoked and would be binding. Under this variant of the

independent commission model, as diagrammed in Figure 8.1, both the judiciary's and the ministry's roles would be advisory in that they would present their positions to an independent commission whose findings and recommendations would govern court administration.²¹³

The dispute resolution variant of the independent mechanism could take the form of a single independent official, a Commissioner for Courts if you will. Alternatively, the dispute resolution mechanism could take the form of an independent commission for court administration, appointed along the same lines as the provincial judges' remuneration commissions. As well, as with these other bodies, the budget for and accountability of such independent commissions should come directly from the Legislature.

The mandate of such a commission could be restricted to only one area of court administrative decision-making. An example of this option would again be the judicial remuneration commissions recently established as the result of the *Provincial Judges Reference (1997)* with the specific mandate of making recommendations about judicial salaries. In this model, the commission decisions might bind the government, as is the practice in Ontario on judicial remuneration pursuant to statute. As the recent *New Brunswick Provincial Judges Association (2005)* case affirms, where such statutory provisions are not in place, governments will have the discretion to reject commission recommendations as long as those recommendations have been given meaningful effect and the reasons for rejecting them are legitimate and clearly set out. As the Court reiterates, the purpose of the independent commission is to preserve judicial independence and promote the depoliticization of the executive-judicial relationship.

The mandate of such a dispute resolution commission could be extended to areas other than judicial salaries (for example, setting policies for security of automated court information systems, or implementing caseload management and delay reduction initiatives). As a specific example, an independent commission could be given the authority to resolve disputes between Court and government on the appropriate staffing levels or judicial complement, or the need for certain types of expenditures. In keeping with the remuneration commission analogy, this variation of the model could provide that commission recommendations may only be altered by the government or the Legislature on constitutionally justifiable grounds. Alternatively, recommendations could be binding if the Legislature agreed. Attention would also have to be paid to ensure that monies provided to execute decisions of the commission were not simply re-allocated from other critical budget line items.

As noted earlier, the dispute resolution variant of the independent commission model may provide a useful function in conjunction with any of the other decision-making models presented in this section which might be chosen to govern other policy and operational aspects of court administration. This function might be especially important during any transition period in the introduction of alternative models that prescribe new decision-making roles for both the Courts and the executive.

.....
²¹³ There are a number of sources to which one could turn to further develop the specific policies and practices of such a dispute resolution commission. For instance, dispute resolution mechanisms in labor relations often provide for compulsory arbitration of grievances by a single individual drawn from an agreed-upon list, or a trio of individuals, one appointed by each side and the third appointed by the first two. These mechanisms are sufficiently well-established that they may provide an alternative to the executive model within certain designated areas. Similarly, in keeping with the labor relations analogy, the commission or commissioner's recommendation could be binding based on the previous agreement of the parties.

- ***Restricted Policy and Operational Mandate***

The second variation would be an independent entity with a considerably more restricted mandate, one that for instance is restricted to policy and/or operational control over only one or a small number of court administration activities shown in Figure 6.2.

Pure examples of such a variation are difficult to find. However, some fairly common institutions and practices do come close. For example, one would include within this variant instances in which the provision of specific administration services has been, in effect, outsourced to an independent private or public entity. The executive and/or Court would, of course, specify in precise terms what had to be accomplished by the otherwise independent body, but that entity would in executing that mandate operate on a day-to-day basis at arms length from the executive and the judiciary. In the justice area, one could cite the outsourcing of the collection and analysis of comparative national statistics on court operations to the Canadian Centre for Justice Statistics, a part of Statistics Canada.

Similarly—although it is not normally considered an example of the types of decision-making “models” considered elsewhere in this document—a more obvious example might be those Rules Committees that have been established as functionally independent bodies with specific policy and operational responsibilities.

- ***Full Administrative Services Commission***

Finally, and at the other end of the continuum, the commission would have full policy and operational control of all, or at least most, stages of all or most court administration activities shown in Figures 6.1 and 6.2. The commission would in fact be a separate court administration unit in and of itself.

Here again pure examples of such a variation are rare if they exist at all. However, the variant is included here for sake of completeness.

8.2.2 Consultations

In our consultations, very few respondents expressed support for this model as a free-standing alternative model of court administration. This model was seen to lack clear and accountable lines of authority and decision-making and to risk a situation in which the judiciary would find itself with even less of a role in court administration than is now the case and in which a new added layer of bureaucracy might further impair innovation and initiative in the court administration sphere. Other respondents believed that, inevitably, tensions surrounding who controls court administration decision-making would spill over into the process of appointing such commissions and the setting of their terms of reference.

Respondents tended to view an independent commission more favourably as a mechanism for dispute resolution and direction on court administration than as an operational framework for court administration decision-making. Most respondents seemed to assume the commission would have only judicial and executive membership but those who considered a broader base of membership, including non-partisan justice sector institutions such as provincial law societies, law deans or bar associations, or other public bodies to represent more fully the public interest in court administration, viewed such possibilities with interest.

While there was very little support for the independent commission as a stand-alone model, a number of respondents were attracted to key aspects of the model, such as the importance of credible and neutral dispute resolution between the courts and executive and a fully professionalized court administration unit. These aspects are addressed further below in the context of the Limited Autonomy and Commission model.

8.3 THE PARTNERSHIP MODEL

8.3.1 Description

The third model, the “Partnership Model”, presents an option that retains a significant role for the executive in court administration, but also *potentially* increases the direct influence of the Court/judiciary. The significance of the increased role for the latter, however, depends on the composition of the joint control partnership.

Conceptualizing the Court as a partner means that the Court does not exercise direct operational control over court administration, as in the autonomy models discussed below, but exercises control jointly, by participating either with the Attorney General alone or with others, on a broader board or council that nominates or appoints the Court Executive Officer and has the authority to make and ensure the implementation of court administration policy. Unlike the *Executive/Guardian Model* discussed below, the Court here is more broadly involved in the full range of management issues. While the judiciary lacks the authority to act on its own, the board on which its representatives sit does in fact have the authority and responsibility to administer the courts, and under existing applications of the model, this authority (and responsibility) extends to all areas of court administration shown in Figures 6.1 and 6.2, including: financial management, human resource management, information system development and other core management functions.

As with the other models, it is assumed that court administration has been established as a separate entity, one that will be governed by the policies and directions of the partnership. It is also important to note that, as in any partnership in which groups might have different interests, effective discussion and decision-making require a clear consensus on the objectives and expectations of the partnership. The importance of clearly defined court administration goals and objectives is therefore especially important to the partnership model.

In practice, different versions of the partnership model vary widely in the degree of judicial control, depending upon the composition of the governing board.

- **Limited Partnership**

The partnership could be more limited and symbolic, with chief justices representing the judiciary ex officio on a board weighted toward government appointees. The chief justices could serve along with a wide variety of judicial, executive and other appointees, as in the model propounded by Professor Martin Friedland that echoed the Governing Council model at his home University of Toronto. However, this model may represent little more than an extension of the consultative approaches currently found in some executive-directed systems, and if it is perceived that the board has an expanded role in court administration, it may be

seen as an extension of executive authority in the field. It also in effect introduces a barrier between the judiciary and government, a barrier that is controlled by government, so that judicial involvement is diluted still further.

- ***Equal Partnership***

Moving further along the continuum, the chief justice or a judge whom is designated could serve on a board such as the one that governs the Irish Courts Services Agency; 50% of the membership of that board is drawn from the judiciary, but only two of its 16 members are appointed at the discretion of the government.²¹⁴

- ***Controlling Partnership***

It is interesting to note here that the judiciary's leadership role in relation to the Irish Courts Service, and the government's well-known desire to remove itself from a role in court administration, have combined to make that model *in practice* closer to that of a majority partner variant of the partnership model.²¹⁵ In a true "Controlling Partnership" variant of this model, the Court would have a voting majority of the seats at the partnership table.

Typically, these variants of the partnership model are spelled out in legislation, and that legislation, while providing for the exercise of wide discretion by the board or council in the internal governance of the court system, maintains the supremacy of the Legislature in the setting of budget estimates and a variety of administrative policies applicable to the greater public sector as a whole. Partnerships have been the subject of non-statutory experiments, as when the Attorney General of Manitoba established a board in the 1980s made up of the province's three chief judicial officers and the provincial deputy attorney-general. However, its lack of a statutory base essentially transformed it into an advisory board, while the "Court as Partner" model requires real joint control—i.e. participation in a board with direct control over court administration.²¹⁶

Proponents and critics of this approach vary as widely as the composition of the boards or councils they envision. Judges who favoured greater judicial control still opposed Friedland's proposal because the sharing of control was seen as a *de facto* extension of executive control to areas that could impinge on judicial independence. Critics of judicial control have felt that even a minority of judges on a board or council would leave the body open to domination. (Ironically, if this is a valid argument, it must also mean that the judiciary has enough expertise and interest in administration to be able to exert its persuasive powers even when its authority is lacking—a supposition that undermines another of the critics' arguments: that judges lack the expertise or interest to exercise leadership over court administration.)

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²¹⁴ Others represent the bar, court staff and segments of the national economy (business, labor and consumers).

²¹⁵ Or even the Limited Autonomy Model discussed below at 8.5.

²¹⁶ See also the New Brunswick Liaison Committee, composed of judicial, executive and bar representatives, which has been in existence for several years, but does not meet on a regular basis and does not make budgetary allocations, and the Court Advisory Board established by the Minister of Justice in Newfoundland in September of 2004 composed of the Minister of Justice and Attorney General, the three Chief Justices of Newfoundland's courts, the Deputy Minister of Justice and the Assistant Deputy Minister. The participation of the Minister on the advisory board in Newfoundland is a novel approach. The Newfoundland Court Advisory Board is not conceived of as a decision-making body but rather as a forum for discussion, exchange of information and planning.

An Important Caveat

It is important to recognize an important caveat relevant to the feasibility of effectively implementing any variants of the partnership model. The lukewarm reception given to partnership models in the past may reflect a conceptual dilemma that has not been given sufficient recognition. The general concept of partnership requires that two separate and independent individuals or organizations come together to pursue a common enterprise. In this case, that common enterprise is court administration. But while the judiciary is independent for the purposes of adjudication, it has not been granted that the Court has an independent role *in court administration*—and that maintaining that independence is critical to the exercise of the *judicial function*.

A true partnership requires not only recognition by the parties of their interdependence, but also recognition of the distinct and independent perspective each one brings to the partnership. Thus an offer of partnership from government or a minister or deputy minister must be more than a concession given to shore up its ultimate authority; it must put into practice a new paradigm, and think through the application of that paradigm in a wide variety of areas and stages in the administration of justice. Conversely, the judiciary must participate in a partnership not merely to veto administrative initiatives that are seen to disrupt the status quo, but primarily to develop and support innovations that enhance the ability of the Courts to serve justice and serve the public. Attempts at the partnership model which are not approached with these principles in mind would tend to erase the distinction between the judiciary and the government, thus eroding the important independence of each.

8.3.2 Consultations

In our consultations, the partnership model attracted a small number of respondents—particularly in specific smaller jurisdictions in which partnership and consultative approaches characterized decision-making in many other parts of public and private decision-making in their community. However, overall this did not constitute significant support.

Many saw this model as a noble aspiration but an unworkable administrative arrangement, or at a minimum, an arrangement which would inevitably lead back to greater executive control when issues of resources or major policy initiatives were at stake. As one judicial respondent emphasized, “This would be a recipe for gridlock, which in the end would simply revert to an executive model, since the courts have to function and they pay the bills.” Other respondents noted, “It sounds great in theory but could never work. Over time, it would simply become the executive model by another name.”

8.4 EXECUTIVE / GUARDIAN MODEL

8.4.1 Description

The fourth model, the “Executive/ Guardian Model” (herein referred to as the Guardian Model), leaves primary responsibility for day to day planning and operations of the Court to the executive.²¹⁷ However, this model also better recognizes the very special and important role and responsibilities the Court (i.e. the judiciary) has in ensuring the existence of an effective judicial system, and therefore the existence of effective court administration activities necessary to support that judicial system.

The Guardian Model therefore gives the Court not only the authority but also the responsibility for intervening in court administrative planning and operations when those activities adversely affect the ability of the judicial system to achieve appropriate levels of effectiveness. This responsibility and authority would be exercised at the discretion of the Court, and would not be subject to the prior approval of either the legislature or the executive.

The Guardian Model encompasses but goes beyond a “quality control” approach to the judicial role in administration since the Court would have the authority to intervene when it deemed necessary and appropriate. Thus, under this model, the Court would have both the responsibility and the authority to order the Chief Court Administrator to perform certain tasks or activities—or to cease performing certain activities—in order to reach or maintain an acceptable level of court administrative support to ensure the achievement of broader court goals and objectives. There would be a concomitant authority and responsibility of the Court Executive Officer to take or cease specific actions as ordered by the Court, and do so without delay. Obviously, the Court Executive Officer could (and should) raise questions afterwards with his/her superiors in government. However, that reporting could not unnecessarily delay or otherwise affect the carrying out of the Court’s orders.

There are a number of variations on this model which would have to be considered. For instance, this “guardian” responsibility might be exercised, not by individual judges, but only by the chief justice personally. Similarly, although it would not be consistent with the model to require the chief justice to request either prior or subsequent approval from either the Legislature or the executive for such orders, it might be appropriate for the Court to provide documentation for such orders. Similarly, whether or not such documentation included reasons would have to be resolved beforehand. Finally, special protocols—such as a contingency fund—would have to be developed for those situations in which resources are not immediately available to allow court administration to comply with the Court’s order out of the existing regular court budget.

However, the development of a consensus on court administration goals and objectives would be an essential building block for implementing the Guardian Model. Clearly the model requires for its success a joint understanding between the Court and the executive (and the Legislature) of what will constitute appropriate goals and objectives regarding administrative infrastructure and services to achieve acceptable levels of court performance. This is particularly important from an

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²¹⁷ This description of the model is written as if the executive controls court administration. The Guardian Model would however apply equally to situations in which court administration is governed through the Independent Commission Model (but not through the Partnership Model).

accountability perspective, since the Court is in effect being given responsibility for ordering that some other party perform or not perform actions necessary to achieve a level of performance for which that other party has agreed beforehand to be accountable. As well, provision must be made to ensure that both the judiciary and the executive are provided on an ongoing basis with current, accurate and relevant information on all key aspects of court administration, especially the extent to which the administration achieves its goals and objectives. Otherwise, the Court will have no mechanism for identifying whether intervention is required, and the executive will have no mechanism for ensuring provision of an adequate level of resources.

This concept is derived from management theory. However, it was the very approach advocated in the comprehensive 1973 Report of the Ontario Law Reform Commission, but never implemented by that province's Ministry of the Attorney General. That report recommended that when a dispute arose between executive and judiciary on a court administrative issue, the view of the judiciary should prevail. It can be argued that the present Federal Court of Canada model is a variation on this theme.

The Guardian Model might also be seen as a reflection of the kind of analysis made by Le Dain J. on behalf of the Supreme Court of Canada in *R. v. Valente*, the first case to define the concept of judicial independence under section 11(d) of the Charter, because that case discussed a set of administrative areas (e.g. assignment of judges to cases) that had to be under judicial control to pass constitutional muster. But the Guardian Model conceptualized here is broader, since a chief justice could invoke his/her authority in areas traditionally controlled by the executive.

8.4.2 Consultations

A small group of respondents in our consultations were attracted to this model, based largely on the similarity of this model to the current Federal Court of Canada administrative structure. The legislation creating the new Federal Court Administration Service, which came into force in July of 2003, provides that the Chief Justices of the Federal Court can give binding direction in writing to the Chief Administrator, which in turn could form part of the Chief Administrator's annual report to Parliament.²¹⁸ However, the Federal Court experience shows how considerable variation is possible within each of the alternative models considered in this report. Although it would normally be assumed that under a Guardian model the court would be selective with respect to the frequency of intervening, within the current implementation of the Federal Court structure—even though it envisions an autonomous administration unit—the court in fact has been involved in a broad range of areas and stages of administration decision-making.

One judicial respondent strongly supported the Guardian model precisely because he did not want the judiciary to be involved in day-to-day court administration matters (e.g. personnel administration, purchasing), but wanted for example to be able to order an exemption from Treasury Board requirements that limited the flexibility of court staff addressing emergency situations.

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²¹⁸ *Courts Administration Service Act*, S.C. 2002, c.8, s.9.

8.5 THE LIMITED AUTONOMY MODEL

8.5.1 Description

This model reflects an emerging trend in countries around the world to confer increasing authority and responsibility on the judiciary for court administration. This trend is also consistent with the development of international instruments increasingly accepted by established and aspiring democracies around the world.

Under the Limited Autonomy Model, court administration authority (including financial and human resource management) is transferred by statute from the executive to the judiciary, which will typically, in turn, delegate the day-to-day operational management of courts to a chief registrar or Court Executive Officer. The registrar/CEO would be appointed by (or on the nomination of) the chief justice or a council of judges, and the work assignments and performance appraisals of the executive officer would be the responsibility of the judiciary. All court staff would be under the direction of the Court.

The main “limitation” in the Court’s autonomy could come from the Court’s global budget being approved by the Legislature, although the Court could make representations directly to the legislature on the Court’s needs. In these circumstances, the Court would operate within that global budget. However, the Court would have the internal flexibility to reallocate approved funds. The chief justice (or chair of a council of judges) would report to the Legislature on the administration of the court, and would advise and receive advice from the attorney general and other officials (and private groups) as he/she deems necessary and appropriate. Typically this would be done through the court registrar or the Executive Officer of the courts. And of course the Courts could be administered within the legal framework established by statutes that define the organization and jurisdiction of the courts and the social justice priorities of the province.

Judicial autonomy is “limited” under this model in another sense as well. Some areas of court administration could remain beyond the sphere of judicial control under a Limited Autonomy model—for example, decisions over whether to construct or close a courthouse could continue to be political decisions. While the judiciary may not control such decisions, the logic of the Limited Autonomy model would militate in favour of significant and meaningful consultation and consensus around decisions of this kind.

Clearly defined court administration goals and objectives—and the provision of information describing how well those goals and objectives have been met—play an especially important role in this model. Under this model, it is the Court itself that defines those administrative goals and objectives. It is through the provision of timely, accurate and comprehensive information to the Legislature and to the public at large that the Courts ensure real transparency and accountability for their administration decisions and actions.

This model is not new to court administration. In fact, variations of the model have been recommended and implemented in a number of jurisdictions.

- ***The Deschenes Report***

In the early 1980s, Quebec Superior Court Chief Justice Jules Deschenes published a blueprint for independent judicial administration of the courts in terms of three stages: consultation, decision-sharing, and independence. His third stage recommended a judicial council in which the judiciary was at least a majority and non-judicial representatives would not be appointed by the government.

- ***Australian Court Autonomous Model***

The *Deschenes Report* had a significant influence on a 1991 Australian study on court administration.²¹⁹ The main characteristics of that report are partly reflected in the design of the Federal Court of Australia and the role of its Chief Justice. That model has been labeled the “Chief Justice Autonomous Model” since it applies to a single Court rather than to all of the Courts within a particular state or province. For our purposes, the conceptualization of this model for the Courts of an entire province may be most closely approximated by the Courts Administration Authority in the state of South Australia. Under that system, court administration is responsible to a three-judge council made up of the chief justice of the state Supreme Court, the chief judge of the District Court, and the chief magistrate of the Magistrate’s Courts. While this council has the authority and responsibility for court administration, it reports to the state Legislature through the responsible minister, in a process analogous to that of Crown corporations or independent boards and agencies in Canadian provinces, and its budget must still be approved by the normal estimates process.

- ***American Federal Courts***

The most frequently cited examples of autonomous court administration operate within the United States. The earliest and best known American model is the federal court system, in which the Judicial Conference of the United States, made up of chief justices from every federal appellate Court and district (trial) judges from each appellate circuit, and chaired by the Chief Justice of the United States, sets policy for the Administrative Office of the United States Courts, the agency with overall responsibility for federal court administration. In turn, judicial councils in each circuit have authority in a dozen geographically-defined circuits. The Congress and the President remain the budget authorities, but the Judicial Conference and the Administrative Office have direct access to Congress and its committees, and chief judges and clerks of court have broad authority to administer the budgets of major court units.

Those in Canada who claim that the American Federal Court Model is inconsistent with principles of parliamentary government and ministerial accountability ignore two facts. First, the separation of powers, especially between the judiciary on one hand, and the executive and legislature on the other, is an accepted norm in Canadian constitutional law. Surely Canadian ingenuity can be counted on to develop a model of court administration in light of the theory and practice of the separation of powers within our parliamentary system. Second, while the American Federal Court Model is linked to the imperatives of that country’s tripartite system of government, in fact the executive model was used in the U.S. federal Courts for 150 years, and was not replaced until 1939, in the wake of President Franklin Roosevelt’s controversial “court-

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²¹⁹ CHURCH and SALLMAN, ch. 6.

packing” proposals two years earlier. Before that time, the Department of Justice administered the Courts even as U.S. Attorneys from the same department prosecuted criminal cases in those Courts, and there were numerous complaints from judges about the need to go through Justice Department officials (i.e. U. S. Marshals) to obtain needed resources.²²⁰

- **American State Courts**

American state court systems have also typically adopted the Limited Autonomy Model. State Courts vary considerably, because in a number of jurisdictions, many areas of trial court administration remain a local responsibility, often in the hands of an elected county Clerk of Court. Court reform has uniformly moved in the direction of unified administration at the state level under the chief justice of the state Court of last resort. This model, advocated in the American Bar Association Standards on Court Organization²²¹ and adopted to various degrees by a solid majority of states, has meant that the most successful and innovative state court systems (e.g. New York, New Jersey, Colorado) have court budgets, personnel systems, and management information systems administered by a state court administrative office directly responsible to the state chief justice.²²² At the same time, however, court budgets remain at the discretion of Legislatures that are often active and vigorous in pursuing budget cutbacks.²²³

- **Singapore**

The internationalization of court administration, and our broader knowledge of court management practices throughout the world, has revealed numerous other exceptions to an executive model. Perhaps most intriguing is the Republic of Singapore. In colonial times, there was no separation of executive and judicial authority; as a result, the chief justice sat in cabinet. Thus court administration was under the authority of the chief justice in British times, and remained with the chief justice after independence. Singapore court officials have never known any other system, taking for granted and taking seriously their responsibility for managing the Courts and introducing a wide range of innovations in technology and organization.

It is noteworthy that prior to Confederation, the executive model was not the accepted model for court administration in Canada. The Chief Justice of Upper Canada sat on that province’s Executive Council before Confederation, just as the Chief Justice of British Columbia sat as one of that future province’s four governing commissioners. But in neither case did any administrative role for the judiciary survive from colonial times.

While we have drawn our previous comparative examples exclusively from common law jurisdictions such as Australia, Ireland and the United States, civil law countries have also moved in the direction of more autonomous court administration. In Western Europe, it appears that the Netherlands has moved furthest in this direction, and in France, 37 regional president judges now have expanded authority and responsibility for court administration. Sweden and more recently

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²²⁰ Until the late 1970s, financial and management audits of the Federal District Courts were conducted by lawyers employed by the Justice Department’s Office of Judicial Examination. Records examined in that office in 1970 revealed that an audit of the Arizona Territorial Court in the 1890s was conducted by Wyatt Earp.

²²¹ First formulated in 1938, and then revised in the 1970s and again in the 1990s.

²²² In another variant, California’s innovative court system is managed by a state court administrative office responsible to the State Judicial Council which, while chaired by the Chief Justice, includes non-judicial representation.

²²³ See the Summer 2004 issue of *The Judges’ Journal*, a special issue on “The State Court Funding Crisis”; note also that the first book on state Court budgeting was titled *Separate but Subservient* (D.C. Heath, Lexington Books, 1975).

Norway have also moved away from the traditional executive model. Emerging nations in post-Communist Eastern Europe have adopted elements of autonomous court administration (e.g. Bulgaria and the Republic of Georgia). In Asia, the Supreme Court of the Philippines has long held tight control over the administration of the nation's entire court system.

8.5.2 Consultations

Not only has the Limited Autonomy model has found considerable support and success in a number of established and emerging democracies around the world, but it also enjoyed the most widespread support among judicial respondents to our consultations. For many, this model struck the optimal balance between ministerial accountability and judicial independence, and seemed best suited to achieving the goals and objectives set out in Figure 5-1.

A number of executive respondents worried that this model could politicize court administration. As one Deputy Minister observed,

If responsibility for court administration were to be assigned to the Judiciary, I believe the values which constitutional recognition of judicial independence advances would be diminished. Responsibility for court administration involves many issues that are, or have the potential to be, political.

The Deputy cited labor relations, budgetary resources, facilities construction (or closure) and policy development as examples of matters inextricably bound up in political and government-wide decision-making. However, it is far from clear that the judiciary would be more politicized under alternatives to the executive model. Moreover, this view ignores the evident political problems arising directly from the executive model and its failure to recognize the role that the Courts legitimately play in the administration of the justice system. The most dramatic examples of judges entering the political arena have occurred when provincial governments have threatened substantial cutbacks in funding, personnel and/or facilities. The most recent example was in the British Columbia Provincial Courts, when a new government elected by a landslide in 2001 threatened major retrenchment, including the closure of 24 (of the 100) provincial courthouses. Would a more autonomous model of court administration result in the judiciary being seen to be more "political"? Arguably, by establishing a clearer and stronger role for the judiciary in court administration—and by clarifying the dividing line between the executive and the judiciary—there would be less need for overt political intervention by the judiciary.

For the judicial respondents, most cited the absence of a dispute resolution mechanism as the key limitation of this model. This of course constitutes a flaw of virtually all of the models, certainly including the executive model. The problem is that where, for example, the autonomy of the courts is not respected by the executive or where the executive declines to provide reasonable support services and facilities for the courts, there is no "third party" to whom to turn to resolve the impasse. For this reason, many believed the Limited Autonomy model would be most effective if combined with a dispute resolution mechanism as anticipated in the model discussed below.

8.6 LIMITED AUTONOMY & COMMISSION MODEL

8.6.1 Description

During our analysis of elements and stages of management in Chapter 6, we suggested that when court administrative decisions are considered in fuller detail and complexity, it might prove useful to consider different models for different elements or stages. Given this suggestion, it is appropriate that we present a model that in fact does this, especially given Canada's experience with models that include mechanisms similar to the remuneration commissions.

The Limited Autonomy & Commission Model identified here represents a combination of the Limited Autonomy Model, by which the judiciary takes responsibility for court administration and defines the standards by which it is accountable to the public for the exercise of that responsibility, and an Independent Commission Model with a narrowly specified "dispute resolution mandate," by which a limited range of issues, principally around budgeting, would be subject to the binding decision of an authority separate from both judiciary and government.

This combination of models is suggested in light of the realities of the Limited Autonomy Model. To place authority for court administration within the Court and remove it from government, effective processes for public accountability must be in place, such as the proposals for defining and measuring objectives suggested in the preceding section. Furthermore, we have noted the importance of the Courts articulating expectations for their administration that could enhance transparency and accountability. Under these circumstances, to maintain full executive and parliamentary control over court budgets could lead to grim reminders of just how limited the administrative autonomy of the Courts would be if central agencies of provincial governments fall prey to the temptation to place more substantial fiscal constraints on the Courts.

More importantly, it must be recognized that one of the most significant shortcomings of the executive model is that the judiciary—through the Chief Justice—is involved in continuous negotiations with the executive branch of government over a wide range of areas. The Limited Autonomy model addresses this concern by making courts self-governing within a global budget. To the extent that the breadth, depth and frequency of negotiations around such budgetary issues is a concern shared by executive and judicial respondents alike, it suggests the need for an appropriate and effective mechanism to resolve issues relating to the setting of the global budget.

Given the extent to which Courts in the United States, particularly at the state level, have been compromised by the politics of the budgetary process even when the executive and legislative branches are separated, the absence of a full separation of executives and Legislatures in Canadian provinces suggests that much more fundamental problems arise in this country. We have been fortunate that the level of political conflict has not traditionally been as high in our provinces as in the governments in the United States and in many newly-emerging democracies. However, we should consider appropriate governance structures before we face greater difficulties.

The option proposed here would be to create a setting and mechanism by which conflicts over levels of funding for the Courts could be referred to an independent official, body or commission for resolution. This would allow for dispute avoidance as well as dispute resolution and would achieve the goal of depoliticizing the relationship between the judiciary and the executive over the most contentious policy and political matters.

While the analogy to the remuneration commissions was raised earlier, it is not clear that a similarly structured body would be appropriate to tackle areas of court administration outside of salaries. The make-up and mandate of such a commission may vary across courts and/or jurisdictions, but the success of the model depends on a credible commission with the moral and legal authority to issue decisions which command the respect of executive and judiciary. With this goal in mind, a broader group, possibly with participation by stakeholders and public organizations (in addition to commission members able to reflect executive and judicial perspectives) may well be appropriate.

8.6.2 Consultations

This model enjoyed the highest degree of support during our consultations. Many respondents suggested the Limited Autonomy and Commission models were complementary and in fact should be integrated. In this fashion, the judiciary would enjoy significant responsibility for and control over court administration decision-making but could avoid becoming embroiled in political disputes over resources. The commission would ensure that disputes were resolved based on principled accommodation and that both political accountability and judicial independence received appropriate consideration.

As one Chief Justice commented during a Canadian Judicial Council seminar discussion on the alternative models, “together, the limited autonomy and commission models strike a balance that can work.”

A number of judicial respondents worried that the limited autonomy model could lead over time to friction with a government intent on retaining or reestablishing control over court administration. Ensuring a mechanism for dispute resolution and, just as importantly, dispute avoidance, would contribute to predictable and constructive relations between the executive and judiciary under the limited autonomy model and also reflect the depoliticization of court administration consistent with the constitutional analysis set out in Chapter 4.

Judicial respondents cited a range of reasons for moving toward a limited autonomy and commission model. These included:

- This model could best support a culture of continuous innovation and improvement of court administration.
- This model could most effectively guarantee judicial supervision over access to justice, especially for self-represented and marginal litigants.
- This model most effectively avoids a divisive and adversarial atmosphere over court administration.
- This model could allow courts to develop and implement strategic planning.
- This model is the only one which combines judicial autonomy with ministerial responsibility.

Overall, the limited autonomy and commission model not only garnered the most supportive response from the consultations but also attracted the fewest negative responses.

8.7 THE JUDICIAL MODEL

8.7.1 Description

For the sake of completeness, and because it is the mirror image of the executive model with which this Chapter began, the last model proposed here is one that is based on complete judicial control, rather than complete executive control, over court administration. Under this model, the Court not only controls its own administration, but it has the authority and ability to set its own rules, hire and fire its own administrative personnel, and set its own budget.

This model of court administration has been manifest in greater and lesser degrees through history and even today, although an interdependent (and even wired) world makes self sufficiency appear obsolete. Historically, common law courts often generated their own funds through court fees, and enforced their own orders through the exercise of the contempt power. To this day, probate courts exist in the United States in which the court receives a percentage of the estates it probates, and uses the proceeds to hire staff and maintain court records and court facilities.²²⁴

Furthermore, American state Courts have used a variation of the contempt power to argue that they have an inherent power to govern many aspects of their internal operations, and even order the payment of funds deemed “reasonably necessary” for the exercise of their constitutional functions. This inherent powers doctrine has been used in over 30 states and remains valid law today, as an extension of the inherent power of common law courts to maintain orderly court proceedings and enforce judicial orders. Most funding mandates based on inherent powers were made against local funding authorities, and as state Courts shifted funding authority from local governments to state Legislatures, the use of the doctrine has declined. In effect, state court systems traded constitutional authority for managerial autonomy.²²⁵

8.7.2 Consultations

The Judicial model did not receive strong support from either judicial or executive respondents, although some respondents in the consultation indicated that this would be their preference “in an ideal world”.

Given the political realities and Westminster principles which characterize the administration of budgets and policies in the justice sector, few believed a fully realized Judicial model would be either viable or desirable. Both judicial and executive respondents acknowledged the importance of responsible government and democratic accountability in court administration.

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²²⁴ Until 1990, Ontario Small Claims Court clerks typically operated in this fashion. One variation of this approach was termed a Franchise Model in a U.S. study that dubbed them “Kentucky Fried Courts”; see Carl BAAR and Thomas A. HENDERSON, “Alternative Models for the Organization of State Court Systems,” in Philip L. DUBOIS, ed., *The Analysis of Judicial Reform* (Lexington, Mass.: D.C. Heath, 1982), ch. 13.

²²⁵ For the best general survey of the use of inherent powers by American state Courts, see Felix F. STUMPF, *Inherent Powers of the Courts: Sword and Shield of the Judiciary* (Reno, Nevada: National Judicial College, 1994).

8.8 CONCLUSIONS

Based on the descriptions, analysis and consultations discussed above, we have reached the following conclusions with respect to each of the models of court administration:

1. Notwithstanding the significant successes and accomplishments of Canadian court administration, it is apparent that the **executive model** is deficient in key aspects. Further, the success of the executive model has often in the past depended on the level of trust and communications that exist among specific persons occupying key decision-making positions—and their dedication and willingness to make modifications to the pure executive model. It is a very positive sign that these modifications—most if not all toward greater (but limited) judicial autonomy—have generated significant improvements and have earned support from both the court and the executive. However, the independence of the judiciary, the effectiveness and efficiency of the courts, and public confidence in the justice system requires an improved and robust model that ensures that jurisdictions take full advantage of more of the types of improvements that have already proven to be advantageous.
2. The **independent commission model** offers some advantages, most notably it provides a “level playing field”. However, it does so by reducing the influence of the executive (and others) to a level similar to that of the judiciary currently. The model therefore fails to resolve one of the key concerns with the executive model, since it fails to enhance the judicial role in court administration decision-making, while reducing the government’s role.
3. The **partnership model** has some appeal—and it may be appropriate in smaller jurisdictions where such models are used routinely in decision-making in other areas of government and civil society. However, for most jurisdictions it fails to resolve the key concerns with the executive model on a number of dimensions; for instance, the absence of a clearly defined decision maker and the dependence on the particular characteristics of the different partners. In fact, in many circumstances this model could exacerbate many of the undesirable features of the executive model.
4. The **executive guardian model** partially resolves the key concerns with the executive model, by giving the court power to order either that certain court administration activities take place or that certain activities be stopped. However, this model also has some deficiencies. In particular, it does not incorporate any ongoing mechanisms to facilitate effective court involvement in larger strategic decisions that will have fundamental impacts on judicial independence and the effectiveness and efficiency of court administration.
5. The **limited autonomy model** resolves many of the key concerns with the executive model. While consistent with a Westminster system of Parliamentary supremacy, and while maintaining democratic accountability over resource allocations, this model is based on judicial control and autonomy over core areas of court administration. Further, although the model of judicial autonomy would be expected to be applied to the large majority of *areas* and *stages* of administration decision-making, the model also recognizes that judicial autonomy could be limited—perhaps differently in different jurisdictions. For instance, the model could address

one of the key concerns raised about models involving judicial control—by leaving the determination of the overall total court administration budget with the executive or legislature and outside the “limit” of judicial autonomy. However, this model does not address dispute resolution between the judiciary and executive over court administration policies.

6. The **limited autonomy and commission model** incorporates the features of the limited autonomy model but joins that model with independent commission model in order to provide a mechanism for resolution and avoidance of disputes.
7. The **judicial model**—with judicial control over virtually all court administration decisions—resolves some of the key concerns with the executive model, but gives rise to a different parallel set of legitimacy and accountability concerns over the role of the judiciary in self-governing courts.

CHAPTER 9

THE RECOMMENDED MODEL: LIMITED AUTONOMY & COMMISSION MODEL

9.1 REVIEW OF THE PURPOSE, CRITERIA FOR ASSESSMENT AND KEY FINDINGS AND CONCLUSIONS

The main purpose of the research and consultations conducted as part of this research has been to determine which of the models described in Chapter 8, alone or in combination, would be the most appropriate for either all or specific subgroups of the different types and stages of administrative decisions (identified in Figures 6.1, 6.2 and 6.3 above).

The appropriateness of any alternative model relates directly to how well its application improves (or hinders) the ability to achieve the goals and objectives in the four areas listed in Figure 5.1, namely:

1. to better preserve judicial independence and the institutional integrity of the judiciary as a separate branch of government
2. to better enhance public trust and confidence in the judicial system
3. to better improve the quality and delivery of judicial services, more specifically:
 - a) By making court dispute resolution more accessible (esp. by reducing costs, introducing more familiar and effective process, resulting in more timely resolution)
 - b) By ensuring a more timely pace of litigation (all stages)
 - c) By enhancing the quality of dispute resolution (equality, fairness and integrity— process and outcomes)
 - d) By enhancing court transparency
 - e) By enhancing the environment for conducting the work of the court (litigants, judiciary, lawyers, mediators, other participants)
4. to better develop within the Court an enhanced capability and culture of continuous improvement and reform (through enhanced direction and leadership, organization, strategies and procedures, resources and/or support systems).

Our investigation developed and examined information from five main sources:

1. a detailed review of related constitutional considerations;
2. two rounds of interviews with Chief Justices and Deputy Ministers and other key participants in court administration from most jurisdictions in Canada, with the first round of interviews focusing on the models currently existing in Canada, and the second round of interviews focusing on a range of alternative models;

3. two seminars held with the Canadian Judicial Council following each round of interviews at which the issues raised during the consultations were discussed;
4. a review of the range of models used in Courts in other jurisdictions internationally; and
5. a review of the more general body of knowledge on models of administrative decision-making in Courts and in other organizations.

This investigation has led to the determination that the limited autonomy and commission model is the optimal model for court administration in Canada. The next section summarizes the analysis which has led to this conclusion.

9.2 THE RECOMMENDED MODEL

Why recommend the limited autonomy and commission model? There are three central justifications for this recommendation, all of which flow directly from the analysis presented in the body of the report. The first is the constitutional argument in favour of this model, the second is the argument based on administrative efficiency and effectiveness and the third is the argument based on the results of the consultations undertaken as part of this research.

First, the limited autonomy and commission model is most fully consistent with the constitutional analysis presented in Chapter 4. It protects judicial independence while respecting the role of the political branches in the budgeting of public funds. *Valente* illustrated the minimum requirements of administrative independence for Courts as judicial autonomy over a limited sphere of court administration activities. The limited autonomy and commission model builds on this same principle—the link between adjudicative and administrative independence—and strengthens it. Importantly, *Valente* did not enumerate any court administration functions which would not be appropriate for judicial autonomy and was never treated as an exhaustive code. More recent decisions expand the grounds of judicial independence and increase its requirements of institutional independence by situating it in the broader context of the separation of powers and the rule of law. These principles and developments all suggest the need for an enhanced judicial role in court administration and a depoliticization of court relationships with the executive and the legislative branches. The limited autonomy and commission model depoliticizes these relationships by clarifying the areas of decision-making in which the judiciary will be autonomous and the area of decision-making which will be subject to an independent commission. A growing body of international soft law on judicial independence reinforces this view, as does a clear trend toward greater judicial autonomy in civil and common law jurisdictions across the globe.

The executive model of court administration in Canada operates in an environment of constitutional uncertainty. The extent to which the doctrines of judicial independence and the separation of powers militate for judicial autonomy over a number of the stages and areas of court administration elaborated in Chapter 6 is unclear. The recommended model ends this uncertainty and provides a more robust constitutional foundation for the administration of the courts, which could in turn enhance public confidence in the administration of justice.

Second, from the vantage of administrative effectiveness and efficiency, this model addresses the key shortcomings identified with the executive model. Those shortcomings need not be repeated again here, but include the lack of a single source of clear leadership and accountability, divided loyalties of court staff, the absence of stable funding and strategic planning capacity, and the likelihood that the court's interests may become subsumed by the policy priorities of the government of the day. The recommended model addresses these shortcomings directly. Under this model, court staff would report to a Court Executive Officer responsible for running the day-to-day operations of the court, who in turn reports to the Chief Justice(s).

Because the courts would have control over how budget is allocated, they will be able to engage in long-term strategic planning (and in augmenting their capacity for such planning) based on the continuous improvement cycle of court administration presented in Chapter 6. Courts on this model would be able to focus on the public interest in efficiently and effectively run courts, undistracted by political vicissitudes or partisan campaigns. Self-administered courts will be able to forge better ties with the other key participants in court administration identified in Chapter 7. Too often in the past, relationships traditionally mediated by the Attorney General's office have proven cumbersome, with the potential for the government's priorities and the court's priorities to be blurred. In the recommended model, courts may develop independent and direct relationships with other government departments, stakeholder groups in the justice community, and the public at large, in furtherance of a coherent vision of court administration priorities.

Returning to the criteria for selecting a preferred model as detailed in Chapter 5, it was observed that innovation in court administration is a function of institutional confidence and administrative competence. A comparative review of developments in court administration in other jurisdictions (including Australia, Singapore, Ireland and the United States) suggests that self-administered courts have a comparative advantage over the executive-led administration of courts both in terms of institutional confidence and administrative competence. Further, as noted above, transparency and accountability are greater when innovation is developed by self-administered courts. Since innovation does not require direct negotiation with government officials to whom court administration is subordinate, the appearance of justice is not compromised—but in fact enhanced—by innovation efforts.

Third, the autonomy and commission model was overwhelmingly the preferred model in the consultations undertaken in support of this analysis and discussed in Chapter 8. The fact that the overwhelming majority of judicial respondents and indeed many executive respondents highlighted flaws in the executive model speaks to the need for change and the rationale for this study. When presented with a number of alternative models, a strong majority of judicial respondents believed that the combination of the limited autonomy model and the independent commission model would be the most desirable alternative model. Some were persuaded for reasons of constitutional principle, some for reasons of administrative practice in light of their own experience. Others were persuaded by the success of judicial autonomy initiatives in their own jurisdiction, or by the success of limited autonomy models in analogous jurisdictions such as Australia.

Executive respondents also emphasized the success of judicial autonomy initiatives within the executive model. The reasons given for why the executive model was nonetheless preferable to alternative models, however, do not stand up to careful scrutiny. Some executive respondents, for example, pointed to the lack of judicial capacity to manage court administration. Courts lack this capacity, however, precisely because under the executive model the executive branch manages court administration and controls the courts' ability to develop this capacity. Other respondents raised the difficulty of judges making daily decisions on human resources, information technology and so forth. Under the recommended model, however, the day-to-day operations of the court are handled by the Court Executive Officer, not judges. What changes under the recommended model is to whom the Court Executive Officer is accountable and who sets the global direction of court administration.

The consultations reflect broad judicial support for the view that the recommended model is the most constitutionally suitable and will result in more efficient and effective court administration. The recommended model is also consistent with the principles most often cited by executive respondents, such as ministerial responsibility and public accountability.

The consultations also reinforced the view that Canada is falling behind its peers. The trend globally, and in other common law jurisdictions such as the United Kingdom and Australia, is toward greater judicial autonomy and self-governing courts.

In summary, based on a constitutional analysis, an analysis of administrative effectiveness and efficiency and extensive consultations with both judicial and executive respondents, this report concludes that the optimal model of court administration in the present circumstances is one which features **limited judicial autonomy, combined with an independent commission** for the prevention and resolution of disputes regarding the global budget for court administration. This model represents the best alternative for preserving judicial independence and the institutional integrity of the judiciary, enhancing public trust and confidence in the judicial system, improving the quality and delivery of judicial services and developing a culture of continuous improvement in the administration of Canadian courts.