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# COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

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As readers of the Commonwealth Judicial Journal (CJJ) will be aware, next year, 2015, will mark the 800th anniversary of the Magna Carta which established for the first time the principle that everybody, including the king, was subject to the law and, although almost all the clauses have been repealed in modern times, the Magna Carta remains a cornerstone of the British constitution as well as of many constitutions across the Commonwealth.

In this context, I am pleased to note that the Commonwealth Magistrates' and Judges' Association (CMJA), together with the Commonwealth Lawyers Association (CLA) and the Commonwealth Legal Education Association (CLEA), has received a grant from the Magna Carta 800th Anniversary Committee to support a touring exhibition entitled "Magna Carta to Commonwealth Charter", celebrating the influence of Magna Carta throughout the Commonwealth. In parallel with this project, we hope to publish a special issue of the CJJ exploring the relationship between the Magna Carta and Commonwealth constitutions next year.

I would also like to remind readers of the 17th Triennial Conference of the CMJA, which will take place on 13-18 September 2015 in Wellington, New Zealand. The theme for this conference is "**Independent Judiciaries, Diverse Societies**" and more details may be found on the CMJA website: [www.cmja.org](http://www.cmja.org).

In past editorials, I have raised the likelihood that this journal will have to start being published exclusively in electronic format and I have invited readers' comments on this subject. Unless the CMJA can get a sponsor for the CJJ, it is likely that from the end of next year (December 2015), the CJJ will start being published in electronic format and circulated by email to members. This measure is necessary in order to ensure that the journal remains sustainable and cost-effective. Readers will be able to access the CJJ through the CMJA website. If you have any queries, please contact us at [info@cmja.org](mailto:info@cmja.org).

In this issue, we open with an article by the Hon. Justice John Z. Vertes, who examines the role of the Chief Justice in the context

of judicial independence. This is followed by an article by the Hon. Justice Fiona Mwale, who seeks to stimulate discussion on possible strategies to overcome some of the challenges identified in the Commonwealth Secretariat Report "Jurisprudence of Equality on Violence against Women: Towards Judicial Leadership." Also in this issue, an article by the Hon. Justice Mahapela Lehohla provides an overview of the application of English law in Southern Africa. Finally, Frank A. V. Falzon QC provides a commentary on the appointment of Justice Nadon to the Supreme Court of Canada (SCC), which was held by the SCC to be void *ab initio*.

The CJJ has once again collaborated with the Law Reports of the Commonwealth (LRC) to publish two judgments, namely (i) *African Echo (Pty) Ltd and Others v Simelane and Others* relating to judicial bias and (ii) *Phylactou v Republic and Vlamis v Republic* relating to judicial independence and judicial salaries. In this respect, I wish to renew our thanks to Dr Peter E. Slinn both in his capacity as chairperson of the Editorial Board of this Journal and as general editor, together with Prof. James S. Read, of the Law Reports of the Commonwealth ("LRC"), for allowing us to publish these law reports. I would also like to express my appreciation to the President of the CMJA, the Hon. Justice John Vertes and to Dr Karen Brewer, Secretary General, for their ongoing support of the Journal. We are also deeply grateful to Lexis-Nexis for their permission to report on these cases which appear in the LRC.

*Dr Aldo Zammit- Borda*

### **NB: from the Secretariat**

As we go to print we are very sad to inform Readers of the passing of our Council Member in Nigeria, Mrs Nkiruka Franklin Iguh who was also President of the Magistrates Association of Nigeria. She was elected to Council in September 2012 and had promoted the CMJA's objectives and work during her time on Council. The CMJA has sent their condolences to both the Magistrates Association of Nigeria and to her family.

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# JUDICIAL INDEPENDENCE AND THE ROLE OF THE CHIEF JUSTICE – POWERS, LIMITATIONS AND CHALLENGES

Hon. Justice John Z. Vertes, President of the Commonwealth Magistrates' and Judges' Association.

This article is based on a paper presented at the CMJA Conference on Judicial Independence: The Challenges of the Modern Era, Zambia, September 2014.

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**Abstract:** *Judicial independence is a norm deeply rooted in tradition and practice throughout the Commonwealth, one that predates the concept of separation of powers and the entrenchment of judicial independence in written constitutions. However, it must be remembered, that judicial independence is but a means to an end. The objective is to enable judges to render decisions in accordance with the law and the facts without concern for the consequences to themselves. This article examines the modern role of the Chief Justice in the context of upholding judicial independence: the powers, both statutory and traditional; limitations on those powers; challenges posed by internal court management responsibilities; and challenges posed by external forces, particularly those of government and the public's changing expectations of the courts.*

**Keywords:** Judicial independence – role of the Chief Justice – administration of justice – misconduct – internal and external challenges

## Introduction

The Commonwealth Charter, adopted by the Commonwealth Heads of Government on 14 December, 2012, declares in Article VII its belief in the rule of law and its support for an independent, impartial, honest and competent judiciary. It also recognizes that an independent, effective and honest judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.

The rule of law is fundamental in a democratic system of government. Similarly, an independent judiciary is essential to the rule of law in a democratic society. The rule of law at once justifies and serves as the foundation of judicial independence.

Judicial independence is a norm deeply rooted in tradition and practice throughout the Commonwealth, one that predates the concept of separation of powers and the entrenchment of judicial independence in written constitutions. Illustrative of this very point is the fact that the Act of Settlement of 1700, which instituted the basic requirements of security of tenure and financial security, was enacted even before the democratization of political power in England.

Modern jurisprudence recognizes both an individual and a collective or institutional aspect to judicial independence. This was explained in the judgment of the Supreme Court of Canada in *Valente v The Queen*, [1985]2 S.C.R. 673 (at pp. 685 and 687):

*[Judicial independence] 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...*

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.

It must be remembered, however, that judicial independence is but a means to an end. It is not an end in itself. The objective is to enable judges to render decisions in accordance with the law and the facts without concern for the consequences to themselves. The protections for judicial independence – protections such as security of tenure, financial security and insti-

tutional independence – were “not created for the benefit of judges, but for the benefit of the judged” (*Gratton v Canadian Judicial Council*, [1994] 2 F.C. 769 (at para. 16), quoted with approval in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (at para. 329)).

Independence is not a perk of the judicial office. It is a guarantee of the institutional conditions of impartiality. It is the “cornerstone, a necessary prerequisite, for judicial impartiality” and critical to the public’s perception of the impartiality of the judiciary (*R v Lippé*, [1991] 2 S.C.R. 114 (at p. 139)). As noted in the Valente case, judicial independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operations.

Much has been written about the principles of judicial independence but very little has been written about the role of the Chief Justice in the maintenance of the independence of the judiciary. And yet it is the Chief Justice of each court who manages the relationship between the court and the government. It is that relationship which carries the most obvious risks to the independence of the judiciary. It is also the Chief Justice who has responsibility for the internal management of the court. And it is the exercise of that authority that could pose risks to the independence of the individual judges of that court. The Chief Justice, therefore, has a unique responsibility not shared by the other judges of his or her court for safeguarding the independence of the judiciary.

This paper will examine the modern role of the Chief Justice: the powers, both statutory and traditional; limitations on those powers; challenges posed by internal court management responsibilities; and challenges posed by external forces, particularly those of government and the public’s changing expectations of the courts.

When I speak of Chief Justices, I will speak generally of that judge who is the highest judicial officer in his or her court. There is ordinarily a Chief Justice of any multi-judge court, and not necessarily just the Chief Justice

of a country, or the apex court of the country. For example, in Canada, the Chief Justice of the Supreme Court of Canada is designated as the Chief Justice of Canada. But the Chief Justice’s administrative responsibilities do not go beyond her court. The internal management of every other court in Canada is the responsibility of each court’s Chief Justice (or Chief Judge as the case may be), whether it is a superior court of inherent jurisdiction, a court of appeal, or a court of limited jurisdiction.

The Chief Justice of Canada certainly has a significant moral authority and is viewed by the public generally as the voice of the Canadian judiciary. She also exerts authority as chair of the Canadian Judicial Council, which is composed of all Chief Justices of the superior courts of Canada. The Council authorizes education initiatives, conducts inquiries into complaints against superior court judges, and from time to time issues guidelines and protocols to the superior courts on various matters, most significantly guidelines on ethical principles. But the direction of each court is the responsibility of that court’s Chief Justice.

Also, it is not uncommon for the head of the judiciary not to be in the highest or apex court of the jurisdiction in question. In the United Kingdom, for example, the apex court is the Supreme Court. Yet its President is not the head of the judiciary. Those heads are respectively, the Lord Chief Justice in England and Wales, the Lord President in Scotland, and the Lord Chief Justice in Northern Ireland.

So my discussion will focus on the role of a Chief Justice generally. And, in this discussion, I hope to emphasize two points. First, the most powerful and effective form of leadership occurs when the leaders lead by example. And, second, the personal qualities, conduct and image that a judge, and particularly a judicial leader, projects affect the image of the judicial system as a whole, and therefore, the confidence that the public places in it.

A Chief Justice has a special role. The Chief Justice sets the direction and tone of the judicial system. He or she is the public face of justice. A strong and able Chief Justice can personify the independence of the judiciary and exemplify that independence in the conduct of judicial proceedings in his or her court. A weak Chief Justice, however, will undoubtedly have a debilitating effect on the other judges

and detrimentally affect the public's trust and confidence in the justice system.

What is the effect on the administration of justice when a Chief Justice misconducts himself or herself? A few recent examples may illustrate the potential problems.

In 2009, the Chief Justice of Gibraltar was removed from office after a recommendation for his removal by the Judicial Committee of the Privy Council (*Hearing on the Report of the Chief Justice of Gibraltar*, [2009] U.K.P.C. 43). The allegations included a lack of restraint in his public statements over what he regarded as intrusions on judicial independence, making unfounded allegations that he was being hounded out of office and improperly entering the political arena by launching a court action attacking parts of a draft new constitution. The Committee's majority and those in the minority agreed that upholding the principle of judicial independence is one of the most important functions of a Chief Justice. The majority, however, concluded that the demands and expectations of the office of Chief Justice go well beyond those placed on ordinary judges and, in this case, the conduct of the Chief Justice brought him and his office into disrepute and adversely affected the public's perception of the administration of justice.

In 2013, the International Commission of Jurists issued a report entitled "The Crisis in Judicial Leadership in the Kingdom of Lesotho". The source of the crisis was a dispute between the Chief Justice and the President of the Court of Appeal over the issue of which of them is the head of the judiciary – a dispute that was widely covered in the media and attracted significant public scrutiny. Traditionally the Chief Justice performed that role but the constitution was unclear on the subject. As the report noted, the public watched as the two most senior judges became embroiled in a rancorous battle for leadership of the judiciary. They witnessed an increasingly contentious series of encounters resulting in a breakdown of the system to the point where the Court of Appeal cancelled a regular session. Most detrimentally, the public witnessed the failure of the judiciary to avert a crisis brought on by the individual egos of these two leaders while at the same time failing to address issues of inefficiencies and backlogs in the court system.

A significant feature of this controversy was that, as the dispute escalated, the President of the Court of Appeal urged the executive of the government to intervene. As the report stated, there is a danger in inviting the executive to intervene in matters falling within the purview of the judiciary. This may well create the perception that the judiciary is dependent on the executive. In addition, this undermines the principle of separation of powers and the independence of the judiciary.

The crisis in Lesotho ended with the Chief Justice retiring and the President of the Court of Appeal becoming the subject of removal proceedings.

Then, there is the peculiar example from earlier this year in which the Chief Justice of Swaziland issued arrest warrants for three High Court Judges for allegedly ignoring his orders and undermining his position. This situation arose when one of the judges set aside warrants issued by the Chief Justice for the arrest of a journalist and a human rights lawyer for alleged contempt of court ("Arrest Warrants for Three Judges", *Swazi Observer*, June 19, 2014).

Finally, there is the unifying example of the disgraced Chief Justice of Malta, Noel Arrigo, who in 2002 was charged and convicted of accepting a bribe to reduce the sentence of a convicted drug trafficker. Arrigo was eventually sentenced to a prison term of 33 months.

The lesson to be taken from these types of incidents is that judges, in particular those who are in positions of leadership, must hold themselves to the highest standard of conduct and accountability. They are entrusted with the responsibility to protect the independence, integrity and image of the judiciary. They must not allow their idiosyncrasies or their personal interests to override that responsibility. Judges are the servants of justice and the people; not the other way around.

### **The Powers of a Chief Justice**

Generally speaking, most of the powers of a Chief Justice will not be found in legislation but in tradition, constitutional theory and the conventions of the office. In Canada, for example, governments historically preferred to establish the position of Chief Justice with a paucity of specific statutory authority. The federal Judges Act says virtually nothing about

the powers and duties of a Chief Justice other than giving a Chief Justice a role in approving the attendance of judges at meetings, conferences and seminars (s. 41) and in granting a leave of absence to a judge for a period of less than 6 months ( s. 54).

This lack of specific statutory stipulations is noteworthy in several respects. First, it provides the office with considerable flexibility, enabling it to evolve with the personality, strengths and interests of the person holding it. Thus, an administrator may strengthen the structure of the court and streamline its procedures. A scholar may concentrate on elevating the academic quality of the court's work. A reformer may seek to change existing practices. Second, the absence of detailed legislation permits the Chief Justice to emphasize his or her independence from government and the legislative branch. Faced with a particular problem, the Chief Justice is able to request from the government whatever he or she feels they should request. It follows that the lack of extensive statutory regulation of the function of Chief Justice is of great significance because it allows the Chief Justice to determine in large measure the scope of his or her office, in accordance with his or her own judgment, energies and abilities.

There are, of course, some constitutional dimensions to the question of powers. The Supreme Court of Canada, for example, has held that there are certain powers that are necessary in order to maintain a sound separation between the judiciary and other functions of government (*Valente v The Queen*, [1985] 2 S.C.R. 673; *MacKeigan v Hickman*, [1989] 2 S.C.R. 796). These are the assignment of judges to hear particular cases; the scheduling of court sittings; the control of court lists for cases to be heard; the allocation of courtrooms; and the direction of registry and court staff in carrying out these functions. These are the essential requirements for institutional independence.

Where there are statutory provisions in place they usually follow this model outlining a Chief Justice's duties. However, as I mentioned previously, much of what is understood to come within the parameters of a Chief Justice's powers stems from tradition and the conventions of the role. In its judgment in *Ruffo v Conseil de la Magistrature*, [1995] 4 S.C.R.

267, the Supreme Court of Canada held that a large part of a Chief Justice's role in maintaining a high quality system of justice was defined gradually over the years, in the same way as judicial precedents. Powers were derived from judicial tradition. The supervisory powers conferred on a Chief Justice were derived from general practice and gradual developments over time.

One of these areas of general practice and tradition was the Chief Justice's supervisory role concerning the ethical conduct of the judges of his or her court. As many authors have noted, judicial independence and judicial ethics have a symbiotic relationship. Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

There is strong authority for the proposition that a Chief Justice's supervisory powers over ethics are inherent in the exercise of his or her functions and need not be conferred by specific statutory provisions (*Ruffo v Conseil de la Magistrature*, [1995] 4 S.C.R. 267 (at p. 304)). And this makes good sense. The Chief Justice oversees the court's operations. He or she is in a preferred position to ensure compliance with judicial ethics. He or she is the person closest to the judges and, as their administrative supervisor, the one most likely to observe problems arising or receive complaints. Further, because of the Chief Justice's status, he or she is often the best situated to deal with difficult matters of conduct through personal intervention with the judge concerned.

There was a long history in England where complaints about judges were directed to the Lord Chancellor or the Lord Chief Justice. It was common to deal with such issues informally and internally. Today many of the old informal procedures have been replaced by formal investigative and inquiry procedures. But there is still room for the informal intervention of a Chief Justice, as a matter of guidance and correction if needed, where the subject matter of the complaint does not raise an issue that could lead to removal or more formal disciplinary measures.

It goes without saying, of course, that the primary supervisory role for a Chief Justice in this respect is with regard to his or her own

conduct. A Chief Justice must set the example for his or her court in disregarding pressure or influence from any source, particularly political pressure with regard to the outcome of cases, and in fighting corruption. The courts are the defenders of the rule of law and this role becomes ever more important when the courts must operate in the context of authoritarian or corrupt regimes.

One can point, for example, to the legacy of the recently retired Chief Justice of Pakistan, Iftikhar Muhammad Chaudry. Although not without controversy himself, Chief Justice Chaudry, during his eight-year tenure as Chief Justice, transformed the Supreme Court into a robust institution capable of exercising its power independently and impartially, safeguarding the country's constitution and acting as a check on the powers of a government and military that failed to protect and respect the rights of its citizens. In a 2013 report by the International Commission of Jurists, entitled "Authority without accountability: the search for justice in Pakistan", the ICJ concluded that the Supreme Court, under Chief Justice Chaudry's leadership, has consistently taken a firm stance against the unconstitutional usurpation of power by the military and has effectively held public officials accountable for corruption and abuse of power.

Another area emanating from tradition is the Chief Justice's role as liaison with the government. A Chief Justice who ignores the need to develop a working relationship with government will only see his or her court resources suffer as a result. I will discuss administrative arrangements later in this paper but suffice it to say that generally courts are still dependent on government for financial and human resources. An open line of communication is absolutely necessary to avoid problems.

The reality in every Commonwealth country is that, of the three branches of government, the judiciary is the weakest because it depends on the other two branches of government to pay the salaries of judges and to provide the necessary infrastructure for an effective court system. Therefore a constructive working relationship must exist between the judiciary and the other branches of government if the public is to have meaningful access to justice.

And the Chief Justice has the lead role in creating that constructive relationship.

Finally, a developing area of responsibility for Chief Justices is that of being the public face and voice of the court. Many modern Chief Justices are coming to the view that, if they have a responsibility to uphold judicial independence and to act so as to enhance public confidence in the judiciary, then surely that obligation extends to communicating with the public to explain the court's procedures and the principles under which it operates. In the words of Chief Justice John Doyle of South Australia: If the public do not understand these things, can we really expect the public to value them and to support them if they are under threat? If the public do not understand the workings of the judiciary, can we assume their confidence in the judicial system when others challenge that confidence, depict the system in a way that might undermine confidence or when decisions are made which might test that confidence? (Hon. John Doyle, "Should the Judges Speak Out?" Judicial Conference of Australia (April, 2001)).

A good example of the type of public communication that might be helpful is a paper published jointly by the Chief Justices of the Court of Appeal, Supreme Court and Provincial Court of British Columbia in 2012 entitled "Judicial Independence (And What Everyone Should Know About It)". It outlines, in plain language, what is meant by judicial independence and why it is important. It was widely publicized and distributed as well as being posted on the courts' website (see: [http://www.courts.gov.bc.ca/about\\_the\\_courts/Judicial\\_Independence.pdf](http://www.courts.gov.bc.ca/about_the_courts/Judicial_Independence.pdf)).

Another example is the "Corporate Communications Office" set up in the office of the Chief Registrar of the High Court of Malaysia. That office plans, designs and executes programmes and activities to increase public awareness of the court's role in the community.

It is instructive that the International Summit of Chief Justices and Senior Justices of the Asia-Pacific Region, held in Istanbul in November 2013, issued a declaration on transparency in the judicial process. Among the principles enunciated in that declaration was that the judiciary should initiate and support appropriate outreach programmes designed

to educate the public on the role of the justice system in society. It stated that transparency involves more than simply providing access to court proceedings. To achieve transparency, information must also be disseminated in a form that is easily accessible, especially for those who do not have a legal background and may often have limited literacy. Publicizing information about court operations and judicial programmes to increase the quality and efficiency of justice also has beneficial effects on public confidence in the judiciary.

Today, there is greater responsibility on the judiciary, and primarily on Chief Justices, to inform the public about the court's role and function as the guardian of the public interest and the rule of law.

### Limitations on the Powers of a Chief Justice

The principle of judicial independence protects all judges, including the Chief Justice, in his or her adjudicative role. But that principle also imposes a restraint on a Chief Justice, a limitation that draws a line between the necessary and important administrative role of a Chief Justice and the adjudicative independence of the Chief Justice's colleagues. This limitation arises from the definition of judicial independence.

In *The Queen v Beaugregand*, [1986] 2 S.C.R. 56, then Chief Justice Dickson of the Supreme Court of Canada wrote (at p. 491):

*Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way a judge conducts his or her case and makes his or her decision. [Emphasis added.]*

In *R. v Lippé*, [1991] 2 S.C.R. 114, the Supreme Court of Canada was more specific when it stated that “members of the Court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice” (at para 46).

These pronouncements accord with international norms.

Part II of the Universal Declaration of the Independence of the Justice, enacted in Montreal in 1983, stipulates that, in the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. The U.N. Basic Principles on the Independence of the Judiciary, adopted in 1985, state that respect for the independence and impartiality of the judiciary requires that judges decide matters free from any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect from any quarter or for any reason.

These principles must, of course, be put into context. A Chief Justice, sitting as part of a multi-judge panel in an appellate court, will surely try to convince his or her colleagues of the rightness of his or her opinion on a case they heard, as would the other judges. The more difficult question is where to draw the line between proper attention to the administration of the court and improper interference in the independence of a judicial colleague.

I suggest that these pronouncements on the limitation of a Chief Justice's power do not diminish the important role of a Chief Justice in administering the court. There is a long tradition of puisne judges seeking the advice of a Chief Justice on difficult issues such as recusal or disqualification. There is an equally long tradition of Chief Justices giving advice, if asked, on matters arising during a trial and even on the substantive result of a case. I emphasize “if asked”. I cannot think that these traditions cross the line into interference with judicial independence.

Moreover, it would be wrong, in my view, to insist that a Chief Justice be silent if a judge is performing poorly, even if that poor performance arises in the context of a specific case. What if lawyers complain that a judge is letting the case proceed too slowly? What if lawyers complain, or the press reports, about a judge being persistently rude in his or her treatment of litigants? What if a judge is taking an excessively long time to render a decision? I realize that the decision to intervene would not be an easy one. However, in my view, in each instance the Chief Justice has the power, indeed the duty, to intervene and speak to the judge about it. I do not think these interventions by a Chief Justice would constitute improper interference.

All of this, in my view, simply reiterates what was said by the Judicial Committee of the Privy Council in the well-known case of *Rees v Crane*, [1994] 2 A.C. 173, an appeal concerning the decision of the Chief Justice of Trinidad and Tobago to not include one of the High Court judges on the list of judges assigned to cases for a specific term. Their Lordships said (at p.177):

*Their Lordships accept that ... the Chief Justice must have the power to organise the procedures and sitting of the courts in such a way as is reasonably necessary for the due administration of justice. This may involve allocating a judge to do particular work, to take on administrative tasks, requiring him not to sit if it is necessary because of the backlog of reserved judgments in the particular judge's list, or because of such matters as illness, accident or family or public obligations. It is anticipated that these administrative arrangements will normally be made amicably and after discussion between the Chief Justice and the judge concerned. It may also be necessary, if allegations are made against the judge, that his work programme should be arranged so that for example he only does a particular type of work for a period, or does not sit on a particular type of case or even temporarily he does not sit at all. Again this kind of arrangement can be and should be capable of being made by agreement or at least after frank and open discussion between the Chief Justice and the judge concerned.*

Having said that, however, it should be noted that in the *Rees* case their Lordships ultimately decided that what the Chief Justice had done was more than merely an administrative arrangement. It was in effect an indefinite suspension, something that the Chief Justice could not do because of the specific provisions of that country's constitution.

There is a notable Canadian example of a Chief Justice over-reaching the administrative powers of the office. In *Canada v Tobias*, [1997] 3 S.C.R. 391, the Supreme Court addressed the issue of a stay of proceedings granted by the trial judge due to an alleged interference with his independence by his Chief Justice.

In that case, a senior official of the federal Department of Justice met privately with the Chief Justice of the Federal Court complaining about the slow progress of certain cases being presided over by a judge of the trial division. The official and the Chief Justice, it should be noted, were friends and former colleagues. The Chief Justice spoke to the trial judge, received assurances that the cases would proceed more expeditiously, and wrote back to the government official confirming that the cases would be expedited. Once these things became public, the defendants sought and obtained a stay of proceedings on the basis that the trial judge's independence had been interfered with and, because the Chief Justice enjoys authority over all the judges of the court, a reasonable observer could conclude that the independence of all the judges had been compromised. Ultimately the Supreme Court of Canada agreed that the appearance of judicial independence had suffered as a result of the meeting between the official and the Chief Justice but that a stay of proceedings was not an appropriate remedy. Instead it ordered that the cases continue but before a different judge and directed that the Chief Justice have no involvement whatsoever with the case.

The problem with the Chief Justice's conduct in that case was not that he chose to address the issue of delay; indeed, the Supreme Court emphasized that "a Chief Justice is responsible for the expeditious progress of cases through his or her court and may, under certain circumstances, be obligated to take steps to correct tardiness" (p. 421). This was such a case because there was a legitimate concern about the exceedingly slow progress of the cases.

Rather, the problem with the Chief Justice's conduct was his methodology, specifically his inappropriate decision to discuss the case privately with a representative of one of the parties, without the knowledge and participation of counsel for the other parties, and to adopt a course of action meant to appease the concerns of that party. As explained by the Supreme Court, these actions by the Chief Justice "were more in the nature of a response to a party rather than to a problem. Thus, an action that might have been innocuous and even obligatory under other circumstances acquired an air of impropriety as a result of the events that preceded it" (p.421).

How each Chief Justice defines and exercises his or her role will depend on many factors, including the Chief's character and personality, the traditions of the court, its size, whether it is a trial or appellate court, and whether the Chief was appointed from inside or outside the court. But most significantly, whatever the circumstances, the Chief Justice is a leader – a leader by virtue of historical development and moral authority, as supplemented by enabling legislation, and by virtue of his or her special role relating to the co-ordination of the activities of the court, its internal management, and to safeguarding standards of judicial ethics and practice.

### Internal Challenges

What are some of the internal challenges confronting Chief Justices? By this I refer to the challenges emanating from within the court.

First and foremost is the Chief Justice's relationship with his or her judges. It is not unusual for puisne judges to express concern regarding the potential abuse of power by Chief Justices. In a study of the Canadian court system commissioned by the Canadian Judicial Council, Professor Martin Friedland of the University of Toronto highlighted the concerns expressed by puisne judges (M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995), pp. 225 – 231):

- the power to control when and what education courses judges are allowed to take;
- the power to control attendance at conferences and seminars;
- the power to allocate desirable and undesirable cases so as to reward or punish judges;
- the discretion to approve or disapprove sabbatical and other leave; and,
- the influence that can be exerted on appointments and promotions.

The powers of a Chief Justice put them in such a dominant position that the independence of their judges may be compromised. Opportunities exist for interference because of the unique nature of the Chief Justice's administrative authority and supervisory duties.

Professor Shimon Shetreet, in his classic study of the English judiciary, also wrote about the pressures felt by puisne judges and gave examples of judicial heads manipulating the assignment of cases so as to either punish judges or to ensure that their views prevailed in cases of public importance (S. Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (North-Holland Publishing Co., 1976), pp. 41 -43).

### What are some of the possible solutions?

First, courts could consider the adoption of formal guidelines or protocols. For example, the Canadian Judicial Council, in 1998, adopted a "Model Policy on Equality within the Court". The policy states that equality is a fundamental concept that should be taken into account by a Chief Justice in carrying out his or her duties and that the work to be done by judges, whether judicial or administrative, should be allocated in an equal manner. This does not preclude specialization where desirable or necessary, however, exclusive specialization should be the exception and judges should not be assigned to just one type of work without their consent.

Another example is the Canadian Judicial Council's "Judicial Education Guidelines" adopted in 2008. Those guidelines set out that each puisne judge should be credited with 10 days per year for education programmes against their sitting time. They also set out requirements for education plans and mentoring for newly-appointed judges.

These types of explicit guidelines go a long way to temper the possibility that assignments or decisions as to education opportunities would be used by a Chief Justice as a form of punishment or reward. They provide a framework to the exercise of discretion by a Chief Justice. And they are known by all of the judges.

Second, judges and legislators have increasingly turned their minds to the possibility of fixed terms for Chief Justices.

In Canada, Chief Justices of the superior courts are appointed by the Prime Minister. They are appointed to serve until the mandatory retirement age of 75. Although this has the effect of making them administratively independent, such long tenure may have an adverse effect

on the other judges of the court in regard to their own independence. A shorter fixed term would put some real limit on the power of the Chief Justice and lessen the possibility of the Chief Justice coming to dominate the ideology of the other judges. A Chief Justice who was aware that he or she would soon return to the rank of puisne judge would be much more inclined to act equitably in allocating work and deciding on education and other opportunities. It should also lead to a style of administration that is more collegial, more consultative, and less autocratic.

In Canada, a number of provincial courts (courts of limited jurisdiction) now have fixed-term appointments of their Chief Judges. Ontario, for example, provides that the appointment of the Chief Judge of the Provincial Court is for six years and cannot be renewed. The U.S. federal court system now provides that a Chief Judge's term is seven years. As far back as 1981, a report commissioned by the Canadian Judicial Council recommended a fixed, non-renewable term for all Chief Justices of between 5 and 10 years (J. Deschênes, *Masters in their own House* (Canadian Judicial Council, 1981)) as did Professor Friedland's subsequent report in 1995 (Friedland, at p. 230). To date, the Canadian Chief Justices who comprise the Council have not given the concept any active consideration.

The major criticism of fixed term appointments is that there is a lack of continuity of direction. This may be particularly pertinent when the position is that of a national Chief Justice or the Chief or President of a country's apex court. But this may simply be a matter of setting the appropriate term. In principle, there should be no impediment to consideration of fixed-term appointments for the position of Chief Justice of any trial or appellate court with the usual array of administrative responsibilities.

## External Challenges

In considering external challenges, I have in mind two issues: first, the issue of court administration and its independence from government; and second, the ever-increasing demands placed on the courts and the changing expectations of the public.

The principle of judicial independence has evolved significantly in the past few decades.

This evolution has had as an overarching objective the depoliticization of the relationship between the judiciary on the one hand and the legislature and executive on the other hand. The norm of judicial independence is the means for the judicial system to depoliticize its relationship with government and to reinforce the public's perception of the impartiality of the judiciary.

The need for depoliticization is most apparent in the area of court administration. Many international instruments, such as the UN Basic Principles on the Independence of the Judiciary in 1985 and the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence in 1998, recognize the importance of administrative autonomy as a fundamental aspect of the principle of judicial independence. They all state, in one way or the other, that the main responsibility for court administration should vest in the judiciary, including the appointment and supervision of support staff and control of the funds allocated to the judiciary.

In many jurisdictions, court administration is still controlled by the executive. This means that courts lack stable funding and discretion over expenditures; the courts are viewed as merely one more government department in the budgeting process; and, administrative staff often have divided loyalties between their ministerial employers and the judicial officers who direct them on a day-to-day basis. And there is very little that the courts can do to correct this situation when financial control is in the hands of the executive.

Fortunately, in recent years, there have been movements toward a more co-operative model and even arrangements whereby greater autonomy is granted to the courts. Arrangements in various courts in Australia, Scotland, Ireland, the United States, and now in some provinces of Canada have developed whereby the courts, and their Chief Justices, have full authority over court resources, both human and physical, with their budgets being set by the legislature after collaboration between the judiciary and the executive.

This trend means greater responsibilities for Chief Justices in planning and financial management. But independence of the judicial power must be based on a solid foundation of judicial control over the various components

that facilitate and support the work of the courts. Preparation of judicial budgets, control over the allocation of resources and direction of support staff must be under the control of the Chief Justices for there to be a meaningful depoliticization of the relationship between the courts and government.

Finally, I turn to what everyone recognizes as the vastly expanded role of the courts in society. The past few decades has seen a formidable increase in judicial powers, particularly regarding judicial review of legislation, and an ever-growing involvement of the courts in the resolution of social issues. This trend has been propelled by the constitutionalization of rights and the perceived inability or unwillingness of the legislatures to deal with controversial social issues. The result is that courts are being asked to resolve these questions and to play a much more significant role in shaping the life of the community. The changing role of the courts was described as follows by Chief Justice McLachlin of Canada (Rt. Hon. B. McLachlin, "The Role of Judges in Modern Commonwealth Society"; Speech delivered at the 10<sup>th</sup> Commonwealth Law Conference, Cyprus, 1993):

The necessary concomitant of the increasing insistence on human rights and the new social face of the law is an independent judiciary, ready and able to review a wide range of government action. While the legislative and executive branches of government have an important role to play in supporting human rights, the difficult burden of interpreting the rights and maintaining them in the face of governmental intransigence if need be rests on the shoulders of the courts.

Some of the extremely controversial social issues that the Supreme Court of Canada, for example, has had to address include the scope of freedom of religion (*R. v Big M Drug Mart*, [1985] 1 S.C.R. 295), the moment when human life begins (*R. v Morgentaler*, [1988], 1 S.C.R. 30), the right of a person to commit suicide with assistance (*R. v Rodriguez*, [1993] 3 S.C.R. 519), and same sex marriage (*Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698). Of course, even though such questions end up before the courts because the legislature has failed to act, this expanded role of the courts leads to the inevitable accusations of judicial activism.

A recent example of this tendency occurred in Canada where a Member of Parliament, a member of the governing party, stated that some groups in society are using the courts to do an "end-run" around the democratic process by using unelected judges to overturn policy decisions made by the government. The MP was quoted as saying: "If citizens through the democratic process are unable to make policy decisions because of unelected judges and well-financed interest groups, (then) we collectively lose" ("Courts being used as 'end-run' around democracy, Tory MP says", July 19, 2014, at <http://www.cbc.ca>). The danger of such comments, ill-informed as they may be, is that they ignore the essential role courts play in society and can easily undermine the public's confidence in the court system.

What this greater role for the courts also leads to are increasing demands for performance accountability. Dissatisfaction with the justice system, whether due to court backlogs or other inefficiencies, combined with expectations that the courts and justice system must somehow solve a variety of difficult social problems, and the continuing unwillingness of governments around the world to adequately increase the resources required by the courts, are among the forces that are contributing to greater demand for judicial system accountability. This reflects an increased scrutiny of the court system, especially scrutiny of the quality of service provided. This will impose a greater need to develop sophisticated workload indicators and budgeting systems as well as the need for more efficient court administration.

Demands for greater system accountability are becoming institutionalized by formal court standards measurement systems. The Council of Europe has introduced a wide-ranging quality measurement initiative through the European Commission for the Efficiency of Justice. In the United States, the state courts have established trial courts performance standards. In Singapore, the Subordinate Courts took the initiative to develop a "framework for court excellence". These measurement standards focus on such things as access to the courts, clearance rates, reliability and integrity of case files, and court employee satisfaction.

The traditional response of the judiciary to accountability measurement systems, certainly ones devised by governments, has been to say

that they pose a potential intrusion on judicial independence. After all, judges are accountable in other ways: they sit in open court; they give public reasons for their decisions; their decisions may be appealed; individual judges are accountable to the Chief Justice and Chief Justices are accountable in turn for the proper discharge of the court's work and the expenditure of funds; and, if judges misbehave, they can be disciplined. But the reality is that this is an area where proactive leadership is critical for ensuring court excellence. And that role falls to the Chief Justice.

Here, again, the policies and procedures instituted by the Chief Justice can have a profound effect on a court's performance and the public's perception of that performance. For example, a court policy on the ethical behaviour of judges or the treatment of litigants and witnesses may positively influence the values of accessibility, integrity and impartiality. Effective management of court resources can lead to greater expedition in the resolution of cases. Inefficient management and utilization of resources will lead to cases of long duration and an increasing backlog of cases. The point is that the Chief Justice must be concerned with issues of efficiency and the quality of service provided to the public.

It follows naturally that a Chief Justice must foster a culture of excellence. The Chief Justice's role can no longer be described as simply first among equals. Today a Chief Justice is also the chief executive officer of the court. The courts are a vital institution in modern society and it is the Chief Justice who must accept responsibility for that institution. Thus, the burden falls on the Chief Justice to move the institution forward while maintaining proper relationships with government, the Bar and the public. And, to do so, a Chief Justice must build support internally on his or her court by consulting the judges on the court so that a consensus can be reached as to the court's goals and how to accomplish them. Important decisions regarding court administration and policy should be done in an atmosphere of consultation, collaboration and collegiality. The Chief Justice of a court may be its leader but without the active support of the judges, he or she will not be leading much.

The challenges for Chief Justices are many and varied. They must be scholars, administrators,

communicators and leaders. They must uphold standards of conduct and ethical behaviour, in themselves and their judges. They must be able to work with government but at the same time keep their distance so that no one can accuse them of being either controlled or influenced by political connections. They are the face and voice of the court.

In conclusion, I will quote from a speech delivered by Canadian Chief Justice Beverly McLachlin to the law school at the University of Windsor in 2007: "Governments and societies may intentionally or unwittingly act to curb or undercut judicial independence, but they can never take away the individual judge's independence of mind and spirit. Judges must be absolutely committed to doing what is right and just, however unpopular that may be. Judges must have courage. Judges must be in no one's corner and in no one's pocket."

These words apply to all judges but in particular to the Chief Justices entrusted with the leadership of the courts throughout the Commonwealth.

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# DISCUSSING STRATEGIES FOR JUDICIAL LEADERSHIP IN ADDRESSING VIOLENCE AGAINST WOMEN

Hon. Justice Fiona Mwale, Judge of the High Court of Malawi.

This article is based on a paper presented at the CMJA Conference on Judicial Independence: The Challenges of the Modern Era, Zambia, September 2014.

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**Abstract:** *This paper seeks to stimulate discussion on possible strategies to overcome some of the challenges identified in the Commonwealth Secretariat Report, “Jurisprudence of Equality on Violence against Women: Towards Judicial Leadership” (2012). It considers how judicial leadership can be exercised in overcoming the challenges cited in the Report using four strategies, namely: (1) Continuing education through Internal Training Programmes; (2) Judicial watch project; (3) Law reform; and (4) Lobbying and advocacy.*

**Keywords:** Violence against women – judicial leadership – administration of justice – judicial training – court watch reports

## Introduction

The purpose of my paper is to stimulate and provoke discussion on possible strategies to overcome some of the challenges identified in the Commonwealth Secretariat Report, “Jurisprudence of Equality on Violence against Women: Towards Judicial Leadership” (2012).

I will start off the discussion with a brief definition of judicial leadership. Underpinning my discussion will be the finding that judicial leadership cannot be exercised in isolation. Although we may hail an individual judge for a landmark decision that sets the tone for eliminating violence against women, the processes that lead to such leadership can often be attributed to a variety of factors that have enabled the judge to come up with that decision. Any action that manifests judicial leadership operates within the context of an enabling environment made up of sufficient resources ranging from adequate funding of the judiciary, availability of relevant information, adequate laws protecting the rights of women and the expertise necessary to interpret them. It is thus as much about the enabling factors as it is about judicial decision making. Judicial leadership extends further than the courtroom, and may see the judge

at the helm of reforms that enable him to effectively address violence against women working in collaboration with others. It is my suggestion that creatively harnessing the roles that each of the stakeholders necessary to creating an enabling environment could go some way to overcoming the challenges that judiciaries across the Commonwealth are facing in addressing violence against women.

By way of background to the Commonwealth Secretariat Report I have referred to above, it is the product of the mid-term review of the Commonwealth Plan of Action which identifies “Violence Against Women” as one of the critical areas for action. The Commonwealth Secretariat, focusing on efforts to strengthen jurisprudence of equality on violence against women commissioned a review of case law in Commonwealth Jurisdictions. The purpose of the review was to assess the outcomes of domestic violence cases filed in national courts within the Commonwealth with a view to analysing the gendered pattern of the judgments and subsequent implementation measures. The Report identified and examined how the various Judiciaries around the Commonwealth have interpreted and applied national and/or international human rights law, to address violence against women.

To briefly summarize the findings that relate to the judiciary, the Report:

- (a) bemoans the absence of a comprehensive law on violence against women in some jurisdictions compounded by the existence of discriminatory laws that reinforce gender stereotypes;
- (b) also notes a failure by some judges to apply the law resulting in narrow interpretations and understanding of domestic violence. This results in failure by the court in question to fairly balance the rights of the victims against those of the accused resulting in a miscarriage of

justice. It is clear from some of the cases reviewed that, where there are no physical injuries, some courts have trivialized some forms of violence as less serious and not warranting police or judicial intervention;

- (c) identified the persistence of gender stereotypes and bias by some courts particularly in sentencing ; and
- (d) in cases of marital rape it highlights that there is a lack of a gender sensitive approach in understanding what constitutes domestic and other forms of violence against women.

The result of these challenges is that perpetrators often walk away free or with lenient sentences that do not reflect the gravity of the offence committed. This state of affairs sends a wrong message that violence against women is not a serious crime after all.

Not wishing to highlight only the obstacles, the Report also presents promising standards and practices that could strengthen the administration of justice and enhance women's access to justice. It also acknowledges the efforts by national judiciaries to address violence.

An example of one of the cases presenting promising standards is the Botswana case of *Sekoto v. DPP* (2007)1BLR 392(CA). Sekoto was convicted and sentenced to serve twelve years imprisonment for the murder of his live-in girlfriend. He had stabbed her with a knife 18 times inflicting fatal injuries. This was after she ended their troubled relationship. He appealed against the sentence on the ground that the High Court failed to give due weight to the mitigating circumstances raised in his defence.

In dismissing the appeal against sentence, the Botswana Court of Appeal seized the opportunity and sent a strong message that domestic violence was on the increase in Botswana and could not be tolerated. The court recognized the right of the deceased to end the relationship and rejected the accused person's portrayal of himself as the wronged party. In dismissing the appeal, the Court reiterated that it had a duty to play its part in stamping out domestic violence and found that a stiff sentence was called for in the circumstances. Such warnings can be effective in conveying the message that violence against women has consequences and will not be condoned by the judiciary.

The question that I will seek to address in my paper, is how judicial leadership can be exercised in overcoming the challenges cited in the report using four strategies so that decisions like the Sekoto case are the norm and not the exception. I do however acknowledge the diversity of the Commonwealth and therefore in no way suggest that these strategies are a "one size fits all" solution.

### **What is judicial leadership?**

The normal tendency is to describe judicial leadership with reference to the cases decided or the jurisprudence developed by individual judges, especially those that sit in an appellate capacity. The 21<sup>st</sup> century has seen an expansion in this perception and the term has come to be associated with judges taking responsibility for the overall health of the judicial institution and its effectiveness at dispensing substantial justice in the society that relies on it for doing just that. Both contexts of the role of the judge in judicial leadership are extremely important in dealing with violence against women. The Commonwealth Report highlighted that judicial leadership is critical at all levels, the local, the national and the international. The judiciary, being the institution on which "women's rights ultimately depend", makes "critical decisions affecting the lives of victims of violence as well as perpetrators of such violence" and are thus ideally situated to "strengthen access to justice and to help protect women victims of violence."

It is important to reiterate at this point that such leadership cannot be exercised by the judiciary in isolation. Whether a judge is presiding over a case involving violence against women or is involved in campaigns for the change in laws, policies, systems and structures that perpetuate violence against women, he or she can only effectively do so with the collaboration of all relevant stakeholders.

Judicial leadership must however be exercised with caution so as not to compromise the impartiality that is expected of the judiciary. Judges must also be careful not to be involved with extra-judicial activities that compromise their independence or to in any way compromise their impartiality or independence when deciding on any particular case.

At an individual level, a judge must be a leader and must be encouraged to take action in the

exercise of this leadership that improves the lives of women, protects them and sends out a message that violence against women is a breach of a fundamental human right, both at local and international level and will not be tolerated. Court leadership must therefore strive to take the lead, with Chief Justices adopting or approving strategies that work within their jurisdictions to overcome the challenges faced by them.

### **Strategy 1: Continuing education through Internal Training Programmes**

Many of the challenges identified have their root in a lack of appreciation of the implications of violence against women and its ever changing manifestations. Whilst the argument for continuing education for judges especially in gender sensitivity, to keep their skills up to date, has often been raised, not enough has been done. The word “training” is usually synonymous with a substantial input of resources which a good many jurisdictions in the Commonwealth can ill afford. Funding levels for the judicial arm of government may not stretch as far as education programmes when faced with even more pressing operational costs. Yet if we are to get the courts to an acceptable level of competence to understanding, appreciating and actually engaging with violence against women, it is imperative that they are trained to “recast their roles as formative social institutions, embracing new paradigms, notably as “managers of justice”, to become more accountable and improve service delivery. As a part of this on-going transformation, these courts are grappling with the need not just to reflect social values of diversity and gender equality but to assume a leadership role in promoting and protecting them. In this dynamic context, the techniques of judicial education in supporting the courts to assume and exercise their leadership role are all the more important today.” How then do judiciaries in such low funding predicaments acquire this essential training?

At the risk of sounding overly simplistic, I would like to suggest that there is still something that judiciaries can do in the form of training without having to strain on resources. Looking inwardly, or in-house, many judiciaries have the necessary knowledge base, but just aren’t sharing it within themselves. For some judiciaries in the Commonwealth, there

are no specialized courts for dealing with violence against women. Most cases of violence come before judges in general divisions with no specialization or training in gender equality, however, within the pool of judges, some may have such training or experience and this can be exploited to the benefit of all. A judiciary with an internal training programme, one organized in collaboration with stakeholders, could also harness the expertise within its ranks so that those judges with the requisite expertise could also form be used as resource persons sharing experiences and knowledge with others.

For example in my own jurisdiction a number of judicial officers have postgraduate degrees in Women and the Law. To borrow an American strategy used for in-house training and information sharing, judicial officers could meet during lunch hour over a working packed lunch, on a designated day and listen to a presentation on current issues in women and the law delivered by a colleague on a rotational basis. Simple and cost effective.

Collaboration with stakeholders with the relevant expertise though, as noted earlier is also important. I would therefore like to suggest that with the right collaborations, a judiciary can formulate a simple programme where not only judicial officers but also various stakeholders that are experts in the field, serve as resource persons at regular judicial colloquia focussing not just on prevailing social norms, but also the technicalities of gender equality and the impact of gender based violence or violence against women on society. I believe some gains would be made by investing time for on-going dialogue that ensures that that all relevant subject matter is explored to the required depth. The judiciary should however initiate contact with the stakeholders as many would shy away for fear of being seen as influencing the judiciary. The judiciary should in consequence take up its leadership role and request general trainings on specific areas in which they are lacking. Internal judicial training committees could take charge in drawing up lists of resource persons and subject matter which could include judicial leadership.

It should not be assumed that every judge will know about judicial leadership and the confines within which it may be exercised. It

is therefore very important that this particular topic should also be included in a training program of this nature.

In conclusion, judiciaries must be accountable to the population they serve and there is no better way to ensure accountability than through continuing education, albeit of an informal nature.

*“To the extent that complaints of inequality encapsulate an underpinning demand for judicial accountability, it is argued that continuing education is acquiring a significant role for the judiciary at two levels: first, as a means to enhance equality of treatment before the law; and second, to illuminate an appropriate means to provide accountability. For these reasons, the judiciary has an emerging interest in developing its continuing education.”*

## **Strategy 2: Judicial watch project**

As noted above, judicial leadership is not restricted to the delivery of judgements but also extends to maintaining the health of the judicial institution and to its survival and its relevance and acceptability on society. The various challenges discussed above can also be resolved through programmes sanctioned by the judiciary, aimed at maintaining public confidence in the judiciary, as an institution that is willing to listen to the public it serves. I would therefore like to propose as a strategy, not lacking in controversy, that other jurisdictions have called “court watch projects”. These projects, common in the United States seek to utilize court monitoring as part of a coordinated response to end violence against women. The goal of such a strategy is to have objective court observers document, not only how victims are treated in court, but also how the lack of adequate funding for the judiciary, prosecutors and legal aid practitioners as well as other relevant service providers, impedes the ability of the judiciary to provide high quality service.

Once the Chief Justice of a jurisdiction sanctions the use of such a strategy, objective monitors (perhaps from the Law Society) would be permitted to come into the courtroom and write reports on cases involving violence against women for the consumption of the court. Whether or not these reports are to be circulated further raises a number

of issues and is a matter than can only be decided by each jurisdiction having considered the implications. Such monitors would report on and accumulate statistics on the types of cases heard, what the outcomes were for the victim and the offender, whether the case was adjourned and why, how long it took for judgment to be delivered, whether the victim was legally aided and the overall conduct of the case.

These statistics could show a trend for certain judges that may very well point to the areas in which they need more training. On the other hand, such reports could also show sentencing trends and the judge would realize whether he is unduly lenient or overly strict with offenders. This data if properly documented may also be used to advocate for the allocation of adequate resources. It may also provide the court’s public relations officer with the information that shows the judiciary in a positive light to share with the public who may often be misguided by negative reporting, thus enhancing public confidence. Properly agreed upon, court watches can be a very effective mechanism to bring about changes to the court.

An example of a court watch report could read:

*In 85% of all your cases Judge ..., you did not order restitution for the abused victim. Battery experts tell us that abusers need to be held financially accountable for their crimes and victims should be compensated for out of pocket expenses directly caused by their crimes. Our request is that you consider the recognized international practice, including asking victims for documentation of crime related expenses, then ordering the defendant to reimburse those.*

*In 90% of the observed cases, in which protective orders were violated, there were no additional sanctions imposed on the defendant. In order to implement the legislative intent of abuse prevention, batterers must know that there will be swift sure sanctions for flaunting the court’s orders. Our request is that some types of sanction are imposed for every violation assuming a full range of punishments depending on the severity of the offence.*

It is also very important to report the positive:

*My Lord, in over 50% of cases watched, you ordered restitution to the victim. Also very helpful was that you ordered money to be paid through the courts so that victim wasn't endangered further during collection.*

### Strategy 3: Law Reform

The Commonwealth Report has also highlighted the need for law reform as an urgent priority in the quest to deal with and eliminate violence against women. Many countries still do not have specific legislation that deals with violence against women in the home in separate statutes outside their Penal Codes. Enacting such legislation and enhancing the capacity of all service providers dealing with it is only the first step. The repeal of discriminatory laws that reinforce gender stereotypes must run concurrently with the enactment of specialized laws. Comprehensive and integrated support and other legal services that take survivors through the judicial process should also be specifically provided for in legislation. Other issues also need to be addressed within the legal framework to ensure that whilst the perpetrator is facing justice in the criminal justice system, the victim is also provided for and protected.

Law reform should not be a challenge in the Commonwealth where almost every country has an institution specifically set up for that purpose. In Malawi, the practice of the Malawi Law Commission which operates with *ad hoc* law commissioners chosen for their expertise in the field of law under review, the practice has been to appoint a high court or a Supreme Court judge as the chairperson of that particular commission, called a special law reform commission. In many other jurisdictions, the head of the law reform body is often a senior judge. This provides ample opportunity for judicial leadership, with the judiciary participating in the development and formulation of new laws as well as the repeal of discriminatory ones. Such practice also recognizes the unique role of the judge in motivating change. It is therefore very good practice to include judges in law reform initiatives, realizing that judges have the training to see any situation from all perspectives and thus provide a clear vision of new laws or systematic frameworks that work towards

eliminating and preventing violence against women.

### Strategy 4: Lobbying and advocacy

Whilst many of the challenges can be dealt either at the individual judge level through training, or at the collaborative level through collective responses with multiple stakeholders, some issues need to be escalated to political and government structures in order for the changes to be made. This is where lobbying and advocacy becomes a useful strategy. Judges can be at the helm of such initiatives because of their status which gives them a natural leadership role. Judges hold the clout to call for meetings which may be attended by high level functionaries with the potential to ensure that law reforms are speedily enacted, so that more meaningful interaction and engagement between them and the executive and legislative arms of government is the order of the day. Meaningful dialogue, initiated by Chief Justices as we heard yesterday, is crucial.

To conclude,

*“A society’s institutions either grow deeper and adapt, or wither and get bypassed. Just as the adjudicating judge long ago ceased being the passive non-manager of litigation, today’s judge must take interest and responsibility for building better systems of justice.”*

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# THE APPLICATION OF ENGLISH LAW IN SOUTHERN AFRICA

*Hon. Justice Mahapela Lehobla, former Chief Justice of Lesotho.*

*This article is based on a paper presented at the Legal and Judicial Legacies of Empire Conference, London, June 2014.*

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**Abstract:** *This paper examines the experience of a few countries in the Southern African Development Community region to illustrate the extent of the application of English law and other legal systems during the British Empire and after independence. Firstly, the paper provides a bird's-eye view of the application of English law and other legal systems in the British Empire with particular reference to Southern Africa. Secondly, the paper considers the contribution of English law to the Southern African law and the rule of law. Thirdly, it briefly reflect on the impact of English law during the post-independence era in these countries.*

**Keywords:** Legal pluralism – English Law – Roman-Dutch law – application in Southern Africa

This rather complex topic of the application of English law and other legal systems in the British Empire and after independence can be sub-divided into three parts: the application of English law in the Empire; the application of that law and its interaction with other legal systems in the Empire before independence; the application of that law and other legal systems after independence

In between these three parts there will understandably be a myriad of other questions, because an empire the size of the British one encompassed a good many nations of diverse legal systems and customs. From this brief premise one can justifiably conclude and say that it takes any and many forms to constitute an empire.

However, in the process, it would be wayward to conclude that law and order are incapable of being maintained in an empire due to the obvious conflict that must arise from this medley and variety of habits, customs and laws characterising individual members of the Empire. Its laws evolved from English law and were applicable to them all as an over-arching

point of reference for their applicability and sustenance.

Thus, both before and after independence, English law served and still serves as some form of judicial touchstone, in the sense that, although wherever it migrated English law sought to preserve the existing order, these laws and customs had to pass the litmus test of being not inconsistent with natural justice or with the British sense of fair play.

Much as English law, by virtue of its quality, where it was applied in the colonies bore the seeds of sustainability in its original form, it has in a good many post-independence colonies developed beyond recognition because of amendments effected to make it suitable to local conditions. But is this not a paradox, a handy pointer to the value of change? Hence the saying “old order changes, yielding place to new, lest one good custom corrupt the world”.

English law, like the Roman-Dutch law, received acceptance as a readymade tool. In this sense, like the Roman-Dutch law, it is an old law that, because of seeds of sustenance in it, has survived into modern times. It wormed itself into acceptance even in the Muslim world and other places practising Sharia law.

British colonialism resulted in the application of English law in all areas and territories under the control of Great Britain. The English legal system was rooted in common law, statutes and judicial precedent. In various territories under British colonial rule, English law was introduced through reception or codification as well as case law. For example, a variety of versions of English criminal codes influenced penal codes in Africa, including the Indian Penal Code, the Queensland Criminal Code and its derivatives, the Nigerian Criminal Code and the second Colonial Office Model Code. The Indian Penal Code was originally adopted in some African states, but these countries later

adopted the more bureaucratic Queensland model.

Regardless of the form adopted, the codes were based on English law and many included a provision that they be read according to the English principles of legal interpretation. Botswana, Malawi, Mauritius, Tanzania, and Zambia are living examples of countries in which the troubling provisions in the English Vagrancy Act of 1824 emerged in their criminal codes.

In this brief paper, I hope to use the experience of a few countries in the Southern African Development Community region to illustrate the extent of the application of English law and other legal systems in the British Empire and after independence. I intend to restrict this exercise to Southern Africa and to undertake it in three main ways. First, an attempt will be made to provide a bird's-eye view of the application of English law and other legal systems in the British Empire with particular reference to Southern Africa. Next, the paper will consider the contribution of English law to the Southern African law and the rule of law. Last, I will briefly reflect on the impact of English law during the post-independence era in these countries.

Legal pluralism and/or dualism are a consequence of colonialism. In almost all countries formerly colonised by the British, the colonial legal order was characterized by the coexistence of different legal systems. The law of the colonisers and the laws and customs of the colonised were juxtaposed in the pluralistic and/or dualistic arrangement. This trend was a corollary of the theory of indirect rule which was central to British colonial ideology. As has been aptly argued, when in the course of colonisation one sovereign was replaced by another, and the law of the colonists became the law of the land and provision was made for the recognition, in certain cases, of a previously existing system of law, difficult questions were likely to arise.

The Southern African Roman-Dutch law is a blend of indigenous Dutch customary law and Roman law. It was this legal system that prevailed in Holland during the 17th and 18th centuries and was introduced and applied into the Colony of the Cape of Good Hope after settlement by the Dutch in 1652.

At the end of the 18th century, the Cape was occupied by the British. Roman-Dutch law was retained and confirmed as the common law of the colony. English, however, became the language of the courts and English legal procedures and the English law of evidence in both criminal and civil matters was introduced. The influence of English private and public law soon became apparent, more particularly because its sources were more readily available to practitioners than the Latin and High Dutch of the Roman-Dutch old authorities.

In Southern Africa, English law was introduced into the British colonies either through reception and codification or both by the British. The countries in point are Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe. As we may remember, the first British occupation of the Cape of Good Hope was in 1795. The Roman-Dutch law, which is the common law in most countries in Southern Africa, was received into the various territories on different statutory dates. The various pieces of legislation in Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe had the effect of introducing legal pluralism and/or dualism.

In the beginning our constitutional law was simply part of the British Empire system, based on the sovereignty of the British Parliament. However, Britain gave to its former colonies (newly independent states) the Westminster constitutional model.

Coming on to consider our criminal law, it has been largely modelled on the British system. The state, which conducts almost all prosecutions, litigates with the accused as if it were the plaintiff in a civil action and he were the defendant, and it seeks, without striving unduly, to prove his guilt beyond reasonable doubt. There is the presumption of innocence. This is a British approach. According to the Continental view, a suspect is guilty until he can prove his innocence. Furthermore, the jury system, which though it had Germanic roots came to us from England, included, for a generation in the Cape Colony of Good Hope, the grand jury. The jury later metamorphosed into the tradition of assessors, who are the triers of fact.

I turn to the contribution of English law to South African law. A leading publication that in my opinion speaks to the application of

English law and Roman Dutch Law is the one entitled: *The Contribution of English Law to the South African Law*; and *The Rule of Law in South Africa*. At pages 10 to 11 of the publication, the following summary of the contribution of English law to our Roman-Dutch law of Southern Africa is to be found:

*The extensive additions to and modifications of our common law since the beginning of the nineteenth century are what we are mainly concerned with... for it has been during this modern period that the influence of English law has come strongly into play. It has happened in various ways, some more direct than others. Sometimes there has been express statutory introduction of the English law; this has been very extensively done in relation to the law of evidence. We have provisions that where in respect of certain subjects, such as the admissibility of evidence and the examination of witnesses, where our existing law is silent, English law is to be applied. Close to the law of evidence in this context is the law of procedure, civil and criminal, where we have taken over with modifications from time to time substantially the whole of the English system, without copying all the detailed rules to be found in Archbold or the Supreme Court Practice. In other branches of the law important English statutes, such as those on company law, merchant shipping, insurance and negotiable instruments, have been copied by our legislatures, with only such minor changes as have seemed to be necessary to suit local conditions or to fit into existing South African law (and indeed other countries as well). Much of the subject-matter of these statutes was part of the law merchant and common to most civilised countries and legal systems, but it was in their English form that, with a few exceptions, they became part of our law.*

As the learned authors also indicate, the other greatest contribution of English law to Roman-Dutch law is the principle of binding precedent. Again as the learned authors correctly point out, while the courts of the Netherlands paid considerable respect to prior decisions, our treatment of the *rationes decidendi* of such decisions as positively binding on courts

dealing later with the same legal problems came to us from English law.

In relation to the post-independence era, while much of Anglophone African post-independence development is of great interest, this paper is limited to the application of English legal order in its newly independent territories. On the granting of independence, the legislative power of former British colonies was vested in a parliament. In general the institutional forms of the British parliamentary system were adopted. A cardinal feature of the judicial order of the newly independent territories, continued from its colonial past, was the division of judicial power between two systems of courts.

I will now consider Lesotho and conclude with Swaziland.

The Kingdom of Lesotho is one of the former British colonies (euphemistically referred to as protectorates). Basutoland (Lesotho) received the law of the Cape Colony of Good Hope through the General Law Proclamation No 2B of 1884. It has a “hybrid” or “mixed” legal system formed by interweaving of a number of distinct legal traditions: a civil law system inherited from the Dutch, a common law system inherited from the British, and a customary law system inherited from the indigenous Africans.

To their credit, the British judges who served in pre-independence Lesotho did not flinch from applying peculiar and weird aspects of Basotho customary laws of the day which had been woven into English criminal law of procedure. For instance, the plea, after the accused has been found guilty in a homicide case, to mitigate the severity of sentence by asking the criminal court to take into account that he has yet “to raise the deceased’s head” in a customary law suit where he would be required to pay ten head of cattle as compensation to the deceased’s family. In this sense they had clearly appreciated the virtue of restorative justice in Basotho society. Today restorative justice is par for the course in enlightened societies of the world.

Let me rush to Swaziland in conclusion. It is important to consider that as a contrast.

Swaziland also applies the common law. Section 252 of the Constitution provides that the principles and rules that immediately

before 6 September 1968 formed the principles and the rules of Roman-Dutch common law as applicable to Swaziland since 22 February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that these principles or rules are inconsistent with the constitution or a statute. The common law of Swaziland is therefore primarily Roman-Dutch common law as applied in the Transvaal in February 1907. This was done by means of the General Law and Administration Proclamation 4 of 1907. The effect of the Proclamation was to make the Roman-Dutch common law the general law or common law of Swaziland, applying to and governing all legal transactions in the kingdom regardless of the race of the parties. This means, in effect, that the Roman-Dutch law of the Cape Colony as adulterated by the principles of English law was introduced into Swaziland through the Transvaal from 22 February 1907.

At independence, the Kingdom of Swaziland adopted a Westminster-style Constitution, which enshrined a comprehensive Bill of Rights as well as the concepts of an independent judiciary, the separation of powers and the rule of law. The Independence Constitution theoretically created a constitutional monarchy which was bound to function on the premise of a bicameral parliament. It also created the executive arm of government, the head of which was a prime minister who was the leader of the majority party in parliament. On 12 April 1973 the life span of the Independence Constitution was cut short by its abrogation by the king. From then on, anything affecting the courts, parliament and the executive was held in utter and bewildering consternation, plus disbelief throughout the Commonwealth – for instance, the indiscriminate arrest and imprisonment of journalists – as a result of which the legal fraternity and lawyers for human rights are constantly up in arms against blatant transgressions by the judiciary and its encroachment on human rights, and the rule of law is a regular diet.

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# REFERENCE RE: SUPREME COURT ACT, SS. 5 AND 6, 2014 SCC 21: A CASE COMMENT

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**Abstract:** On 3 October 2013, Justice Nadon was named a judge of the Supreme Court of Canada, replacing Justice Morris Fish as one of the three judges appointed from Quebec pursuant to s. 6 of the Supreme Court Act. He was sworn in as a member of the Court on 7 October 2013. Subsequently, however, in the Supreme Court of Canada's opinion in Reference re: Supreme Court Act, ss. 5 and 6, 2014 SCC 21 (the Nadon Reference), the Court held, by a 6-1 margin, that the appointment of Justice Nadon to the Supreme Court of Canada was void *ab initio*. This commentary examines the background and circumstances of this appointment and concludes that the Nadon Reference is a stark reminder that the analytical approaches adopted by the courts in matters of statutory interpretation and constitutional adjudication are only the beginning of the process of answering difficult questions.

**Keywords:** Rule of law – Supreme Court Act – constitutional interpretation – appointment to the Supreme Court of Canada – void *ab initio*

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 28.

## The Rule of Law

The rule of law is part of the Canadian social fabric – western civilization's greatest gift to all free and democratic societies. By insisting that everyone, including government, is bound by the law as interpreted by an independent judiciary, the rule of law creates the legal conditions that are necessary for a society to achieve freedom, equality and human dignity. The rule of law promotes the fundamental values and freedoms we enjoy as Canadians precisely because it demands a measure of

accountability, and even humility, on the part of those exercising statutory power.

It would be a mistake to think of the rule of law as being solely a doctrine of limitation. As emphasized in *Dunsmuir*, *supra*, the rule of law is quite big enough to recognize that specialized state actors must be given a degree of deference and procedural flexibility to carry out their legitimate statutory purposes. However, the rule of law ultimately places boundaries around the exercise of all statutory power.

One way of expressing this might be to say that the rule of law will bend, but it will not break. In the end, the rule of law insists that it is illegitimate for *anyone* – no matter how personally powerful, wise or well-intentioned – to exercise statutory power except in accordance with the law. It is precisely because we are all equal before the law that an exercise of statutory power contrary to law can be brought before the courts and declared to be of no force or effect. All this reflects the fundamental norm that governs a democracy governed by the rule of law – the actions of the State obtain legitimacy from the law, not the other way around.

## A Messy Secret

For all of its great and profound importance, rule of law contains within itself a messy secret – at least it might seem this way to those not initiated in the law. That secret is that the legal experts responsible for declaring the law, our judges, are required to engage in what is sometimes a rather uncertain process when they interpret the law, even when it has been written down in the form of a statute passed by a democratically elected legislature.

As legal professionals, we know of course that when it comes to construing statutes, uncertainty comes with the territory. We know that language, for all its wonder, remains an imperfect tool for expressing some ideas.

We know that, even in common parlance, a word or phrase may mean very different things depending on the context. We know that statutes are not all prepared with the same degree of planning, care and precision. We know that statutes are often the product of many minds and many hands. We know that for reasons that can relate as much to the psychology of the reader as to the objective reality of the text, some may perceive as utterly clear a statutory provision that others may regard as being ambiguous. And we know that where the governing principles of statutory construction instruct courts to glean legislative intent with the aid of tools such as “context”, “statutory purpose” and the “absurdity principle”, statutory interpretation can be uncertain indeed, as even as judges may uniformly strive to “determine and apply the intention of the legislature without crossing the line between judicial interpretation and legislative drafting” (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 51).

### Reference re: Supreme Court Act, ss. 5 and 6, 2014 SCC 21

It is difficult to find a better illustration of the statutory interpretation challenges described above than in the Supreme Court of Canada’s recent opinion in *Reference re: Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 (the *Nadon Reference*).

#### A. The Court’s conclusions

The *Nadon Reference* concluded, by a 6-1 margin, that the appointment of Justice Marc Nadon to the Supreme Court of Canada, to which Court he was sworn in on October 7, 2013, was *void ab initio*.

The Court further concluded that Parliament lacked the constitutional authority to amend the *Supreme Court Act* to authorize Justice Nadon’s appointment.

#### B. The basic facts

The basic facts giving rise to the *Reference* were succinctly summarized by the majority, at para. 9:

*On September 30, 2013, the Prime Minister of Canada announced the nomination of Justice Marc Nadon, a supernumerary judge of the Federal Court of Appeal, to the Supreme Court of*

*Canada. On October 3, 2013, by Order in Council P.C. 2013-1050, Justice Nadon was named a judge of the Supreme Court of Canada, replacing Justice Morris Fish as one of the three judges appointed from Quebec pursuant to s. 6 of the Supreme Court Act. He was sworn in as a member of the Court on the morning of October 7, 2013.*

#### C. The relevant statutory provisions

The relevant statutory provisions were ss. 5 and 6 of the *Supreme Court Act*, R.S.C. 1985, c. S-26:

5. Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.
6. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

#### D. The problem

As the Federal Court is not a provincial superior court, Justice Marc Nadon was obviously not a provincial superior court justice, let alone a judge of one of the Quebec Superior Courts.

Justice Nadon had, however, prior to his appointment to the Bench, practiced law in Quebec for more than 10 years. The issue was therefore whether his prior experience at the Quebec Bar was sufficient to satisfy the requirements of ss. 5 and 6 of the *Supreme Court Act*.

One might think that answering this question in light of two brief sections of the Supreme Court of Canada’s own enabling statute and in light of that Court’s lengthy pedigree and experience would not be the source of great judicial controversy, particularly among the judges of our highest Court.

Think again.

#### E. The politics of Supreme Court appointments

Alexis de Tocqueville famously observed that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” Consistent

with this observation, Americans have always openly recognized that who gets appointed to the Supreme Court matters. American politicians have always been keenly aware that one's judicial philosophy can, even where similar analytical approaches are being applied, have significant impacts on the outcomes of contested questions of law, particularly those which can intersect with politics as often happens in constitutional law, administrative law and statutory interpretation.

De Tocqueville's observation applies with full force in the post-*Charter* world in which Canadians now live. Today, the identity and judicial philosophy of any prospective new Supreme Court of Canada justice is a matter of considerable and legitimate concern to a wide range of individuals and advocacy organizations. It should therefore be no surprise that the question as to who should be appointed would also be of intense concern to an appointing government, particularly one with well recognized concerns about the appropriate relationship between the role of Parliament and the role of the judiciary.

When Justice Morris Fish notified the Chief Justice in April 2013 that he would be retiring at the end of August of that year, public commentary and advocacy began almost immediately regarding who should be the replacement. The relevant commentary asserted a range of factors to which government should give priority in making the new appointment, including the candidate's standing in the legal community, gender, regional representation, judicial and personal philosophy and, especially in Quebec, the candidate's connection to Quebec and his or her approach to issues of federalism and language rights both inside and outside Quebec.

Since Canada does not employ the highly public and often very intense judicial appointments process employed in the United States, our appointment process is usually rather more obscure to the public. However, the public record in respect of the Nadon appointment stands out as being considerably more detailed than almost any prior appointment to the Supreme Court of Canada.

It might be argued that resort to the "amplified" record that follows has no proper place in a legal case comment addressing questions of statutory interpretation and constitutional

jurisprudence. That kind of objection might well have some force in a case comment designed to support an entirely cynical view of a judgment or opinion of the court. However, I make no such assertion. My assertion is much more modest and much more respectful of our judiciary.

My assertion is that judges are human beings. Judges remain human even as they strive mightily to apply the law in a fashion that is true to the judicial role. Judges live in the world. They have opinions about things. It should not surprise anyone that in the face of real ambiguity on legal questions, judges tend to resolve legitimate ambiguities in a fashion that they believe will enhance the interests of justice, the legitimacy of the legal process and their individual views regarding the larger purposes of the statute in question, including the Constitution.

As seen from the backstory that follows, the Court was in this case confronted with several contextual factors not listed in the textbooks on statutory construction. It will be for the reader to consider and assess whether and to what extent these factors – involving issues ranging from the proper relationship between the Executive Branch and the Court as it relates to judicial appointments, to the institutional integrity of the Court and the Justices' perceptions of what is or is not required for Quebecers to have confidence in the Supreme Court of Canada as an institution – should and did enter into the answers provided by the majority in this case.

#### F. The backstory

On 22 April 2013, Justice Fish provided notice of his pending retirement, four months prior to his retirement date. On that day, the Chief Justice met with the Prime Minister as a courtesy to give him Justice Fish's retirement letter.

On 11 June 2013, Justice Minister Rob Nicholson issued a press release outlining the process to choose a successor to Justice Fish. That Press Release described a Selection Panel consisting of 5 MPs with the following mandate:

*The mandate of the Selection Panel is to review and assess a list of qualified candidates put forward by the Minister of Justice and Attorney General of Canada in consultation with the Prime Minister, the Chief Justice of Canada, the Chief*

*Justice of Quebec, the Attorney General of Quebec and other prominent legal organizations, including the Barreau du Québec and Canadian Bar Association. The Minister has also received public input with respect to candidates who merit consideration.*

The Press Release went on to state that from the list put forward by the federal Government after its consultations (including the Chief Justice), the Selection Panel would undertake its own consultations (including with the Chief Justice), and would finally put forward an “unranked list of three qualified candidates” to the Prime Minister and Minister of Justice, who would select from that list, following which the nominee would appear at an *ad hoc* meeting of a parliamentary committee.

Following the Court’s opinion, the *Globe and Mail* reported that it had obtained the original “long list” that the federal government provided to the Selection Panel. That long list referenced six names. The article states that:

*Four of the six judges put forward were from the Federal Court in Ottawa, even though it wasn’t clear judges from that court were eligible.*

The *Globe and Mail* reports that after the Selection Panel was given the long list, the panel undertook its consultations, which included a meeting in Montreal with 10 senior members of the Quebec legal community. At that meeting, concern was expressed not only that the list included only two members of the Quebec bench, but that there was an eligibility issue flowing from ss. 5 and 6 of the *Supreme Court Act* in respect of the four Federal Court candidates.

On 29 July 2013, the Chief Justice met with the Selection Panel and, according to a statement issued by the Chief Justice on 2 May 2014, “provided the committee with her views on the needs of the Supreme Court.”

The Chief Justice also advised that on 31 July 2013, she called the Minister of Justice’s office and the Prime Minister’s chief of staff. In response to an earlier suggestion from the Prime Minister that he had declined to take her call out of concerns for propriety, the Chief Justice stated that she had called the Government:

*...to flag a potential issue regarding the eligibility of a judge of the federal courts to fill a Quebec seat on the Supreme Court. Later that day, the Chief Justice spoke with the Minister of Justice, Mr. MacKay, to flag the potential issue. The Chief Justice’s office also made preliminary inquiries to set up a call or meeting with the Prime Minister, but ultimately the Chief Justice decided not to pursue a call or meeting.*

In the end, the Selection Panel, by majority, identified the three person short list, which list included Justice Nadon.

#### G. The Binnie opinion

That the Government was acutely aware of the eligibility issue is reflected not only in the fact that it took legal advice regarding the issue from senior external counsel (not an uncommon occurrence), but that it publicly released that advice on 30 September 2013 concurrently with the appointment announcement.

The opinion was dated 9 September 2013. Its author was former Supreme Court of Canada Justice Ian Binnie. The Government press release announcing the Nadon appointment and the Binnie opinion also noted that the Binnie opinion was reviewed and endorsed by former Supreme Court of Canada Justice Louise Charron and the eminent Peter Hogg.

Mr. Binnie’s opinion was that Justice Nadon clearly qualified to sit on the Court. His opinion was that s. 5 of the *Supreme Court Act* plainly allows current and former advocates to sit on the Court, and that section 6 must be read in light of s. 5 lest it create the “nonsensical result” that a Quebec advocate with zero years of standing would be eligible to be appointed to the Supreme Court of Canada the day after his or her call to the Bar”. Mr. Binnie supported this conclusion with reference to legislative history (“Parliament’s concern has never been with current membership but with a minimum length of experience at the bar”) as well the purpose of the *Act* and the avoidance of absurd results (a Federal Court judge who had practiced in Quebec for 15 years until 1985 and was appointed to the Federal Court in 2000 “is clearly better qualified for the bench after 15 years on the bench than he or she was in 1985 prior to the initial appoint-

ment”). Mr. Binnie was asked about whether, out of an abundance of caution, it might be better for a Federal Court nominee to resign from the Court and join the Quebec Bar for a short time in order to ensure that no issue arises. His opinion on this issue was that such a measure would “make no practical sense” as being contrary to the intent of the *Supreme Court Act* and the “dignity of the office”.

H. The swearing in, the legal challenge and the Reference

On 7 October 2013, Justice Nadon was sworn in as a member of the Supreme Court of Canada in a private ceremony.

Also on 7 October 2013, Mr. Rocco Galati, a Toronto lawyer, filed an application in Federal Court seeking a declaration that a judge of the federal Court cannot be appointed to one of the three Quebec seats on the Court. At the time, Mr. Galati was quoted as saying the following regarding the purpose of s. 6:

*“There’s a lot of reasons the provision is there. One of the reasons with respect to the accommodation of Quebec is that you don’t want people being absent that long from Quebec and then purporting to be Quebec judges.”*

*“[Nadon] has been a Federal Court judge for 20 years. The section doesn’t allow his appointment.”*

On 8 October 2013, the Supreme Court of Canada issued a Press Release stating that “Mr. Justice Marc Nadon has decided, in light of the challenge to his appointment pending before the Federal Court, not to participate for the time being in matters before the Supreme Court of Canada.”

On 12 October 2013, the Barreau du Québec asked Prime Minister Stephen Harper to refer Galati’s challenge directly to the Supreme Court of Canada.

On 22 October 2014, the Government referred the following questions to the Court:

1. Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the Supreme Court Act?

2. Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled Economic Action Plan 2013 Act, No. 2?

I. Composition of the Bench hearing the Reference

The Supreme Court of Canada sat as a Bench of seven members to hear the Reference, which meant that one member of the Court had to sit out. Justice Rothstein, formerly of the Federal Court and a former colleague of Justice Nadon, did not participate.

J. The role of the Chief Justice

Chief Justice McLachlin did participate.

The Chief Justice’s participation became a matter of public controversy when, following the release of the *Nadon Reference*, the Prime Minister was accused of alleging that the Chief Justice had acted inappropriately in seeking to have a discussion with him about the legality of the Federal Court appointments when she knew or ought to have known the matter was going to come before the Court.

The exchange of press releases included this 1 May 2014 statement on behalf of the Prime Minister:

*Neither the Prime Minister nor the Minister of Justice would ever call a sitting judge on a matter that is or may be before the court.... The Chief Justice initiated the call to the Minister of Justice. After the Minister received her call he advised the Prime Minister that given the subject she wishes to raise, taking a phone call from the Chief Justice would be inadvisable and inappropriate. The Prime Minister agreed not to take her call.*

For her part, the Chief Justice responded publicly that it is customary that the Chief Justice be consulted during the consultation process, that her concern was simply to ensure that government was aware of the eligibility issue and that at no time did she express her opinion as to the merits of the issue.

These public exchanges prompted several members of the legal community, including the International Commission of Jurists, to criticize the government for suggesting impropriety on the part of the Chief Justice. There was, however, a minority opinion, suggesting that the Chief Justice's stated intention regarding the call was difficult to square with the majority's subsequent finding that a "requirement of current membership in the Quebec bar has been in place — unambiguous and unchanged — since 1875."

#### K. What might have been

The composition of the Court that decided the *Reference* included five of six common law judges and both Quebec judges remaining on the Court.

The external observer might have been forgiven for hoping in advance that, whatever the outcome, it would be ideal in a larger sense if the outcome of the case, whatever it was, avoided a deep division between the common law and Quebec justices, and that the Court itself would have been alive to this ideal.

#### L. The Statutory Interpretation Question

The statutory provisions

For convenient reference, ss. 5 and 6 are set out again below:

5. Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.
6. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

The competing positions

Since the Federal Court is not a "superior court of a province", a Federal Court judge's eligibility to occupy one of the three Quebec seats on the Supreme Court of Canada depends on whether, pursuant to ss. 5 and 6, that judge, as a former lawyer, is eligible to sit on the Court.

The view advanced by the federal Government and supported by the Binnie/Charron/Hogg opinions, was that ss. 5 and 6 are interlocking

provisions. On this view, section 5 provides the minimum prerequisites for *all* appointment to the Supreme Court of Canada (*is or has been* a judge of a superior court or a lawyer of at least 10 years standing), while section 6 builds on section 5 by guaranteeing three Quebec seats, required to be filled from among judges and lawyers from Quebec who meet the requirements of s. 5. On this view, Justice Nadon, as a former Quebec lawyer of more than 10 years standing, was qualified to sit on the Court.

The contrary view, advanced by those who challenged the appointment, was that s. 6 imposes an entirely distinct set of statutory requirements in respect of the three Quebec seats. This argument asserted that while the six common law seats may indeed be filled by former lawyers or former judges, s. 6 requires that the three Quebec seats must be filled by *current* judges or lawyers from Quebec. On this view, former Federal Court justices Iacobucci and Rothstein were eligible to sit on the Supreme Court of Canada because they filled vacancies in the common law seats. Justice Nadon, on the other hand, was ineligible for appointment to fill one of the three a Quebec seats as he was not currently a Quebec lawyer or a judge of a Quebec court.

#### The majority opinion

The majority opinion, attributed to all 6 majority justices, rejected the federal Government's position for reasons the majority summarized as follows:

*17 In our view, s. 6 narrows the pool from the four groups of people who are eligible under s. 5 to two groups who are eligible under s. 6. By specifying that three judges shall be selected from among the members of a specific list of institutions, s. 6 requires that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of these institutions.*

*18 We come to this conclusion for four main reasons. First, the plain meaning of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. Second, this interpretation gives effect to important differences in the wording of ss. 5 and 6. Third, this interpretation of s. 6 advances*

*its dual purpose of ensuring that the Court has civil law expertise and that Quebec's legal traditions and social values are represented on the Court and that Quebec's confidence in the Court be maintained. Finally, this interpretation is consistent with the broader scheme of the Supreme Court Act for the appointment of ad hoc judges.*

The majority began with a review of legislative history. It held that the current provisions reflect the “historic bargain” that gave rise to the Court’s birth in 1875, and that the original provision “contemplated only the appointment of current lawyers to the Court, both for Quebec and the rest of the country” (para. 21). The Court noted that when the section was amended in 1886 to adopt its current two part structure (then in two different subsections rather than two separate sections), the amendments expanded eligibility for “former lawyers” generally, “but did not change the more restrictive language for the Quebec appointments” (para. 23).

With regard to s. 5, the majority recognized that the French version is somewhat ambiguous as to whether a former advocate is eligible to sit on the Court at all, but held that this ambiguity was resolved in favour of such eligibility given the clarity of the English version: paras. 28-33: “In the result, judges of the Federal Court of Appeal will generally qualify for appointment under s. 5 on the basis that they were formerly barristers or advocates of at least 10 years standing”: para. 34.

With regard to s. 6, the majority accepted the federal government’s argument that the section 5 requirement of “10 years standing” applies to the Quebec appointments. However, the Court rejected the position that the other parts of s. 5 apply to the Quebec appointees. The Court stated:

*37 We agree that ss. 5 and 6 must be read together. We also agree that the requirement of at least 10 years standing at the bar applies to appointments from Quebec. We disagree, however, with the Attorney General's ultimate conclusion that reading these provisions together in a complementary way permits the appointment of former advocates of at least 10 years standing to the Quebec seats on the Court. Section 6 does not displace*

*the general requirements under s. 5 that apply to all appointments to the Supreme Court. Rather, it makes additional specifications in respect of the three judges from Quebec. One of these is that they must currently be a member of the Quebec bar.*

The majority supported its conclusion based on the “plain meaning” of s. 6, its “purpose” and the “surrounding statutory context”.

With regard to “plain meaning”, the majority held that, in addition to the legislative history described above, the words “from among” in s. 6 clearly connote a “temporal element” (para. 41):

*There is an important change in language between s. 5 and s. 6. Section 5 refers to both present and former membership in the listed institutions by using the words "is or has been" in the English version and "actuels ou anciens" in the French version. By contrast, s. 6 refers only to the pool of individuals who are presently members of the bar ("shall be appointed from among" and "sont choisis parmi"). The significance of this change is made clear by the plain meaning of the words used: the words "from among the judges" and "parmi les juges" do not mean "from among the former judges" and "parmi les anciens juges", and the words "from among the advocates" and "parmi les avocats" do not mean "from among the former advocates" and "parmi les anciens avocats".*

With regard to “purpose”, the majority concluded, with reference to the historical record, that: “the purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada” (para. 49). This discussion led to what might be seen as the central policy consideration that informed the majority’s opinion:

*56 Viewed in this light, the purpose of s. 6 is clearly different from the purpose of s. 5. Section 5 establishes a broad*

pool of eligible candidates; s. 6 is more restrictive. Its exclusion of candidates otherwise eligible under s. 5 was intended by Parliament as a means of attaining the twofold purpose of (i) ensuring civil law expertise and the representation of Quebec's legal traditions and social values on the Court, and (ii) enhancing the confidence of Quebec in the Court. Requiring the appointment of current members of civil law institutions was intended to ensure not only that those judges were qualified to represent Quebec on the Court, but that they were perceived by Quebecers as being so qualified. [emphasis added]

It is difficult not to read the underlined words without considering the intense controversy, including the objections coming from Quebec itself, regarding the appointment.

Finally, with regard to “surrounding statutory context”, the majority looked to other provisions of the *Supreme Court Act* – in particular those concerning who can sit as an *ad hoc* judge of the Court – and held that they “reflect the same distinction between eligibility and eligibility for one of the Quebec seats”: para. 63.

The majority then concluded with this rather curious if not teasing comment:

71 We note in passing that the reference questions do not ask whether a judge of the Federal Court or Federal Court of Appeal who was a former advocate of at least 10 years standing at the Quebec bar could rejoin the Quebec bar for a day in order to be eligible for appointment to this Court under s. 6. We therefore do not decide this issue.

Whether one agrees or disagrees with the majority's analysis, all would likely agree that the Federal Government was wise to not “try this one on” given everything the Court had earlier stated about the purpose of the provision.

### The dissenting opinion

In a powerful dissent, Moldaver J. rejected the majority's interpretation of s. 6. Justice Moldaver commenced his opinion with this preface:

110 The issue raised in Question 1 is whether former advocates of the Quebec bar of at least 10 years standing meet the eligibility requirements in the *Supreme Court Act* for appointment to the Quebec seats on this Court. That is a legal issue, not a political one. It is not the function of this Court to comment on the merits of an appointment or the selection process that led to it. Those are political matters that belong to the executive branch of government. They form no part of our mandate.

Justice Moldaver summarized his opinion as follows:

117 All members of this Court agree that under s. 5 of the Act, both current and former members of a provincial bar of at least 10 years standing, and both current and former judges of a provincial superior court, are eligible for appointment to this Court. We part company, however, on whether s. 6 restricts the eligibility criteria, in the case of the three Quebec seats, to only current members of the Quebec bar and current judges of Quebec's superior courts. My colleagues conclude that it does; I reach the opposite conclusion. In my respectful view, the same eligibility criteria in s. 5 apply to all appointees, including those chosen from Quebec institutions to fill a Quebec seat. The currency requirement is not supported by the text of s. 6, its context, its legislative history, or its underlying object. Nor is such a requirement supported by the scheme of the *Supreme Court Act*. In short, currency has never been a requirement under s. 6 and, in my view, any attempt to impose it must be rejected.

Like the majority, Justice Moldaver analyzed the statutory text, the legislative history, statutory purpose and the statutory context.

With regard to the statutory text, Justice Moldaver stated that the legislation is indeed clear, but in precisely the opposite direction. As noted in his judgment:

122 First, the words “[a]ny person” in s. 5 are a clear indication that the eligibility requirements set out in that section apply to all appointees. Second, the words “the judges” in s. 6 refer explicitly to the description of the judges provided in s. 5.

Manifestly, one must read s. 5 in order to understand which judges s. 6 is referring to and what their eligibility requirements are.

123 Apart from these textual cues, an absurdity results if s. 6 is not read in conjunction with s. 5. Section 6 says nothing about the length of Quebec bar membership required before an individual will be eligible for one of the Quebec seats on this Court. Hence, for the purposes of s. 6, if it is not read in conjunction with s. 5, any member of the Quebec bar, including a newly minted member of one day's standing, would be eligible for a Quebec seat on this Court. Faced with this manifest absurdity, the majority acknowledges that the phrase "advocates of that Province" in s. 6 must be linked to the 10-year eligibility requirement for members of the bar specified in s. 5.

124 But that, they say, is where the link ends. It does not extend to the fact that under s. 5, both current and past members of the bar of at least 10 years standing are eligible. With respect, this amounts to cherry-picking. Choosing from s. 5 only those aspects of it that are convenient -- and jettisoning those that are not -- is a principle of statutory interpretation heretofore unknown.

125 Given that s. 6 contains an explicit reference to the eligibility criteria set out in s. 5 and that an absurdity would result if s. 6 did not take its meaning from s. 5, the next logical question to ask is: What is it in s. 6 that imposes a currency requirement on Quebec appointees? The answer, in my view, is nothing.

126 Contrary to the view of the majority, the words "from among" found in s. 6 do not, with respect, impose a currency requirement on Quebec appointees. The words convey no temporal meaning. They take their meaning from the surrounding context and cannot, on their own, support the contention that a person must be a current member of the bar or bench to be eligible for a Quebec seat. In short, they do not alter the group to which s. 6 refers -- the group described in s. 5.

127 If Parliament had intended to distinguish Quebec appointees from other appointees by requiring that Quebec judges be current judges or current advocates, surely it would have said so in clear terms. It would not have masked this crucial distinction between Quebec candidates and non-Quebec candidates by using words as ambiguous and inconclusive as "from among". The addition of the word "current" before the words "judges" and "advocates" in s. 6 would have been a simple -- and obvious -- solution.

With regard to legislative history, Justice Moldaver held as follows:

130 And once it is understood that current and former judges of the Quebec superior courts have always been included in the eligibility pool, it is a short step to realize that the 1886 amendments did not reduce the eligible groups for Quebec judges to two -- rather, they increased the number of eligible groups in Quebec (and elsewhere in Canada) from three to four. One can scour the Hansard debates of 1875 -- or at any point in time since then -- and find no mention that Parliament intended to narrow the four groups of eligible candidates under s. 5 to only two groups in the case of Quebec. In short, the four group/two group distinction has no foundation in fact or law. [footnote omitted]

Justice Moldaver also strongly disagreed with the majority's assessment of the purpose of s. 6:

145 ... The objective of s. 6 is, and always has been, to ensure that a specified number of this Court's judges are trained in civil law and represent Quebec. By virtue of the fact that these seats must be filled by candidates appointed from the three Quebec institutions named in s. 6 (the *Barreau du Québec*, the *Quebec Court of Appeal*, or the *Superior Court of Quebec*), the candidates will necessarily have received formal training in the civil law. The combination of this training and affiliation with one of the named Quebec institutions serves to protect Quebec's civil law tradition and inspire Quebec's confidence in this Court. To that extent, I agree with the majority. Respectfully, however, I do not agree that s. 6 was intended to ensure that "Quebec's

... social values are represented on the Court" (para. 18). Parliament made a deliberate choice to include only objective criteria in ss. 5 and 6. Importing social values -- 140 years later -- is unsupported by the text and history of the Act...

147 To suggest that Quebec wanted to render ineligible former advocates of at least 10 years standing at the Quebec bar is to rewrite history. There is nothing in the historical debates that suggests any such thing. Indeed, it defies logic and common sense to think that Quebec would have had some reason to oppose the appointment to this Court of Court of Québec judges who had been members of the Quebec bar for at least 10 years on the day of their appointment to that court. Court of Québec judges apply the civil law on a daily basis. Why such persons, otherwise eligible for appointment to this court by virtue of their 10 years standing at the bar, would suddenly become unacceptable to the people of Quebec on the day of their elevation to the bench escapes me. Likewise, though the federal courts did not exist at the time, to suggest that Quebec would have resisted the appointment to this Court of a federal court judge occupying a seat on that court reserved for Quebec is, in my view, equally untenable. These judges have been trained in the civil law and continue to hear federal law cases involving Quebec that require a working knowledge of the civil law. [footnotes omitted]

Justice Moldaver differed from the majority's view that the *ad hoc* judge provision of the Supreme Court Act (s. 30) was of any assistance in interpreting ss. 5 and 6, describing it as an historical anomaly with its own unique history which was relevant only when the Supreme Court of Canada had a smaller quorum and a provision had to be enacted to ensure that the Court could continue to exercise its function while ensuring that civil law judges could not form a majority on common law cases: paras. 132-142. Justice Moldaver concluded his judgment with the following:

149 In addition to rendering ineligible candidates who might otherwise be worthy appointments to this Court, the currency

requirement does nothing to promote the confidence of Quebec in this Court. In Quebec, there are approximately 16,000 current members of the Quebec bar with at least 10 years standing. Surely it cannot be suggested that the appointment of any one of these 16,000 advocates would promote the confidence of Quebec in this Court.

150 This becomes all the more apparent when one realizes that a person can maintain his or her Quebec bar membership by simply paying annual fees and completing a set number of hours of continuing legal education -- currently, 30 hours over a two-year period. Notably, there is no requirement that this continuing legal education have anything to do with the civil law, nor does it actually have to be completed in Quebec. Indeed, a person does not have to live in Quebec, or actually practice law in Quebec, in order to maintain his or her bar membership. In sum, a person could have only the most tenuous link to the practice of civil law in Quebec, and yet be a current member of that bar of 10 years standing.

151 This is the reality -- and it illustrates how implausible it is that anyone would view current membership at the Quebec bar as the *sine qua non* that assures Quebec's confidence in appointments to this Court. Likewise, it is equally implausible that being a past member of the Quebec bar could singlehandedly undermine this confidence.

152 My colleagues have chosen not to address the scope of the currency requirement under s. 6, i.e. whether one day's renewed membership at the Quebec bar is sufficient to qualify as an advocate or whether something more is needed -- six months, two years, five years, or perhaps even a continuous 10-year period immediately preceding the appointment.

153 In my view, currency means exactly that. A former Quebec superior court judge or advocate of 10 years standing at the Quebec bar could rejoin that bar for a day and thereby regain his or her eligibility for appointment to this Court. In my view, this exposes the hollowness of the currency requirement. Surely nothing

is accomplished by what is essentially an administrative act. Any interpretation of s. 6 that requires a former advocate of at least 10 years standing at the Quebec bar, or a former judge of the Quebec Court of Appeal or Superior Court, to rejoin the Quebec bar for a day in order to be eligible for appointment to this Court makes no practical sense. Respectfully, I find it difficult to believe that the people of Quebec would somehow have more confidence in this candidate on Friday than they had on Thursday. [footnote omitted]

#### M. The constitutional law issue

##### The majority opinion

In view of the majority's opinion on the statutory interpretation question, the majority was required to address the constitutional law question:

Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2*?

The answer to this question turned on whether or to what extent the eligibility requirements set out in s. 6 are entrenched in the Constitution of Canada. If they are not entrenched, Parliament could amend s. 6 unilaterally pursuant to its power in s. 101 of the *Constitution Act, 1867* (power to “provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada”). If the eligibility requirements in s. 6 are entrenched as part of the Constitution, it would follow that they could be amended only through the constitutional amending formula, which in the case of amendments to the “composition of the court” requires unanimity, and in other respects requires adherence to the 7 provinces and 50% of the population rule: *Constitution Act, 1982*: ss. 41(d) and 42(1)(d):

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and

House of Commons and of the legislative assemblies of each province:

(d) the composition of the Supreme Court of Canada.

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(d) subject to paragraph 41(d), the Supreme Court of Canada;

In support of its position, the federal government advanced the rather daring argument that while the *Constitution Act, 1982* expressly refers to the Supreme Court of Canada, these provisions are “empty vessels” – that they are essentially preparatory provisions that would become active only once the Court itself became entrenched, as it might have been had the *Meech Lake* or *Charlottetown* Accords passed. The reader will not be surprised to discover that this submission found little purchase with the majority, which had staked out its ground earlier in the opinion concerning its understanding of the Supreme Court of Canada's place in Canada's constitutional order:

93 *The fact that the composition of the Supreme Court of Canada was singled out for special protection in s. 41(d) is unsurprising, since the Court's composition has been long recognized as crucial to its ability to function effectively and with sufficient institutional legitimacy as the final court of appeal for Canada. As explained above, the central bargain that led to the creation of the Supreme Court in the first place was the guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture. The objective of ensuring representation from Quebec's distinct juridical tradition remains no less compelling today, and implicates the competence, legitimacy, and integrity of the Court. Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent. Protecting the composition of the Court under s. 41(d) was necessary because leaving its protection to s. 42(1)(d) would have left open the possibility*

that Quebec's seats on the Court could have been reduced or altogether removed without Quebec's agreement.

94 Section 42(1)(d) applies the 7/50 amending procedure to the essential features of the Court, rather than to all of the provisions of the Supreme Court Act.<sup>3</sup> The express mention of the Supreme Court of Canada in s. 42(1)(d) is intended to ensure the proper functioning of the Supreme Court. This requires the constitutional protection of the essential features of the Court, understood in light of the role that it had come to play in the Canadian constitutional structure by the time of patriation. These essential features include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

The majority concluded:

100 Our constitutional history shows that ss. 41(d) and 42(1)(d) of the Constitution Act, 1982 were enacted in the context of ongoing constitutional negotiations that anticipated future amendments relating to the Supreme Court. The amending procedures in Part V were meant to guide that process. By setting out in Part V how changes were to be made to the Supreme Court and its composition, the clear intention was to freeze the status quo in relation to the Court's constitutional role, pending future changes: Monahan and Shaw, at pp. 204-5; W. R. Lederman, "Constitutional Procedure and the Reform of the Supreme Court of Canada" (1985), 26 C. de D. 195, at p. 200; Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 233-34. This reflects the political and social consensus at the time that the Supreme Court was an essential part of Canada's constitutional architecture.

101 It is true that at Confederation, Parliament was given the authority through s. 101 of the Constitution Act, 1867 to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada". Parliament undoubtedly has the authority under s. 101 to enact routine amendments

necessary for the continued maintenance of the Supreme Court, but only if those amendments do not change the constitutionally protected features of the Court. The unilateral power found in s. 101 of the Constitution Act, 1867 has been overtaken by the Court's evolution in the structure of the Constitution, as recognized in Part V of the Constitution Act, 1982. As a result, what s. 101 now requires is that Parliament maintain -- and protect -- the essence of what enables the Supreme Court to perform its current role.

The majority next turned to address whether the eligibility requirements of s. 6 are matters going to the "composition of the court" (requiring unanimity to amend) or whether they constitute "another matter" which may be amended using the "7 and 50" rule. The majority held that unanimity was required in order amend s. 6 (paras. 104-105):

...Sections 4(1), 5 and 6 of the Supreme Court Act codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. Of particular relevance is s. 6, which reflects the Court's bijural character and represents the key to the historic bargain that created the Court in the first place. As we discussed above, the guarantee that one third of the Court's judges would be chosen from Quebec ensured that civil law expertise and that Quebec's legal traditions would be represented on the Court and that the confidence of Quebec in the Court would be enhanced.

Both the general eligibility requirements for appointment and the specific eligibility requirements for appointment from Quebec are aspects of the composition of the Court. It follows that any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court of Canada and triggers the application of Part V of the Constitution Act, 1982. Any change to the eligibility requirements for appointment to the three Quebec positions on the Court codified in s. 6 therefore requires the unanimous consent of Parliament and the 10 provinces.

In the result, the majority opinion was that insofar as Parliament had attempted to pass a “declaratory” provision to the *Supreme Court Act* that would have clarified the meaning of s. 6 so as to make clear that Justice Nadon was qualified, that provision was “*ultra vires* of Parliament acting alone”: para. 106.

### The dissenting opinion

While it was unnecessary for him to comment on the question in view of his conclusion on the statutory interpretation issue, Justice Moldaver offered this comment on the constitutional issue raised by the case (paras. 113-115):

*[A]lthough I need not address the constitutional issues in view of my response to Question 1, I choose to do so to this extent. The coexistence of two distinct legal systems in Canada -- the civil law system in Quebec and the common law system elsewhere -- is a unique and defining characteristic of our country. It is critical to both Quebec and Canada as a whole that persons with training in civil law form an integral part of this country's highest court. Indeed, a guarantee to that effect was central to the bargain struck between Parliament and Quebec when the Supreme Court was first created in 1875.*

*Section 6 of the Act protects Quebec's right to have three seats on this Court. Like the majority, I agree that this guarantee has been constitutionally entrenched, and that the three seats allotted to Quebec are an integral part of this Court's composition. As such, any change in this regard would require the unanimous consent of the Senate, the House of Commons, and the legislative assembly of each province under s. 41(d) in Part V of the Constitution Act, 1982.*

*I stop there, however. I do so because I have difficulty with the notion that an amendment to s. 6 making former Quebec advocates of at least 10 years standing eligible for appointment to the Court would require unanimity, whereas an amendment that affected other features of the Court, including its role as a general court of appeal for Canada and its independence, could be achieved under s. 42(1)(d) of the Constitution Act, 1982 using the 7-50 formula. Put simply, I am*

*not convinced that any and all changes to the eligibility requirements will necessarily come within "the composition of the Supreme Court of Canada" in s. 41(d). [footnote omitted]*

### Conclusion

The *Nadon Reference* is a stark reminder that the “analytical approaches” adopted by our courts in matters of statutory interpretation and constitutional adjudication are only the beginning of the process of answering difficult questions. The reality that an analytical approach does not apply itself led Justice Felix Frankfurter to offer these observations to the New York Bar Association in 1947:

*No matter how one states the problem of statutory construction, for me, at least, it does not carry its own answer. Though my business throughout most of my professional life has been with statutes, I come to you empty-handed. I bring no answers. I suspect the answers to the problems of an art are in its exercise. Not that one does not inherit, if one is capable of receiving it, the wisdom of the wise.*

The majority and dissenting reasons in the *Nadon Reference* employed precisely the same analytical method. The judicial disagreement reflected in the *Nadon Reference* thus did not harken back to debates about the relative weight to be given to “legislative text” versus “legislative purpose” in statutory and constitutional adjudication. Rather, it lay precisely in a profound disagreement about what the “wisdom of the wise” would have to say concerning the proper judicial role in a constitutional democracy, including whether and to what extent justice should be blind to the external impact of one result or another on the Canadian political order.

The irony of course is that this very question – the proper role of the judiciary in a democracy – is precisely what the *Nadon* appointment was about in the first place.

And yet, such is the profound respect that all parties have for the Rule of Law, that when the Supreme Court of Canada pronounced its judgment, and despite the press releases, commentary and competing objections that followed, the matter was put to rest. The Supreme Court of Canada had spoken and all that remained was for the federal Government

to comply. Which the government did, when on 5 June 2014, less than two months following the *Nadon Reference*, the Government appointed Justice Clement Gascon, a justice of the Quebec Court of Appeal, to the Supreme Court of Canada.

However the story, dear reader, is not over yet, for while the Rule of Law prevails, governments have their role to play too. It will therefore not surprise the reader to learn that when it appointed Justice Clement Gascon to replace Justice Fish, Government decided to proceed with the appointment in the absence of a "Selection Committee" or public hearing

process. When asked about criticism that it had failed to use these processes, a spokesperson for Justice Minister Peter MacKay, said "these appointments have always been a matter for the executive and continue to be."

Barring an unforeseen circumstance, the current government will have to contend with at least one further Supreme Court of Canada appointment during its term of office. That issue will arise when the seat of Mr. Justice Louis LeBel, who occupies one of the other 3 Quebec seats on the Supreme Court, becomes vacant on 30 November 2014, when he turns 75.

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# LAW REPORTS

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## AFRICAN ECHO (PTY) LTD AND OTHERS V SIMELANE AND OTHERS

8, 29 November 2013

*Supreme Court of Swaziland [2014] 3 LRC 583*  
*Ebrahim, Moore and Levinsohn JJA*

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The appellants, the publisher and editor of a newspaper in Swaziland and a reporter on the newspaper, were sued for defamation in the High Court of Swaziland by the President of the Swaziland Senate and a local businessman, arising out of articles published in the newspaper. The judge hearing the actions reserved judgment and then heard a criminal case in which the accused, S, pleaded guilty to 11 charges of committing terrorist acts and sabotage. The judge imposed two sentences of 10 years' imprisonment and nine sentences of 5 years' imprisonment, some of which were to run concurrently, making a total of 20 years' imprisonment. The next day the front page of the appellants' newspaper carried the headline, '[S] gets 65 years in jail', which took up two-thirds of the page. An article inside the newspaper stated that S had received two life sentences plus 15 years, which gave the impression that the judge had imposed excessively severe sentences on S. The judge was concerned and irritated at the inaccurate report on S's sentencing and telephoned the newspaper's ombudsman and then the managing director to make his annoyance known. He was later contacted by the newspaper's lawyer and the next day the newspaper published a clarification and apology to the judge, but not with the same prominence as the original articles. Some days later, at the request of the newspaper's attorneys, an informal meeting was held in the judge's chambers at which the newspaper's attorneys invited the judge to recuse himself from giving judgment in the defamation actions, on the ground that he had used rude, insulting, domineering and boastful language in his telephone conversations with the newspaper's ombudsman and managing director and was biased against the newspaper. The judge, in a considered judgment, refuted the allegations and refused to disqualify

himself from the defamation actions. The appellants appealed to the Supreme Court of Swaziland, contending that the articles did not express or convey any criticism of the judge's sentences or actions and were protected by the right to freedom of expression and opinion, the freedom of the press, and the freedom to communicate ideas and information without interference, all of which were guaranteed by s 24 of the Constitution of Swaziland.

**HELD:** Appeal dismissed.

(i) There was a presumption that judicial officers acted impartially in adjudicating disputes, which placed a heavy burden on a person alleging judicial bias or its appearance and imposed a high threshold for an allegation of perceived judicial bias to succeed. The test for judicial bias in Swaziland was the 'double reasonableness' test, which required both the person who apprehended bias and the apprehension itself to be reasonable, ie would a reasonable, objective and informed person in the position of the litigant but who had no interest in the outcome of the matter have reasonable grounds for apprehending that the judge would not or might not be impartial in his adjudication of the case. Applying that test, the appellants had not come near to establishing that the judge would not or might not act impartially when giving judgment in the two defamation actions brought against the appellants.

(ii) The overwhelming import of the banner headline and accompanying articles in the appellants' newspaper was that the judge had sentenced S to two life sentences plus 15 years' imprisonment and the cumulative effect was that the judge had imposed cruel, merciless and inhumane sentences. The judge had legitimately sought to correct the inaccuracy of the newspaper's fallacious headline and report

of the case and his concern to achieve the correction of the inaccuracies and potentially damaging errors in the newspaper's report, about which he had rightly complained, did not show any hostile animus on his part towards the newspaper warranting his recusal.

Per curiam. (i) While a proper apology published with appropriate prominence, retracting adverse imputations with an unqualified expression of regret, might mitigate harm caused by an impugned publication, the 'clarification' and apology published by the appellant with much less prominence, albeit vetted in advance by the judge himself, could be regarded as a woefully inadequate antidote to the extensive damage done to truth itself, as well as to his reputation as a judge capable of imposing just and appropriate sentences.

(ii) It is undesirable for a sitting judge, however irritated he might be by an inaccurate article in the press, to seek in person to have errors which do not place him in a favourable light corrected.

(iii) Section 24 of the Constitution protected freedom of expression, including freedom of the press, subject to qualifications expressly stated. In a democratic society the press had undoubted freedom to publish information and to express ideas free from unlawful and improper restraints stemming from any quarter, but that freedom was not absolute and unrestrained. It was a fundamental charac-

teristic of all freedoms that a proper balance had to be struck between constitutional rights and freedoms and the corresponding responsibilities, duties and obligations to which they were subject. Thus, the freedom of the press could not be exercised in a manner which impinged on the rights and reputations of individual persons or groups of persons, or on the freedoms and reputations of corporate or public entities and institutions. Misleading information published in a newspaper or other media affected not only the complainant but also the public at large, since it was in the public interest that the media provided accurate information, published rational comment not disguised as news, and news and public interest stories which observed public cannons of good taste and decency and proper concern for the reputations of both public and private persons and for the public institutions which were so vital to the good governance of Swaziland. The duty of the media to act responsibly was accentuated by the fact that individual persons generally did not enjoy the opportunity or financial resources to respond effectively to inaccuracies published in the media and, in the case of judicial officers, that they were effectively muzzled by the many constraints inhibiting them from entering into public debate on controversial subjects from replying publicly to articles which adversely affected their personal or professional reputations.

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## PHYLACTOU V REPUBLIC AND VLAMIS V REPUBLIC

14 June 2013

*Supreme Court of Cyprus [2014] 2 LRC 546*

*Artemis P, Hadjihambis, Papadopoulou, Nicolatos, Erotocritou, Nathanael, Pamballis, Clerides and Paschalides JJ*

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Laws enacted in 2011 during a deterioration in the national economy provided for monthly deductions of a percentage (3% monthly, 2% from annual pensionable earnings) from the gross emoluments of public officials, employees and pensioners 'as a special contribution to the Republic'. Although members of the judicial service, including judges of the Supreme Court, were initially exempted from these provisions, a subsequent Law included them. The applicant judges filed recourses

against the administrative decisions for deductions from their monthly salaries, arguing that those decisions were null and void as the Laws on which they were based contravened art 158.3 of the Constitution of the Republic of Cyprus, which provided that the remuneration of any judge should not be altered to his disadvantage after his appointment. For the state the Attorney General argued that the Laws were justified as tax laws or, alternatively, by the doctrine of necessity.

**HELD:** Recourses upheld. Impugned administrative decisions declared null and void.

(1) There was no doubt as to the proper interpretation of art 158.3 of the

Constitution, which prohibited a reduction of judges' emoluments by legislation resulting in deductions from their salaries. That expressed the necessary prerequisite for the wider principle of judicial independence, which was irrevocably interwoven with the existence and function of the judiciary within the framework of the rule of law. While judges' salaries could not be directly reduced, there was no reason why judges should not share the tax burdens borne by all citizens. However, tax laws would affect the applicants' salaries indirectly, not directly by a percentage rate deduction, and would be non-discriminatory but of general application to all citizens, not confined to public servants. That other legislation provided for the imposition of taxes upon the private sector during the same period did not, as the Attorney General argued, render the taxation imposed of general application, because that other legislation had different provisions, different percentages and required employers to pay half of the contributions. It was therefore clear that the impugned laws were not tax laws but amounted to an impermissible adverse alteration of judges' remuneration, in contravention of the clear provision of art 158.3.

Per curiam. (i) The Attorney General had withdrawn his initial submission that the members of the court were disqualified from determining the case by the apprehension of bias, as any decision would have a direct effect on their own personal interests. He had acknowledged that there was no alternative solution. However, it had been members of the court who had first pointed out the difficult situation in which they found themselves and observed that no other court could try the cases. Moreover, no one could deny any citizen the right of access to the courts, a principle from which judges, like other citizens, could not be excluded: they had the right to question the validity of the impugned decisions, which raised a constitutional issue of such importance as the protection of the independence of the judiciary. The court, as guardian of the Constitution, had to interpret and apply its provisions exclusively upon legal princi-

ples and had no choice but to determine the case, albeit a difficult and unpleasant task. In previous cases the court, as a matter of duty, had had to decide matters which affected the personal interests of court members.

(ii) The United States appeared to be the only other country with a provision, in the 'Compensation Clause', similar to art 158.3. Decisions of the courts of other countries dealing with similar issues could not have the same weight and persuasiveness as those of the United States. In particular *United States v Hatter* 532 US 557 (2001), reversing *Evans v Gore* 253 US 245 (1920), provided extensive analysis of the contemporary interpretation of the issue under consideration, reviewing all the relevant principles, although the court there concluded that the deductions were under a tax law and therefore not unconstitutional.

(iii) While the decision of the court would probably displease the public and the state, the court had to administer the law, whatever the consequences.

The court noted with satisfaction the pronounced intention of most of the applicants to contribute voluntarily to the effort to salvage the national economy and hoped that their example would be followed by the other applicants.

(2) The doctrine of necessity did not apply to the instant case. In accordance with well-established case law, in order successfully to invoke the doctrine of necessity, there had to be an absolute necessity to safeguard the continuation of the effective functioning of the state. It was, furthermore, a basic principle of constitutional law as well as of the common law that the doctrine of necessity required that the evil sought to be averted was greater than the evil caused. In the circumstances existing it was difficult to perceive how the need to include a relatively small number of persons in the assumption of the burdens caused by the adverse financial situation was more important than the need to safeguard the independence and impartiality of the judiciary protected by art 158.3, a matter of supreme importance in terms of the public interest.

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