Ref. re Remuneration of Provincial Court Judges, [1997] 3 S.C.R. 3

Argued: December 3, 4, 1996 Decided: September 18, 1997.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

On appeal from the Prince Edward Island Supreme Court, Appeal Division; Court of Appeal for Alberta; Court of Appeal for Manitoba

[During the early 1990s, various provincial governments cut their budgets by rolling back or limiting the growth of public service salaries. In several cases, these restraint programs were extended to provincial court judges. Several challenges were launched by accused persons and, in one case, a provincial judges association, alleging that the salary reductions meant the courts were no longer independent and impartial tribunals under s. 11(*d*) of the *Charter*. Superior court judges are guaranteed their independence in ss. 96-100 of the Constitution Act, 1867. Over time, provincial court judges have gradually been extended similar, but not identical, guarantees. This case asked the Supreme Court to determine what guarantees of judicial independence the Charter made for provincial court judges.]

The judgment of Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by THE CHIEF JUSTICE --

Introduction

The … appeals handed down today … raise a range of issues relating to the independence of provincial courts, but are united by a single issue: whether and how the guarantee of judicial independence in s. 11(*d*) of the *Charter* restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. ...

…[T]he aspect of judicial independence which is engaged by the impugned reductions in salary — financial security — has only been dealt with in any depth by *Valente v. The Queen*, [1985], and *Beauregard v. Canada*, [1986]. The facts of the current appeals require that we address questions which were left unanswered by those earlier decisions.

… [In *Beauregard]*, the Court rejected a constitutional challenge to federal legislation establishing a contributory pension scheme for superior court judges. It had been argued that the pension scheme amounted to a reduction in the salaries of those judges during their term of office, and for that reason contravened judicial independence and was beyond the powers of Parliament. Although

the Court found that there had been no salary reduction on the facts of the case, the judgment has been taken to stand for the proposition that salary reductions which are "non-discriminatory" are not unconstitutional.

There are four questions which arise from *Beauregard*, and which are central to the disposition of these appeals. The first question is what kinds of salary reductions are consistent with judicial independence — only those which apply to all citizens equally, or also those which only apply to persons paid from the public purse, or those which just apply to judges. The second question is whether the same principles which apply to salary reductions also govern salary increases and salary freezes. The third question is whether *Beauregard*, which was decided under s. 100 of the *Constitution Act, 1867*, a provision which only guarantees the independence of superior court judges, applies to the interpretation of s. 11(*d*), which protects a range of courts and tribunals, including provincial court judges. The fourth and final question is whether the Constitution — through the vehicle of s. 100 or s. 11(*d*) — imposes some substantive limits on the extent of permissible salary reductions for the judiciary. …

The task of the Court in these appeals is to explain the proper constitutional relationship between provincial court judges and provincial executives … The failure to do so would undermine "the web of institutional relationships . . . which continue to form the backbone of our constitutional system.".

Although these cases implicate the constitutional protection afforded to the financial security of provincial court judges, the purpose of the constitutional guarantee of financial security — found in s. 11(*d*) of the *Charter*, and also in the preamble to and s. 100 of the *Constitution Act, 1867* — is not to benefit the members of the courts which come within the scope of those provisions. The benefit that the members of those courts derive is purely secondary. Financial security must be understood as merely an aspect of judicial independence, which in turn is not an end in itself. Judicial independence is valued because it serves important societal goals — it is a means to secure those goals.

One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule. It is with these broader objectives in mind that these reasons, and the disposition of these appeals, must be understood. …

Financial Security

Introduction: The Unwritten Basis of Judicial Independence

… Notwithstanding the presence of s. 11(*d*) of the *Charter*, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an unwritten constitutional

principle, in the sense that it is exterior to the particular sections of the *Constitution Acts.* The existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions of the *Constitution Acts, 1867 to 1982*, merely "elaborate that principle in the institutional apparatus which they create or contemplate.".

I arrive at this conclusion, in part, by considering the tenability of the opposite position — that the Canadian Constitution already contains explicit provisions which are directed at the protection of judicial independence, and that those provisions are exhaustive of the matter. Section 11(*d*) of the *Charter*, as I have mentioned above, protects the independence of a wide range of courts and tribunals which exercise jurisdiction over offences. Moreover, since well before the enactment of the *Charter*, ss. 96-100 of the *Constitution Act, 1867*, separately and in combination, have protected and continue to protect the independence of provincial superior courts. More specifically, s. 99 guarantees the security of tenure of superior court judges; s. 100 guarantees the financial security of judges of the superior, district, and county courts; and s. 96 has come to guarantee the core jurisdiction of superior, district, and county courts against legislative encroachment, which I also take to be a guarantee of judicial independence.

However, upon closer examination, there are serious limitations to the view that the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence. The first and most serious problem is that the range of courts whose independence is protected by the written provisions of the Constitution contains large gaps. Sections 96-100, for example, only protect the independence of judges of the superior … courts, and even then, not in a uniform or consistent manner. …. Moreover, ss. 96-100 do not apply to provincially appointed … courts, otherwise known as provincial courts.

To some extent, the gaps in the scope of protection provided by ss. 96-100 are offset by the application of s. 11(*d*), which applies to a range of tribunals and courts, including provincial courts. However, by its express terms, s. 11(*d*) is limited in scope as well — it only extends the envelope of constitutional protection to bodies which exercise <u>jurisdiction over offences</u>. As a result, when those courts exercise civil jurisdiction, their independence would not seem to be guaranteed. The independence of provincial courts adjudicating in family law matters, for example, would not be constitutionally protected. The independence of superior courts, by contrast, when hearing exactly the same cases, would be constitutionally guaranteed.

The second problem with reading s. 11(*d*) of the *Charter* and ss. 96-100 of the *Constitution Act, 1867* as an exhaustive code of judicial independence is that some of those provisions, by their terms, do not appear to speak to this objective. Section 100, for example, provides that Parliament shall fix and provide the salaries of superior … court judges. … However, on its plain language, it only places Parliament under the obligation to provide salaries to the judges covered by that provision, which would in itself not safeguard the judiciary against political interference through economic manipulation. Nevertheless, as I develop in these reasons, with reference to *Beauregard*, s. 100 also requires that Parliament must provide salaries that are adequate, and that changes or

freezes to judicial remuneration be made only after recourse to a constitutionally mandated procedure.

A perusal of the language of s. 96 reveals the same difficulty:

> **96.** The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Section 96 seems to do no more than confer the power to appoint judges of the superior … courts. It is a staffing provision, and is once again a subtraction from the power of the provinces under s. 92(14). However, through a process of judicial interpretation, s. 96 has come to guarantee the core jurisdiction of the courts which come within the scope of that provision. In the past, this development has often been expressed as a logical inference from the express terms of s. 96. Assuming that the goal of s. 96 was the creation of "a unitary judicial system", that goal would have been undermined "if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts." … The rationale for the provision has also shifted, away from the protection of national unity, to the maintenance of the rule of law through the protection of the judicial role.

The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of <u>unwritten</u> understandings which are not found on the face of the document itself. …

However, I do wish to add a note of caution. As I said in *New Brunswick Broadcasting*, *supra*, at p. 355, the constitutional history of Canada can be understood, in part, as a process of evolution "which [has] culminated in the supremacy of a definitive written constitution". There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost importance to articulate what the source of those unwritten norms is.

In my opinion, the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the *Constitution Act, 1867*. The relevant paragraph states in full:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

Although the preamble has been cited by this Court on many occasions, its legal effect has never been fully explained. On the one hand, although the preamble is clearly part of the Constitution, it is equally clear that it "has no enacting force." In other words, strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it.

But the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute … However, in my view, it goes even further. … [T]he preamble articulates "the political theory which the Act embodies." It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.

What are the organizing principles of the *Constitution Act, 1867*, as expressed in the preamble? The preamble speaks of the desire of the founding provinces "to be federally united into One Dominion", and thus, addresses the structure of the division of powers. Moreover, by its reference to "a Constitution similar in Principle to that of the United Kingdom", the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged. To my mind, both of these aspects of the preamble explain many of the cases in which the Court has, through the normal process of constitutional interpretation, stated some fundamental rules of Canadian constitutional law which are not found in the express terms of the *Constitution Act, 1867*. …

[Lamer, C.J., then goes on to list several examples where judges have uncovered constitutional principles that are not explicitly provided for in the text of the Constitution Acts.]

The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. As we said in *Valente, supra*, at p. 693, that Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country. I also support this conclusion on the basis of the presence of s. 11(*d*) of the *Charter*, an express provision which protects the independence of provincial court judges only when those courts exercise jurisdiction in relation to offences. As I said earlier, the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. … Section 11(*d*), far from

indicating that judicial independence is constitutionally enshrined for provincial courts only when those courts exercise jurisdiction over offences, is proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear. …

In conclusion, the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. However, since the parties and interveners have grounded their arguments in s. 11(*d*), I will resolve these appeals by reference to that provision.

Section 11(d) of the Charter

… The starting point for my discussion is *Valente*, where in a unanimous judgment this Court laid down the interpretive framework for s. 11(*d*)'s guarantee of judicial independence and impartiality. Le Dain J., speaking for the Court, began by drawing a distinction between impartiality and independence. … Impartiality was defined as "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case." It was tied to the traditional concern for the "absence of bias, actual or perceived". Independence, by contrast, focussed on the status of the court or tribunal. In particular, Le Dain J. emphasized that the independence protected by s. 11(*d*) flowed from "the traditional constitutional value of judicial independence", which he defined in terms of the relationship of the court or tribunal "to others, particularly the executive branch of government." …

Le Dain J. went on to state that independence was premised on the existence of a set of "objective conditions or guarantees", whose absence would lead to a finding that a tribunal or court was not independent. The existence of objective guarantees, of course, follows from the fact that independence is status oriented; the objective guarantees define that status. However, he went on to supplement the requirement for objective conditions with what could be interpreted as a further requirement: that the court or tribunal be reasonably perceived as independent. The reason for this additional requirement was that the guarantee of judicial independence has the goal not only of ensuring that justice is done in individual cases, but also of ensuring public confidence in the justice system …

Another point which emerges from *Valente* relates to the question of whose perceptions count. The answer given is that of the reasonable and informed person. …

After establishing these core propositions, Le Dain J. in *Valente* went on to discuss two sets of concepts; the three core characteristics of judicial independence, and what I term the two dimensions of judicial independence.

The three core characteristics identified by Le Dain J. are security of tenure, financial security, and administrative independence. *Valente* laid down two requirements for security of tenure for provincial court judges: those judges could only be removed for cause "related to the capacity to perform judicial functions", and after a "judicial inquiry at which the judge affected is given a full opportunity to be heard". …

Financial security was defined in these terms:

> The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. [Emphasis added.]

Once again, the Court drew a distinction between the requirements of s. 100 of the *Constitution Act, 1867* and s. 11(*d*); whereas the former provision requires that the salaries of superior court judges be set by Parliament directly, the latter allows salaries of provincial court judges to be set either by statute or through an order in council. …

The three core characteristics of judicial independence — security of tenure, financial security, and administrative independence — should be contrasted with what I have termed the two dimensions of judicial independence… individual independence of a judge and the institutional or collective independence of the court or tribunal of which that judge is a member. In other words, while individual independence attaches to individual judges, institutional or collective independence attaches to the court or tribunal as an institutional entity. …

… [F]inancial security has both an individual and an institutional or collective dimension. …

… But in order to determine whether financial security has a collective or institutional dimension, and if so, what collective or institutional financial security looks like, we must first understand what the institutional independence of the judiciary is. I emphasize this point because, as will become apparent, the conclusion I arrive at regarding the collective or institutional dimension of financial security builds upon traditional understandings of the proper constitutional relationship between the judiciary, the executive, and the legislature.

Institutional Independence

… In *Beauregard* … the institutional independence of the judiciary was said to arise out of the position of the courts as organs of and protectors "of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important". Institutional independence enables the courts to fulfill that . . . distinctly constitutional role.

Beauregard identified a number of sources for judicial independence which are constitutional in nature. As a result, these sources additionally ground the institutional independence of the courts.

The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government. Institutional independence also inheres in adjudication under the *Charter*, because the rights protected by that document are rights against the state. As well, the Court pointed to the preamble and judicature provisions of the *Constitution Act, 1867*, as additional sources of judicial independence; I also consider those sources to ground the judiciary's institutional independence. Taken together, it is clear that the institutional independence of the judiciary is "definitional to the Canadian understanding of constitutionalism".

But the institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government. This is also clear from *Beauregard*, where this Court noted that although judicial independence had historically developed as a bulwark against the abuse of executive power, it equally applied against "other potential intrusions, including any from the legislative branch" as a result of legislation.

What follows as a consequence of the link between institutional independence and the separation of powers I will turn to shortly. The point I want to make first is that the institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court judges. I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence. …

Collective or Institutional Financial Security

Introduction

Given the importance of the institutional or collective dimension of judicial independence generally, what is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized. As I explain below, in the context of institutional or collective financial security, this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse. …

First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political

interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions… Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision — if need be, in a court of law. As I explain below, when governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy.

Second, under no circumstances is it permissible for the judiciary — not only collectively through representative organizations, but also as individuals — to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. As I explain below, salary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence. … Negotiations over remuneration and benefits, in colloquial terms, are a form of "horse-trading". The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

Third, and finally, any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries. …

These different components of the institutional financial security of the courts inhere, in my view, in a fundamental principle of the Canadian Constitution, the separation of powers. As I discussed above, the institutional independence of the courts is inextricably bound up with the separation of powers, because in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government.

The separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies. However, there is also another aspect of the separation of powers — the notion that the principle requires that the different branches of government only interact, as much as possible, in particular ways. In other words, the relationships between the different branches of government should have a particular character. For example, there is a hierarchical relationship

between the executive and the legislature, whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory. In a system of responsible government, once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement those choices.

What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. … [T]he legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy …

The challenge which faces the Court in these appeals is to ensure that the setting of judicial remuneration remains consistent — to the extent possible given that judicial salaries must ultimately be fixed by one of the political organs of the Constitution, the executive or the legislature … — with the depoliticized relationship between the judiciary and the other branches of government. … The three components of the institutional or collective dimension of financial security, to my mind, fulfill this goal. …

Section 1

[Lamer, C.J., rejected all arguments that these rights could be limited under section 1.]

LA FOREST J. (dissenting in part) --

Introduction

… I have had the advantage of reading the reasons of the Chief Justice who sets forth the facts and history of the litigation. Although I agree with substantial portions of his reasons, I cannot concur with his conclusion that s. 11(*d*) forbids governments from changing judges' salaries without first having recourse to the "judicial compensation commissions" he describes. … In my view, reading these requirements into s. 11(*d*) represents both an unjustified departure from established precedents and a partial usurpation of the provinces' power to set the salaries of inferior court judges pursuant to ss. 92(4) and 92(14) of the *Constitution Act, 1867*. ...

My concern arises out of the nature of judicial power. As I see it, the judiciary derives its public acceptance and its strength from the fact that judges do not initiate recourse to the law. Rather, they respond to grievances raised by those who come before them seeking to have the law applied, listening fairly to the representations of all parties, always subject to the discipline provided by the facts of the case. This sustains their impartiality and limits their powers. Unlike the other branches of the government, the judicial branch does not initiate matters and has no agenda of its own. Its sole duty is to hear and decide cases on the issues presented to it in accordance with the law and the Constitution. And so it was that Alexander Hamilton referred to the courts as "the least dangerous" branch of government: *The Federalist, No. 78.*

Indeed courts are generally reluctant to comment on matters that are not necessary to decide in order to dispose of the case at hand. This policy is especially apposite in constitutional cases, where the implications of abstract legal conclusions are often unpredictable and can, in retrospect, turn out to be undesirable. …

I am, therefore, deeply concerned that the Court is entering into a debate on this issue without the benefit of substantial argument. I am all the more troubled since the question involves the proper relationship between the political branches of government and the judicial branch, an issue on which judges can hardly be seen to be indifferent, especially as it concerns their own remuneration. In such circumstances, it is absolutely critical for the Court to tread carefully and avoid making far-reaching conclusions that are not necessary to decide the case before it. If the Chief Justice's discussion was of a merely marginal character -- a side-wind so to speak -- I would abstain from commenting on it. After all, it is technically only *obiter dicta.* Nevertheless, in light of the importance that will necessarily be attached to his lengthy and sustained exegesis, I feel compelled to express my view.

The Effect of the Preamble to the *Constitution Act, 1867*

I emphasize at the outset that it is not my position that s. 11(*d*) of the *Charter* and ss. 96-100 of the *Constitution Act, 1867* comprise an exhaustive code of judicial independence. As I discuss briefly later, additional protection for judicial independence may inhere in other provisions of the Constitution. Nor do I deny that the Constitution embraces unwritten rules, including rules that find expression in the preamble of the *Constitution Act, 1867*. I hasten to add that these rules really find their origin in specific provisions of the Constitution viewed in light of our constitutional heritage. In other words, what we are concerned with is the meaning to be attached to an expression used in a constitutional provision.

I take issue, however, with the Chief Justice's view that the preamble to the *Constitution Act, 1867* is a source of constitutional limitations on the power of legislatures to interfere with judicial independence. …

… At the time of Confederation (and indeed to this day), the British Constitution did not contemplate the notion that Parliament was limited in its ability to deal with judges. The principle of judicial independence developed very gradually in Great Britain. …

… Generally speaking, up to the seventeenth century, judges held office during the king's good pleasure. This power to dismiss judges for political ends was wielded most liberally by the Stuart kings in the early seventeenth century as part of their effort to assert the royal prerogative powers over the authority of Parliament and the common law. It was thus natural that protection against this kind of arbitrary, executive interference became a priority in the post-revolution settlement. Efforts to secure such protection in legislation were scuttled in the two decades following 1688, but at the turn of the century William III gave his assent to the *Act of Settlement*. …[T]hat statute mandated

that "Judges Commissions be made [during good behaviour], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them". …

Various jurists have asserted that these statutes and their successors have come to be viewed as "constitutional" guarantees of an independent judiciary. … It has thus been suggested that the preamble to the *Constitution Act, 1867*, which expresses a desire to have a Constitution "similar in Principle to that of the United Kingdom" is a source of judicial independence in Canada: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 72.

Even if it is accepted that judicial independence had become a "constitutional" principle in Britain by 1867, it is important to understand the precise meaning of that term in British law. Unlike Canada, Great Britain does not have a written constitution. Under accepted British legal theory, Parliament is supreme. By this I mean that there are no limitations upon its legislative competence. As Dicey explains, Parliament has "under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament". …

The consequence of parliamentary supremacy is that judicial review of legislation is not possible. The courts have no power to hold an Act of Parliament invalid or unconstitutional. When it is said that a certain principle or convention is "constitutional", this does not mean that a statute violating that principle can be found to be *ultra vires* Parliament. …

This fundamental principle is illustrated by the debate that occurred when members of the English judiciary complained to the Prime Minister in the early 1930s about legislation which reduced the salaries of judges, along with those of civil servants, by 20 percent as an emergency response to a financial crisis. Viscount Buckmaster, who vigorously resisted the notion that judges' salaries could be diminished during their term of office, admitted that Parliament was supreme and could repeal the *Act of Settlement* if it chose to do so. …

The idea that there were enforceable limits on the power of the British Parliament to interfere with the judiciary at the time of Confederation, then, is an historical fallacy. By expressing a desire to have a Constitution "similar in Principle to that of the United Kingdom", the framers of the *Constitution Act, 1867* did not give courts the power to strike down legislation violating the principle of judicial independence. The framers did, however, entrench the fundamental components of judicial independence set out in the *Act of Settlement* such that violations could be struck down by the courts. This was accomplished, however, by ss. 99-100 of the *Constitution Act, 1867*, not the preamble.

It might be asserted that the argument presented above is merely a technical quibble. After all, in Canada the Constitution is supreme, not the legislatures. Courts have had the power to invalidate unconstitutional legislation in this country since 1867. If judicial independence was a "constitutional" principle in the broad sense in nineteenth-century Britain, and that principle was continued or

established in Canada as a result of the preamble to the *Constitution Act, 1867*, why should Canadian courts resile from enforcing this principle by striking down incompatible legislation?

One answer to this question is the ambit of the *Act of Settlement*. The protection it accorded was limited to superior courts, specifically the central courts of common law. It did not apply to inferior courts. While subsequent legislation did provide limited protection for the independence of the judges of certain statutory courts, such as the county courts, the courts there were not regarded as within the ambit of the "constitutional" protection in the British sense. Generally the independence and impartiality of these courts were ensured to litigants through the superintendence exercised over them by the superior courts by way of prerogative writs and other extraordinary remedies. The overall task of protection sought to be created for inferior courts in the present appeals seems to me to be made of insubstantial cloth, and certainly in no way similar to anything to be found in the United Kingdom.

A more general answer to the question lies in the nature of the power of judicial review. The ability to nullify the laws of democratically elected representatives derives its legitimacy from a super-legislative source: the text of the Constitution. This foundational document (in Canada, a series of documents) expresses the desire of the people to limit the power of legislatures in certain specified ways. Because our Constitution is entrenched, those limitations cannot be changed by recourse to the usual democratic process. They are not cast in stone, however, and can be modified in accordance with a further expression of democratic will: constitutional amendment.

Judicial review, therefore, is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument. In this sense, it is akin to statutory interpretation. In each case, the court's role is to divine the intent or purpose of the text as it has been expressed by the people through the mechanism of the democratic process. Of course, many (but not all) constitutional provisions are cast in broad and abstract language. Courts have the often arduous task of explicating the effect of this language in a myriad of factual circumstances, many of which may not have been contemplated by the framers of the Constitution. While there are inevitable disputes about the manner in which courts should perform this duty, for example by according more or less deference to legislative decisions, there is general agreement that the task itself is legitimate.

This legitimacy is imperiled, however, when courts attempt to limit the power of legislatures without recourse to express textual authority. From time to time, members of this Court have suggested that our Constitution comprehends implied rights that circumscribe legislative competence. On the theory that the efficacy of parliamentary democracy requires free political expression, it has been asserted that the curtailment of such expression is *ultra vires* both provincial legislatures and the federal Parliament. …

Whatever attraction this theory may hold, and I do not wish to be understood as either endorsing or rejecting it, it is clear in my view that it may not be used to justify the notion that the preamble to the *Constitution Act, 1867* contains implicit protection for judicial independence. Although it has been suggested that guarantees of political freedom flow from the preamble, as I have discussed in

relation to judicial independence, this position is untenable. The better view is that if these guarantees exist, they are implicit in s. 17 of the *Constitution Act, 1867*, which provides for the establishment of Parliament. More important, the justification for implied political freedoms is that they are supportive, and not subversive, of legislative supremacy. That doctrine holds that democratically constituted legislatures, and not the courts, are the ultimate guarantors of civil liberties, including the right to an independent judiciary. Implying protection for judicial independence from the preambular commitment to a British-style constitution, therefore, entirely misapprehends the fundamental nature of that constitution.

[T]o the extent that courts in Canada have the power to enforce the principle of judicial independence, this power derives from the structure of Canadian, and not British, constitutionalism. Our Constitution expressly contemplates both the power of judicial review and guarantees of judicial independence. While these provisions have been interpreted to provide guarantees of independence that are not immediately manifest in their language, this has been accomplished through the usual mechanisms of constitutional interpretation, not through recourse to the preamble. The legitimacy of this interpretive exercise stems from its grounding in an expression of democratic will, not from a dubious theory of an implicit constitutional structure. The express provisions of the Constitution are not, as the Chief Justice contends, "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*". On the contrary, they are the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review.
…

Financial Security

… [T]he Chief Justice concludes in the present appeals that the financial security component of judicial independence has both individual and institutional dimensions. The institutional dimension, in his view, has three components. One of these -- the principle that reductions to judicial remuneration cannot diminish salaries to a point below a basic minimum level required for the office of a judge -- is unobjectionable. As there has been no suggestion in these appeals that the salaries of provincial court judges have been reduced to such a level, I need not comment further on this issue.

The Chief Justice also finds, as a general principle, that s. 11(*d*) of the *Charter* permits governments to reduce, increase or freeze the salaries of provincial court judges, either as part of an overall economic measure which affects the salaries of all persons paid from the public purse, or as part of a measure directed at judges as a class. I agree. He goes on to hold, however, that before such changes can be made, governments must consider and respond to the recommendations of an independent "judicial compensation commission". He further concludes that s. 11(*d*) forbids, under any circumstances, discussions about remuneration between the judiciary and the government.

I am unable to agree with these conclusions. While both salary commissions and a concomitant policy to avoid discussing remuneration other than through the making of representations to commissions may be desirable as matters of legislative policy, they are not mandated by s. 11(*d*) of

the *Charter*. … By its express terms, s. 11(*d*) grants the right to an independent tribunal to persons "charged with an offence". The guarantee of judicial independence inhering in s. 11(*d*) redounds to the benefit of the judged, not the judges. Section 11(*d*), therefore, does not grant judges a level of independence to which they feel they are entitled. Rather, it guarantees only that degree of independence necessary to ensure that accused persons receive fair trials. …

In my view, it is abundantly clear that a reasonable, informed person would not perceive that, in the absence of a commission process, all changes to the remuneration of provincial court judges threaten their independence. I reach this conclusion by considering the type of change to judicial salaries that is at issue in the present appeals. It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this. …