

**BETWEEN PRINCIPLE AND PRACTICALITY: A DYNAMIC REALIST
EXAMINATION OF INDEPENDENCE IN THE CANADIAN JUSTICE
SYSTEM**

by

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Abstract

This work examines independence in the Canadian justice system using an approach adapted from new legal realist scholarship called ‘dynamic realism’. This approach proposes that issues in law must be considered in relation to their recursive and simultaneous development with historic, social and political events. Such events describe ‘law in action’ and more holistically demonstrate principles like independence, rule of law and access to justice. My dynamic realist analysis of independence in the justice system employs a range methodological tools and approaches from the social sciences, including: historical and historiographical study; public administrative; policy and institutional analysis; an empirical component; as well as constitutional, statutory interpretation and jurisprudential analysis.

In my view, principles like independence represent aspirational ideals in law which can be better understood by examining how they manifest in legal culture and in the legal system. This examination focuses on the principle and practice of independence for both lawyers and judges in the justice system, but highlights the independence of the Bar. It considers the inter-relation between lawyer independence and the ongoing refinement of judicial independence in Canadian law. It also considers both independence of the Bar and the Judiciary in the context of the administration of justice, and practically illustrates the interaction between these principles through a case study of a specific aspect of the court system. This work also focuses on recent developments in the principle of Bar independence and its relation to an emerging school of professionalism scholarship in Canada.

The work concludes by describing the principle of independence as both conditional and dynamic, but rooted in a unitary concept for both lawyers and judges. In short, independence can be defined as impartiality, neutrality and autonomy of legal decision-makers in the justice system to apply, protect and improve the law for what has become its primary normative purpose: facilitating access to justice. While both independence of the Bar and the Judiciary are required to support access to independent courts, some recent developments suggest the practical interactions between independence and access need to be the subject of further research, to better account for both the principles and the practicalities of the Canadian justice system.

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List of Abbreviations

ADR	-	Alternative Dispute Resolution
CBA	-	Canadian Bar Association
CJ	-	Chief Justice
CJC	-	Canadian Judicial Council
CJSC	-	Chief Justice of the Supreme Court
FLSC	-	Federation of Law Societies of Canada
KB	-	King's Bench
KC	-	King's Counsel
JCPC	-	Judicial Committee of the Privy Council
LSM	-	Law Society of Manitoba
LSBC	-	Law Society of British Columbia
LSUC	-	Law Society of Upper Canada
NSBC	-	Nova Scotia Barristers' Society
NPM	-	New Public Management
SCC	-	Supreme Court of Canada
SRL	-	Self-Represented Litigant
OSCC	-	Ontario Small Claims Court
SCJ	-	Superior Court of Justice
QB	-	Queen's Bench
QC	-	Queen's Counsel

PART I

Chapter 1

Introduction

This analysis explores the principle of independence in law, highlighting independence of the Bar, its relationship to independence of the Judiciary, and how both function within a public legal system. While often viewed in isolation, these three threads of the principle of independence operate together to support the rule of law within Canada.

There have been a wide range of influences on the development of the principle and practice of independence, some of which arose outside the common-law tradition and which are highlighted in **Part II** of this work. However, my analytical emphasis is on the dominant practice of independence for judges and lawyers in the Westminster common-law tradition, within Canada's legal system.¹

My ambition is to develop a more comprehensive understanding of the meaning, purpose and function of both the principle and the practice of independence in the Canadian justice system. Toward this end, I examine the development of an independent

¹ Consequently, comparative differences in the modern principle and practice of independence in terms of possible differences engendered by the civil law tradition are largely outside the scope of this work. The focus on Canada's legal system is also largely confined to the operation of the court system and generally excludes broader considerations of the legal system that might include, for example, Canada's expansive administrative law regime.

Bar and correlate it with the development and role of judicial independence, to assert that lawyer independence is integral to judicial independence. Ultimately, I conclude that a primary normative justification for independence, for both lawyers and judges, is to facilitate access to justice in independent courts. However, within the modern Canadian court system, independence, access to justice and the concept of rule of law are changing principles that have evolved and must continue to adapt in the face of new challenges if the promise of independence -- accessible justice for everyone -- is to remain an achievable goal.

This work highlights the gap in scholarship concerning the principle of an independent Bar. Most considerations of the principle of independence in law rely instead on the touchstone of an independent judiciary and the role and function of adjudicative officials.² While lawyer independence is also regarded as an essential component of the Canadian justice system,³ compared to independence of the Judiciary, the exact meaning, purpose and function of ‘independent’ lawyers has not been as well examined or theorized.⁴ In this case, there are few accounts of the role of the Bar throughout the Canadian legal system,⁵ and many do not integrate independence for lawyers with

² One authoritative source remains the classic two-part article by W R Lederman, “The Independence of the Judiciary” (1956) *Can Bar Rev*, Vol 34 769-809; 1139-1179, [Lederman, “Independence”].

³ *Lavallee Rackel & Heintz v Canada (Attorney General)*, [2002] 3 SCR at para 65 [“*Lavallee*”].

⁴ Phillip Girard, “The Independence of the Bar in Historical Perspective” in *In the Public Interest*, [Girard, “Historical Perspective”], The Report and Research Papers of the Law Society of Upper Canada’s Task Force on Rule of Law and Independence of the Bar, (Toronto: Irwin Law Inc, 2007) 45 – 81, [LSUC, “*Public Interest*”]. In note 1, at 45, the author observes that in Canada there is no scholarly equivalent for lawyers to Lederman’s examination of the judiciary, *supra* note 1 Lederman, “Independence”, and that in constitutional scholar Peter Hogg’s *Constitutional Law of Canada*, fourth ed (Scarborough: Carswell, 1997), there is only 1 footnote reference in the entire text related to the principle of the independence of the Bar.

⁵ Traditional accounts may be, “little more than historical myth in disguise”, Wesley Pue, “In Pursuit of Better Myth: Lawyers’ Histories and Histories of Lawyers”, (1995) 33 *Alta L Rev* 730 [Pue, “In Pursuit”].

judicial independence. Even less common are attempts to integrate the theoretical and practical understandings of independence of lawyers and judges with important concepts such as rule of law and access to justice as those principles have developed in Canada.⁶

In contrast to studies of independence of the Bar, there is a substantial body of literature that deals with judicial independence and the role of the judiciary through the adjudicative process, and as a third branch of government.⁷ The principle of independence of the Judiciary developed over a long period, but the role of independent judges in Canada has also been the subject of considerable refinement in recent years.⁸ While judicial independence is essential to rule of law and access to justice, it also relies on the role played by independent lawyers. This work makes the assertion that Bar independence is a constitutional principle that supports independence of the Judiciary, both of which are necessary to support a public and independent court system under the democratic rule of law.⁹

⁶ One exception is Philip Girard's, "Liberty, Order, and Pluralism: the Canadian Experience", in Jack P Greene, ed, *Exclusionary Empire: English Liberty Overseas, 1600 to 1900*, (New York: Cambridge University Press, 2009). In the USA, one recent work in this vein is Judith Resnik & Dennis Curtis, *Representing Justice*, (New Haven: Yale University Press, 2011), [Resnik & Curtis, *Representing Justice*].

⁷ See, for example, Peter McCormick P & Ian Greene, *Judges and Judging* (Toronto: McGraw-Hill Ryerson, 1987); Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) [Dodek & Sossin, *Judicial Independence*]; Peter Russell, *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw-Hill Ryerson, 1987) [Russell, *Judiciary in Canada*]; Perry Millar & Carl Baar, *Judicial Administration in Canada*, (Kingston: McGill-Queen's Press, 1981).

⁸ *Supra* note 4, Girard, "Historical Perspective" at 53 – 55. The modern line of jurisprudence on judicial independence from the Supreme Court of Canada starts with *R v Valente*, [1985] SCJ 2 SCR 673 ["*Valente*"], and continues through approximately 15 cases up to the present day.

⁹ A similar view of Bar independence is presented by Patrick J Monahan in, "The Independence of the Bar as a Constitutional Principle" [Monahan, "Independence of the Bar"] in *supra* LSUC, "*Public Interest*" at note 4 at 117.

In examining the different aspects of independence, this work uses a new legal “realist” perspective termed ‘dynamic realism.’¹⁰ This approach includes consideration of some traditional tools of legal analysis, like jurisprudential, statutory and constitutional analysis. However, the approach also seeks to incorporate a wide range of additional considerations,¹¹ which includes social science approaches that take into account historical and political factors, institutional, public administrative and policy examinations, as well as a quantitative empirical component. Following this introduction, **Part I** introduces the dynamic realist conceptual and methodological approach in more detail.

Chapter Two starts by providing a description and critical analysis of my theoretical framework. The examination of dynamic realism in the first section of Chapter Two provides a departure point to explore important dichotomies that affect the principle of independence in the justice system and the latter sections more closely examine the dynamic realist methodological concept of ‘constitutive tensions’, to better delineate the relation between independence and concepts such as rule of law and access

¹⁰ For ease of reading, I use an uncapitalized version of the terms that signify the school of legal theory, legal “realism” and “realist” in the remainder of this work. ‘Dynamic realism’ describes a stream of new legal realism scholarship, see Victoria Nourse & Gregory Shaffer “Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?” (2009) 95 Cornell L Rev 61 [Nourse & Shaffer, “Varieties”]. See also Hanoach Dagan, “The Realist Conception of Law” (2007) 57 U Toronto LJ 607 [Dagan, “Realist Conception”].

¹¹ Generally new legal realism includes scholarship that may incorporate behavioural economics, see Daniel A Farber (2001) “Toward a New Legal Realism” 68 U Chi L Rev 279; quantitative empirical studies of political influences on judging, see Thomas J Miles & Cass R Sunstein, “The New Legal Realism” (2008) 75 U Chi L Rev 831 [Miles & Sunstein, “New Legal Realism”]; qualitative “law in action” studies such as Howard Erlanger *et al*, “Foreword: Is It Time for a New Legal Realism?” (2005) Wis L Rev 335; as well as a body of work that focuses on institutional analysis, eg Edward L Rubin, “The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions” (1996) 109 Harv L Rev 1393.

to justice.¹² I assert that, while these concepts are important to understandings of law and the operation of the legal system, they are also indeterminate and are best thought of as aspirational principles.

Part II of this work applies the dynamic realist approach in three separate Chapters. These Chapters examine the development of independence in the context of the Bar, the Judiciary and in the court system. Chapter Three demonstrates how traditional narratives about independence of the Bar do not fully capture the range of influences that affected the emergence of the principle for lawyers. In addition to conflicting accounts about the origins of independence of the Bar, this section also tracks contested accounts of the development of lawyer independence and shows that modern understandings of the principle did not fully emerge in Canada until well into the twentieth century.

Chapter Four examines the origins of the principle of independence of the Judiciary. As with Bar autonomy, traditional accounts of independence remain an important touchstone that have informed the ongoing development of independence of the Judiciary. However, traditional accounts do not adequately describe the principle, or fully capture its ongoing refinement in the modern Canadian context. In the end, like the principle of lawyer independence, the principle and practice of judicial independence has adapted and continues to be refined in response to distinct historical and political factors.

¹² *Supra* Nourse & Shaffer, “Varieties” at note 10 at 131.

Chapter Five examines the emerging importance of independent courts in Canada following World War Two. During this period, there was increased focus on the capacity of individuals to advance and defend their rights in publicly available and independent adjudicative environments. The first section of Chapter Five considers factors related to this enhanced focus, including a new emphasis on individual rights, structural and governance reform within the Canadian justice system, and modifications to the legal process. These factors led to changes that altered the roles played by independent lawyers and judges in courts. These changes also further emphasized the value of access to justice, which became a primary normative value underlying the modern justice system at this time.

Despite the focus on access to justice, the case study presented in the second section of Chapter Five concludes that the democratic value of access to justice may be at risk. This case study applies the dynamic realist approach to examine the role and function of independent actors in Ontario's Small Claims Court. It examines origins of the court and its emergence in modern times. In assessing the modern performance of the Court, the last part employs a quantitative metric to illustrate that access to the justice system, as measured by Court utilization, has declined in recent years. Ultimately, changes to the independent function of the legal system and its actors, like lawyers and judges, have not been entirely successful in enhancing access to justice in the context of the small claims adjudicative environment.

Part III of this work synthesizes the presentation of the principle of independence. Chapter Six further addresses the gap in scholarship with respect to the principle of Bar independence by reviewing current literature touching on lawyer ‘professionalism’ in Canada. While there is no one literature of legal professionalism, or of lawyer independence, the jurisprudence and scholarship from this perspective represents an important additional emergent analytic to understanding the ongoing development of the principle for legal professionals.¹³

Chapter Seven concludes my analysis, by comparing and contrasting features of independence for the bench and the Bar. Despite contextual differences between the principle for lawyers and judges, I conclude that independence is best thought of as a unitary principle. I propose that ‘independence’ is best understood as applying to legal decision-makers in the justice system who are expected to act impartially, neutrally and autonomously to apply, protect and improve the law.

The principle and practice of independence generally applies to lawyers and judges, who act for a common and primary purpose of facilitating access to justice within the Canadian legal system. Though access to justice has become a primary normative value within Canadian legal culture and underlies independence, this analysis concludes that access to justice is at risk in modern times. If the value of access to justice is to be

¹³ See for example the recent recognition by the Supreme Court of a lawyer’s professional duty of commitment to the client’s cause as a new principle of fundamental justice as a further refinement of the principle in *Canada (AG) v Federation of Law Societies of Canada* [2015] 1 SCR 401, 2015 SCC 7 (CanLII).

fully realized within the legal system, future changes to enhance access must better consider the role of fundamental principles, like independence, within a broader framework that includes both the principles and the practical realities of the Canadian justice system.

PART I

Chapter 2

The Dynamic Realist Approach

*Canada is suffering from what we call a “justice deficit”: a large and growing gap between the aspirations of the justice system and its actual performance.*¹

2.1 Introduction

Chapter Two critically describes the dynamic realist perspective and approach. Following this introduction, the second section describes the legal realism movement of the early twentieth century and connects it to its modern iteration. The third section presents my methodological framework and starts by critically comparing and contrasting the general thematic premises of traditional legal realism with the modern approach employed in this work. This section also identifies the key methodological components and explains the meaning of the title of this work. As suggested in the preface to this Chapter, there is a growing recognition of the gap between theory and practice in the legal system. This work complements that observation and a major theme is ‘Between Principle and Practicality,’ or the need to balance the aspirations of justice with the practical realities of law and Canada’s legal system.

¹ Perrin B, *et al* “Bridging Canada’s Justice Deficit Gap” (May 16, 2016) Macdonald-Laurier Institute, available online: <http://www.macdonaldlaurier.ca/bridging-canadas-justice-deficit-gap-mli-paper-by-benjamin-perrin-richard-audas-and-sarah-peloquin-ladany/> at p 3. Though this report focuses on the criminal justice system, as discussed throughout this work, the general observation excerpted is applicable to other kinds of proceedings as well.

The fourth section of Chapter Two expands on the concept of ambiguity in law to explore the effects of uncertainty on important terms like ‘rule of law,’ its connection to ‘independence,’ and the relationship of both terms to ‘access to justice’. Chapter Two concludes that these important legal terms are aspirational and can best be understood holistically in the context of how they emerge and function within the administration of justice.

2.2 ‘Dynamic’ vs Old ‘Legal Realism’

New legal ‘realism’ is an emerging theoretical perspective and a methodological framework.² The original realists adopted a critical stance towards law, legal reasoning and the justice system in the early twentieth century.³ While incorporating many of the critical attitudes, perspectives and techniques of the older realist movement, ‘dynamic’ realism is a new perspective that presents a novel approach to legal studies.⁴

² *Supra* note 10 in Chapter 1 where Nourse & Shaffer “Varieties”, propose a methodological framework integrating the various streams of new legal realist scholarship that they identify as “dynamic” legal realism.

³ There were several strains of original legal realist scholarship but arguably all based on this central theme.

⁴ *Supra*, at note 2. More generally new legal realism includes scholarship that incorporates behavioural economics, see Daniel A Farber (2001) “Toward a New Legal Realism” 68 U Chi L Rev 279; quantitative empirical studies of political influences on judging, see Thomas J Miles & Cass R Sunstein, “The New Legal Realism”, (2008) 75 U Chi L Rev 831 [Miles & Sunstein, “New Legal Realism”]; qualitative “law in action” studies such as Howard Erlanger *et al*, “Foreword: Is It Time for a New Legal Realism?” (2005) Wis L Rev 335; as well as a body of work that focuses on institutional analysis, eg Edward L. Rubin, “The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions” (1996) 109 Harv L Rev 1393.

This new approach integrates the older conceptual and methodological tools of the original realism into an innovative analytical framework.⁵ Before examining the conceptual tools and analytical framework utilized in this analysis, the next section situates the overall legal realist perspective within the larger framework of legal theory.

2.2.1 Development of Legal Realism

The original legal realist movement responded to ‘Formalism’, which was a prevalent mode of legal analysis throughout the latter half of the 19th century.⁶ A hallmark of formal approaches to law was a description of principles that could be classified, induced and deduced using traditional forms of logical reasoning. Using this approach, law was readily determinable through the application of logical and objective principles to evidence in particular cases. In this fashion, one view of formalism was that it sought to mimic or reflect a more scientific approach to law. To be fair, this explanation may oversimplify and even caricature formal conceptions of law,⁷ and there were likely few who dogmatically asserted this so-called ‘scientific’ approach to legal reasoning.⁸ However, one important realist reaction was to this characterization of

⁵ ‘Dynamic’ realism employs the 5 distinct methodological concepts of recursivity, simultaneity, mediation, emergent analytics and constitutive tensions, described *infra*.

⁶ The description that follows represents the typical, perhaps stereotypical description of “Formalism”, though the terms have been employed to describe other views as well, see Richard H Pildes, “Forms of Formalism” (1999) 66 U Chi L Rev 608 – 9; Duncan Kennedy, “Legal Formalism” in *International Encyclopedia of the Social and Behavioural Sciences*, vol 13 (Amsterdam: Elsevier, 2001) 8634. From this point forward, I use the uncapitalized version of the terms ‘formal’, ‘formalism’ and ‘formalist’ for ease of reading in the text. In Chapter 6, I employ a capitalized version of the term “Formal” to describe professionalism approaches to lawyer independence, which is unrelated to the major legal school of formal legal theory.

⁷ Some claim that the typical description caricatures classic formalism, see Anthony J Sebok, *Legal Positivism in American Jurisprudence*, (Cambridge: Cambridge University Press, 1998) at 83 – 104.

⁸ *Ibid.* Some describe Langdell as ‘culturally personifying’ formalism, see Paul D Carrington, “Hail! Langdell!” (1995) 20 L & Soc Inq 691 at 708 – 709.

formalism, which appeared to portray law and legal theory as internally valid and independent of external values.⁹

By contrast, the original realists did not accept a purely formal account of law. For example, Roscoe Pound rejected such traditional views, which were derided as “the rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of actual facts.”¹⁰ Dean Pound’s sociological approach to law sought instead to understand “law in action,”¹¹ which included a range of factors. In the words of fellow realist Karl Llewellyn,

Before rules, were facts; in the beginning was not a Word, but a Doing. Behind decisions stand judges, judges are men... [B]eyond decisions stand people whom rule and decisions directly and indirectly touch...¹²

More specifically, the realist critique of formal approaches was based on three broad grounds. First, realists argued that formal accounts did not adequately include the vital role of adjudication in the legal process. In this case, realists suggested more traditional characterizations described adjudication as a formulaic exercise, where judges operated as simple “technicians” whose work was “mechanical: to find the law, declare what it said, and apply its pre-existing prescriptions.”¹³ By contrast, a central realist claim was that judges determined cases “based on what they think would be fair on the facts of

⁹ *Ibid.*

¹⁰ *Ibid* at 462.

¹¹ See Roscoe Pound, “Law in Books and Law in Action” (1910) 44 Am L Rev 12 [Pound, “Law in Books”].

¹² Karl N Llewellyn, “Some Realism About Realism—Responding to Dean Pound” (1930) 44 Harv L Rev 1222 at 1222.

¹³ *Supra*, note 10 Chapter 1, Dagan, “The Realist Conception” at 3.

the case, rather than on the basis of the applicable rules of law.”¹⁴ For the realists, the context and values that informed judicial legal reasoning were additional important determinants in law.

The perceived failure to describe adjudication adequately led to a second broad ground of criticism. Here realists proposed that neither law nor legal theory was as determinate as some formalists described. This criticism was based on the observation that aspects of law were highly contextual and not valid only by internal reference.¹⁵ So, for example, the indeterminacy of law could be found in both rules and statutes, which often could be understood only by reference to external authority.¹⁶ A related, but perhaps even greater challenge, was presented by the “profound and irreducible” doctrinal indeterminacy that resulted from the existence of potentially multiple and sometimes contradictory sources of law.¹⁷

¹⁴ See Brian Leiter, “Rethinking Legal Realism, Toward a Naturalized Jurisprudence” (1997) 76 Tex L Rev 267, 275, reprinted in Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (London: Oxford University Press, 2007) 15 – 30 [Leiter, “Rethinking”] at 21- 22.

¹⁵ In addition to rule and doctrinal indeterminacy the interaction between rules and facts, and the need to determine factual relevance presents further contextual complications, *supra* Dagan, “The Realist Conception”, at note 10 at 5.

¹⁶ Legal positivists such as Hans Kelsen acknowledge that the validity and meaning of legal rules comes by virtue of being part of a broader and effective legal system, see *General Theory of Law and State*, trans Anders Wedberg (Cambridge, MA: Harvard University Press, 1949) at 3.

¹⁷ Karl Llewellyn claimed that all legal systems were patchworks of contradictory promises, with “a variety of strands, only partly consistent with one another” in Karl N Llewellyn, *The Case Law System in America* (1993) Paul Gerwitz ed, trans Michael Alsandi (Chicago: University of Chicago Press, 1989) at 45. See also Roberto Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1983 at 15 – 22.

A third ground of realist criticism was the assertion that formalism obscured a pattern of choices based not on law, but rather on normative values.¹⁸ In a similar vein, others noted formal perspectives had a tendency to assert as essential what were really contingent doctrinal choices,¹⁹ ultimately privileging the *status quo*.²⁰ As a result, early realists sought to understand a range of potential inputs into the determination of legal facts, which included psychological and social factors.²¹ Realists also eschewed the formalist tendency to minimize values and sought to better understand the role of principles underlying justice, including broader values such as those contained in moral systems, notions of class and political preferences.²²

Legal realism succeeded in bringing a broader perspective to legal theory. However, as the twentieth century progressed, some of the weaknesses of the approach became the subject of criticism. For example, in the 1930s and 40s, some realists struggled to explain the rise of totalitarianism.²³ In this case one criticism of the realist approach, that judicial independence supported arbitrary determinations of fairness based on the personal opinions of judges rather than the rule of law, came to be regarded as

¹⁸ For example, formalism masked choices based on “considerations of social advantage”, see Oliver W Holmes, “The Path of Law” in *Collected Legal Papers* (New York: Harcourt, Brace & Co, 1920) at 184.

¹⁹ For example, Cohen criticized the use of legal language that “thingifys” legal concepts, but that may not account for social forces and ideals in law, see Felix S Cohen, “Transcendental Nonsense and the Functional Approach” (1935) 35 Colum L Rev 809 at 820 – 1 and 827 – 9.

²⁰ For example, John Dewey, “Logical method and Law” in William W Fisher II *et al*, *American Legal Realism* (New York: Oxford University Press, 1993) at 191.

²¹ See, for example, Jerome Frank, *Law and the Modern Mind* (Anchor Books: New York, 1963) [Frank, *Law*], at 156; Felix S Cohen supported borrowing from behavioural social sciences in legal analysis, see “Transcendental Nonsense and the Functional Approach” (1935) 35 Colum L Rev 809, 833 – 849.

²² “The Core Claim of Realism” is that judges use fairness rather than applicable rules to determine law, *supra*, Leiter, “Rethinking” at note 10, at 21 – 22.

²³ Neil Duxbury, “Jerome Frank and the Legacy of Legal Realism” (1991) 18 J L & Soc’y 175, [Duxbury, “Jerome Frank”] at 179.

potentially “traitorous.”²⁴ A second perceived weakness was that realism served only to deconstruct formalist legal theory and was therefore “nominalist”.²⁵ In this sense, the relativistic implications of realism appeared to provide no constructive alternative legal theory or practical approach to law.²⁶

In the end, ‘old’ legal realism faltered in the face of these political, social and moral challenges. Even so, the realists succeeded in their larger aim, to widen the scope of legal theory and analysis. The basic core of their criticisms was that a strict application of an objective formalist doctrine was impossible. In the following decades, this basic criticism became widely accepted within the legal academy.²⁷ If anything, the overall success of legal realism remains apparent throughout legal theory.²⁸ However, the inability of the old legal realism to address constructively larger questions meant it became submerged by a more prominent discourse about the role of “positive” law and the moral underpinnings of the legal system following World War Two.²⁹

²⁴ *Ibid.*

²⁵ The deconstructionist tendency of the old legal realism is criticized as “nominalism”, see Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978) at 15 – 6. See also Morton Horwitz, *The Transformation of American Law, 1870 – 1960* (Cambridge, MA: Harvard University Press, 1977) at 202.

²⁶ For example, some of the early realist empirical efforts were described as a “ridiculous and expensive pursuit of trivia” that had no effect on the law, see William Twining, “Karl Llewellyn and the Realist Movement” (1973) 63, at 65 – 66, commenting on Underhill Moore & Charles C Callahan, “Law and Learning Theory: A Study in Legal Control”, 53 *Yale L J* 1, at 3 – 4 (1943) [Moore & Callahan, “Law and Learning”].

²⁷ See for example, the comment that “we are all legal realists now” in Joseph William Singer, “Legal Realism Now”, 76 *Calif L Rev* 465 (1988) at 467.

²⁸ Incorporation of other disciplinary perspectives has resulted in at least some legal scholars questioning the sustainability of separate ‘legal theory’, see Hanoch Dagan, Roy Kreitner, “The Character of Legal Theory”, 96 *Cornell L Rev* (2011) 671 at 672 [Dagan & Kreitner, “Character”].

²⁹ As captured by HLA Hart’s article “Positivism and the Separation of Law and Morals” (1958) 71 *Harvard Law Review* 607 and Lon Fuller’s response article “Positivism and Fidelity to Law: A Reply to Professor Hart” (1958) 71 *Harvard Law Review*, 630. See also, in *The Hart-Fuller Debate in the Twenty-First Century*, Peter Crane, ed (Oxford: Hart Publishing Ltd, 2010). From this point forward in the text, for ease of reading I use uncapitalized versions of the term ‘positive’, ‘positivist’ and ‘positivism’.

2.2.2 Emergence of ‘Dynamic’ Realism

The early legal realists were opposed to formal approaches to law,³⁰ and challenged the mechanical determinism which seemed to advocate a ‘science’ of legal doctrine.³¹ By comparison, modern realists are also critical of formal tendencies in some theories of law that have gained currency in the last several decades. Dubbed “new” or “neo” formalism,³² such approaches rely on what is characterized as deterministic reasoning, usually from an economics perspective. Such formal approaches have become influential in multiple disciplines, including public administration and politics.³³

Both old and new formalism regard political considerations in the formation and development of law and legal theory as inappropriate. For example, the old formalists focused on the common law, since statutes were thought not to reflect legal theory as such, but were regarded as manifestations of the political process. By comparison, new formalists seek to constrain the operation of statutes through ‘textual’ interpretation, “often in light of public-choice theory’s conception of a debased political process.”³⁴ In

³⁰ Stewart Macaulay, “The New Versus the Old Legal Realism: ‘Things Ain’t What They Used to Be’” (2005) *Wis L Rev* 365 at 391 – 392.

³¹ *Supra*, Nourse & Shaffer “Varieties” at note 2, at 67. Describing formalism, see for example, Thomas C Grey, “Langdells’ Orthodoxy”, (1983) 45 *U Pitt L Rev* 1, at 5 – 6 and 11 – 13.

³² *Ibid*, Nourse & Schaefer, “Varieties” at 74.

³³ For example, Timothy Lewis notes “the acceptance of these theoretical changes in bureaucracies often required political sponsorship to be fully expressed. Conservative Margaret Thatcher attained power in England in 1979; Republican Ronald Reagan did the same in the United States in 1980. Each espoused an economic neo-liberalism and sought to circumscribe the state role in the economy,” in *In the Long Run We’re all Dead: The Canadian Turn to Fiscal Restraint*” (UBC Press: Vancouver, 2003) at 95.

³⁴ *Ibid* at 98. See also Frank H Easterbrook, “The Supreme Court 1983 Term--Foreword: The Court and the Economic System”, (1984) 98 *Harv L Rev* 4, which at 14 - 17 discusses statutes as the rent-seeking product of competing interest groups.

law, new formalism has become a touchstone for discourse about a wide range of legal subjects including constitutional, administrative and contract law.³⁵

In legal theory, modern realists are largely opposed to the central features of new formalism, which they characterize as relying on “axiomatic reasoning, substituting assumptions of rational behavior and self-correcting markets for the old formalists’ scientific principles.”³⁶ In addition, new legal realist approaches share other similarities with the original realism movement.³⁷ For example, like its precursor, new formalism tends to de-emphasize contextual factors such as history, political or institutional factors.³⁸ By contrast, dynamic realism accepts a variety of perspectives and methodological approaches, including those from the social sciences.³⁹ Dynamic realism embraces the contributions of many of these different areas as part of its acknowledgement of the importance of context, and includes incorporation of empirical data.⁴⁰ From this perspective, a diversity of perspectives and methodologies provides capacity for a more rounded understanding of law and legal theory.

³⁵ For example see Victoria F Nourse, “Make Constitutional Doctrine in a Realist Age” (1997) 145 U Pa L Rev 1401; David Charny, “The New Formalism in Contract, (1999) 66 U Chi L Rev 842; Thomas C Grey, “The New Formalism” 5 – 7 (Stanford Law Sch Pub Law & Legal Theory Working Paper Series, Paper No 4, 1999, available online: <http://papers.ssrn.com/abstract=200732>.

³⁶ *Supra*, Nourse, Shaffer, “Varieties” at note 2 at 74.

³⁷ *Ibid*, where the authors note the hundreds of recent articles citing the term ‘new legal realism’ at 64 under endnote 3.

³⁸ See, for example, Miles & Sustain, “New Legal Realism” (2008) University of Chicago L R 75, No 2 83, uses the term “new legal realism” to describe empirical approaches to assessing political influences on judging. In their work; *supra*, Nourse & Shaffer, “Varieties” at note 2, the authors identify and describe 3 broad institutional approaches: the Comparative Institutionalism, Neoinstitutionalism, and Microanalysis at 85 – 89.

³⁹ For example, “the power of social science methodology to push us beyond our personal politics or situations” in Elizabeth Mertz, “Challenging Translations: New Legal Realist Methods” (2005) Wis L Rev 482 at 483 – 4.

⁴⁰ Though note “the nature of the empiricism and their actual engagement with it varies quite a bit,” in *supra*, Nourse & Shaffer, “Varieties” at note 2, at 112.

The body of work by those who have claimed the title of ‘new legal realism’ is wide-ranging. Currently, this viewpoint presents as a developing legal theory that has many ‘varieties,’ with different focuses and a range of methodologies.⁴¹ Yet most of these approaches embrace a common core of five theoretical concepts: recursivity, simultaneity, mediation, emergent analytics, and, constitutive tensions. The themes underlying my adaption of this approach and its core concepts are examined in more detail in the next section.

2.3 Methodological Framework of Dynamic Realism

2.3.1 General Thematic Premises

‘Dynamic’ realism is a distinct approach that is characterized by three broad themes. The first theme builds on the original realist idea that law must be understood ‘in action.’⁴² From this viewpoint, legal theories cannot be fully appreciated unless they also incorporate context to consider things like the influence of history, the role of institutions and the development of practices. In this sense, context informs all of the specific tools of this methodological approach.

⁴¹ *Ibid.*

⁴² *Supra*, Pound “Law in Books” at note 11.

The second theme extends the appreciation of context in law to incorporate a respect for ‘purposive’ empiricism.⁴³ One criticism of the older legal realism was that its empirical research seemed only peripherally related to the substantial questions posed by legal concepts and practice. For example, Underhill Moore's study of the relation between human psychology and compliance with parking ordinances in a small American town in the 1940s was lambasted as a ‘symbol of the ridiculous and expensive pursuit of trivia by the highly talented.’⁴⁴ In the end, some empirical research of the original realists, which seemed only tangentially related to law and legal theory, appeared to make little contribution to legal scholarship.

Dynamic realism, in contrast, uses empirical research ‘purposively’ to seek engagement with larger concerns in legal theory, like the rule of law, independence and access to justice. By employing a range of methodological tools, including empirical methods, this approach has the capacity provide more holistic insights into law. Purposive empiricism can also serve as a check on the validity and reliability of purely theoretical insights. While it is important to study law ‘in action,’ where possible such studies should take advantage of the variety of empirical tools and methods now available.⁴⁵

⁴³ The phrase “purposive” empiricism, is employed to distinguish it from some of the empirical studies of the original legal realists which were criticized as unconnected to legal theory, *supra* note 26 Moore & Callaghan, “Law and Learning”.

⁴⁴ William Twining, *Karl Llewellyn and the Realist Movement* (Cambridge: Cambridge University Press, 1973) at 63 and 65 - 66.

⁴⁵ As noted by Nourse & Shaffer, “Varieties” *supra* note 2 at 93 “empiricism has exploded in the legal academy”.

A third broad theme is the idea of balance. This theme extends from contextualism and includes the need for balance between concepts and practicality, between the principles of law and the realities of the legal system.⁴⁶ It also includes a balance between using the recognized tools of legal theoretical analysis and respect for considerations external to the law. The collision of potentially discordant approaches and ideas and the need to maintain a balanced perspective in law, but also between the study of law and the contributions of other disciplines, presents a distinct challenge.

Accommodating the many potential factors that affect both conceptions and the practice of law in a way that maintains the integrity of law and of legal reasoning requires delicate, and sometimes less-than-perfect balancing. In this way, “the realist understanding of law presents an ideal, but it is decidedly not utopian. It emphasizes the human factor, with its inevitable frailties.”⁴⁷ In the end, the need for balance, purposive empiricism and a recognition of the importance of context in law permeate the five distinct methodological concepts of dynamic realism. The specific methodological tools and their relation to the three general themes of context, purposive empiricism and balance, are highlighted in the next subsection.

⁴⁶ Such a balance uses theoretical principles “as part of a dynamic, recurrent, interactive process with empirical assessment of practice” in *ibid*, at 121 citing Steward Macaulay’s, “Law and Behavioural Sciences: Is There Any There There?”, (1984) 6 Law & Pol’y 149, as an example that achieves this balance.

⁴⁷ *Supra*, note 10, Dagan, “Realist Conception” at 8.

2.3.2 Key Methodological Components

The first methodological component incorporates context by including an examination of the ‘recursive’ background of many modern legal issues. The concept of ‘recursivity’ incorporates an acknowledgement that there is a cyclic interaction between law and society over time. The term ‘recursive’ is used throughout this work, to emphasize both its grounding in legal scholarship, but also to address the inaccurate notion that legal history is not something more than ‘simply ‘descriptive’’.⁴⁸ In this respect, the recursive cycle “is also why modern and ancient history are so essential to understanding law’s best realism. If done right, such inquiry invites the scholar willing to reconsider the present by engaging critically with the most basic concepts that shape institutions.”⁴⁹

My historical analysis examines the development of independence in relation to concepts of law and substantial principles, like rule of law and access to justice. On this basis, some modern understandings of the principle of independence in the legal system associated it with liberal democratic notions.⁵⁰ Yet both judicial independence and independence of the Bar have their roots in a period before the widespread reception of things like the rule of law. The advancement of ideals like democracy and liberty have

⁴⁸ As was suggested by one early reviewer. The concept was developed in the context of global norm-making in bankruptcy law, see Terrence C Halliday & Bruce G Carruthers, “The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes”, (2007) 112 Am J Soc 1135 and is expanded by Nourse & Shaffer, “Varieties” *supra* note 2 at 130 – 131. While there is no special magic to the term, emphasis on ‘recursive’ is also intended to highlight the value of legal history as a legitimate and recognized approach to legal inquiry, despite a possible gap in scholarship in this area in relation to independence of the Bar, *supra* note 5, Pue, “In Pursuit”.

⁴⁹ *Ibid*, Nourse & Shaffer, “Varieties”.

⁵⁰ For example, the general association of the rule of law with publicly accessible, independent courts is a broad theme in *supra*, Resnik & Curtis, *Representing Justice*” in Chapter 1 at note 6.

been an important result of the emergence of independence. But, over time and place, the connection between the advancement of liberal values and the development of independence in the Canadian justice system has been more tentative.

While the historical context has changed, the basic core challenges presented by rule of law, independence, and access to justice remain the same. Similar concerns over the role of autonomous lawyers and judges, and their relation to both rule of law and access to justice in the legal system, have also arisen throughout the development of the principle. For example, the underlying notion behind the theory of ‘independence’ suggests it represents an absolute ideal.⁵¹ However, ‘independence’ in context is neither absolute, nor unchanging. Over time, the independence of both the Bar and the bench in Canada have been both conditional and responsively adaptive.⁵²

In Canada, the overall principle of independence has developed sporadically and remains limited in several respects. The modern forms of judicial independence have interacted with the complementary principle of an independent Bar.⁵³ In this way, the scope and limits of the principle of independence continue to be refined in the Canadian context.⁵⁴ Practically speaking in modern times, a conditional independence for lawyers

⁵¹ The either/or proposition about independence is consistent with the observation of the ‘inherent dichotomy’ in adversarial systems of law more generally, *infra* note 192.

⁵² “Like equality, liberty is an interpretive concept: politicians all promise to respect it, but they disagree what it is”, see Ronald Dworkin, *Justice for Hedgehogs*, (Harvard University Press: Cambridge, 2011) at 364. Dworkin’s scholarship reconciles ambiguity and indeterminacy in law by positing the existence of an interpretive community that relies on generally held norms of legal understanding. See also, W Bradley Wendel, “Professionalism as Interpretation” (2005) 99 NW U L Rev 1167 and David Luban, *Legal Ethics and Human Dignity*, (New York: Cambridge University Press, 2007) at 198 – 199 [Luban, *Legal Ethics*].

⁵³ *Supra* LSUC, *In the Public Interest* in Chapter 1 at note 4.

⁵⁴ For example, for judges see *R v Valente*, [1985] SCJ 2 SCR 673 [*Valente*].

and judges is essential to support independence within a public legal system. Ultimately, my assertion is that the primary normative justification for independent lawyers and judges is to facilitate access to justice at independent courts.⁵⁵

A second key methodological component is the concept of ‘simultaneity’. Simultaneity is the principle that law is mutually interactive with other recognized domains of inquiry.⁵⁶ Overall, dynamic realism seeks a more holistic integration of factors important to law, legal theory and practice. In particular, my assessment of independence in the justice system includes an examination of the ‘simultaneous’ interactive relation between law, history and politics.

One risk in employing simultaneity to consider the influence of a broader range of factors on law is reductionism.⁵⁷ The application of additional perspectives, like those of the social sciences, may lead to the risk that one area, like law, will be regarded as simply a lesser subset of a different discipline.⁵⁸ One critique of neo-formalism is that it engages in reductionism when it treats law as only an aspect of the larger economic framework,

⁵⁵ For example, “the principle of an independent bar, like the principle of an independent judiciary, is an idea that has a fundamental constitutional character. This is so because where it is interfered with all other constitutional rights including rule of law itself are place in jeopardy” in Jack Giles, QC, “The Independence of the Bar” (2001) 59 *The Advocate* 549.

⁵⁶ *Supra* note 1 at 132.

⁵⁷ *Ibid* at 122 – 125. For a discussion of the ‘reductionist’ challenge see Owen Fiss, “The Death of Law?” in *The Law As it Could Be* at 191 and Owen Fiss, “The Law Regained” 74 *Cornell L Rev* (1989) 245 at 245 – 46. For an examination of this challenge in the context of a ‘topology of discourses about law’ see *supra*, Dagan & Kreitner “Character” at note 28, 673 – 680.

⁵⁸ For example, “in its extreme manifestation, law and policy takes the methodology of another discipline (typically economics) to explain legal doctrine or to call for its reform with no reference, explicit or implicit, to the concept of law”, in *supra* Dagan & Kreitner “Character”, at note 28 at 674 – 675.

whose overriding imperative is efficiency within the marketplace.⁵⁹ While some neo-formalists may reduce law to economics, there is a similar danger that dynamic realism will engender a new form of reductionism by incorporating the significant contributions of other fields, like political studies, to law.⁶⁰

Dynamic realism avoids the reductionist risk by maintaining balance between principle and practice. This balance makes it possible to bridge the perceived divide between two subjects in order to present a more comprehensive account of both. In terms of law and politics, “the simple dichotomy of law-versus-politics is not only under-theorized but also falsely dichotomized; the two constantly interact and operate in parallel, simultaneously.”⁶¹ In the end, my analysis of lawyers, judges and of the court system presented concludes that there is a strong correlation between historical and political events and the emergence of the principle of independence.

The third and fourth conceptual tools are ‘mediation’ and ‘emergent analytics’. These related concepts build on the ideas of recursivity and simultaneity both conceptually and practically. Conceptually, the idea of mediation accommodates insights gained from an appreciation of the recursive cycle in the development of law, as well as the acknowledgement that the theory and practice of law operate in simultaneous

⁵⁹ This ‘neo’ formalist approach “sets forth coherent principles (efficiency and wealth maximization) that can be applied objectively and deductively to any set of facts in all areas of law”, *supra* at note 2 at 96.

⁶⁰ This reductionist tendency can be seen in the work of some modern legal scholars. Michael Mandel’s work, *The Charter of Rights and the Legalization of Politics in Canada*, rev ed (Toronto: Thompson Education Publishing Inc, 1994) [Mandel, *Legalization*], argues for example that law is simply politics by other means.

⁶¹ *Supra*, note 2 at 123.

collision with other things, like social context and politics.⁶² Practically speaking, the idea of mediation also incorporates respect for the fact that “law in action” sometimes differs from assertions based only on legal theory.⁶³

In other words, a more complete understanding of law includes respect for the effects of mediating factors like the participation of individuals and their effects on institutions.⁶⁴ The concept of mediation also builds on the functionalist current in the old legal realism,⁶⁵ but extends it to consider “the ways in which law’s purposes are thwarted, amplified, condensed, or switched entirely when translated into the real world.”⁶⁶ Ultimately the concept of mediation suggests that no thorough consideration of law would be complete without some operational understanding of law and legal systems.

The fourth methodological tool of emergent analytics is related to the concept of mediation in that it proposes a practical method to address the challenge of potential dissonance between concepts of law and law in action. By consciously refusing to start with a strong theory, information derived from observations of law and the legal system ‘emerges’ to provide measurable units of analysis.⁶⁷ In this work, a review of the

⁶² See, for example, Howard Erlanger *et al*, “Foreword: Is It Time for a New Legal Realism?” (2005) *Wis L Rev* 335, at 339 which calls for the incorporation of bottom-up methodologies.

⁶³ *Supra*, Pound “Law in Books” at note 11.

⁶⁴ This characterization of the role of ‘mediation’ adapts a similar view expressed by Jeremy Waldron in “Concepts and the Rule of Law” (2008) 43 *Ga L Rev* 1 [Waldron, “Concepts”] at 55.

⁶⁵ See, for example, the work of Felix S Cohen, “Transcendental Nonsense and the Functional Approach” (1935), 35 *Colum L Rev* 809, who proposed that legal analysis borrow from social sciences, at 833-49.

⁶⁶ *Supra* Thomas S Kuhn, *The Structure of Scientific Revolutions* 52 – 53 (2d ed 1970) where, at 142 – 144 the author discusses mediating theory and the concepts of amplification, condensation and switching.

⁶⁷ From this perspective strong theory approaches risk ‘self-referentiality’ where “theory will simply seek to prove its own worth”, *supra* note 1 at 119, citing generally Raymond Boudon, “Theories, theory, and Theory” in *The Crisis in Sociology: Problems of Sociological Epistemology* 149 (Howard H Davis trans, 1980).

development of the principle of independence, in particular of independence of the Bar, is combined with an institutional assessment of the court system. This assessment describes the development and refinements of independence in modern, independent courts in Canada and has been extended to incorporate a case study that observes and assesses the operation of the principle of independence, in light of its identified role to provide access to justice, within a particular aspect of the Canadian court system.⁶⁸

Within the framework of these four distinct methodological components: recursivity, simultaneity, mediation and emergent analytics, dynamic realism integrates an overarching fifth concept of ‘constitutive tensions’. Constitutive tensions are largely irresolvable theoretical and practical challenges within law which play a significant role in shaping approaches to legal concepts and the justice system. There are a wide range of possible characterizations of the many constitutive tensions within law. Many secondary constitutive tensions appear to arise from a primary tension in law and legal theory that law is, to a degree, substantially indeterminate. This observation about the nature of law builds on the original criticism of old legal realism, which rejected the apparent certainty afforded by the application of a ‘scientific’ approach to legal reasoning.

Discussions about the nature of the indeterminacy in law have been more fully developed in recent years. Legal indeterminacy arises from the fact that law involves an

⁶⁸ For the role of a Chief Justice see, for example, Peter Hogg, “The Role of the Chief Justice in Canada”, (1992) 19 Queen’s L J 248 [Hogg, “Chief Justice”]. For the role of Attorneys General see, for example, Kent Roach, “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law”, (2006) 31 Queen’s LJ 598.

interaction between several ‘essentially contested’ concepts,⁶⁹ within an inherently dichotomous forum,⁷⁰ that admits the possibility at least of several ‘right’ answers.⁷¹

This characterization of law suggests that legal reasoning leads to conclusions that are always potentially defeasible.⁷² As noted, this basic indeterminacy gives rise to other important secondary constitutive tensions. These secondary tensions touch on the interaction between rule of law and other important principles in the legal system, like independence and access to justice. The scope, nature and relationship between of all these constitutive tensions are examined in more detail in the next section.

2.3.3 Legal Indeterminacy as a Primary Constitutive Tension

Legal indeterminacy is a constitutive tension that raises a number of additional fundamental questions, the most important of which are: what is law and why does it exist?⁷³ Embedded within these basic questions is the related inquiry about how to

⁶⁹ This point builds on Jeremy Waldron’s observation about the rule of law in *supra*, Waldron, “Concepts” at note 64, at 52, citing Richard Fallon, “The Rule of Law as a Concept in Constitutional Discourse” (1997) *Colum L Rev* 1 at 18 – 19. See also Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?” in R Bellamy ed, *The Rule of Law and Separation of Powers* (Ashgate, 2005) [Waldron, “Rule of Law”] at 119.

⁷⁰ The justifications for the adversarial dichotomy are discussed, for example, in David Luban, “The Adversary System Excuse” (1984) *The Good Lawyer* 83 at 93 -111 [Luban, “Adversary System”]. In addition to the general indeterminacy of the adversarial system, its efficacy has been challenged in the face of pluralism, see, for example, Carrie Meadow, “The Trouble with the Adversary System in a Post-Modern, Multicultural World, (1996-1997) 38 *Wm & Mary L Rev* 5.

⁷¹ Ronald Dworkin, *Law’s Empire* (Harvard University Press: Cambridge, 1986) [Dworkin, *Law’s Empire*], where Dworkin sets out his views of ‘right answers’ by a process of constructive interpretation by an ideal judge.

⁷² Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005) [MacCormick, *Rhetoric*]; Neil MacCormick, “Rhetoric and the Rule of Law” in Dyzenhaus (ed) *Recrafting the Rule of Law* (1999) (Portland: Hart Publishing, 1999) [Dyzenhaus, *Recrafting*].

⁷³ See, for example, *supra* 52 Luban, *Legal Ethics* where, at 197, the author states law’s indeterminacy is “of a special and limited sort – moderate, not global”. The ‘who’ question is deliberately limited to focus on bench and the Bar; the ‘where’ question is largely limited to the Canadian common law legal system, and; the ‘when’ question is related to the dynamic realist concept of recursivity employed in this work. The

recognize legitimate sources of legal authority, which often leads to a basic disagreement amongst and between theorists. For positivists, law is a human creation comprised of statutes, judge-made law and customs.⁷⁴ For some non-positivists, like Ronald Dworkin, law is a part of a system of values.⁷⁵ For others, like Lon Fuller, while law contains a list of identifiable pragmatic qualities, it must also contain a principled moral component.⁷⁶

Disagreements about the nature of law can be observed at the conceptual level, but are also apparent within the determination of individual units of analysis. So, for example, there is wide general acceptance that parts of law captured in descriptive words and phrases like ‘rule of law,’ ‘independence’ and ‘access to justice,’ should be supported and advanced.⁷⁷ However, despite their importance, there remains no consistent interpretation as to what they mean. In fact, much of the language employed in describing the nature of law and its component parts is the subject of substantial disagreement.⁷⁸

Some of this disagreement over both the basic concepts and the language of law may arise from a degree of conceptual confusion or vagueness. In other areas, conceptual

‘how’, ‘what’ and ‘why’ questions are examined throughout, and the latter two are the subject of extended analysis in Chapter 7. See Gregoire Webber “Asking Why in the Study of Human Affairs” (2015) *The American Journal of Jurisprudence* 1- 28, available online: <http://ajj.oxfordjournals.org/> downloaded June 1, 2015 [Webber, “Asking Why”].

⁷⁴ Hart, HLA, *The Concept of Law*, second ed, (Oxford: Oxford University Press, 1994).

⁷⁵ See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge MA: First Harvard University Press, 2013).

⁷⁶ Including that they must be: general, promulgated, prospective, clear, non-contradictory, not impossible, constant and congruent, for extended discussion of these qualities see Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 46 – 90.

⁷⁷ See, for example in the Canadian context, T Farrow, “What is Access to Justice?” (2014) 51 *Osgoode Hall L J* 3; Micah Rankin, “Access to Justice and the Institutional Limits of Independent Courts” (2012) *Windsor YB Access Just* 101 at 4 [Rankin, “Access to Justice”].

⁷⁸ *Supra*, MacCormick, *Rhetoric* at note 72.

confusion has presented challenges in social sciences research.⁷⁹ Conceptual ambiguity may be further exacerbated at the practical level when scholars broaden their inquiries to employ more holistic frameworks. For example, approaches that emphasize the importance of context must also guard against the risk of the analytical ambiguity resulting from too much context, or getting lost in the vague “swamp” of detail.⁸⁰ While recognizing the risk of conceptual confusion or vagueness, a greater challenge in law is presented by the fact that disagreement about the use and definition of vital terms represents a constitutive tension because they are “essentially contested.”⁸¹

In short, ‘essentially contested’ concepts are those which involve endless disputes about the proper uses of an idea on the part of their users.⁸² They are “not resolvable by argument of any kind, [but] are nevertheless sustained by perfectly respectable arguments and evidence.”⁸³ While the idea of ‘essential’ contestation was described initially more

⁷⁹ See, for example, James Johnson, “Conceptual Problems as Obstacles to Progress in Political Science”, *Journal of Theoretical Politics*, 15, 2003 pp 87 – 115. Confusion can arise from the inconsistent definition and application of commonly accepted terms. Some have gone as far as to reject the focus or use of complex conceptual ideas, see, for example Gary King, Robert Keohan and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research*, (Princeton, NJ: Princeton University Press, 1994).

⁸⁰ *Supra*, note 1 at 162, where the authors state “the late Arthur Leff, who read extensively in both saw law-and-economics as a desert and law-and-society as a swamp”, quoted in his work examining how social norms affect property disputes, Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press: Cambridge, 1991) at 147.

⁸¹ WB Gallie, “Essentially Contested Concepts” *Proceedings of the Aristotelean Society*, 56, 1956, pp. 167 – 198 [Gallie, “Concepts”]. These views were subsequently developed in further works by the same author: “Art as an Essentially Contested Concept” *The Philosophical Quarterly*, 6, 1956, at 97 – 114 in *Philosophy and Historical Understanding*, second ed (New York: Schocken Books, 1968) [Gallie, “Art”].

⁸² Gallie’s work in this area can be most productively regarded in terms of its more recent broader applications as an “analytic framework”. In this sense, the concept of ‘essential contestedness’ should be judged by its overall utility to “illuminate important problems in understanding and analyzing concepts”, Collier, Hidalgo & Maciuceanu, “Essentially contest concepts: Debates and applications”, *Journal of Political Ideologies*, (October 2006), 11 (3), 211 – 246, at 214 – 215 [Collier *et al*, “Debates”], at 215, where the authors contrast Gallie’s work with a hypothesis which can be challenged as inherently right or wrong.

⁸³ *Ibid*, Gallie, “Concepts” at note 81 at 169.

than half a century ago,⁸⁴ the various elements of the framework continue to be the subject of refinement,⁸⁵ as well as further application in the modern context.⁸⁶

As an analytical perspective and descriptor, ‘essential contestedness’ partly explains the definitional tension that continues to permeate vital terms in legal studies. That is, terminology and phrases like ‘rule of law,’ ‘independence’ and ‘access to justice’ represent aspirational ideals that depend on a range of variables, including context. To the extent that such words and phrases might depend on contextual factors, including the potentially diverse perspectives of their many users over time, the meanings of this basic terminology are fluid and thus always subject to dispute.

The ‘essential contestedness’ of law is further exacerbated by several additional related factors. These include the disputatiousness that results from the dichotomy inherent within an adversarial system.⁸⁷ Indeterminacy in Canada’s legal system is also likely a by-product of reliance on the system of *stare decisis*,⁸⁸ within a highly

⁸⁴ The seven basic criteria are: 1) Appraisiveness; 2) Internal complexity; 3) Diverse describability; 4) Openness; 5) Reciprocal recognition; 6) Exemplars; and, 7) Progressive competition.

⁸⁵ Later extensions of Gallie’s framework suggest concepts may also become “decontested” and be subject to a degree of ‘practical closure’, in the sense that they can achieve a stable meaning within a given framework, *supra*, note 82 Gallie, “Art” at 113 – 114. There is some debate about the consistent application of this distinction, *supra* Collier, *et al* “Debates” at 214 – 215.

⁸⁶ Though not without some criticism. For example, the criterion of appraisiveness, *supra* note 84, relates to the use of a term to signify a valued achievement. However, the appraisive use of a term like ‘democracy’ may not fully capture the full suite of values and meanings, some of which may be either positive or negative. As noted, for example, by William E Connolly “Essentially Contested Concepts in Politics”, Ch 1 in *Terms of Political Discourse*, second ed (Princeton, NJ: Princeton University Press, 1983) at 22; see also Michael Freedon, “Assembling: From Concepts to Ideologies”, Ch 2 in *Ideologies and Political Theory: A Conceptual Approach* (Oxford: Clarendon Press, 1996) at 60.

⁸⁷ *Supra*, Luban, “Adversary System Excuse” at note 91.

⁸⁸ The general challenge of *stare decisis* is examined in Jeremy Waldron, “*Stare Decisis* and the Rule of Law: A Layered Approach”, (2012) 111 Mich L Rev 1-31. The challenge identified by Waldron is also illustrated by an examination of recent Canadian Supreme Court decisions that overturned established

decentralized federal framework,⁸⁹ in an evolutionary system of constitutionalism,⁹⁰ that depends on both written and unwritten norms, practices and conventions.⁹¹ These additional complicating factors form a sub-set of constitutive tensions within Canada's distinct political-legal framework.

Though related, a separate challenge is presented by the uncertainty that exists within law and legal reasoning. Ultimately, when legal concepts or principles are viewed from a philosophical viewpoint, they tend to be more influenced by ideas that revolve “around predictability and the determinacy of legal norms.”⁹² However, a great deal of legal doctrine ignores or minimizes substantial parts of law and the legal system that are, at least, what David Luban describes as “moderately” indeterminate.⁹³

In his work, Neil MacCormick has identified an aspect of law's indeterminacy that he describes as its ‘arguable character,’ which is a fundamental aspect of a changing and responsive legal system.⁹⁴ In this case, argumentation, one of the primary practice skills of all legal advocates, makes all legal determinations potentially ‘defeasible’. In his

precedents in Joseph J Arvay *et al* “*Stare Decisis* and Constitutional Supremacy: Will our Charter Past Become an Obstacle to Our Charter Future?” (2012) Supreme Ct L Rev, vol 58.

⁸⁹ See, for example, Debra Parkes “Precedent Unbound? Contemporary Approaches to Precedent in Canada”, (2007) 32 Man LJ 135, where the author identifies of the challenges of vertical and horizontal *stare decisis* within Canada's justice system.

⁹⁰ See, for example, the Supreme Court's identification of constitutionalism as a “fundamental and organizing principle”, *Reference re Secession of Quebec* (1998) 161 DLR (fourth) 385 at para 32 [*Secession Reference*].

⁹¹ In the context of judicial independence, see, for example, Peter Hogg, “The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries” in *supra*, Dodek & Sossin, *Judicial Independence* at note 7 in Chapter 1.

⁹² *Supra*, Waldron “Concepts” at note 64 at 9.

⁹³ *Supra*, Luban, *Legal Ethics* at note 52, at 197.

⁹⁴ *Supra*, MacCormick, *Rhetoric* at note 72.

view, argumentation and contestation are “not some kind of a pathological excrescence on a system that would otherwise run smoothly. They are an integral element in a legal order that is working according to the ideal of the rule of law.”⁹⁵ The rule of law includes independent judges and lawyers who have the capacity to present alternative understandings of the law, its application, improvement and protection.⁹⁶ Ultimately, this role, to hold in balance the uncertainty inherent in alternative meanings and interpretations, is an essential part of a court process that ensures that individuals have the opportunity to enforce and defend their various rights.

2.3.4 The Balance Between Principle and Practice

The scholarly debate about the important role of indeterminate aspects of law is related to a broader distinction within legal theory. Many legal theories tend to start at the level of principle and often minimize the practicalities and procedures that make up the working justice system.⁹⁷ Richard Posner has described a similar distinction in constitutional legal reasoning and has suggested that legal theory can be characterized as incorporating either ‘top-down’ or ‘bottom-up’ reasoning.⁹⁸ For Posner, the difference

⁹⁵ Neil MacCormick, “Rhetoric and the Rule of Law” in *supra* Dyzenhaus, *Recrafting* at note 94 at 176.

⁹⁶ Leslie Green’s recent paper on “Law and the Role of a Judge” *University of Oxford Legal Research Paper Series*, Paper No 47/2014, September 2014, at 19 – 20, suggests that a judge’s distinct functions are to apply, improve and protect the law, online: < <http://ssrn.com/abstract=2495953>>, [Green, “Role of a Judge”].

⁹⁷ I mean ‘principles’ in a general way, in the nature of ideal absolutes.

⁹⁸ R Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995) at 172 – 175 [Posner, *Overcoming Law*]. Posner is a leading proponent of a “pragmatic” approach to legal theory that also focuses on the role of economics in law. Posner identifies this as the ‘dominant form’ of constitutional theorizing. An interesting recent take on a similar, if not the same ‘top down’ and ‘bottom up’ characterization of law, was recently described by Canada’s Chief Justice, who stated a view in the context of judicial reasoning that traditional ‘bottom up’ judicial approaches in Canada have given way to take a more principled ‘top down’ approach, see, Remarks of the Rt Hon B McLachlin, “Supreme Courts and the Common Law”, May 27, 2016, video available online: < https://www.youtube.com/watch?v=w__JIR-KO9c&t=12m19s>.

between the top-down and bottom-up approaches lies in the starting points in the legal analysis. A top-down approach, for example, would involve “a judge or other legal analyst” who,

invents or adopts a theory about an area of law - perhaps about all law – and uses it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the decided cases to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the cases accepted as authoritative within the theory.⁹⁹

Bottom-up reasoning, for Posner, is the kind of legal analysis that starts with “a statute or other enactment or with a case or a mass of cases, and moves from there.”¹⁰⁰

As Posner notes, this bottom-up type of approach to law is likely familiar to anyone who has attended law school where many students are perplexed when, at the very start of their legal education, they are asked to read and analyze a judicial decision. At that stage in their education, law students often have little understanding of either legal analysis or of the particular subject area.¹⁰¹

The ‘top-down’ and ‘bottom-up’ distinction identified by Posner in constitutional legal reasoning can also be modified and applied more broadly to categorize legal theory. In this respect, the distinction Posner draws between ‘top’ and ‘bottom’ can be conceived as a spectrum. What Posner calls the ‘top’ is instead on one end of the spectrum and can be characterized as approaches to legal theory that focus on the role and function of broad

⁹⁹ *Ibid*, at 172.

¹⁰⁰ *Ibid*, at 174

¹⁰¹ Posner makes the additional point that cases introduced to new law students also lie “in the middle rather than at the historical or logical beginning of the field, *ibid*.”

principles.¹⁰² By contrast, along the spectrum at the opposite end lie those theories which focus on practical aspects of the justice system. Though similar to Posner's view of 'bottom-up' reasoning in law, a focus on practicality in legal scholarship encompasses a somewhat broader set of ideas. The practicality end of the spectrum includes consideration of statutes and case law, but also seeks to incorporate other component parts of law and legal systems, procedures and policies,¹⁰³ the roles of individual actors, and the operation of norms and values.¹⁰⁴

Along the spectrum, individual aspects of law or the legal system might fall toward the principled end of the spectrum or more toward the practical. But to a large degree, if not absolutely, all the different parts that comprise law and legal systems involve a balance between elements at both ends.¹⁰⁵ For example, to a lesser or greater extent, all theories incorporate principles about what law "is," or sometimes what it "ought to be."¹⁰⁶ Most theories also include some consideration of how these notions

¹⁰² The challenge is to take the "series of principles" and the legal theory which result and "weave it back together into the fabric of the law" see Mark Walters "Legality as Reason: Dicey, Rand, and the Rules of Law" (2010) 55 McGill L J 563 [Walters, "Legality as Reason"] at 566; also *supra* Dworkin, *Law's Empire* at note 71 at 225.

¹⁰³ See, for example, Lorne Sossin, "Discretion Unbound: Reconciling the Charter and Soft Law" (2002) *Can Pub Admin* 45.

¹⁰⁴ "Dynamic realism thus combines critical engagement with values while stressing the operationalization of such values requires close attention to psychological and social context and institutional mechanisms", *supra*, Nourse & Shaffer, at note 2 at 135.

¹⁰⁵ The balance between principle and practicality is similar to Dworkin's idea of constructive 'reflective equilibrium', though with some important differences. Dworkin's views arguably apply to an explanation for justification in law, instead of my broader goal to describe a manifestation of different approaches to truth as between correspondence and coherence. Rawls' earlier 'natural' description of the term arguably also preferenced pre-existing moral realities, in keeping with coherence theories. While Dworkin's work strives to be more neutral in its constructive oscillation between concepts and practicalities, its starting point still appears largely rooted in theory and concept, for discussion see Stephen Guest, *Ronald Dworkin* (Stanford UP, 1991) at 147 – 150; J Rawls *A Theory of Justice* (Cambridge: Harvard UP, rev ed 1999).

¹⁰⁶ For example, see discussion of this aspect of law, as 'censorial' or 'expository' jurisprudence in Jeremy Bentham, *An Introduction to Principles of Morals and Legislation*, JH Burns & HLA Hart eds, (Athlone Press, 1970) as cited in *supra*, Waldron, "Concepts", at note 64 at 11 -12.

manifest in the real world. For example, discussions about rule of law often tend to focus on specific aspects of the function of a legal system.¹⁰⁷ In this respect, discourse about concepts of law frequently elide into examinations of the nature and the practice of the rule of law in particular jurisdictions, often in the face of perceived violations of the principle.¹⁰⁸ In reality, in the context of such examinations, the distinction between ideas about law and its actual practice, between concepts and the rule of law, may simply be different sides of the same coin.¹⁰⁹

In this way, legal theory which starts at the level of principle examines a relatively stable set of tensions related to the concepts of law. Many of these tensions stem from the primary questions of what law is and why it exists. On the basis of these questions, many constitutive tensions in law derive from the challenge of how to recognize legitimate sources of legal authority. The question of how to recognize legitimate legal sources underlies two of the most important tensions, secondary to law's indeterminacy that will be examined in the next section of Chapter One.¹¹⁰

The first of these secondary tensions is the example of the perceived divide between theory and practice described briefly above. This secondary tension is one of

¹⁰⁷ In the popular and political deployments of the term, "it is the procedural current that tends to be emphasized", *supra* Waldron, "Concepts" at note 64 at 9.

¹⁰⁸ For example, *supra*, Waldron, "Rule of Law" at note 90.

¹⁰⁹ Though in a fully contextualized account a more accurate comparison might be to say 'two sides of the same die', *supra* Waldron "Concepts" at note 84, at 46. At 55 Waldron, states, "no conception of law will be adequate if it fails to accord a central role to institutions like the courts".

¹¹⁰ There are other possible characterizations of constitutive tensions in law. For example, Dagan and Kreitner focus tensions described as "the insights of socio-historical analyses of law", "law and policy", and "law as craft", *supra* Dagan & Kreitner "Character", at note 28 at 689.

two that are amongst the most important in understanding independence and its relation to other concepts in law. A further secondary constitutive tension is the mutually informing interrelationship between law and politics. In the end, an understanding of the interrelationship between law and politics is essential to an understanding of the principle of independence for lawyers and judges, who ideally facilitate access to justice within an independent court system. Both of these secondary tensions, between concepts and rule of law and between law and politics are examined next.

2.4 Secondary Constitutive Tensions and Their Relation to Rule of Law, Independence and Access to Justice

The essential contestedness of law, its inherent dichotomy and defeasible certainty all support the claim that law is significantly indeterminate.¹¹¹ In addition to the challenge of ‘what law is,’ most of the major schools of legal theory dispute the sources, or relative priority of the sources of law.¹¹² As between these various conceptual frameworks, the indeterminacy of law and the ‘sources’ question generally turn on a set of distinctions, amongst which the most important are theory vs practice and law vs politics.

¹¹¹ See text and associated notes 95 – 118.

¹¹² A general overview can be found at Marmor, Andrei, "The Nature of Law", *The Stanford Encyclopedia of Philosophy* (Winter 2011 Edition), Edward N Zalta (ed), online: <http://plato.stanford.edu/archives/win2011/entries/lawphil-nature/> >

2.4.1 Theory vs Practice – Concepts and Rule of Law

The ‘sources’ question practically examines the conditions for legal validity.¹¹³ The question ultimately informs the discussion over understandings about rule of law,¹¹⁴ but also of its important component parts like independence and access to justice. In my opinion, the debate over the nature of these parts and the important phrases and terms used to describe them signifies a substantial subset of constitutive tensions that derive from law’s indeterminacy. Much of this indeterminacy and its derivative constitutive tensions are attributable to different philosophical starting points. On the spectrum between principle and practicality, while including some consideration of the practical aspects of law and legal systems, most concepts of law are generally based on an approach that starts by identifying important principles.¹¹⁵

The main schools of legal thought fall within several broad categories. In addition to realism and formalism, discussed above, other influential schools of legal theory, such as naturalism and positivism, suggest alternative primary sources for legal validity. For example, for many early natural law theorists, legal validity was rooted in some underlying inherency in the nature of reality, including perhaps divine will.¹¹⁶ By contrast, positive law theorists in the nineteenth century were focused on law created by

¹¹³ The priority of understanding of ‘what’ and ‘why’ law is a significant conceptual issue, *supra* note 73.

¹¹⁴ *Supra*, Waldron, “Concepts” at note 64, particularly at 10 – 14 where Waldron discusses the interrelationship between understanding concepts and rule of law.

¹¹⁵ In many accounts, “philosophical inquiry into the nature of law is conceived as a conceptual prelude to the expository side”, *supra*, Waldron, “Concepts” at note 64 at 12.

¹¹⁶ *Supra*, eg Brian Bix, “Natural Law Theory”, in *Philosophy of Law*, J Feinberg & J Coleman eds, 6th ed (Wadsworth/Thomson Learning: Belmont CA, 2000) [Feinberg & Coleman, *Philosophy*], 7 – 18, at 8. As with the other major approaches to legal theory I describe, henceforth in my text I have used the uncapitalized version of ‘natural law’, ‘naturalist’ and ‘naturalism’.

human society,¹¹⁷ rooted in legislation.¹¹⁸ From those initial premises of what law is and where it comes from, legal theorists from both perspectives constructed conceptual frameworks. This principled approach to legal theory is also characteristic of other influential legal schools of thought.¹¹⁹

The inclination towards principled approaches in legal theory mirrors the philosophical theory of ‘coherence.’¹²⁰ That is, under a coherence theory of reality, something is true to the extent that it coheres with a previously existing set of values or beliefs.¹²¹ Coherence theorists start by building a hypothetical model of the world. In the case of concepts of law, theories that rely on coherence approaches start with a hypothetical model based on principle. The model is then used to examine reality and the legal ‘truth’ of something. From the point of view of legal theory, the ‘truth’ of something determines what is or is not ‘legal’ based on the extent and degree to which it coheres to the underlying conceptual model.

¹¹⁷ For John Austin, the “aggregate of rules” or “any portion of that aggregate” was positive law or “law existing by position”, *supra*, “The Challenge of Legal Positivism: A Positivist Conception of Law” in *Ibid*, Feinberg & Coleman, *Philosophy*, 33 – 44, at 34.

¹¹⁸ As Dyzenhaus notes, “Democratic positivists, following the tradition established by Jeremy Bentham, argue that the legislature is the sole source of law and that its legitimacy derives from its accountability to the people” in *supra*, note 94 *Recrafting* at 2.

¹¹⁹ For example, Ronald Dworkin’s non-positivist viewpoint is largely based on the principle of human rationality and the power of reason, to discern a “right answer”. This view has been associated with a characterization of rule of law theories as either a system of institutional restraints or, in the case of Dworkin, as the “rule of reason” as sketched out by Judith N Shklar, “Political Theory and the Rule of Law”, in Allan Hutchinson and Patrick Monahan, eds *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 1. As noted by Mark Walters, there continues to be a tension in Canadian legal culture between characterizations of rule of law as based in ‘reason’ or in ‘order’, *supra* note 103.

¹²⁰ “The notions of precedent and argument from analogy have been explained in ways that resemble...holistic and coherence theories” in Kenneth Kress, “Legal Reasoning and Coherence Theories: Dworkin’s Rights Thesis, Retroactivity, and the Linear Order of Decisions” (1984) *Cal L R Vol 72*:369 at 369. The author also notes the focus in legal philosophy in recent years on ‘coherence’ theories, at 402.

¹²¹ For example, ‘coherence’ also plays an important role in M Moore’s examination of facts, morality, law and legal reasoning, see “Moral Reality” (1982) *Wis L Rev* 1061 at 1106 – 10.

By contrast, some approaches in law are more in keeping with the alternative theory of correspondence.¹²² Whereas coherence approaches start with a theory, correspondence approaches first seek evidence which is then corroborated with possible explanations. To the extent that a body of evidence corresponds with a particular explanation, that explanation is more likely to be ‘true’ or to accurately illustrate the underlying reality.¹²³

Dynamic realist approaches seek to accommodate both coherence and correspondence in legal theory to achieve a better balance between the principles and practicalities of the justice system. Rather than start with a strong concept or theory,¹²⁴ this framework utilizes conceptual tools, such as emergent analytics, as a way to collect or develop units of analysis which are applied to various potential understandings of reality. The underlying philosophical distinction between correspondence and coherence philosophical approaches is the wellspring of the constitutive tension that exists in discussions about concepts of law and the rule of law.

¹²² “Narrowly speaking, the correspondence theory of truth is the view that truth is correspondence to a fact”, David, Marian, "The Correspondence Theory of Truth", *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2013/entries/truth-correspondence/>, where the author also describes the many variants of correspondence theory and its philosophical competitors, including coherence theory.

¹²³ *Ibid*, this is a deliberate oversimplification of the many variations of correspondence theory and minimizes the substantial complexity in the tension between correspondence, coherence and other possible theories such as pluralism. While a detailed philosophical analysis of these distinctions is outside the scope of this work, this limited overview suggests an underlying and fundamental schism in human understanding, that is reflected in the difference between principled and practical approaches to law.

¹²⁴ *Supra*, Nourse & Shaffer, “Varieties” at note 2. The dynamic realist approach described here is similar to the Dworkian idea of ‘reflective equilibrium’, *supra* note 105, that suggests in brief, that concepts of law need to be tested against reality and adjusted accordingly. However, I would argue that ‘reflective equilibrium’ also is primarily based on a coherence approach to concepts of law, with the potential risks both of confirmation bias and results based reasoning.

A distinction similar to the spectrum between principle and practicality, described above, has been advanced by public law scholar Paul Craig.¹²⁵ Craig sets out a classification of ‘rule of law’ theory as between ‘formal’ and ‘substantive’ ideas about the rule of law. ‘Formal’ concepts are those that focus on procedural and practical aspects of the rule of law such as “the manner in which the law was promulgated.”¹²⁶ This distinction is an important way to think about the different meanings of the term ‘rule of law’. However, when viewed on the spectrum between principle and practicality, the distinction drawn by Craig does not provide a bright line separation between substantive and procedural aspects of the principle. As noted by David Dyzenhaus,

[Craig] is not right in his implication that somehow that idea stands free of a theory of justice. Indeed, the very claim that the rule of law is best understood formally – detached from a substantive theory of justice – is deployed in his hands in order to make a substantive claims about the best way to conduct political and legal debate.¹²⁷

Dyzenhaus’ criticism highlights the fact that characterizations of legal theory and rule of law tend toward the theoretical or principled end of the spectrum, between principle and practicality.¹²⁸ Most theories address at least some practical aspects of the legal system. However much of the scholarship on the subject frontlines the role of

¹²⁵ Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] *Public Law* 466, at 477 and 484 – 486 [Craig, “Formal and Substantive”].

¹²⁶ *Ibid.*, at 466.

¹²⁷ *Supra*, Dyzenhaus *Recrafting*, at note 72, at 6.

¹²⁸ Dyzenhaus’ own work on this point tends towards a coherence viewpoint in that he categorizes rule of law approaches on the basis of principles that inform different understandings of, alternatively, a culture of reflection, a culture of neutrality and a culture of justification. *Ibid.* In this framework, the author notes Dworkin’s approach, which includes reflective equilibrium, as the ‘best example’ of a culture of neutrality, at 7.

principles and does not especially focus on the pragmatic and practical aspects of the rule of law.¹²⁹

On this point, Jeremy Waldron has argued that the distinction between concepts and the rule of law is not as clear as suggested by the principled premises underlying much legal analysis and that it is challenging, if not impossible, to fully understand concepts of law on a purely theoretical basis.¹³⁰ Similarly, rule of law cannot be understood in isolation from either the principles or the practicalities of law. In considering the spectrum of principled and practical associations with the term, the meaning of either rule of law or a concept of law (or both together), requires some appreciation of the other. In this context, Waldron's observation that, "no conception of law will be adequate if it fails to accord a central role to institutions like courts, and to their distinctive procedures and practices" is particularly apt.¹³¹

In contrast to the intricacies of legal theory and concepts of law, practical questions about rule of law have become important within a contemporary and wider discourse about law and the justice system. Public perceptions about the 'rule of law' have been very prominent in recent years partly because of the frequent use of the term in

¹²⁹ As Waldron notes, some like Joseph Raz appear to claim it is necessary to begin with a conceptual understanding of law to understand rule of law, *supra*, Waldron, "Concepts" at note 64 at 10 -11, citing "The Rule of Law and its Virtue", *Authority of Law* second ed (Oxford University Press: London, 2009) at 214.

¹³⁰ "One can understand these two sets of criteria – for the existence of law and for the Rule of Law – as two perspectives on the same basic idea" in *ibid*, at 46.

¹³¹ *Supra*, Waldron, "Concepts" at note 64 at 56.

political contexts. Ultimately, public appeals to respect the ‘rule of law’ have occurred so frequently, and in such different circumstances, that many commentators have begun to criticize the utility of the term. For example, in Jeremy Waldron’s view, use of the phrase ‘rule of law’ by opposing sides in a recently disputed election in the United States was the substantial equivalent of cheerleading: “Hooray for our side.”¹³² In other words, critics like Waldron suggest that modern uses of ‘rule of law’ may have debased the phrase to such an extent that, in many cases, use of the term in common parlance amounts to only meaningless sloganeering.¹³³

From either the conceptual or the practical point of view though, discussions about rule of law manifest the basic indeterminacy that exists within law. Comparative scholar Thomas Carrothers has noted that “there is uncertainty about what the essence of the rule of law actually is.”¹³⁴ In his own recent work on the subject, British Law Lord Tom Bingham observed that “it is tempting throw up one’s hands and accept that the rule of law is too uncertain and subjective an expression to be meaningful.”¹³⁵ From a comparative perspective, the indeterminacy of such a fundamental term in legal discourse may be especially troubling, since there has been considerable effort devoted to ‘transplanting’ rule of law institutions and practices to other countries in the last few

¹³² *Supra* note 69 Waldron, “Rule of Law” an Essentially Contested Concept (in Florida)?” at 119.

¹³³ For additional critical commentary in this vein see: Judith Shklar, “Political Theory and the Rule of Law, in A Hutchinson and P Monohan eds, *The Rule of Law: Ideal or Ideology* (Carswell: Toronto, 1987).

¹³⁴ “Promoting the Rule of Law Abroad”, Carnegie Endowment for International Peace, Rule of Law Series, No 34 (January 2003), at 3, 17 531 US 98 (2000) as quoted in *infra* Bingham, *Rule of Law* at 5.

¹³⁵ Tom Bingham, *The Rule of Law*, (Penguin Books Ltd: London, 2010) [Bingham, *Rule of Law*].

years.¹³⁶ But, as noted by some commentators, there appears to be little clarity about not only ‘what’ is being transplanted, but ‘why.’¹³⁷

Notwithstanding the frequent invocations of the term and its conceptual and practical ambiguity, there has also been increasing focus on the positive normative goals of the rule of law. For example, Joseph Raz has commented that people sometimes employ the term ‘rule of law’ as a simple way to describe the “positive aspects of political systems.”¹³⁸ For other commentators, the attractiveness of the principle “may stem mainly from its imprecision, which allows each of us to project our own sense of the ideal government onto the phrase ‘rule of law.’”¹³⁹ One simple observation about the practical meaning of ‘rule of law’ has been made by John Finnis. , who asserts that, whatever else the phrase ‘rule of law’ may mean, as a basic functional matter it is “the name commonly given to the state of affairs in which a legal system is legally in good shape.”¹⁴⁰ Despite the degree of constitutive indeterminacy and uncertainty that appears to surround modern use of the term, there is a substantial body of scholarship that has attempted to deconstruct the meaning of ‘rule of law.’

¹³⁶ See, for example, Daniel B. Rodriguez et al., The Rule of Law Unplugged, 59 *Emory Law Journal* 1455-1494 (2010) [Rodriguez, et al “Rule of Law”].

¹³⁷ *Ibid*, at 1492 where the authors conclude that “while there is enormous enthusiasm about the rule of law world-wide, we should be somewhat apprehensive about transplanting American-style legal institutions into other countries and systems of government until we have a clearer sense of the concept and can demonstrate a much more informed understanding of how these institutions will work and how trade-offs will be made when values, structures, and rules come into conflict.”

¹³⁸ “The Rule of Law and its Virtue”, in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: University Press, 1979), at 210.

¹³⁹ *Supra*, Rodriguez, et al “Rule of Law” at note 136, at 1458, where the authors also note “myriad incomplete and unsupported assumptions underlie the claims made by the institutions associated with the rule of law”.

¹⁴⁰ John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) at 270 [Finnis, *Natural Law*].

A common starting point for considering rule of law is the work of A.V. Dicey, who is given credit for coining the term.¹⁴¹ For Dicey, the rule of law boiled down to three things:

- 1) “No man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land”;¹⁴²
- 2) “As a characteristic of our country, not only that no man is above the law, but (which is a different thing) that here, every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”;¹⁴³
- 3) “As a special attribute of English institutions, ...the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right to public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many for constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.”¹⁴⁴

A contemporary take on the ‘rule of law’ has recently been crafted by Tom Bingham.¹⁴⁵ In his work, Bingham relies on Dicey’s understanding of the phrase to suggest that the core of the existing principle is “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws

¹⁴¹ Walters notes that Dicey’s work was “standard fare among lawyers throughout the common law world”, though Dicey himself was perhaps early on “surprised” by the large reception he received when he lectured in Canada at the University of Toronto in 1898, *supra* note 103, Walters, “Legality as Reason” at 567. See also Bingham, *Rule of Law* note 135, at 3. As Bingham notes, Dicey may have ‘coined the phrase’ but the idea can be traced back to Aristotle. See also Brian Z Tamanaha, *On Rule of Law* (Cambridge University Press: London, 2004) at 8 – 9; H W Arendt, “The Origins of Dicey’s Concept of the ‘Rule of Law’ (1957) 31 *Austl L J* 117.

¹⁴² Alfred V Dicey, *An Introduction to the Study of Law of the Constitution*, ECS Wade, ed, 9th ed (Macmillan: 1945) at 188 [Dicey, *Introduction*].

¹⁴³ *Ibid* at 193.

¹⁴⁴ *Ibid* at 195.

¹⁴⁵ *Supra*, Bingham, *Rule of Law*, at note 135.

publicly made, taking effect (generally) in the future and publicly administered in the courts.”¹⁴⁶

On one hand, Bingham’s view of the ‘rule of law,’ described above, is a functional and practical approach to understanding the term. On the spectrum between principle and practicality, ‘rule of law’ analyses usually incorporate the detailed context which describes the operation of any individual legal system. This view emphasizes how the procedural aspects of the legal system correspond with more generally accepted ideas of legal legitimacy.

On the other hand, the practical meaning of ‘rule of law’ also contains embedded within it broad principles. These features also incorporate and examine general concepts such as ‘justice’ and ‘fairness’ that touch on basic questions of what and why law is, and that identify the rule of law within a broader social and legal framework.¹⁴⁷ From this broader viewpoint, in addition to the procedural aspects of the ‘rule of law’ captured in Dicey and Bingham’s definitions, ‘rule of law’ cannot be said to exist in any particular circumstance without some coherence to both its descriptive features, and the important principles articulated in concepts of law. In this sense, Finnis’ very general definition of ‘rule of law’ as the description of a legal system that is in legally “good shape,”¹⁴⁸ while perhaps imprecise, is one that nonetheless has the capacity to cohere with the more general principles utilized at the conceptual level.

¹⁴⁶ *Ibid*, at 8.

¹⁴⁷ Including the lists of qualities commonly associated with rule of law, *supra* note 76.

¹⁴⁸ *Supra*, Finnis, *Natural Law*, at note 140.

In balancing the principled and practical applications of the term, ‘rule of law’ has (at least) this dual meaning. The debate over the nature of the rule of law and its relationship to broader legal concepts also reflects the fundamental indeterminacy that exists within law, as described earlier. An understanding of rule of law also depends to a large degree on context, which must be balanced against the principled imperatives of the legal system. This includes the role of ‘independence’ to facilitate ‘access to justice,’ which is subject to constitutive tensions, such as between law and politics, and which is the focus of the next section.

2.4.2 Law vs Politics – Independence of the Bar and Judiciary

In addition to the constitutive tension between theory and practice, another important constitutive tension in law is the distinction between law and politics. From a dynamic realist perspective, a complete separation between law and politics represents a false dichotomy,¹⁴⁹ and is captured in the concept of simultaneity.¹⁵⁰ That is, while separate in principle, in practice law and politics operate in a mutually informing interrelationship. By contrast, the predominant view within law and legal studies tends to distinguish between and separate political and legal considerations.

¹⁴⁹ *Supra*, note 61.

¹⁵⁰ *Supra*, note 56.

At least some of the perceived distinction between law and politics arises out of the question about what should and should not be valid sources of law. That is, some who distinguish between law and politics often acknowledge political influences on the development of law and legal systems, but still regard law and politics as things which operate, or should operate, within separate spheres.¹⁵¹ So, for example, positivist Jeremy Bentham described rule of law as including independent judges whose job was only to apply positive law and legislation.¹⁵² While such legislation was thought to mirror the democratic will,¹⁵³ common law was subject to the individual opinions of judges. In this framework, positive law required highly responsive political institutions to manifest public reason. By contrast, judge-made common law was the product of individual reason and was therefore highly subjective and consequently less democratic.¹⁵⁴ In this way, the jurisprudential aspects of law within a legal system employing *stare decisis* were ultimately separate and less democratically legitimate than statutory pronouncements.

A different view of the relationship between law and politics is presented by some social theorists. At a very basic level, some social theorists regard the development of independence as a distinct principle that results from social interactions which do not overtly consider political influences. For example, Martin Shapiro's analysis of the formation of a 'social triad' as a prototype for the development of adjudicative processes

¹⁵¹ *Ibid.*

¹⁵² A version of this argument has been asserted by Michael S Moore, *Educating Oneself in Public: Critical Essays In Jurisprudence* (Oxford: Oxford University Press, 2000) at 96, though it is subject to challenge by Leslie Green who argues in a recent paper that a modern extension of this positive duty is where judges not only apply, but also improve and protect the law, in *supra* Green, "Role of a Judge" at note 96 at 19 – 20.

¹⁵³ *Supra*, Dyzenhaus, *Recrafting*, at note 72.

¹⁵⁴ *Ibid.*, at 6.

suggests that independent courts are the most formal manifestation of a common social phenomena.¹⁵⁵ At its foundation, independence results when,

two actors find themselves in disagreement, unable to resolve the disagreement on their own and yet needing some resolution in order to continue with normal interaction, they turn to a third party to help them find an answer.¹⁵⁶

As with much of the literature that considers the nature of ‘independence’ within the legal system, this work focuses on judging and the perceived legitimacy of having a neutral and autonomous decision-maker. However, one aspect of a successful outcome in this framework is the perceived legitimacy of the process itself. While adjudicative independence is essential to the process Shapiro describes, this framework can also be extended to account for the need for independent advocates. For example, in a more established version of the social triad interaction, the need for both real and perceived fairness within the social triad also explains and justifies the need for the independent role of legal professionals, who must act to assist disputing parties to navigate within a system comprised of specialized rules and procedures.¹⁵⁷

¹⁵⁵ Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981) at Ch 1 “The Prototype of Courts” [Shapiro, *Courts*]. See also Peter McCormick, *Judicial Independence and the Judicial Governance in the Provincial Courts*, Report Prepared for the Canadian Association of Provincial Court Judges, (April, 2004) online: < <http://judges-juges.ca/sites/default/files/publications/Judicial%20Independence.pdf>> at 5 – 6 [McCormick, *Judicial Independence*].

¹⁵⁶ *Ibid* at 5.

¹⁵⁷ This extension of Shapiro’s framework is similar to the idea behind David Dyzenhaus’s proposition that a complex legal system may require lawyers to facilitate individual access to justice, *supra* David Dyzenhaus, “Normative Justifications for the Provision of Legal Aid” in *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Toronto: Queen's Printer, 1997) [Dyzenhaus, “Normative Justifications”] at 475.

Other social approaches recognize the role of politics in law at the same time as they reinforce the distinction between the two. For example Martine Valois' recent work examining judicial independence in Canada builds on a sociological line of research that observes comparisons between biological and social systems.¹⁵⁸ The origin of 'systems theory' lies with the efforts of early sociologists such as Max Weber, who, for example, "demonstrated the correlation between the forms of legitimate domination and the types of legal order."¹⁵⁹ Grounded in Weber's observations, Talcott Parson's later work posited the existence of thresholds that accounted for the establishment and institutionalization of a "universal" legal system.¹⁶⁰ Parson's work was, in turn, further developed by Niklas Luhmann, who developed a theory of social organization which occurred in a succession of evolutionary stages.¹⁶¹

Valois's more recent effort builds on this earlier sociological scholarship to apply social systems theory in the context of the evolution of judicial independence in the Canadian justice system. One of the key conceptual mechanisms in systems theory is the idea of 'autopoiesis,' or independent self-replication of legal forms, concepts and

¹⁵⁸ Martine Valois, *Judicial Independence: Keeping Law at a Distance from Politics* (Markham: LexisNexis Canada Inc, 2013), who notes, "English sociologist Herbert Spencer was one of the first to comment on the similarities in the development of organic and superorganic entities" at 5 [Valois, *At a Distance*] citing to Bertrand Badie & Pierre Birnbaum, *Sociologie de l'État*, coll, "Pluriel" (Paris: Éditions Grasset & Fasquelle, 1979) at 28.

¹⁵⁹ *Ibid*, Valois, *At a Distance*, at 7.

¹⁶⁰ Talcott Parsons, *Societies: Evolutionary and Comparative Perspectives* (Englewood Cliffs, NJ: Prentice-Hall, 1966) at 23, at cited in *Ibid* at 36.

¹⁶¹ These stages are segmentation, hierarchization and differentiation. *Supra*, Valois, *At a Distance*, at note 158 at 7

practices to keep law ‘at a distance’ from other cultural systems of legitimization.¹⁶² In this way, Valois’s work proposes that judicial independence is a vital component of systemic self-legitimization for law.

Some aspects of Valois’ work concord with a dynamic realist approach. For example, the preservation of uncertainty as to outcomes is vital to the legitimacy of the legal system in systems theory. Within Valois’s framework, uncertainty as to outcomes maintains the functional differentiation between actors, including judges. Judges adjudicate outcomes, interpret the law and are functionally differentiated as the primary authority for resolving legal uncertainty. However, Valois proposes a systemic causation for this uncertainty based on an imperative of self-legitimization, to separate law and politics. By contrast, dynamic realism suggests the uncertainty of law is more fundamental. In this respect, uncertainty in law does not arise from a systemic imperative to separate law and politics. Instead, the indeterminacy of law is primarily a product of law’s essential contestedness, as well as its inherent dichotomy and its character as ‘defeasibly’ certain.¹⁶³

Moreover, unlike Valois’ application of systems theory in the judicial context, which proposes that law is kept at a distance from politics, dynamic realism asserts that issues in law and politics interact in a recursive and simultaneous manner. In the

¹⁶² *Ibid*, at 15. On the concept of autopoiesis in law see also, Gunther Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993); Gunther Teubner *Autopoietic Law: A New Approach to Law and Society* (Berline: de Gruyter & Col, 1987).

¹⁶³ *Supra* notes 81 - 96 and associated discussion.

jurisprudential development of the idea of judicial independence, one example provided by Valois is the case of *Valente*,¹⁶⁴ where she suggests that, in the absence of a mandatory rule that guaranteed judicial independence, Canadian judges resorted not to positive law, but rather to history and ‘tradition’ to ground their modern jurisprudential formulations of judicial independence.¹⁶⁵

However, the example and the subsequent jurisprudential refinement of the principle of judicial independence also demonstrates the recursivity and simultaneity of an ambiguous legal concept. In this respect, subsequent jurisprudence on judicial independence was further developed in the *Remuneration Reference*.¹⁶⁶ In that case, the government attempted unsuccessfully to limit the scope of the principle of independence in the context of judicial remuneration. The ambiguity of the judicial independence protections as they might apply to lower courts, and the proximity of the remuneration issue to contemporary political considerations about how to determine judicial compensation, meant that judges used their interpretive authority over common law to effectively step into a dispute between branches of government. In the *Remuneration Reference* the court used an interpretation of the law to ‘find’ a constitutional principle,

¹⁶⁴ *Supra*, Valois, *At a Distance*, at note 158 at 15, citing *supra* note 8, *Valente* at paras 34 – 36.

¹⁶⁵ *Ibid*, where Valois gives this example as evidence that sociological validity proceeds legal validity. Though outside the scope of this work, Valois’ conclusion on this point appears subject to challenge.

¹⁶⁶ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R v Campbell; R v Ekmecic, R v Wickman; Manitoba Provincial Judges Assn v Manitoba (Minister of Justice, [1997] 3 SCR 3 [Remuneration Reference].*

based partly in history, which extended the security of independent judicial finance protections.¹⁶⁷

The *Remuneration Reference* provides an example of judicial resolution of an arguably political problem. However, the legal resolution of the issue in that case did not end the basic political challenge of judicial remuneration.¹⁶⁸ Moreover, the *Remuneration Reference* is but one example in a line of scholarship and studies that have examined several issues which involve risks to judicial independence inherent in the relation between the executive and the judiciary in Canada.¹⁶⁹ All of these issues highlight the influence of political factors in the context of conflict resolution between branches of government.

A related, though more overtly political role is played by the judiciary in Canada in regulating tensions arising from Canada's federal structure. For the bench, the

¹⁶⁷ There has been some, though not universal criticism of the "curious legal reasoning" in this case, *ibid.* One commentator notes that the Court effectively "read into the Constitution – with practically no textual support – an elaborate mechanism for remuneration of judges...[which] is difficult to reconcile with the notion of 'interpretation' (as distinguished from legislation) and therefore it is unclear whether it is the role of judges to devise such a constitutional arrangement", Amnon Reichman, "Judicial Non-Dependence: Operational Closure, Cognitive Openness, and the Underlying Rationale of the *Provincial Judges Reference* – The Israeli Perspective" in *supra* Dodek & Sossin, *Judicial Independence* at note 7 at 439.

¹⁶⁸ See, for example, the academic commentary which includes: "The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries" in *supra* Dodek & Sossin, *Judicial Independence* at note 91.; Lori Sterling & Sean Hanley "The Case for Dialogue in the Judicial Remuneration Process" in *supra* Dodek & Sossin *Judicial Independence*, at note 91. Also see Tsvi Kahana, "The Constitution as a Collective Agreement: Remuneration of Provincial Court Judges in Canada" (2003-2004) 29 *Queen's LJ* 445 at 452.

¹⁶⁹ See, for example, the ongoing commentary regarding the influence of politics in political appointments described in: Charles G Geyh, "The Endless Judicial Selection Debate and Why It Matters for Judicial Independence" (2008) 21 *Geo J Legal Ethics* 1259. See also FC Decoste, "Political Corruption, Judicial Selection And The Rule Of Law" (2000) 38 *Alta L Rev* 654; Michael Bryant, "Judging the Judges: Judicial Independence and Reforms to the Supreme Court of Canada Appointment Process" (2004) 24 *Sup Ct L Rev* 29; KD Ewing, "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary" (2000) 38 *Alta L Rev* 708.

conditions of independence establish a relatively clear space for individual judges to act autonomously in their adjudicative capacity, particularly vis-à-vis the state. On an institutional basis, however, the nature of independence faces a different set of challenges. For example, at the national level, federal systems, like Canada's following 1867,¹⁷⁰ are fundamentally 'legalistic' in the sense that the bench and Bar are "inevitably called upon to interpret the constitution and define the respective powers of the two levels of government."¹⁷¹

In such a system, lawyers and judges become involved in legal questions over jurisdiction and constitutional authority, which often raise intrinsically political questions about the nature of the Federation.¹⁷² An independent court system, which is generally regarded as apolitical,¹⁷³ means that such constitutional and jurisdictional interpretational disputes can be resolved in a public forum that is widely perceived to be neutral.¹⁷⁴ As with Shapiro's triad,¹⁷⁵ the perceived neutrality of the decision-makers, here Supreme Court judges, and of the institution itself, a recognized branch of the Canadian

¹⁷⁰ A V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan, 1961) 138 – 80.

¹⁷¹ See, for example Garth Stevenenson, *Unfulfilled Union: Canadian Federalism and National Unity* (McGill-Queen's University Press: Montreal & Kingston, 2004) at 15 [Stevenenson, *Unfulfilled Union*].

¹⁷² *Ibid*, in particular at ch 3 "Judicial Interpretation of the Constitution" at 43 and ch 9 "Federal Provincial Conflict and Its Resolution" at 220 – 1, which focuses on "Judicial Conflict Resolution".

¹⁷³ Though there have been periods when the Supreme Court has not been regarded as neutral as between the federal government and the provinces and "between 1977 and 1981...provincial governments did not hesitate to denounce the Supreme Court publicly if they found its decisions inconvenient" in *ibid* at 63.

¹⁷⁴ Though the perception has not always been universal, *ibid*, most evidence appears to point to a lack of bias as between levels of government in recent years, see Peter Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?", (1979) *Can Bar Rev* LVII 721 – 39. A similar conclusion was reached by Gilbert l'Ecuyer in a report commissioned by the Quebec provincial government in 1978, *La cour supreme du Canada et le partage des competence, 1948 – 1978* (Quebec: Ministere des affaires intergouvernementales) cited in *ibid* at 66.

¹⁷⁵ *Supra*, Shapiro, *Courts* at note 155.

government,¹⁷⁶ increases the likelihood that the legitimacy of the resolution will be respected by all parties.¹⁷⁷ Such a function is apparent throughout Canadian history. The series of federal-provincial disputes resolved by the Privy Council in the late 1800s is an early example of this judicial role within Confederation.¹⁷⁸ The Supreme Court of Canada's decision in the *Secession Reference*,¹⁷⁹ which set out the legal parameters by which a provincial jurisdiction could leave Confederation and is also a more recent example of the mediating role played by the courts in the Federation.

The institutional role of the courts to mediate inter-jurisdictional disputes in Canada is accorded an added degree of legitimacy, given the jurisprudential recognition of the principle that the legislative, executive and judicial branches of government in Canada are functionally separate.¹⁸⁰ For the judiciary, one commentator has described the

¹⁷⁶ See eg, Peter Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) [Russell, *Judiciary in Canada*].

¹⁷⁷ For example, though the subject of wide critical commentary, eg Sujit Choudhry & Robert Howse "Constitutional Theory and the *Quebec Secession Reference*" (July, 2000) *Can Jour of Law and Juris* Vol XIII, No 2 at 43, the Supreme Court's decision determining a basic legal/political question of how a jurisdiction may go about leaving the federal union in *supra*, *Secession Reference* at note 90, was generally accepted across the country.

¹⁷⁸ For example, as highlighted in Macklem, *et al Canadian Constitutional Law*, second ed (Emond Montgomery Publications: Toronto, 1997), at ch 4 "The Late Nineteenth Century: the Canadian Courts Under the Influence" at 45 [Macklem *et al*, *Constitutional Law*], this included *Citizens Insurance Company v Parsons* (1881) 7 AC 96 (PC); *Russell v The Queen* (1882) 7 AC 829 (PC), *Hodge v The Queen* (1883) 9 AC 117 (PC), and; *AG Ontario v AG Canada (the Local Prohibition Reference)* [1896] AC 348 (PC).

¹⁷⁹ *Supra*, *Secession Reference* at note 90.

¹⁸⁰ The Supreme Court of Canada has determined that the constitution assigns to the judiciary the responsibility to act as "an impartial umpire to resolve disputes between two levels of government as well as between governments and private individuals who rely on the distribution of powers", see *Beauregard v Canada* [1986] 2 SCR 56, at para 23. For the substantial commentary on the doctrine of separation of powers see, for example: P R Verkuil, "Separation of Powers, the Rule of Law and the Idea of Independence" (1988) 30 *Wm & Mary L Rev* 301; EM Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?" (1993) 13 *Int'l Rev L & Econ* 349; Ferejohn & Kramer, *ibid*, Cheryl Saunders, "Separation of Powers and the Judicial Branch" (2006) 11 *Jud Rev* 337; Peter A Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (California: Hart Publishing, 2009) at 17.

separation of powers as a “kissing cousin of judicial independence” since “judicial review of executive activities and legislation is much too vital for maintaining the rule of law.”¹⁸¹ The judicial review function is but one of many procedural aspects that “safeguards” rule of law and is “associated with political ideals such as the separation of powers and the independence of the Judiciary.”¹⁸² In the end, much of the discussion about the separation of powers doctrine is premised on the observation that the largely persuasive power of courts, within Canada’s Westminsterian style democracy, means that they require the support of the executive and the legislature, since “courts are dependent upon the other branches of government voluntarily complying with, or enforcing, their rulings.”¹⁸³ While separate, judges operating independently in open and transparent courts become an important part of the democratic political process.¹⁸⁴

Compared to the principle of independence in the judicial context, articulations of independence of the Bar also often acknowledge the separation of independent lawyers from political factors.¹⁸⁵ For example, American scholar Robert Gordon describes the principles of Bar independence in a way that demonstrates this separation in at least two

¹⁸¹ Peter Russell, “A General Theory of Independence Revisited” in *supra*, Dodek & Sossin, *Judicial Independence* at note 91, 599 – 622 (Russell, “A General Theory”) at 605. Though the utility of judicial review as a democratic principle under the rule of law is subject to considerable debate, see eg *supra*, Stevenson, *Unfulfilled Union* at note 171 at 44 – 5.

¹⁸² *Supra*, Waldron, “Concepts” at note 64 at 8 cited to Helaine M Barnett, “Justice For All: Are We Fulfilling the Pledge? 41 Idaho L Rev, 403, where at 405, Barnett notes “what distinguishes our government in large part is the separation of powers [and] ... an independent judiciary that ensures our adherence to the rule of law”.

¹⁸³ *Supra* Rankin, “Access to Justice” at note 77, at p 19, referring to Alexander Hamilton’s similar and earlier observation in Federalist Papers No 78 *The Federalist Papers*, Terence Ball ed (United Kingdom: Cambridge University Press, 2003) at 378.

¹⁸⁴ *Supra*, Resnik and Curtis, *Representing Justice* at note 50.

¹⁸⁵ One exception at the institutional level is Woolley, “Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation” (2012) 45 UBC L Rev 145 – 203 [Woolley, “Rhetoric”], where the author raises questions about the need for lawyer self-regulation.

senses.¹⁸⁶ In one sense, the theory of an independent Bar requires institutional independence in the form of autonomy in the public regulation of its own practice. At the individual level, lawyers must also be free from government and political controls in order to advance and defend the interests of clients.¹⁸⁷

At the institutional level, the emphasis on lawyer independence from government is underlined by the perception that lawyer independence may require self-regulation of the profession.¹⁸⁸ However, such a proposition is becoming less tenable given the decreasing number of jurisdictions that rely on a purely self-regulatory model. As Alice Woolley notes, North America is “arguably, the last bastion” of traditional notions of self-regulation of the legal profession.¹⁸⁹ In Canada, self-regulatory independence of the Bar also has distinct features, such as lawyer elections and a system of statutorily authorized regulatory bodies, run largely by lawyers,¹⁹⁰ organized in all provinces and territories.¹⁹¹ At either the institutional or individual level, the independence of the

¹⁸⁶ Robert Gordon, “The Independence of Lawyers” (1988) 68 Boston U L Rev 1 at 6 – 10 [Gordon, “Independence of Lawyers”]. For example, the 2007 Task Force on the Rule of Law and the Independence of the Bar of the Law Society of Upper Canada references Gordon’s definition in full, and a majority of the papers included cite Gordon’s work authoritatively, in *supra* LSUC, *Public Interest* at note 53.

¹⁸⁷ *Ibid.*

¹⁸⁸ Though see, for example, *supra* Woolley, “Rhetoric” at note 185.

¹⁸⁹ Alice Woolley, *Understanding Lawyers’ Ethics in Canada*, (Markham: LexisNexis, 2011) at 4.

¹⁹⁰ Which also distinguishes Canada within North America. In the US Rhode notes “the failures of bar-controlled oversight structures have prompted an expanded range of overlapping, at times conflicting bodies of regulation. Civil liability suits, as well as legislative and administrative agency regulations, supplement or supplant bar standards in a widening array of contexts.” See Deborah L Rhode, “The Professionalism Problem” (1998) 39 Wm & Mary L Rev 283 at 313 – 315, 325 citing David B Wilkins, “Who Should Regulate Lawyers? (1992) 105 Har L Rev at 805 – 809.

¹⁹¹ For example the *Law Society Act*, RSO 1990, c L 8 in Ontario. Every province and territory in Canada has similar legislation, that provides for self-regulation of the legal profession, pursuant to provincial constitutional responsibility for both property and civil rights, as well as the administration of justice under ss 92 (13) and 92 (14) *Constitution Act, 1867*; *Law Society of British Columbia v Mangat* [2001] 3 SCR, at paras 38 – 42; Monahan, “Independence of the Bar” in *supra* note 4 at 117.

Canadian Bar is a principle that has been jurisprudentially recognized as an important principle having constitutional dimensions.¹⁹²

One exception to analyses highlighting the separation of lawyer independence from politics is a line of scholarship that examines the association between lawyers and liberal values. In particular, this literature associates the appearance of more modern democratic forms with the work of independent lawyers. In most cases,¹⁹³ this literature relies on an assertion that lawyers, acting in their individual capacity to represent clients, have played a causal role in the political recognition and promulgation of generally accepted notions of liberal democratic values.¹⁹⁴ One influential strain of this scholarship has been identified as “law” or “lawyers and liberalism” theory.¹⁹⁵

For example, Karpik and Halliday’s work in this area breaks down the categories of independent professional scholarship.¹⁹⁶ In keeping with the broad general perception about the divide between law and politics, Karpik and Halliday note that most studies of

¹⁹² As Monahan notes, *ibid* at 122, the principle has constitutional recognition in a variety of courts and decisions, see, for example, Justice McIntyre’s comments in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 187 – 188.

¹⁹³ A narrower version of this argument asserts an association between lawyers and constitutionalism, see W Wesley Pue, “Death Squads and ‘Directions over Lunch’” [Pue, “Death Squads”] in *supra*, *Public Interest*, at note 5, at 83 – 115.

¹⁹⁴ *Ibid*. Pue notes, at 97, that the “lawyers and liberalism hypothesis is ambitious but limited. It has spawned historical research demonstrating that, in at least some key countries ‘for a long period...lawyers have mobilized on behalf of political liberalism.’”

¹⁹⁵ *Ibid*.

¹⁹⁶ Terence C Halliday and Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*. (Clarendon Press: Oxford, 1997) [Halliday & Karpik, *Lawyers*], contains a series of essays that identifies parts of this relation in France, Germany, England, Wales and the USA.

legal professionals exclude considerations of politics.¹⁹⁷ They go on to suggest instead that the historical emergence of the principle of independent lawyers in fact shows a close political relationship with the principles of liberalism. This relation is especially apparent in the context of lawyers developing comparative notions of autonomy, before, during and after the development of modern notions of statehood.¹⁹⁸

For Karpik, the representational role that lawyers play “to speak and act on behalf of another person” is a distinguishing feature of lawyering that is at the nub of the rule of law.¹⁹⁹ Ultimately, the developing professional autonomy of lawyers also served as a cornerstone for the emergence of modern political liberalism. So understood, political liberalism is a group of ideas that includes “equality before the law, freedom of speech, personal security, property rights, due process of law, and so on whatever [is] needed to define in a very central but narrow way the elements of political citizenship.”²⁰⁰ Aspects of this relationship, between liberal political values and lawyering, have been identified as manifesting in several countries at different points over a time period ranging from the eighteenth to the twentieth centuries.²⁰¹ In these accounts, the role of independent lawyers,

¹⁹⁷ “With few exceptions, lawyers were and still are considered as *homo socius* or *homo economicus*, but never as *homo politicus*” in *ibid*, at 15. Exceptions noted include the work of Talcott Parsons, eg “A Sociologist Looks at the Legal Profession” in T Parsons ed, *Essays in Sociological Theory* (Free Press: Glencoe Ill, 1954) and R Shamir, *Managing Legal Uncertainty* (Duke Univ Press: Durham NC, 1994).

¹⁹⁸ *Ibid*, particularly at Chapter 1, “Politics Matter: a Comparative Theory of Lawyers in the Making of Political Liberalism” at 15 – 64.

¹⁹⁹ Lucien Karpik, *French Lawyers: A Study in Collective Action, 1274 – 1994* (Oxford: Oxford University Press, 1999) at 77.

²⁰⁰ Lucien Karpik & Terence Halliday, “Reply Essay: Can Lawyers Be Committed to Political Liberalism?”, (2001) 4 *The Jurist* (Books-on-law/Book Reviews, available online: <http://jurist.law.pitt.edu/lawbooks/revapro1.htm#KarpikHalliday>).

²⁰¹ *Supra* Halliday & Karpik, *Lawyers* at note 196.

moves from the periphery to centre-stage in the historical processes that displaced absolutism with liberal governance. The independent action of lawyers and, perhaps, legal professions, becomes indispensable, imbricated in the very fabric of forms of constitutionalism characterized by the modern state, free associations, and civil rights.²⁰²

However, views about the role of the legal system to facilitate or enable liberal/democratic values in Canada are not universal. For example, a contrary point of view about the role of lawyers and politics is presented by Michael Mandel. In his work looking at the “legalization of politics” he examines the role of lawyers (and judges) since the implementation of the *Charter of Rights and Freedoms* in 1982.²⁰³ Mandel contends that lawyers as a group are not reflective of the Canadian citizenry and that they represent an economic and social elite, who have also often demonstrated a basic lack of integrity.²⁰⁴ In contrast to the views of lawyers as a kind of informal, liberal body, Mandel suggests their role since the 1980s has been fundamentally political and undemocratic when he says:

If any group has shown itself unworthy of standing above government as representatives of the people, this is it. Yet the Charter has *legalized* our politics. But legalized politics is the quintessential conservative politics. Not only does the legal profession not have a more democratic technique for resolving political issues – far from it – the legal technique actually *obscures* these issues by dealing with them in abstractions that are meant to disguise the political nature of the choices being made. ... The anti-democratic, inegalitarian nature of legal politics has always constituted its principal appeal for those who have brought us the various constitutional charters over the years. **They have advocated, instituted and used legal politics for the precise purpose of protecting powerful, narrow interests from the threat of democracy.**²⁰⁵

The interrelationship between law and politics, as well as the involvement of lawyers and judges in political issues, is also an important component of the work of

²⁰² *Supra*, Pue “Death Squads” at note 193 at 97.

²⁰³ *Supra* Mandel, *Legalization of Politics* at note 60.

²⁰⁴ *Ibid*, generally at 2 – 5.

²⁰⁵ *Ibid* at 4, my bolding.

political scientist Peter Russell. Russell's work reflects a theoretical stance that is similar to the 'lawyers' or 'law and liberalism' thesis. In assessing the institutional role of lawyers in the justice system, Russell asserts that the strength of Canadian legal culture rests in substantial part on the independent status and strength of the legal profession. From his viewpoint, the commitment to lawyer professional independence is fundamentally ideological in the sense that there is "value in a liberal state under the rule of law of ensuring that individuals and groups have access to legal counsel not controlled by government."²⁰⁶ In this respect, the legal profession acts as a kind of "fifth estate," that provides an essential public service through its professional activities, advocacy and participation by many members at the highest levels of politics.²⁰⁷

Unlike approaches that examine lawyer and judicial independence in isolation, Russell's later work links lawyer and judicial independence.²⁰⁸ From his viewpoint, the core of judicial independence refers to the relationship between the bench and the political system, as distinct from the individual actions and behaviour of judges. In this institutional sense, independence of the bench is an "essential condition of a *liberal* democracy" that establishes conditions whereby individual judges can make decisions "free from control by others."²⁰⁹ In this way, judicial independence sits alongside lawyer

²⁰⁶ *Supra*, Russell, *Judiciary in Canada* at note 176 at 38

²⁰⁷ *Ibid.*

²⁰⁸ *Supra*, Russell, "A General Theory" at note 181.

²⁰⁹ *Ibid.*, at 600 - 01.

independence to buttress a broad ideological commitment to liberal political values, including democracy.

The contrary positions about the role of politics in the development of the principle of independence for lawyers and judges reflect an important constitutive tension. As between principle and practicality, the general ‘law and liberalism’ thesis represents a theoretical and aspirational ideal that reflects some values, liberal and democratic, which underlie much of the modern justice system. By contrast, practical assessments of the monopolistic and potentially undemocratic functions of the law and of lawyers, like Mandel’s,²¹⁰ suggest that the correlation between law and independent lawyers and the advancement of liberalism in Canada has not been entirely consistent over time. In this respect, the representational role of lawyers, working in the interest of individuals and of the public is in tension with other interests, which may also include things like private interests, group or elite protection.²¹¹

Less public-service oriented values and behaviours are also evident in relation to the judiciary. One of the main historical motivations for enshrining judicial independence protections in the original *Act of Settlement* in the 1700’s was not explicitly to advance liberalism or even democracy *per se*, but for the more practical purpose of putting an end

²¹⁰ *Supra*, Mandel, *Legalization of Politics* at note 80.

²¹¹ Some have argued that the creation and protection of a legal elite was a primary goal in the early establishment of the profession, see eg William N T Wylie, “Instruments of Commerce and Authority: The Civil Courts in Upper Canada, 1789 – 1812, in David H Flaherty, ed *Essays in the History of Canadian Law* vol 1 (Toronto: University of Toronto Press, 1981) 3 at 3.

to judicial corruption, which under the Stuart kings had become rampant.²¹² In the Canadian context, the examination of the development of judicial independence presented in more detail in Chapter Four of this work shows that some judicial officials in Canada have also historically acted in ways that can be described as significantly illiberal.²¹³ In such cases, at the individual or institutional level, or both, the judiciary was also subject to a range of influences, sometimes overtly political, that influenced their behaviours and decisions, often in what appears to be disconcertingly undemocratic ways.²¹⁴

The law and liberalism hypothesis generally raises an interesting question about the emergence of the principle of independence in the justice system. For example, the association of modern ideas about rule of law with judicial independence occurred notwithstanding the fact that they developed well before modern democratic notions.²¹⁵ However, as a value in the justice system, judicial independence appears to have been recognized prior to the general acceptance of more liberal democratic forms.²¹⁶ The similar question of the early development of independence of the Bar is equally

²¹² *Supra*, Lederman, “Independence” at note 2 in Chapter 1, who notes that judges at this time “were incompetent or corrupt, or both, for only the incompetent or corrupt would take up the posture of extreme subservience the king was demanding....it is no surprise then to find that reform of the tenure of judicial office took some priority in the revolution settlement” at 781.

²¹³ For example see, Girard, “Historical Perspectives” in *supra* note 4 where, at 78 – 79 the author critically discusses the role of lawyers and Supreme Court judges in the “debacle of the 1946 Kellock-Taschereau Commission and the ensuing trials for breaches of the *Official Secrets Act*”.

²¹⁴ *Supra*, Mandel, *Legalization of Politics* at note 80.

²¹⁵ *Supra*, Valois, *At a Distance* at note 158.

²¹⁶ *Ibid*, at 9 where the author notes “the paradox of the principle of judicial independence in a democratic society being based on a statute enacted even before the democratization of power in England” citing *supra*, *Remuneration Reference* at note 166.

perplexing.²¹⁷ In this respect, some scholars share Mandel’s view, described above, which suggests that there really is no puzzle at all, since the emergence of the principle of independence has been largely to protect elite interests from democracy.²¹⁸ Still others suggest only limited association between the principle of an independent Bar and politics, to promote more modern constitutional governance.²¹⁹

In any event, the primary constitutive tension of indeterminacy in the law, along with secondary tensions between theory and practice and between law and politics all inform an understanding of the principle of independence. Subject to these tensions, independence is not “a sovereign political principle”,²²⁰ but operates conditionally within the justice system. The analysis of lawyer and judicial independence, which later in this work examines the historical commitment to the principle, also concludes that it is a highly changeable principle, which continues to be modified. Moreover, the role of the principle of independence to fortify an independent and democratic system of courts has been under increasing challenge.²²¹ These challenges are illustrated and analyzed in the context of the operation of rule of law, independence and access to justice in Chapter Five, which includes a case study analyzing a specific aspect of the court system.

²¹⁷ *Supra* Pue, “Death Squads” at note 193, at 96.

²¹⁸ See Paul Romney, “From Types Riot to Rebellion: Elite Ideology, Anti-Legal Sentiment, Political Violence, and the Rule of Law in Upper Canada” (1987) 79 *Ontario History* 113. Though some also contend that attempts to create a legal elite were not entirely successful, see Sarah Elizabeth Mary Hamill, “A Class Apart? The Legal Profession in Upper Canada from Creation to Confederation, 1791 – 1867”, LL M thesis submitted to Graduate Department of the Faculty of Law, University of Toronto, 2009, available online: <
https://tspace.library.utoronto.ca/bitstream/1807/18319/1/Hamill_Sarah_E_M_200911_LLM_thesis.pdf>.

²¹⁹ *Supra*, Pue, “Death Squads” at note 193

²²⁰ *Supra*, Russell, “A General Theory”, at note 208 at 601.

²²¹ For example, *supra*, Resnik & Curtis, at note 50 where the authors present a thesis that the public nature of courts is being constrained by devolution, outsourcing and privatization.

While the ‘law and liberalism’ thesis is somewhat limited in Canada, embedded within it is a narrower and relatively modern justification, that lawyers and judges require independence to facilitate access to justice in independent courts. While perhaps correlated to the advancement of liberalism, or constitutional governance, a primary normative justification for independence in modern times has become access to justice. While this justification is an important component of the rule of law, the emphasis on access to justice has occurred relatively recently in historic terms. A brief examination of the scope and limits of the term ‘access to justice’ and its relation to the principles of rule of law and independence is focus of the next and final substantive section of this Chapter.

2.4.3 Access to Justice – Justification for Independence Under Rule of Law

If a broad-based claim cannot be made for the advancement of liberal values as the justification for the principle of independence in a legal system operating under the rule of law, what, then, is the explanation? One view is that the purpose of judicial independence is to support a primary constitutional value of impartiality.²²² There is some merit to this viewpoint in the sense that in the instrumental context of the adjudicative role, impartiality is recognized as an essential aspect of the decision-making

²²² In arguing that there has been a ‘judicialization of politics’ in Canada, in part because of an over-reliance on judicial inquiries, Adam Dodek proposes that judicial independence is a second order constitutional and political value that serves the primary purpose of supporting impartiality in “Judicial Independence as a Public Policy Instrument” in *supra*, Dodek & Sossin, *Judicial Independence* at note 91, 295, at 299 - 301.

process.²²³ However, even within the strictly judicial context and though related, judicial independence arguably also includes certain additional distinguishable features. These include separate concepts such as neutrality and autonomy²²⁴ and impartiality is therefore only one of several important aspects of judicial independence.²²⁵

A wider view of independence in the lawyer context acknowledges that some Bar autonomy is required in order for professional advocates to provide impartial legal services.²²⁶ In this sense, lawyers function as perhaps the most important sources of “legal authority” for clients.²²⁷ For example, focusing on legal professionalism scholarship, Alice Woolley’s recent examination of lawyers as independent advisors advances a line of thinking that suggests that while lawyers do act as a source of ‘legal authority,’ they are ultimately also the conduits for their clients’ decision-making.²²⁸ From this viewpoint, the job of a professional lawyer is to facilitate the conditions where individual clients can “actualize” their values, and “structure their commitments.”²²⁹

²²³ Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at 44-45 (“[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary”).

²²⁴ See for example distinctions drawn by the Supreme Court between independence and impartiality in *supra Valente*, at note 54 at 685 and in *R v Lippe* [1991] 2 SCR 114 at para 48, compared to the conceptual role of ‘neutrality’, like that described by *supra* Shapiro, “Courts” at note 155.

²²⁵ And perhaps not the most important. Amnon Reichman argues that judicial independence is not “subservient to impartiality” and can clash with independence, as in the *Remuneration Reference, supra, Remuneration Reference*, at note 166, that it could be achieved through other means, such as creating equal dependency on all sides and that independence itself may have broader scope as an “intrinsic feature of democracy”, in *supra*, Reichman “Judicial Non-Dependence”, at note 167, at 440 to 441 and fn 7.

²²⁶ Though note in Canada, there is no equivalent of the British ‘cab rank rule’ since Canadian lawyers have a right to exercise some choice over whom they take as clients. For a discussion see Woolley, *et al* eds *Lawyers’ Ethics and Professional Regulation* (Markham: LexisNexis Inc 2008) [Woolley *et al*, *Lawyers’ Ethics*] at 141 – 147.

²²⁷ David Luban makes this assertion in considering the additional legitimacy conferred on lawyers because of their interactional function to interpret law for clients, *supra*, Luban “*Legal Ethics*” at note 52 at 160-161.

²²⁸ Alice Woolley, “The Lawyer as Advisor and the Practice of the Rule of Law”, (2014) 47 UBC Law Review, at 65 [Woolley, “Lawyer as Advisor”].

²²⁹ Kate Kruse, “The Jurisprudential Turn in Legal Ethics” (2011) 53 Ariz L Rev 493 at 527.

This broader view of the function of lawyer independence also dovetails with a view of the role of independent judges in courts as part of a “system of laws” in an independent court. So devised, the legal system provides a coordinated structure for resolving differences that, at the same time, “allows respect for dignity and autonomy of the person.”²³⁰ This view of the independent role of lawyers to enable judicial independence builds on Lon Fuller’s characterization of interactions between parties in a legal dispute who require legal advice in order to present their claims. In that case, Fuller noted that a “litigant...must...if his participation is to be meaningful...assert some principle or principles by which his arguments are sound and his proofs are relevant.”²³¹

As Dyzenhaus notes, the role of lawyers to provide independent legal services, particularly in the context of adjudication, becomes increasingly essential where professional advocacy must address the complexities of the legal system.²³² The challenge presented by this view of independence is the best way to support the operation of independent judges and lawyers within an independent and public court system. This challenge is especially apparent in light of trends like increased self-representation by parties,²³³ as well as signs of decreasing utilization of the court system, which are identified and discussed later in this work.²³⁴

²³⁰ *Supra*, note 228 Woolley, “Lawyer as Advisor” at 19.

²³¹ Lon L Fuller, “The Forms and Limits of Adjudication” (1978) 92 *Harvard L Rev* 353, at 369.

²³² *Supra*, Dyzenhaus “Normative Justifications” at note 157.

²³³ As Micah Rankin notes, “the space for partiality and bias increased because unrepresented litigants cannot produce the kind of dialogical interaction that Fuller had in mind” *supra* Rankin, “Access to Justice” at note 8 at 17.

²³⁴ In noting the significant decline in trial proceedings in the USA, Judith Resnik and Dennis Curtis have stated, “the questions are whether courts will remain available to ordinary persons seeking to engage in the democratic practices of adjudication; whether the courts will continue to attend to individuals as equal and dignified members of a polity; and whether polities will authorize disputants to contest state authority and

However, from this viewpoint a primary normative justification for independence is to establish and maintain the conditions whereby individuals can advance and defend their legal interests. In addition, the role of judicial officials to provide independent adjudication is a necessary part of an independent court system under the rule of law. By facilitating access to legal services and fulfilling a representative function, lawyer independence also enables judicial independence. In this sense, the principles of independence for lawyers and judges are integrated and operate together to facilitate access to justice within a legal system under the rule of law. As I will argue in the later parts of this work, independence for judges, lawyers and the courts, is a principle best unified not by ‘what’ it is, but rather by the ‘why’ of its most important function within the modern justice system.

Practical aspects of the ‘access to justice’ question have become a central issue in Canada within the last few years.²³⁵ Numerous reports, initiatives, jurisprudence and scholarship have all endeavoured to examine the nature of access to justice in Canada, and have made it a significant issue of public policy.²³⁶ Conceptually, the overall idea of ‘access

to use courts to foster debate about both the content and the application of norms”, in their work *supra* Resnik & Curtis, *Representing Justice* at note 50 at 307. A similar declining trend in Canada is identified in this work at Chapter 5.

²³⁵ See, for example, “For nearly three decades, access to justice has been a central policy issue within the Department of Justice”, Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada*, Proceedings of a National Symposium (2000).

²³⁶ See Mary Jane Mossman & Heather Ritchie, "Access to Justice: A Review of Canadian Legal Academic Scholarship" in Allan C Hutchinson ed, *Access to Civil Justice* (Toronto: Carswell, 1990) More recently, see Leonard Doust, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (Vancouver: Public Commission on Legal Aid, 2011); Lisa Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, 1998). In terms of regulation of the legal profession in Ontario, for example, the obligation for the Law Society to act in the public interest was only provided for statutorily in 2006, *Law Society Act*, RSO 1990, c L8 as amended by SO, 2006 ch 21 Sched C, s 7, which added a duty to act to protect the public interest at 4.2 (3), effective May 1, 2007.

to justice’ is sometimes said to be a value that supports the rule of law.²³⁷ In this framework, people must understand both their legal obligations and entitlements.²³⁸ Such a system relies on a conception of law that emphasizes the certainty afforded by a legal system. In this case, people must be able to access legal services, which can, at least aspirationally, reliably serve to guide and manage their affairs.²³⁹ On a practical basis, ‘access to justice’ may also promote complementary democratic values such as equal opportunity for participation in legal governance.²⁴⁰

As a matter of legal governance, the capacity for individuals to enforce and defend their rights through a public court process can be regarded a basic democratic right. A related value that is supported by the concept of ‘access to justice’ is the broader normative goal of the justice system to encourage equality.²⁴¹ For his part, Lon Fuller took the position that an aspect of moving towards ‘rule of law’ was where “formal institutions are established guaranteeing to the members of the community some participation in the decisions by which their interests were affected.”²⁴²

²³⁷ *Supra*, Rankin “Access to Justice” at note 77.

²³⁸ For example, Dyzenhaus argues that a requirement under the publicity condition found in most rule of law formulations means that, where a government creates laws that are so complex that they require a lawyer, governments may have an obligation to provide legal assistance, *supra* Dyzenhaus, “Normative Justifications” at note 183 at 477.

²³⁹ *Supra*, Rankin, “Access to Justice” at note 99.

²⁴⁰ See, for example, Hilary Sommerland, “Some Reflections on the Relationship Between Citizenship, Access to Justice and the Reform of Legal Aid” (2004) *JL & Soc Pol’y* 442 [Sommerland, “Some Reflections”], where at 445 – 6 the author asserts that legal access is “fundamental to social participation”. Equality and dignity are complementary values, but as I argue *infra* in Chapter 7, they are preceded by access, and particularly in the scope of my analysis, access to the justice system.

²⁴¹ *Supra*, Dyzenhaus, “Normative Justifications” at note 183.

²⁴² Lon L Fuller, “Adjudication and the Rule of Law” (1960) *Proceedings of the Am Society of International Law* at 5 [Fuller, “Adjudication”].

Under a democratic system of legal governance, those who cannot access justice often because of inequalities arising from things like poverty, race or gender,²⁴³ may face practical limits on their ability to participate in the system of legal and social governance.²⁴⁴ Beyond the traditional consideration of inequalities created by economic challenges, race or gender, the general scope of the term ‘access to justice’ has been expanded in recent years. This includes consideration of a wide range of possible barriers to accessible justice such as, *inter alia*, court fees,²⁴⁵ physical access, translation, sign language interpretation, as well accommodation of other physical and mental challenges.²⁴⁶

However, like other important terms in law, the phrase ‘access to justice’ is also subject to the constitutive tensions. For example, there is a substantial degree of indeterminacy about what ‘access to justice’ actually means. Part of this indeterminacy arises from the gap between theoretical and practical uses of the term. There is a significant literature that deals with the concept of ‘access to justice,’ but much of it acknowledges that ‘access to justice’ is a concept that has both substantive and procedural dimensions.²⁴⁷ Substantive access to justice is usually thought of as addressing

²⁴³ See, for example, Kerri A Froc, "Is the Rule of Law the Golden Rule? Accessing "Justice" for Canada's Poor" (2008) Can Bar Rev 459, particularly at 461; B Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000) 26 Queen's LJ 43; Mary Jane Mossman, "Shoulder to Shoulder: Gender and Access to Justice" (1990) 10 Windsor YB Access Just 351.

²⁴⁴ *Supra*, Fuller, "Adjudication" at note 242. In this sense, the justice system must be accessible, as a primary goal.

²⁴⁵ See, for example, the recent decision of the Supreme Court of Canada dealing with fees and access to justice in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59.

²⁴⁶ See, for example, Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46 Osgoode Hall LJ 773, where the author discusses the scope of the term at 775.

²⁴⁷ *Supra* Waldron, "Concepts" at note 64.

broader social justice concerns. By comparison, procedural approaches to evaluating access to justice generally focus on examinations of the justice system.²⁴⁸ As with other important principles in law, the two characterizations of access to justice, procedural and substantive, are distinct, but they are not mutually exclusive,²⁴⁹ and there is considerable overlap in the substantive and procedural characterizations of the idea.

For example, both substantive and procedural notions of ‘access to justice’ include the idea that the legal system of courts needs to be reasonably available. Consequently, ‘access to justice’ is a principle of the justice system operating under the rule of law that also requires practical consideration in terms of the capacity and frequency with which people actually use the system. While it is widely accepted as a normative goal of a functional legal system,²⁵⁰ in practice the nature of ‘access to justice’ is also both changing and conditional.²⁵¹ In this respect, understandings of ‘access to justice,’ and its relationship to the independent role of lawyers and judges are informed by Canada’s distinct political and legal context.²⁵² In this sense, ‘access to justice’ like ‘independence’ and ‘rule of law’ cannot be fully understood without some appreciation of how the legal and political system practically mediates these principles.²⁵³

²⁴⁸ *Ibid.*, where Waldron suggests that rule of law concepts should also emphasize “procedural and argumentative” aspects of legal practice at 5.

²⁴⁹ *Supra*, Rankin, “Access to Justice” at note 77 at 4. .

²⁵⁰ For example, Joseph Raz suggests access to justice, in particular to the courts, is an important component of the rule of law, in Joseph Raz, “The Rule of Law and its Virtue” (1977) 93 Law Q Rev 195 at 203.

²⁵¹ In the senses that it is both subject to change and it is limited.

²⁵² Bhabba, for example, explicitly links the need for access to justice within the rule of law, as essential to the operation of a constitutional democracy, see “Institutionalizing Access-to-Justice: Judicial Legislative and Grassroots Dimensions” (2007) 33 Queen’s LJ 139 at 154.

²⁵³ *Ibid.* *Supra* note 1.

While a primary normative role of the principle of independence is to support access to justice, the ways in which the overall principle of independence operates to facilitate access has not been practically well-explored. Nonetheless, in modern times a commitment to upholding the ideal of access to justice,²⁵⁴ in independent and public courts, is fundamental to the rule of law in a democracy.²⁵⁵ There is widespread, if not universal support for ‘enhanced’ access to justice within independent courts.²⁵⁶ However, in order to achieve a primary normative goal, access to justice, a more thorough understanding of the operation of these principles, their inter-relationship and the constitutive tensions to which they are subject, is required.

On this point, while discussions and analysis of important terms in law are necessary, they should not obscure one of the most important goals of legal studies of this sort. That is, it is important to examine and assess the “actual performance” of these principles, for lawyers and judges within the court system.²⁵⁷ In this respect, assessing the performance of the justice system includes both theoretical discussion of concepts and principles, but then tests these ideas against ‘law in action’ in the real world. In this work,

²⁵⁴ *Supra*, Waldron “Concepts” at note 64, where the author contrasts Lon Fuller’s substantive approach to a procedural current within the conception as typified by the work of A V Dicey, at 6 - 8.

²⁵⁵ *Supra*, Resnik & Curtis, *Representing Justice*, at note 262.

²⁵⁶ See for example, M Fenrick, “Habermas, Legal Legitimacy, and Creative Cost Awards in Recent Canadian Jurisprudence” (2007) 30 *Dalhousie LJ* 165; *supra*, Sommerland, “Some Reflections” at note 240;

²⁵⁷ *Supra* note 1. Kornhauser makes a similar point in the context of discussing the meaning of judicial independence, which should not impair studies of the performance of courts and judges in practice, see Lewis A Kornhauser, “Is Judicial Independence a Useful Concept?” in Stephen B Burbank & Barry Friedman eds, *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks: Sage Publications Inc, 2002) at 45.

the examination of the principle of independence is consequently followed by a dynamic realist assessment of the operation of the principle for lawyers, its interrelationship with judicial independence, and scope and limits of both to facilitate an accessible court system.

From the perspective of dynamic realism, the legal system is informed by its recursive and simultaneous development. The operation of the principle of independence is mediated in practice by its application in the context of the justice system, the nature of which is best ascertained by examining emergent analytics. All of these components of are affected by significant constitutive tensions in law, such as law's indeterminacy, and the tension between theory and practice, as well as between law and politics. In focusing on the meaning, purpose and operation of the principle of independence in the justice system, and particularly in theorizing Bar independence, these tensions have resulted in a distinct approach to independent courts in Canada. These various aspects of the operation of the principle of independence are the subject of the remaining Chapters of this analysis.

2.5 Conclusion

What then is the scope and role of independence, for the Bar and the bench, to facilitate access to justice in the Canadian justice system? The next Chapters will explore the specific concepts of independence of the Bar and the Judiciary, which developed

iteratively over a long period of time. The development of the principle of independence was also connected to other historical and political events. These events mediated the interrelated forms of independence that emerged for both the Bar and the bench. Independence of the Bar and judicial independence took on distinct institutional and individual aspects in the Canadian context. These elements of independence continue to develop in response to tensions within the principle, in the justice system and within Canadian democracy.

Ultimately, I argue that independence of the Bar is an essential aspect of the Canadian legal system that complements and enables judicial independence. In addition, I assert that a primary normative justification for the principle of independence, for lawyers and judges, has become access to justice. Without an independent judiciary, supported by an independent Bar, the independence of the courts would be in doubt and the principle of the rule of law would be jeopardized. Moreover, the overall theory of independence is influenced by politics, at least to the extent that it enables citizens to access the institutions of the justice system like the courts, where they can enforce and defend their rights. The aspirational nature of things like ‘independence’ and ‘rule of law’ and ‘access to justice’ means that they may never be absolutely realized in any legal system. Nevertheless, an understanding of their interrelationship, and how their operation can be fostered and supported, is vital to a functional and democratic justice system.

Part II of this work more closely examines the recursive and simultaneous emergence of the three different aspects of the principle of independence and its practical mediation in Canada. This includes an examination of the emergence and development of judicial independence in Chapter Four, as well as a new emphasis following World War II on the role of independent courts examined in Chapter Five. Chapter Three starts **Part II** of this work by examining the emergence of the principle and practice of independence of the Bar in Canada.

Part II

Chapter 3

A Dynamic Realist Analysis of the Emergence of Independence of the Bar

*Legal argument is a struggle for the privilege of recounting the past. To the victor goes the right to infuse a constitutional clause, or a statute, or a series of prior decisions with the meaning that it will henceforth bear by recounting its circumstances of origin and assigning its place in history.*¹

3.1 Introduction

Chapter Three examines the mediation of independence of the Bar in Canada. Like the nature of ‘legal argument’ described by David Luban above, historical accounts of independence of the Bar often represent efforts to infuse the principle with meaning in different contexts.² In many cases, the focus of this scholarship is not on independence of the Bar *per se*, but rather highlights concepts of law and the nature of the legal system, especially in the context of the related principle of independence of the Judiciary.

In contrast to judicial independence though, the landscape of independence of the Bar in Canada remains relatively unexplored.³ Ultimately, traditional narratives and

¹ David Luban, “Difference Made Legal: The Court and Dr. King”, 87 Michigan L R 2152 (1982) as quoted in J Feinberg & J Coleman eds, *Philosophy of Law*, (Wadsworth/Thompson Learning, Belmont CA, 2000) at 227.

² *Ibid.*

³ Phillip Girard, “The independence of the Bar in Historical Perspective” [Girard, “Historical Perspective”], *In the Public Interest*, The Report and Research Papers of the Law Society of Upper Canada’s Task Force on Rule of Law and Independence of the Bar, (Toronto: Irwin Law Inc, 2007) 45 – 81, [LSUC, “*Public Interest*”]. In note 1, at 45, the author observes that in Canada there is no scholarly equivalent for lawyers

historiography about the development of lawyer autonomy in Canada do not adequately capture the diversity of sources or the complexity of influences and tensions inherent within the principle.⁴ In fact, most modern retellings of the development of independence of the Bar rely directly and indirectly on the traditional understanding of the concept.⁵ Consequently, the second section of this Chapter looks at these traditional origins, starting with general approaches and early development of the principle. The roots of the principle are sometimes traced in a continuous line, from the development of lawyer independence in its English past, to the present.⁶ However, this second section also considers additional sources, outside of England and external to the general narratives, which supplement and sometimes run contrary to accepted accounts.

Traditional accounts also generally utilize an internal frame of reference, ‘inside the law,’ in a way that depicts the development of lawyer independence as only peripherally connected to contemporaneous historical and political events.⁷ The third

to William Lederman’s examination of the judiciary, *infra* at note 23 [Lederman, “Independence”], and that in Peter Hogg’s *Constitutional Law of Canada*, 4th ed (Scarborough: Carswell, 1997), at 15.9 g, there is only 1 footnote reference in the text related to the principle of the independence of the Bar.

⁴ See Wesley Pue, “In Pursuit of Better Myth: Lawyers’ Histories and Histories of Lawyers”, (1995) 33 *Alta L Rev* 730 [Pue, “Better Myth”]. See also Hanoach Dagan & Roy Kreitner, “The Future of Legal Theory” (2011) 96 *Cornell L Rev* 671. Dagan and Kreitner also suggest that most socio-historical analyses suspend direct normative inquiry and risk submerging law into other disciplines, at 678 [Dagan & Kreitner, “Future”].

⁵ “Few occupations are as freighted with history as is the practice of law. The legal profession’s origins are literally lost in the mists of time,” W Wesley Pue, “The Canadian Legal Profession – The Historical Context” in Woolley *et al* eds *Lawyers’ Ethics and Professional Regulation* (Markham: LexisNexis Inc 2008), 93 – 128 at 93 [Woolley *et al*, *Lawyers’ Ethics*] [Pue, “Historical Context”].

⁶ Demonstrating an historical fallacy known as the presumption of continuity, see David Hackett Fischer, *Historians’ Fallacies: Toward a Logic of Historical Thought* (New York: Harper Colophon Books, 1970) [Fischer, “Historian’s Fallacies”].

⁷ Terence C Halliday and Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries* (Clarendon Press: Oxford, 1997) [Halliday & Karpik, *Lawyers*], where the authors note “accounts of lawyers sometimes consider them as “*homo socius* or *homo economicus*, but never as *homo politicus*” at 15.

section considers the early emergence of the principle of independence of the Bar in colonial times, and demonstrates the early and close connection of lawyers and the principle of independence with political and historical developments in Canada. The fourth section builds on the earlier examination of the influence of politics by considering two competing streams of scholarship in light of the Canadian experience throughout the 1800s. Some scholars have asserted a close connection between the promulgation of liberal democratic values and the development of lawyer independence. However, this scholarship is balanced against those who associate lawyer independence with elite, private and state interests. This section suggests that there is a range of values underlying the historical development of lawyer independence.

Reliance on traditional narratives in the history of law and lawyers is a significant lapse in legal scholarship about the role of legal professionals and is, “perhaps, the single most important failing of what passes for analysis in contemporary legal writing.”⁸ In Canada, there has been little attempt to examine the emergence of an independent Bar in the context of developments in other parts of the legal system, such as the development of independence of the Judiciary, within independent courts, as part of Canada’s democratic political structure.⁹

⁸ *Supra* note 4 Pue, “Better Myth” at 16.

⁹ One exception that captures some of these threads of analysis on an historical basis is Jack P Greene, ed, *Exclusionary Empire: English Liberty Overseas, 1600 to 1900*, (New York: Cambridge University Press, 2009).

Given the limited scrutiny of independence of the Bar in Canada, it is perhaps not surprising that many accounts rely on the tradition of an independent Bar and its perceived continuity with historical English legal traditions.¹⁰ In this sense the main thrust of historical accounts of Bar independence usually emphasize the development of independent advocacy on behalf of clients within a centuries-old British tradition.¹¹ However, in recent years traditional accounts of the development of an independent Bar have been increasingly subjected to more critical analysis. These critical assessments suggest that many of the origin stories told by and about lawyers are permeated by inaccuracies that amount to historical fallacy,¹² some of which approach mythical proportions.¹³

From this tension between traditional and more critical accounts, emerges a picture of independence of the Bar that is both increasingly complex and more nuanced in its presentation of the principle, its origins and subsequent development in Canada. The examination of the development of Bar independence starts with a closer look, in the next section, at the roots of the principle.

¹⁰ *Supra* note 4 Pue, “Better Myth”. In the traditional story, “Canadians...are heirs to a peculiarly British tradition of liberties which can be traced back at least as far as the Magna Carta”, at 10.

¹¹ *Ibid*, there is a “genuinely astonishing argument for continuity of institutional order from the 1300s through 1797 to the present, at 7, citing Law Society of Upper Canada, *Submission to The Professional Organizations Committee* (Toronto: Law Society of Upper Canada, April 1979) at 1 – 2.

¹² *Supra* note 6, Fischer, “Historian’s Fallacies”.

¹³ *Ibid*.

3.2 General Approaches and Early Development of the Principle

General historical approaches to independence of the Bar usually take as their starting point the development of the legal system within mediaeval Britain. However, in terms of principle, some scholars, such as Martin Shapiro, suggest an even more rudimentary origin of ‘independence’ as a kind of basic social interaction. For example, in Shapiro’s prototype for modern court processes, two disputing parties “turn to a neutral third party determine a resolution of the social conflict.”¹⁴ From this viewpoint, independence arises naturally as a fundamentally necessary aspect of dispute resolution to facilitate group and social cohesion. Other approaches to the principle of Bar independence downplay the prior development of legal culture and practice,¹⁵ or mingle the social and historical roots of the principle with traditional accounts.¹⁶

For example, sociological approaches such as Martine Valois’s ‘systems theory’ focus on the effects of social factors in development of legal systems over time, including an acknowledgement of classical conceptions of lawyers, but still focus on the traditional narrative of independence. While Valois’ work highlights independence in the judicial context, she also acknowledges the key complementary role of lawyer independence,

¹⁴ Peter McCormick, *Judicial Independence and the Judicial Governance in the Provincial Courts*, Report Prepared for the Canadian Association of Provincial Court Judges, (April, 2004) online: < <http://judges-juges.ca/sites/default/files/publications/Judicial%20Independence.pdf>>, at 5 [McCormick, *Judicial Independence*].

¹⁵ *Supra* note 4, Dagan & Kreitner, “Future”. One exception is the classic work of legal historian Henry S Maine, *Ancient Law* (London: Murray, 1861), available online: < <https://archive.org/stream/ancientlawitsco18maingoog#page/n10/mode/2up>>.

¹⁶ See, for example, Martine Valois, *Judicial Independence: Keeping Law at a Distance from Politics*, (Markham: LexisNexis Canada Inc, 2013), [Valois, *At a Distance*].

which interacted with the developing autonomy of judicial officials. So, for example, Valois asserts that judicial independence results from the interaction of several factors including “the formation of a class of people specialized in knowledge of the law.”¹⁷ In this respect, the historical-social picture painted by Valois and others in this area implicitly relies on independence of the Bar as an essential component of an independent legal system.

As noted, most histories of independence of the Bar emphasize the roots of the profession in the context of early English history and its later transformation from the 17th to the 19th centuries. In particular, scholars focus on the “emergence of a professional caste dedicated to representing litigants”¹⁸ and the establishment of the early Inns of the Court.¹⁹ Over time, the members of the Inns of the Court gradually became associated with the ‘barristers’ branch of the profession.²⁰ The English Inns were self-governing, but have always been voluntary societies and not governed by statute. By the mid-1500s, the distinctions within England between barristers, solicitors and attorneys were solidified when the exclusive jurisdictions of each branch of the profession were set out.

¹⁷ *Ibid* at 10. On ‘systems theory’, “English sociologist Herbert Spencer was one of the first to comment on the similarities in the development of organic and superorganic entities” at 5 citing to Bertrand Badie & Pierre Birnbaum, *Sociologie d’État*, coll, “Pluriel” (Paris: Éditions Grasset & Fasquelle, 1979) at 28.

¹⁸ Pue, “Historical Context”, *supra* note 5.

¹⁹ Of which there were originally 5, Inner, Middle, Grey’s and Lincoln, as well as Serjeants Inn, which lasted until the 1870’s. Until the effective date of a new *Judicature Act* in 1876, membership in the order of serjeants was still a requirement for judicial appointment. Serjeant’s Inn was sold in 1877. See JH Baker, *The Order of Serjeants at Law*, (London: Selden Society, 1984) and Wilfrid Prest, *The Rise of the Barristers: A Social History of the English Bar 1590 – 1640* (Oxford: Clarendon Press, 1986) at 3 – 9.

²⁰ *Supra* note 3, Girard, “Historical Perspective” at 50.

By 1590 a call to the Bar at an English Inn of the Court was considered a minimum qualification for practice for all prospective barristers.²¹

During the 1600s, the English monarchy made some effort to directly control and manage the emergence of independent lawyers.²² These efforts were part of the larger constitutional challenges during this time, which ultimately resulted in 1688's 'Glorious Revolution'.²³ The fundamental re-ordering of the relationship between the Crown and other parts of government following 1688 included a new respect for the role that lawyers played as part of a "balanced constitution."²⁴ The demise of the Stuarts in England also led to the later passage of *Act of Settlement* in the early 1700s.²⁵ This legislation is usually regarded as one of the starting points for most modern considerations of judicial independence, but it also had significant effects on the practice and politics of the principle of independence of the Bar.

The codification of judicial independence guarantees contained in the *Act of Settlement* also set the stage for the Crown to employ less direct means to influence the

²¹ *Ibid.*

²² D M Walker notes, for example, the disbarment of a number of Scottish lawyers by Charles II in 1674, *A Legal History of Scotland* (Edinburgh: W Green & Son, 1988) vol IV at 389 – 390 [Walker, *Legal History*].

²³ Constitutional scholar William Lederman notes, "a great constitutional struggle was joined over the scope of the royal prerogative powers as against both the common law and Parliament...the Stuart Kings lost in the end" in "The Independence of the Judiciary", (1956) *Can Bar Rev* vol XXXIV, No 7, 769 – 809, 1139 – 1179, at 780 [Lederman, "Independence"].

²⁴ Andrew Boon, "Professionalism Under the Legal Services Act 2007", (2010) *International Journal of the Legal Profession* 17(3): 195 – 232 [Boon, "Professionalism"]. The Revolution of 1688 affirmed the autonomy of many professional bodies, like the Bar, which are described in later times as 'little republics', see, for example, M Burrage, "Mrs Thatcher against the 'little republics': ideology, precedents and reactions", in *supra* note 7, Karpik & Halliday, *Lawyers*.

²⁵ Though ultimately passed in 1701 after considerable political wrangling, the legislation continued to be stalled, not taking effect until the accession of George I in 1714, *supra* note 23, Lederman "Independence" at 782, 12 and 13 William III (1701), c 2 ["*Act of Settlement*"].

emergent autonomous body of legally trained advocates. So, for example, the awarding of ‘King’s Counsel’ (KC) designations was a way for the Crown to convey prestige to some preferred lawyers. At the same time, the possibility of a KC appointment also exerted influence on other lawyers, who might regard the designation as a necessary precursor to judicial office.²⁶ Throughout the 1700s, patronage of this sort was used “to develop a class of court lawyers who were trained in crown service from an early stage in their careers, who became eligible to serve as judges because they were politically safe.”²⁷

3.2.1 External Sources for Independence of the Bar

While traditional narratives focus on the link between the early development of the Inns in England and the independence of the Bar, other accounts suggest that the principle did not arise in isolation. In fact, there were several likely complementary sources for the modern principle. One alternative source was the role played by the Faculty of Advocates in Scotland. There, the early Scottish Bar developed its own concept and practices of lawyer independence. In several ways the Scottish Bar of the 1600s exceeded their English counterparts in fostering the nascent autonomy of the Bar.²⁸

²⁶ *Supra* note 3, Girard, “Historical Perspectives” at 54. See also David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2000) at 270 [Lemmings, *Professors*]. At 274 Lemmings notes at that time that “lawyers who competed for government patronage were under constant scrutiny by the government’s managers, and among them, political loyalty as well as legal ability, were primary qualifications for preferment, and eventual promotion to a judge’s place.”

²⁷ David Lemmings, “The Independence of the Judiciary in Eighteenth Century England” in P Birks, ed *The Life of the Law: Proceedings of the Tenth British Legal History 1991* (London: Hambledon Press, 1993) at 129 [Lemmings, “Independence”].

²⁸ The institutional history of Scottish lawyers usually begins with the establishment of the Faculty of Advocates in 1532, see Nan Wilson, “The Scottish Bar: The Evolution of the Faculty of Advocates in its Historical Social Setting”, (1968) *La L R*, vol 28, 236 – 257 [Wilson, “Scottish Bar”].

As noted, the passage of the *Act of Settlement* in the early 1700s ostensibly established the elements of judicial independence.²⁹ However, this legislation was also the culmination of a separate tradition of independence and challenges by the Scottish lawyers to the authority of the English Crown. The Scottish ‘Faculty’ historically played an analogous role to the English Inns of the Court. However, Scottish members of the Faculty were at the forefront of challenges to the depredations of the Stuart monarchs and in asserting the rights of an independent Bar,³⁰ unlike their comparatively docile counterparts in England.

The Scottish lawyers at this time provided an early model of what in modern times might be characterized as ‘access to justice’ in the public interest. They were, for example, leaders in the establishment of a system of free legal aid and in the defence of criminal defendants in treason and felony matters, where in England such activities were forbidden.³¹ The independence of the Scottish advocates did not go unnoticed by officials who sought to control the “arrogance” of the Bar.³² One result of these challenges by Scottish lawyers occurred in 1670 when a Royal Commission in Scotland led to the imposition of a fee cap on advocates. The relatively independent Scottish Bar of the day refused at first to accept the limitation. Scottish lawyers engaged in what today could be

²⁹ Though judicial ‘independence’ in the modern sense of the word would not develop for some time.

³⁰ *Supra* note 3, Girard, “Historical Perspective” at 53, where the author notes “in 1674 Charles II disbarred a large number of Scottish advocates in the course of a political dispute”. Girard speculates about the “chilling effect” the mass disbarment had on lawyers in England.

³¹ *Supra* Wilson, “Scottish Bar” at note 28, at 244.

³² *Ibid* at 242.

described as a collective response in the nature of a modern ‘strike’ since, as a group, they refused in protest to plead cases before the Courts for a period of 2 months.³³

While there is little research examining the reception of early Scottish legal concepts elsewhere,³⁴ Scottish-trained lawyers likely carried some of their distinct ideas about the independence of the Bar to both England and to the wider world. The last Scottish Parliament before union with England sat in the early 1700s. Thereafter, the Scottish advocates frequently joined the out-migration, either to the centre of political power in London, or to seek opportunities afforded by Britain’s increased imperial presence throughout the world.³⁵ In this respect, commentators have noted the later intellectual contributions of this small northern country through the dissemination of the thoughts and values of the Scottish enlightenment later in the 1700s.³⁶

Important figures in the later articulation of the principle of Bar independence provide specific examples that support the inference that Scottish legal traditions helped

³³ *Ibid*, citing I Omond, *Lord Advocates of Scotland* 70 (1883)

³⁴ One exception is the work of Arthur Herman, *How the Scots Invented the Modern World* (New York: Three Rivers Press, 2001). His work notes the establishment of a distinct Scottish approach to law and philosophy, which continued to have effects on common law jurisprudence into the 1800s, at 87 – 105.

³⁵ “Great men went south drawn by the magnet of political power, and became in effect Britons, southern English in their interest...Men of family but of less fortune...were also increasingly drained from Scotland. The Armed Forces and the East India Company, where promotion depended on patronage, in particular provided occupation and opportunity for the ambitious Scot in the 18th century, in *Ibid*, at 251. The historical revisionism described by Luban, *supra* note 1, means an actual cause/effect relation at the time may be less important than the way such matters are interpreted or remembered after the fact.

³⁶ On the Scottish enlightenment in the mid-18th century see, for example, Anand Chitnis’s *The Scottish Enlightenment* (London: 1976). A well-known collection of essays on the topic is I Hont & M Ignatieff, eds *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (London: Cambridge University Press, 1983). *Supra* note 34.

shaped developing ideas about the role of lawyers.³⁷ For example, the careers of both Thomas Erskine in the late 1700s and Lord Brougham in the early 1800s are regarded as providing two key building blocks of the contemporary understanding of independence of the Bar.³⁸ Erskine is remembered best today for his defence against the state of high profile clients like Thomas Paine and Thomas Hardy, and as the originator of the ‘cab rank’ rule of lawyer professionalism. This rule stands for the proposition that, like the queue of taxis, lawyers must similarly accept the next client in line.³⁹

For his part, Brougham is perhaps best known for his defence of Queen Caroline in the 1820s,⁴⁰ and his articulation of the lawyer’s duty of loyalty to clients in that case as a “zealous advocate.”⁴¹ Erskine was a Scottish noble whose family was deeply connected to the law.⁴² Brougham was also born in Scotland, was initially called to the Scottish Bar and practiced there before moving south to become a member of England’s Lincoln’s Inn

³⁷ Though these ideas were accepted only after the fact, in a later period when others sought to explain the developing role of lawyers. *Supra*, note 3 Girard, “Historical Perspective” at 59.

³⁸ *Ibid* at 60 – 65.

³⁹ Moreover, the principle also stood for the idea that “a lawyer cannot refuse a brief offered to him because of its palatability, political or otherwise”, *ibid* at 63. In Canada, this tradition has never been strictly followed, *supra* note 5 Woolley *et al*, *Lawyers’ Ethics* at 167. In England this principle is variable and lawyers have a number of ways to screen out certain clients, see, for example, HHA Cooper, “Representation of the Unpopular: What can the Profession do about this Eternal Problem” (1974) 22:10 Chitty’s L J 333 at 338.

⁴⁰ 2 Trial of Queen Caroline 3 (1821). See also Monroe H Freedman, “Henry Lord Brougham and Zeal”, *Hofstra Law Rev*, Vol 34, No 4 1319.

⁴¹ *Ibid*, Brougham’s remarks in the trial of Queen Caroline have stood as the epitome of the ‘zealous advocate’. It appears Brougham’s intent was to allude to the evidence that King George IV wished kept hidden, that his previous secret marriage to a Catholic may have clouded his entitlement to the Crown. The intention and meaning behind Lord Brougham’s ‘zealous advocacy’ have themselves been the subject of reconceptualization and discussion, see, for example, Fred C Zacharias and Bruce A Green. “Anything Rather Than a Deliberate and Well-considered Opinion – Henry Lord Brougham, Written By Himself”, (2006) 19 *Geo J Legal Ethics* 1221.

⁴² His brother, Henry Erskine, was later appointed Lord Advocate, a similar position to that of Lord Chancellor in England, see David Lemmings, “Erskine, Thomas, first Baron Erskine (1750 – 1823” in *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004).

in 1807.⁴³ Both later held the position of Lord Chancellor, historically the highest legal office in Britain.⁴⁴ The Scottish background, legal training and experience of Erskine and Brougham undoubtedly informed, in part at least, their understanding of the role of legal advocates, and their views have now been accepted as important components of the principle of lawyer independence and professionalism.

Scottish conceptions about the role of independent lawyers also had roots outside Great Britain. While the traditional roots of independence of the Bar may have had some bases in the English Inns of the Court, some of these ideas about law, justice and the role of lawyers were connected to developments in other countries. In this respect, of note as well is the likely influence of foreign education and training of the early Scottish lawyers. For example, political ties outside of Scotland up to the 1600s led many initially to French law schools and later to Dutch law schools.⁴⁵ As noted by legal historian Nan Wilson, “this custom of foreign study and education provided Scots Judges and advocates of the past with a more cosmopolitan and European outlook on legal and social problems.”⁴⁶

This wider outlook on the law is consistent with the comparative observation that demonstrates the development of independent lawyer traditions outside Great Britain. For

⁴³ Michael Loggan, “Brougham, Henry Peter, first Baron Brougham and Vaux (1778 – 1868) in *Oxford Dictionary of National Biography*, *ibid.*

⁴⁴ Lord Chancellor was historically a member of cabinet and leader of the profession and even after recent legislative changes in the U.K., remains an important office in British legal culture.

⁴⁵ *Supra* note 28, Wilson, “Scottish Bar” at 238 citing TB Smith, *Studies Critical and Comparative* 28, 33, 51, 71 (1962) and Boswell in Holland *passim* (Pottle ed 1952).

⁴⁶ *Ibid.*

example, in their accounts of the development of lawyer independence and its association with liberal democratic principles, Karpik and Halliday have traced the historical roots of the idea of autonomous lawyers. Outside the United Kingdom they note the development of independent lawyer roles within the *ancien regime* in pre-revolutionary France.⁴⁷ Observations about the development of the principle of independence for lawyers in France might lie outside the traditional narrative about the continuity between British common law and most of Canadian legal culture; however, this traditional view neglects the fact that Canada has, at least,⁴⁸ a dual legal heritage that rests on both English common and French civil law traditions.

While notions about the principle of independent lawyers may have been received indirectly and assimilated over time, until the British Conquest in 1763, it is likely that at least some aspects of this European concept of independence of the Bar were also conveyed to the colony of Quebec and other French holdings in the New World.⁴⁹ This may help to explain further alternative sources of the principle that rest on the observations that some of the modern features of independent legal professionalism developed in Canada itself.

⁴⁷ *Supra* note 7, Karpik & Halliday, *Lawyers*.

⁴⁸ “Canada’s legal history precedes Confederation by some centuries and includes the traditions of many First Nations, as well as French, English, Scottish, and British inheritances” “Writing Canadian Legal History: Origins” (2013) 37:1 Man LJ 85 – 100 at 85 [Girard, “Origins”]. See also for example, Guth & Pue, “Canada’s Four Legal Inheritances”,(1996) Man LJ 23 at 654 – 688; Guth & Pue, *Canada’s Legal Inheritances* (Winnipeg: Canadian Legal History Project, 2001).

⁴⁹ This includes the northern North American colonies of Quebec and Acadia, *Ibid*, Girard, “Origins”.

3.3 Early Development of Independence of the Bar in Canada

Starting in the 1730s, Quebec had developed its own structured program of legal education and accreditation.⁵⁰ In Quebec, “this system of licensing by the executive on the successful completion of a structure academic program was established firmly by the time of the Conquest.”⁵¹ Things changed somewhat in the years following the advent of British rule in 1763. At this time, Quebec had no Inns of the Court and the power to appoint lawyers resided with the Governor.⁵² However by 1785, influential French Canadian lawyers, who were familiar with the old system, succeeded in obtaining a partial return to the earlier practice of education and training. An ordinance issued at that time noted:

the welfare and tranquility of families and the peace of individuals require as an object of the greatest importance that such persons only should be appointed to act and practise as barrister, advocates, solicitors, proctors and notaries who are properly qualified to perform the duties of those respective employments.⁵³

Traditional histories of independence of the Bar in Canada also usually observe the establishment of the Law Society of Upper Canada in 1797 as a significant institutional marker in the development of the principle of independent professionalism

⁵⁰ G Blaine Baker, “Legal Education in Upper Canada 1785 – 1889” [Baker, “Legal Education”] in David H Flaherty ed *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, 1981) [Flaherty, *Essays*]. Baker notes at 60 “Canada’s first structured program of legal education was initiated by Louis Guillaume Verrier, an expatriate Parisien [*sic*], in 1733” citing E Fabre-Surveyor, “Louis-Guillaume Verrier”, *Revue d’histoire de l’Amérique française* VI (1952 – 53) 159. Baker goes on to say, “Verrier’s lectures led directly to the inauguration in 1744 of a system of licensing.”

⁵¹ *Ibid*, Baker “Legal Education” at 60.

⁵² *Ibid*.

⁵³ (1785) 25 Geo III, c 4 (Que), preamble Reproduced in *Ordinances Made and Passed by the Governor and Council of the Province of Quebec, 1763 – 1791*, 2 vols (Ottawa 1917) II 165.

and of self-regulation.⁵⁴ In fact, several of the inaugural Benchers of the new Law Society in Upper Canada and early members of its legal community received their training and education under the old system in place in Quebec.⁵⁵ By the early 1800s in Upper Canada, the resulting amalgam of different experiences and concepts of independence was a “confluence of traditions” that led to “the refinement and perpetuation of a distinctive Upper Canadian vernacular in law training and governance of the profession in the century that followed.”⁵⁶ Consequently, it appears that some of the early roots of the principle of independence of the Bar came from within Canada.

The connection between the independence of the Bar in Canada and England’s traditional Inns of the Court is also less certain than traditional histories assert. For example, in legal historian Philip Girard’s analysis, the roots of independent legal professionalism in Canada lay not with the barristers of the English Inns of the Court, but instead with the attorney and solicitors branch of the profession.⁵⁷ Similar to the role of Canada’s professional lawyer organizations today, the attorneys and solicitors branch of the profession in England had their own professional body, the ‘Society of Gentleman Practisers in the Courts of Law and Equity.’⁵⁸ Founded in 1737, this organization had

⁵⁴ *Supra*, for example, Christopher Moore, *The Law Society of Upper Canada and Ontario Lawyers, 1797-1997*, (Toronto: University of Toronto Press, 1997), [Moore, *Law Society*].

⁵⁵ *Supra* note 50, Baker, “Legal Education” at 60.

⁵⁶ *Ibid* at 59.

⁵⁷ Admission involved keeping a term at an Inn and eating a certain quota of meals. There were no qualifying or final examinations until the late 1800s. The worst disciplinary sanction that an Inn could impose “was exclusion from the circuit mess, not disbarment,” *supra* note 3, Girard, “Historical Perspective” at 51, citing Raymond Cocks, *Foundations of the Modern Bar* (London: Sweet & Maxwell, 1983) [Cocks, *Foundations*].

⁵⁸ It “gave rise to the London Law Institution in 1823, emerging in 1825 as a rebranded body with national pretensions known as “The Society of Attorneys, Solicitors, Proctors and other not being Barristers, practicing in the Courts of Law and Equity of the United Kingdom. Granted at Royal Charter in 1831 and

several different names and official recognitions over the years, but had responsibility in England for what have been considered the “lower branches” of the legal profession. This self-regulating body was officially named the “Law Society” in 1903, was subject to statutory regulation, and had other features more associated with modern notions of legal professional regulation in Canada.⁵⁹ Despite the historical treatment in Canada of ‘lawyers’ as a unitary class and their long association with barristers at the English Inns of the Court, independence of the Bar, as it developed in British North America, also has some roots in the other branches of the profession.⁶⁰

The recognition of the contributions of the attorneys and solicitors branch of the profession raises as interesting point about the principle and practicality of the independence of the Bar in Canada. In contemporary times, some commentators have asserted that approaches to law and legal professionalism have become increasingly “fragmented” by both specialization and a plurality of new perspectives introduced by increasing diversity amongst lawyers.⁶¹ But in a very real sense, historically there has always been a degree of ‘fragmentation’ of different kinds of legal professionals.

another in 1845, this ‘Law Society’ took an increasingly important roles in professional life for the ‘lower’ branches of the legal profession.” *Ibid* at 93

⁵⁹ *Ibid*. Such features include a set educational function and an apprenticeship, responsibility for self-regulation in disciplinary matters, as well as examinations prior to admission, *infra* note 65.

⁶⁰ “North American lawyer regulatory regimes are also distinctive in their maintenance of a single, unified occupation of “lawyer”, Semple, Noel, Core Values: Professionalism and Independence Theories in Lawyer Regulation (May 8, 2013). Available at SSRN <<http://ssrn.com/abstract=2262518>> at 1 [Semple, “Core Values”]. Much of the work in the paper has been further developed in Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions*, (Edward Elger Publishing: 2015) [Semple, *Legal Regulation*].

⁶¹ “From its elite status at Confederation, the legal profession has become increasingly fragmented, both in terms of diversity (different people and forms of organization) and stratification (a hierarchical order to such diversity)”, Allan Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed, (Toronto: Irwin Law, 2006) at 37 – 38 [Hutchinson, *Legal Ethics*].

Within the practice of law in Canada, some of the distinctions between different kinds of legal professionals continue to be apparent. There are and have always been several distinct kinds of ‘Barrister’ and ‘Solicitor’. Certainly in the modern day, a real estate lawyer doing solicitor’s work in land conveyances requires substantially different sets of practice skills from a policy lawyer, developing public positions and engaging in public advocacy on behalf of a non-profit agency.⁶² In contemporary times, lawyers in all organizational settings, public and private, also may face special challenges to their independence, not shared by sole practitioners.⁶³

Moreover, historical differences between branches of the profession are also mirrored today by the existence of non-lawyer legal professionals in Canada. In addition to differences in legal culture occasioned by its civil law tradition, the province of Quebec also has a recognized additional class of legal professionals.⁶⁴ Moreover, in Ontario, the Law Society now regulates and licences ‘paralegals,’ a recognized class of legal advocate that now shares many of the institutional features of traditional lawyer self-regulation.⁶⁵ Notwithstanding modern concerns about the increasing heterogeneity of

⁶² Hutchinson makes a similar point, *supra* note 61, at 38 – 39.

⁶³ “Lawyers working in corporate or other organizational contexts build relationships with clients that may not fit neatly within the traditional paradigm of a sole practitioner or a lawyer in a law firm representing individuals”, *supra* note 5, Woolley *et al*, *Lawyers’ Ethics*, at 427. Fragmentization resulting from increasing lawyer specialization presents significant challenges to a unitary conception of lawyers and their regulation.

⁶⁴ Some 4000 notaries in Quebec maintain their own distinct professional standing, but which is self-regulated under the provincial Law Society, *Le Barreau du Quebec*. All 14 territorial and provincial jurisdictions in Canada maintain their own professional organizations, operating under the umbrella of a national coordinating body known as the Federation of Law Societies of Canada, see <http://www.flsc.ca/>.

⁶⁵ Though the institutional features of self-regulation are “somewhat vague and imprecise. In essence, it refers to the control, direction, or governance of an identifiable group by rules and regulations determined by members of the group”, *supra* note 21, Woolley *et al*, *Lawyers’ Ethics* at 49. The Ontario government

approaches to legal advocacy, both historically and in contemporary times the ideal of Bar independence has always been more multi-faceted than can be explained by traditional narratives about the principle.

3.3.1 Liberalism, Law Societies and Elite Formation

Correlations between the historical development of lawyer independence and the advancement of liberal values in Canada are, at best, inconsistent. While some theories about independence of the Bar stress lawyers' ongoing roles to promote democratic ideals, there was a definite early degree of hesitancy amongst many about popular democracy as it arose in the late 18th and early 19th centuries. These general sentiments were perhaps best described in de Tocqueville's *Democracy in America*. In his view, American lawyers played an important role to protect *against* democracy, and the perceived risks of popular movements, which were presented as the danger of a tyranny by the majority.⁶⁶

Similar concerns were apparent amongst the early Bar in Canada whose colonial leaders also worried about the 'dangers' of democracy. These democratic dangers

passed legislation in 2006 to provide for the licensing and regulation of paralegals by the Law Society of Upper Canada –see *Access to Justice Act, 2006*, SO 2006 c 21, that amended the *Law Society Act*, RSO c L 8 [“*Law Society Act*”], to permit the licensing and training of paralegals effective May 1, 2007. See also The Law Society of Upper Canada, “Five-Year Report to the Attorney General”, (Toronto: The Law Society of Upper Canada, 2012) at 21. In British Columbia, there are also several hundred notaries, who have a separate statutory grant of authority to perform some legal services, see *Notaries Act*, RSBC 1996 c 334, though there are current reform efforts to bring the independent notaries under the regulation of the provincial law society, see Law Society of British Columbia, *Final Report of the Legal Service Providers Task Force* (December 2013) available online:

http://www.lawsociety.bc.ca/docs/publications/reports/LegalServicesProvidersTF_final_2013.pdf

⁶⁶ Alexis de Tocqueville, *Democracy in America* (New York: Adlard and Saunders, 1831) at 356.

included “excesses,” which were sometimes attributed as causes of the American Revolution.⁶⁷ In this respect, there is little doubt that the lawyer-leadership of British North America was mindful of the effects of the Revolutionary War in the U.S.,⁶⁸ which had set a pattern for ‘democratic’ challenges to the established orders around the world for years to come.⁶⁹ The developing context of regime change during the late 18th century set the political stage for the creation of a distinct organizational framework that is the basis for the institutional independence of the Bar in Canada as a self-regulating profession.⁷⁰

The establishment of the Law Society of Upper Canada in 1797 was both “unorthodox” and “unprecedented” to the point that “anyone steeped in the jealously guarded traditions of the English common law should have found the whole transaction repugnant.”⁷¹ The Law Society of Upper Canada was a professional self-regulating body, authorized by statute, which had authority for admission to practice, education and

⁶⁷ Paul Romney, “From Constitutionalism to Legalism: Trial By Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture” (1989) 7:1 LHR 121 at 125.

⁶⁸ Though there is some historiographical debate about the relative priority placed on the perceived need for order versus developing liberal concepts, see discussion by Philip Girard “Liberty, Order, and Pluralism: The Canadian Experience” in Jack P Greene ed, *Exclusionary Empire*, (Cambridge UP: 2012), at 160 – 163 [Girard, “Liberty”]. See also Donald Creighton, *The Commercial Empire of the Saint Lawrence 1760 – 1850* (Toronto: Ryerson Press 1937).

⁶⁹ In Upper Canada, historians trace the roots of political grievances back to the formation of the colony, “in the midst of mounting anxieties about the French Revolution and determination not to repeat the mistakes made in the American colonies...the province was tightly governed by appointed councils that also dominated the administration of law” in F Murray Greenwood & Barry Wright eds, *Canadian State Trials II: Rebellion and Invasion in the Canada’s, 1837 – 1839* (Toronto: University of Toronto Press for the Osgoode Society, 2002) at 18 [Greenwood & Wright “*State Trials II*”].

⁷⁰ Moore notes that “in 1797, it seemed to go against the trend of history to be seeking the extension of British legal tradition. The British Empire, rocked by the secession of the United States of America in 1783, was now also challenged by the revolutionary ideology and revolutionary armies of France”, *supra* note 54 at 14.

⁷¹ The territory was not referred to as ‘Ontario’ until after Confederation, Margaret A Banks, “The Evolution of the Ontario Courts 1788 – 1981” *supra* note 50 Flaherty ed “*Essays*”, 492 – 552.

discipline of its members. From this perspective, the creation of the Law Society of Upper Canada established a new form of self-regulation that “had no close analogues anywhere in the world.”⁷² The organizational structure created during this time also set a pattern which was eventually followed by the rest of Canada.

New Brunswick was another colony established, in 1784, as the result of the Loyalist migration. In contrast to Upper Canada, in New Brunswick lawyers “would have dismissed any legislative proposal which provided for anything beyond the general supervision of the chief justice...as a challenge to their dignity and an unseemly interference with the independence of the judicial system.”⁷³ As Moore observes of the later Canadian expansion into the west, “the new governing bodies there bore distinctively Ontarian traits. All of the western provinces and territories adopted the Ontario terminology of ‘Law Society,’ ‘bencher,’ ‘treasurer’ and ‘secretary’ and their governing bodies acquired powers and practices very similar to Ontario’s.”⁷⁴ The form of institutional independence of the Bar pioneered by the Law Society of Upper Canada is now the practice in all Canadian jurisdictions.⁷⁵

⁷² *Supra* note 54 Moore, *Law Society* at 27.

⁷³ *Ibid* at 29.

⁷⁴ *Supra*, note 44 Moore, *Law Society*, at 160.

⁷⁵ Though older jurisdictions do not always use the same language to describe their organizations. New Brunswick finally passed legislation to enable its Barrister’s Society and give it governance powers in 1845. By comparison, Nova Scotia passed similar legislation in 1848 and Quebec did so in 1885, *ibid* at 152, all 3 jurisdictions contained legal communities with an older heritage than Ontario’s. Also *supra* Cocks, *Foundations*; at note 57; D G Bell “The Transformation of the New Brunswick Bar 1785 – 1930: From Family Connection to Peer Control”, *Papers of the Canadian Law in History Conference*, Carlton University 1987; Philip Girard, “The Roots of Professional Renaissance: Lawyers in Nova Scotia 1850 – 1910” in Gibson & Pue eds *Glimpses of Canadian Legal History* (Winnipeg: Legal Research Institute of the University of Manitoba, 1991); W H Hurlbut, *The Self-Regulation of the Legal Profession in Canada and England and Wales*, (Calgary and Edmonton: Law Society of Alberta and Alberta Law Reform Institute, 2000), which describes the establishment of provincial Law Societies at 9 – 30 [Hurlbut, *Self-Regulation*].

The traditional emphasis on connections between the Inns of the Court and the Law Societies likely has its origins in the desire of the early colonists to maintain ties to the English legal system. However, in British North America there may also have been an appreciation amongst some of the legal elites of the ‘defective training’ the traditional English legal education provided.⁷⁶ By the late 1700s the Inns of the Court had largely abandoned their limited role to regulate the legal profession in England. There were no set education or training programs. The only explicit professional obligation on English barristers at the time was to eat a prescribed number of meals at the Inns. In terms of behaviour and discipline, members of the Inns followed only informal codes of etiquette. The most serious ‘disciplinary’ sanction an English Inn could impose on one of its members was to preclude them from dining.⁷⁷ Far from demonstrating the early attributes of modern ‘professionalism,’ an 18th century Inn of the Court appeared less a self-regulating professional body, at least as it came later to be understood in Canada, and more like a kind of social ‘supper club.’

The statutory creation of the Law Society of Upper Canada presented several advantages to the early Bar. Unlike its putative counterparts in England, the Law Society was created in 1797 with a specific goal of providing scrutiny over the training of advocates. Such scrutiny likely served a secondary goal of protecting local lawyers, by

⁷⁶ *Supra* note 50, Baker “Legal Education” at 121

⁷⁷ Admission to an Inn involved keeping a term at an Inn and eating a certain quota of meals. There were no qualifying or final examinations until the late 1800s. The worst disciplinary sanction that an Inn could impose “was exclusion from the circuit mess, not disbarment,” *supra* note 3, Girard, “Historical Perspective” at 51, citing *supra* Cocks, *Foundation* at note 57.

placing admission to practice firmly in the hands of the new body.⁷⁸ At a minimum, it was expected that this new institution might also create a respected local Bar, in addition to a well-trained judiciary, that would reduce the risk of appeals to Great Britain.⁷⁹ Such a system of legal training and licensing also had a third possible advantage in that it could preserve patronage opportunities for local elites.⁸⁰

From an early institutional perspective, the Law Society of Upper Canada conceived of itself as an educational body that was preoccupied with admission and training, perhaps as the necessary precursor to a deliberate program of elite formation.⁸¹ This view of the role of the legal regulator in Ontario history is consistent with some critical historical perspectives, which examine independence of the Bar and the subsequent development of legal ‘professionalism’. These critical historical perspectives suggest a tension in the developing concepts of lawyer independence, between the ‘lawyers and liberalism’ thesis and the protection of private and elite interests.

For the creation of a new ruling class in Upper Canada, the legal profession “was an obvious choice, for its function of administering the body of rules that regulated civil

⁷⁸ “The 1797 act cleverly protected this first, and ill qualified, Upper Canadian bar from being overwhelmed and dismissed by a few better-qualified legal gentlemen who might arrive from Britain”, *supra* note 54, Moore, *Law Society*, at 30.

⁷⁹ *Supra* note 50, Baker, “Legal Education” at 61.

⁸⁰ Flaherty notes that the judiciary became ‘Upper Canadian’ quickly as between 1805 and 1827, no English judge was sent to serve in the new colony in “Writing Canadian Legal History”, *supra* note 50, Flaherty, *Essays*, at 23.

⁸¹ “Benchers thought they were building an elite, which accounts for their preoccupation with admission and training”, *supra* note 50, Baker, “Legal Education” at 55.

relation within the polity made it an ideal nursery for future administrators.”⁸² Some historical-political accounts provide evidence of lawyer involvement in several events that reinforces the ‘elite formation’ hypothesis. These accounts provide a counterpoint to challenge associations between an independent Bar and the emergence of modern liberal values in Canada.

For example, in Upper Canada in the 1820s, the so-called ‘types riot’ saw law clerks attack and destroy the printing press of prominent reformer and government critic William Lyon Mackenzie. The consequence was to have the matter largely ignored by the government.⁸³ The Attorney General of the day, Beverly Robinson, chose not to lay criminal charges or otherwise discipline the legal clerks, who were directly employed by him.⁸⁴ In fact, Robinson personally sought to defend the attackers, later launching a libel prosecution on behalf of one of the clerks who had been identified by name by a critical journalist.⁸⁵ Nor was the Attorney General’s behaviour in this case exceptional. Throughout the 1820s and 1830s, the state often seemed more than willing to forgo legal niceties in the protection of elite interests.⁸⁶

⁸² Paul Romney “From the Types Riot to the Rebellion: Elite Ideology, Anti-Legal Sentiment, Political Violence, and the rule of Law in Upper Canada” (1987) *Ontario History* 113 [Romney, “Types Riot”], at 119.

⁸³ Robinson was later subjected to critical commentary by a reform dominated select Committee of the Assembly in 1828, *supra* note 54, Moore, *Law Society*, at 74.

⁸⁴ See, for example, G Blaine Baker, “‘So Elegant a Web’: Providential Order and the Rule of Secular Law in Nineteenth-Century Upper Canada” (1988) 38 *UTLJ* 184 [Baker, “So Elegant”]; Patrick Brode, “John Beverly Robinson: Bone and Sinew of the Compact” (Toronto: University of Toronto Press for the Osgoode Society, 1988).

⁸⁵ *Supra* note 82.

⁸⁶ Government’s confidence in the law was suggested by its complicity with informal “‘rough justice’ against Reformers” during this period, *supra* note 69, Greenwood & Wright, *State Trials II*, at 10.

While the creation or protection of elite interests may have been the focus of some of the historical figures involved, historical accounts that focus on developing or protecting elites must be balanced by the comparative reality of opportunity presented by legal training and practice in early British North America. In England or elsewhere in North America,⁸⁷ law was associated with the upper classes. By contrast, in Upper Canada, law was a “distinctly middle-class enterprise...that offered opportunities for social mobility to Upper Canadians of low and middling estate.”⁸⁸

The range of opportunities in law in British North America, comparatively rare elsewhere, appeared to have reflected broader social and economic prospects available in the new territory.⁸⁹ Ultimately, these chances for legal education did succeed in training a leadership for the new colonies, and placed them in a position to take powerful roles within the community throughout the 1800s.⁹⁰ For example, by 1867 fully half of the

⁸⁷ See, for example, GW Gawalt, *The Promise of Power: The Legal Profession in Massachusetts 1760 – 1840* (Westport: 1979); Jerold S Auerback, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: 1976).

⁸⁸ *Supra* note 50, Baker, “Legal Education” at 56. Baker also notes as evidence for this proposition that “the occupations of the parents of many candidates admitted as students-at-law were catalogued in the ‘Minutes’ as ones like blacksmith, wharfinger, farmer, stonemason, or labourer...the ranks of Upper Canada’s legal elite were relatively open, and the occupational status of lawyers was not exclusively an inherited one”.

⁸⁹ In commenting on the arrival of the family of Canada’s 1st Prime Minister, Richard Gwyn, has noted, “a respectable claim can be made that in one vital respect, the country Macdonald’s parents were taking him to was more democratic even than the United States, that great experiment in egalitarianism”, *John A: The Man Who Made Us* (Toronto: vol I, 1815 – 1867, at 15 [Gwynn, *John A*]).

⁹⁰ “No one in 1797 had feared that the Law Society or the lawyers were too powerful...but in a quarter of a century the Law Society had helped Upper Canada’s lawyers reach the point where [some] could begin to think their power was dangerous...”, *supra* note 54, Moore *Law Society*, at 64. *Supra* note 84 Baker “So Elegant” who, at 188-189, observes that the provisions of the legislation providing for the Law Society, *An Act for Better Regulating the Practice of the Law* (1797) 37 Geo III, c 8 (UC), provided that members of the Law Society were ‘to assist their fellow subjects as occasion may require and to support and maintain the constitution of the said Province.’ He also argues that ‘constitution’ in this context was shorthand for social order based upon very limited democratic values, theism, and a graduated social hierarchy. While some have argued that this made lawyers the tools of elite interests that ruled the province, as I set out in the remainder of the chapter this viewpoint must be balanced against those accounts that highlight lawyers who sought to protect more liberal and democratic interests.

‘Fathers’ of Canadian Confederation were lawyers, many of whom, like the first Prime Minister, John A. Macdonald, had received their legal education and training in Canada.⁹¹

In this vein, some scholars have also noted the historical prominence and involvement of lawyers in Canadian political culture.⁹² For example, joining Prime Minister Macdonald in that first House of Commons after Confederation, other lawyers made up fully 25 percent of the membership.⁹³ At the leadership level in politics throughout Canadian history the involvement of lawyers is more pronounced and continues to the present day, with 15 of 23 Prime Ministers since Confederation having been lawyers.⁹⁴ There is some evidence that the high participation rates of lawyers at the federal level was also mirrored by substantial involvement of lawyers in politics at the local level.⁹⁵ As an historical matter, lawyers have always been closely involved in

⁹¹ Though there remains some dispute as to who should be considered a “Father of Confederation”. Archives Canada lists the 36 separate participants of one or more of 3 conferences at Charlottetown, Quebec and London in the 1860’s, 18 of which had legal training, see Library and Archives Canada, available online: <http://www.collectionscanada.gc.ca/confederation/023001-3010.22-e.html>.

⁹² Carol Wilton, “Introduction: Beyond the Law – Lawyers and Business in Canada, 1830 to 1930 in Carol Wilton ed, *Essays in the History of Canadian Law Volume IV*, 3, at 23, where Wilton suggests part of the explanation may be grounded in the high participation rates of lawyers in community associations [Wilton, “Introduction”] [Wilton, *Essays IV*]. Wilton also notes a study that observes countries with a strong social democratic tradition have lower percentages of elected lawyers compared to countries where parties at the centre of the political spectrum are dominant, cited to Dietrich Rueschemeyer, *Lawyers and Their Society: A Comparative study of the Legal Profession in Germany and in the United States*, (Cambridge MA: Harvard University Press, 1973) at 72 – 74.

⁹³ *Ibid* Wilton, “Introduction”.

⁹⁴ John A Macdonald, John Abbott, John Thompson, Wilfred Laurier, Robert Borden, Arthur Meighen, R B Bennett, Louis St Laurent, John Diefenbaker, P E Trudeau, John Turner, Brian Mulroney, Kim Campbell, Jean Chretien and Paul Martin.

⁹⁵ *Supra* note 95, Wilton, *Essays IV*, Elizabeth Bloomfield, “Lawyers as Members of Urban Business Elites in Southern Ontario, 1860 - 1920” 112 at 135 – 139, where the author tracks lawyers’ representation on municipal councils in 2 smaller Ontario communities in the late 1800’s [Bloomfield, “Lawyers”]. Also *supra*, for example, the similar descriptions of community involvement by lawyers in Alberta in the early 1900s in the same volume, Joseph Swainger, “Ideology, Social Capital, and Entrepreneurship: Lawyers and Business in Red Deer, Alberta, 1900 to 1920” 377 at 388 – 392 [Swainger, “Ideology”].

political matters and, in Canada, may have been trained to expect a leadership role in politics as part of their professional legal education.⁹⁶

However, while the opportunities for legal education in early Canada may have succeeded in creating some elites, it also served to train some of its most notable reformers, like Marshall Spring Bidwell, who as a lawyer and politician led numerous reforms in Upper Canada and worked closely with the leader of the Rebellion of 1837, William Lyon Mackenzie.⁹⁷ In this respect, the direct and indirect influence of these reformers on the political and social developments that led to the establishment of the Canadian state were profound and later had effects that were felt throughout the British Empire.⁹⁸ The work of legally trained reformers also highlights the many cleavages and tensions that existed amongst lawyer-trained political elites throughout Canadian history.⁹⁹

A good example of this tension in the latter half of the 19th century occurred between Ontario's Liberal Premier, Oliver Mowat,¹⁰⁰ and Conservative Prime Minister

⁹⁶ Melanie Brunet, "Good Government, without Him, is Well-Nigh Impossible": Training Future (Male) Lawyers for Politics in Ontario, Quebec, and Nova Scotia, 1920 – 1960", [Brunet, "Good Government"], in N Backhouse & W Pue eds *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2015) at 49 [Backhouse & Pue, *Promise and Perils*].

⁹⁷ Bidwell served as Mackenzie's counsel during the litigation resulting from the 'Types Riot', *supra* note 86 and http://www.biographi.ca/en/bio.php?id_nbr=4834; also *supra* note 4, Moore *Law Society*, at 97 - 98

⁹⁸ *Supra* note 89, Gwynn, *John A*, where at 96 the author notes in relation to the Durham Report following the Rebellions of 1837 – 1838, "[The] recommendation for Responsible Government began a fundamental reordering of the Empire, and it set the political maturation of the British North American colonies in motion".

⁹⁹ Interpretations that regard historical developments as exclusively the result of elite manipulation and control neglect the fact that elites at this time "lacked sufficient solidarity" as well as "popular support" to consistently enforce their views, *supra* note 69, Greenwood & Wright, *State Trials II* at 6.

¹⁰⁰ See "The Political Economy of Decentralization" in Garth Stevenson ed, *Unfulfilled Union: Canadian Federalism and National Unity*, 4th ed (Montreal: McGill-Queen's University Press, 2004) 72 – 93,

Sir John A. Macdonald.¹⁰¹ Lifelong colleagues in law,¹⁰² the earliest clashes of these two men over federal and provincial jurisdictions within the newly formed Canadian Confederation shaped modern understandings of decentralized federalism.¹⁰³

From an elite formation perspective, there were likely many amongst the early colonial leadership who saw themselves as the ‘guardians’ of the established social and political order. However, while some lawyers sought to reinforce the *status quo* implied by linkages with the traditions of the English Bar, the relatively open availability of legal education also provided a chance for those opposed to the entrenched order.

3.3.2 Unpopular Causes and the Last Lawyer in Town

In terms of the development of Bar independence, opposition to entrenched or established interests is often linked to individual lawyers defending clients against the state. One relatively well developed area of historical study underlines the political nature

particularly at 76, where the author notes “under the skilful leadership of Oliver Mowat the government of Ontario became a rallying point for those who opposed the National Policy” [Stevenson, *Unfulfilled Union*].

¹⁰¹ The political strife between Mowat and Macdonald became intensely personal, with Mowat directly arguing matters in Britain before the Judicial Committee of the Privy Council and with Macdonald dubbing Mowat “the little tyrant”, see *Loyal No More: Ontario’s Struggle for a Separate Destiny* (Toronto: Harpers Collins Publishers Ltd, 2001) at 47 – 50.

¹⁰² Mowat served articles in Macdonald’s Kingston law office in the 1840’s, along with a 3rd ‘Father’ of Confederation, Sir Alexander Campbell, who also later served as federal Justice Minister during the trial of Louis Riel, *supra* note 89, Gwyn, *John A.* See also Richard Gwyn, *Nation Maker, Sir John A Macdonald: His Life, Our Times Volume Two 1867 – 1891* (Toronto: Random House, 2011), at 458 [Gwyn, *Nation Maker*].

¹⁰³ “The reasons for the struggle are debatable. The contest took place on a wide range of battlegrounds, including newspapers, elections platforms, legislatures, and courts. By 1900, Ontario and Mowat had triumphed. The results in the courts were a measure of that triumph – the provinces won most of them, by far” in P Macklem, RCB Risk *et al*, *Canadian Constitutional Law*, 2nd ed, (Toronto: Emond Montgomery Publications Limited, 1997), “The Late Nineteenth Century The Canadian Courts Under the Influence”, 45 – 77 at 46.

of independent lawyering and illustrates the developing role of criminal defence lawyers. One of paradigmatic dilemmas in lawyer independence and professionalism is the “last lawyer in town” scenario.¹⁰⁴ That is, without sufficient independence which includes a public duty to act on behalf of clients with unpopular causes, some citizens will face the prospect of legal proceedings without representation. The capacity and frequency of the legal profession to take up such causes over time is consequently one marker in the development of independence of the Bar. The most common manifestation of this challenge occurs in matters where individuals require a legal defence against allegations from the state.¹⁰⁵

Prior to 1830 most criminal matters in England proceeded as private prosecutions and did not employ state counsel. The exception to the use of state prosecutors was where criminal charges included allegations of treason. The use of professional advocates by the Crown in treason trials created a perception of “unfairness,”¹⁰⁶ which resulted from having an accused facing a legally trained professional. This perceived unfairness ultimately led to the passage in England of the *Treason Trials Act*¹⁰⁷ in 1696 that provided for, *inter alia*, defendants’ right to trial counsel.¹⁰⁸ The introduction of

¹⁰⁴ *Supra* note 61, Hutchinson, *Legal Ethics*, at 77. The dilemma appears to have two dimensions. For the client the capacity of lawyers to choose whom they represent means the client may be left with no counsel and no choice in counsel as Hutchinson notes. From the alternate perspective of counsel, choice of client implicates the public duty of lawyers not to select clients on the basis of the popularity of their causes.

¹⁰⁵ Henry Erskine’s defence of Thomas Paine in the late 1700’s and Lord Brougham’s defence of Queen Caroline in the 1820’s are early examples, *supra* notes 38 - 44.

¹⁰⁶ *Supra* note 3, Girard “Historical Perspective” at 56. Generally, see Douglas Hay, “Controlling the English Prosecutor (1983) 21 Osgoode Hall L J 165; Douglas Hay, “The Criminal Prosecution in England and its Historians” (1984) 47 Mod L Rev 1.

¹⁰⁷ *An Act for regulateing of Tryals in Cases of Treason and Misprison of Treason*, (1696 -7) 7 & 8 Will 3 c 3.

¹⁰⁸ John H Langbein, *The Origins of the Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) at c 2.

defendant's counsel in treason trials 'set the stage' for the introduction of defence counsel in other felony matters.

However, as with other aspects of the principle of independence, the general use of legal counsel in criminal defence matters faced considerable resistance and took some time to become an established norm in England. In fact, this change only took place over the course of the next 140 years. The examples of Erskine and Brougham's defence of clients against the state in the 18th and early 19th centuries, noted above, are today considered important milestones in the developing role of independent lawyers as defence counsel.¹⁰⁹ However, given longstanding resistance to the use of defence counsel in England, the actions of Brougham and Erskine were exceptional in their times.¹¹⁰

Even later into the 1830s, general reforms permitting defendant's counsel to appear in criminal matters were opposed by most of the judiciary and the Bar in England. Such measures only passed into law as part of the broader political agenda championed by the Whig government of the day.¹¹¹ Though some observe a political motivation in these changes as part of a perceived need to curtail state abuses,¹¹² others suggest more

¹⁰⁹ It was not until much later in the 19th century that Erskine's view of the role of the Bar was "widely accepted", *supra* note 3, Girard, "Historical Perspective" at 63.

¹¹⁰ *Ibid.* "These two cases stand relatively isolated during the long period of Hanoverian rule (1714 – 1837), a fact that should make us suspicious of how representative they are of contemporary understandings of independence of the Bar."

¹¹¹ In England, this change was finally secured by the passage of the *Prisoner's Counsel Act* in 1836. In Upper Canada, the equivalent legislation, the *Felon's Counsel Act*, was also passed in 1836, *supra* note 3 Girard, "Historical Perspective" note 3 at 59 and 69.

¹¹² *Supra* note 26 Lemmings, *Professors of Law* at 216 – 218. See also John Beattie, "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries", (1991) 9 *Law & Hist Rev* 221.

prosaic origins for the developing role of defence counsel. From this viewpoint, “the new role of defence counsel had emerged not as a result of any public campaign to ensure better protection of fundamental rights and liberties, or as the result of a crusading bar, but as an incremental and pragmatic adjustment to changes in prosecutorial practices in the eighteenth century.”¹¹³

One substantial explanation for the emergence of lawyer independence was that it arose, in part at least, as a practical response to gradual changes in the English justice system. In Canadian history, ‘state trials’ also provide some examples of how this aspect of independence of the Bar developed in the colonies.¹¹⁴ While lawyers sometimes played the role of ‘the last lawyer in town’ to defend clients against the state, in other cases, British North American lawyers’ historical responses and motivations sometimes appeared lacklustre or associated not with the liberal values their clients’ causes may have represented, but with their own self-interests.

One of the best known early state trials in Canadian history saw the prosecution of Nova Scotia’s Joseph Howe.¹¹⁵ Howe is best remembered today as a politician, fiercely

¹¹³ *Supra* note 3 Girard “Historical Perspective” at 59, where the author also notes the additional economic opportunities afforded to junior counsel by these changes. See also Allyson N May, *The Bar and the Old Bailey, 1750 – 1850* (Chapel Hill & London: University of North Carolina Press, 2003).

¹¹⁴ I employ the term ‘state trials’ broadly to encompass government sanctioned proceedings in which the state, or its elite representatives, responded in a way that suggests the defendants were challenging their sovereign authority or integrity, as well as the more usual instances of treason and sedition proceedings. For discussion, *supra* note 69 Greenwood & Wright, *State Trials II*. My definition falls within the taxonomy of ‘political trials’ developed in Otto Kirchheimer’s seminal work, *Political Justice: The Use of Legal Procedure for Political End* (Princeton: Princeton University Press, 1961).

¹¹⁵ Though whether Howe was defending against seditious libel or ‘mere’ criminal libel is still contested, see Lindsay M Campbell, “Licence to Publish: Joseph Howe’s Contribution to Libel Law in Nova Scotia” (2005) 29 Dal L J 79.

opposed to Confederation, who held multiple offices including as Premier, federal cabinet minister and Lieutenant-Governor of the province. However, before his political career, Howe was the self-taught son of a Loyalist immigrant, who believed fervently in British constitutional traditions and, as a publisher, ran the most influential newspaper of its day in Nova Scotia.¹¹⁶ The criminal proceedings involving Howe also provide an illustration of some of the historic limits placed on lawyers in these matters in Canada.

Amongst the legal community in Nova Scotia at that time, the local Bar had not yet adopted the modern institutional form of self-regulation by a Law Society.¹¹⁷ However, the Nova Scotian legal community had a relatively well developed local identity.¹¹⁸ In 1835, Howe faced a criminal libel charge for publication of materials that suggested extensive corruption by local officials. The response of the local government to the publication places this incident firmly within the scope of ‘state trials’ in Canadian legal historiography. In response, Howe consulted the local Bar, not a single member of whom thought the case winnable. As a result, Howe chose to represent himself.

¹¹⁶ J Murray Beck, “HOWE, JOSEPH,” in *Dictionary of Canadian Biography*, vol. 10, University of Toronto/Université Laval, 2003–, accessed February 20, 2015, http://www.biographi.ca/en/bio/howe_joseph_10E.html. Accessed February 20, 2015.

¹¹⁷ Beck, J M "" A Fool for a Client": The Trial of Joseph Howe." *Acadiensis* 3.2 (1974): 27 [Beck, “A Fool”]. Nova Scotia had earlier passed legislation to regulate lawyers, in 1811, but after a few years it was not renewed and modern professional regulation in that jurisdiction traces back to the formation of the Society of Nova Scotia Barristers in 1825, though it was not until 1858 that the Society was incorporated and not until 1899 that compulsory membership was required by practicing lawyers, Barry Cahill, “2011: a 200-year odyssey of regulating Nova Scotia’s legal profession” in Nova Scotia Barristers’ Society, *Society Record* (October, 2011) 18.

¹¹⁸ *Ibid*, like other eastern colonies, the Nova Scotia Bar first formed as an unincorporated voluntary association in 1825. *Supra* note 75, Hurlbut, *Self-Regulation*, at 9 – 30.

There may have been some strategy behind Howe's choice of self-representation. For example, up to this time in Nova Scotia, the tactics of defence counsel were limited. So, for example, defence counsel were prohibited from making closing addresses to the jury. As a non-lawyer, Howe was exempt from these restrictions.¹¹⁹ Upon the conclusion of the prosecution's case, Howe did not present evidence or call witnesses and his entire defence was in the form of an address to the Court.

At this time, a practising lawyer would not have been permitted to address the jury in this fashion. As a non-lawyer, Howe took full advantage of the procedural laxity he was afforded, ensuring his remarks lasted over 6 hours, over the course of 2 days. The jury hearing the matter took all of 10 minutes to find him 'not guilty.'¹²⁰ Despite the apparent unlikelihood of success if Howe had retained counsel, who would not have been able to employ what were tactics and rhetoric not accepted from lawyers in Court at the time, "it does not speak highly of the independence of the Nova Scotia Bar that no one came forward to act as counsel for him, even if only for moral support."¹²¹

In Canada, lawyers have also participated in state trials and proceedings involving allegations of treason. When in crisis, the pre-Confederation state in Canada often used Courts as a "political battlefield."¹²² Government reactions at times of stress suggest that

¹¹⁹ *Supra* note 121 Beck "A Fool" at 37. Lawyers in court were under traditional restrictions in their defence role that prevented them from certain tactics like making addresses. The law of libel at this time, which would have bound a legally trained advocate, also prohibited the introduction of evidence as to intent. As a self-represented litigant, Howe was not limited by these traditional constraints.

¹²⁰ *Ibid.*

¹²¹ *Supra* note 3, Girard, "Historical Perspective" and *Ibid.*, at 38.

¹²² "The sheer number and patterns of political trials in British North America" made the courts "a pre-Confederation political battlefield" *supra* note 72, Greenwood & Wright, *State Trials II*, at 6.

the role of lawyers in defending a more progressive constitutional order has been mixed. In Canadian history, there has often been a trend towards what can be described as a default ‘Baconian’ legal approach.¹²³ That is, times of social and political conflict have often led to a reflexive resort to an older legal tradition, one that values loyalty to the Crown more highly than the “legal partiality” that “characterized the culture of those who dominated colonial government and the administration of justice.”¹²⁴ This theme appears as an historical tension but can be traced to the emergence of the modern Canadian Bar, discussed later in this Chapter.

In some cases individual lawyers in Canada have historically also risen to the professional challenge of committing to unpopular causes in defence of those accused of treasonous acts.¹²⁵ One example is provided in the case of the rebellions in Lower Canada

¹²³ F Murray Greenwood, “Judges and Treason Law in Lower Canada, England and the United States During the French Revolution, 1794 – 1800” in eds F Murray Greenwood & Barry Wright *Canadian State Trials Volume I: Law, Politics, and Security Measures, 1608 - 1837*, (Toronto: University of Toronto Press, 1996), where the author notes, at 242, the ‘Baconian’ approach favours executive power despite the law in contrast to that typified by Edmond Coke who favoured upholding the law despite government desires.

¹²⁴ Rainer Baehr, “Trying the Rebels: Emergency Legislation and the Colonial Executive’s Overall Legal Strategy in the Upper Canadian Rebellion” in *supra* note 69 Greenwood & Wright, *State Trials II*, at 43. The resort to an older legal tradition that defers to the Crown, or state authority, may also reflect a more general Canadian cultural trait that shows “reverence for law and order and authority”, see Graham Parker, “Canadian Legal Culture” in Louis A Knafla ed, *Law and Justice in a New Land* (Toronto: Carswell, 1986) at 24.

¹²⁵ In addition to the *Canadian State Trials* series, edited by Greenwood & Wright, *supra* note 69 and 123, there is a 3rd volume, Barry Wright & Susan Binnie, *Canadian State Trials Volume III: Political Trials and Security Measures, 1840 – 1914* (Toronto: University of Toronto Press, 2009), and a 4th volume, *Canadian State Trials, Volume IV*, Barry Wright, Eric Tucker and Susan Binne eds, (Toronto: University of Toronto Press, 2015).

in the 1830s. Lewis Drummond¹²⁶ and Aaron Hart,¹²⁷ both well-established lawyers, attained ‘folk hero’ status for their defence of the largely French Quebecois rebels known as *patriotes*. In Upper Canada, John A. Macdonald played a similar role in defending accused persons in the Kingston treason trials and courts martial proceedings following the Rebellions of 1837–1838.¹²⁸

As the later founder of the modern nation state of Canada, Macdonald’s life and politics have been the *main d’oeuvre* of several biographers over the years, though few have considered in detail his professional career as a lawyer.¹²⁹ As a new call to the Bar in 1836, Macdonald already had gained significant experience as a commercial lawyer. His switch to criminal law in the mid-1830s from his far more lucrative pursuit of commercial law, has consequently presented something of a puzzle to some historians.¹³⁰ An understanding of the emerging independent role of lawyers at this time and how it may have affected the future first Prime Minister’s involvement with the law does however suggest one explanation.

¹²⁶ Called to the Bar in 1836, Drummond’s notoriety in defending the *Patriotes* led to a political career in which he supported Louis-Hippolyte La Fontaine, and later was appointed a judge of the Court of the Queen’s Bench by John A Macdonald in 1864. Little, “DRUMMOND, LEWIS THOMAS,” in *Dictionary of Canadian Biography*, vol. 11, University of Toronto/Université Laval, 2003–, accessed February 18, 2015, http://www.biographi.ca/en/bio/drummond_lewis_thomas_11E.html. Accessed February 18, 2015.

¹²⁷ Hart was the 1st Jewish lawyer called to the Bar in the Canadas, Denis Vaugeois, “HART, AARON EZEKIEL,” in *Dictionary of Canadian Biography*, vol. 8, University of Toronto/Université Laval, 2003–, , http://www.biographi.ca/en/bio/hart_aaron_ezekiel_8E.html, accessed February 18 2015.

¹²⁸ “His decision to represent the prisoners... was a courageous political gamble, particularly given the state of local feeling after the Prescott invasions”, see Barry Wright, “The Kingston and London Courts Martial” in *supra* note 69, Greenwood & Wright, *State Trials II*, at 136.

¹²⁹ One short exception is HRS Ryan, “Sir John A Macdonald, the Young Lawyer’ in MM Cohoe, ed *Sir John A Macdonald, 1815 – 1891* (Kingston, On: Historical Society 1991), 76 – 82.

¹³⁰ *Supra* note 89, Gwyn John A, who notes, “his reasons for the switch can only be guessed at, because no record of his motive remains,” at 49.

Born in 1815, as a boy Macdonald immigrated with his family to British North America in the 1820s from Scotland. As part of his early legal education, Macdonald would undoubtedly have been familiar with important legal cases and developments in Great Britain¹³¹ and was likely aware of the achievements of Scottish compatriots like Brougham and Erskine, described above.¹³² Moreover, the Whig reform agenda in England, which had enlarged the role of criminal defence counsel in Britain at the time, was mirrored in Upper Canada by the passage of the *Felon's Counsel Act* in 1836.¹³³ As in England, this legislation afforded expanded opportunities for criminal defence counsel in Upper Canada thereafter. Together with the past examples provided by English lawyers, who had defended high profile criminal matters to great acclaim, the new opportunity for both legal work and for notoriety was likely very inviting for the young politician. In the end, with the positive reviews of his qualified success as criminal defence counsel in these proceedings,¹³⁴ Macdonald used his turn to criminal law practice to ensure his “rapid rise to prominence.”¹³⁵

¹³¹ In the Courts Martial proceedings in 1839 in Kingston, for example, Macdonald demonstrated his appreciation of the statutory enhancements to the role of defence counsel by arguing in the case of client Nils Von Shoulz, that the Courts Martial proceedings stripped his client of the procedural protections of earlier legislation, *ibid* at 52 – 53.

¹³² *Supra* notes 38 – 44 and associated text.

¹³³ *Ibid*.

¹³⁴ Macdonald obtained acquittals for multiple clients in the treason trials that first occurred in 1838. However, in a later set of proceedings, conducted as Courts Martial, Macdonald was not successful. *Supra* note 135.

¹³⁵ *Supra* note 69 Greenwood & Wright, *State Trials II*, at 136. Though there may be some doubt as to Macdonald's overall legal professionalism, see James Careless, “Practising law came naturally to the young Sir John A”, *National Post*, April 17, 2017, retrieved online June 8, 2016, <<http://www.nationalpost.com/m/search/blog.html?b=news.nationalpost.com/news/canada/the-founding-father/practising-law-came-naturally-to-the-young-sir-john-a&q=illegal&o=728>>.

Macdonald's activities in the treason proceedings of the 1830s, were echoed almost 50 years later by another well researched 'state trial' that convicted Louis Riel in 1885, following Canada's Northwest Rebellion. In 1838, Macdonald had taken a risk to represent unpopular clients accused of treason, with some initial success. However, in later proceedings, also in 1838, the colonial government changed the process to institute courts martial proceedings against some defendants, which stripped them of many procedural protections.¹³⁶ The government also employed an ancient statute,¹³⁷ which guaranteed the death penalty on conviction. The specific decision to use the 1351 *Statute of Treasons*,¹³⁸ as well as procedural alterations by the government in the courts martial proceedings in 1838, to advantage the prosecution were all tactics employed by the Macdonald government in the trial of Louis Riel.

In 1885, the movement of Riel's trial from Winnipeg in the province of Manitoba helped to ensure that the jury would contain no potentially sympathetic francophone or Catholic members. In addition, the territorial court in Regina, where the trial was held, provided that the number of jurors would be reduced to 6 from the traditional 12. Moreover, the court was presided over by a stipendiary judge, who, in addition to lacking

¹³⁶ Such as the right to direct representation by counsel in the proceeding, resulting in the conviction and hanging of Macdonald's client, Nils Von Shoulz, who had led the Hunters' Lodge raid at Prescott Ontario, *supra* notes 128 and 131.

¹³⁷ This was the statute, from 1351, which is still on the books today, *The Statute of Treasons* (UK), 25 ed III, Stat 5, c 2.

¹³⁸ It was initially not clear in Riel's proceedings under what statutory authority the government had chosen to proceed, but the *Statute of Treasons* was the most onerous for the defence, since it made 'high treason' the most serious offence in law and guaranteed a death penalty upon conviction. Right Honourable Beverley McLachlin, P.C., "Louis Riel: Patriot Rebel" (2011) Man L J 35 No 1, 1 – 13, at 6 – 8 [McLachlin, "Louis Riel"]. Of the total of 72 people charged during these proceedings, only Riel was charged with high treason under this law. George Goulet, *The Trial of Louis Riel: Justice and Mercy Denied* (Toronto: Tellwell Publishers, 1999) at 48 [Goulet, "Trial"].

the protections of judicial impartiality was, by all accounts, not “a highly skilled lawyer or jurist.”¹³⁹

In 1838, Macdonald had played the archetypal role of the ‘last lawyer in town’ to defend individuals against the state. By 1885, the shoe, so to speak, was on the other foot and Macdonald and his former law clerk Alexander Campbell, now federal Attorney General,¹⁴⁰ had become the face of political power. As for the lawyers defending Riel, they received “mixed reviews” in what must have been difficult circumstances.¹⁴¹ The lead counsel, Charles Fitzpatrick, later himself became Minister of Justice and subsequently Chief Justice of the Supreme Court of Canada.¹⁴² Though the fairness of this example of what was an undeniably political state trial continues to be debated, for their part, Fitzpatrick and his defence team did succeed in convincing the jury to recommend clemency when Riel was ultimately found ‘guilty.’¹⁴³

¹³⁹ *Ibid* McLachlin “Louis Riel”, at 8; *Ibid* Goulet, “Trial” at 52 – 62. Gwyn notes, for example, that Judge Hugh Richardson’s charge to the jury was “grossly unbalanced” and “in several instances plain wrong”, *supra* note 102, Gwyn, *Nation Maker*, at 459.

¹⁴⁰ *Ibid*, McLachlin, “Louis Riel” at 8.

¹⁴¹ Including that Riel may have been delusional, see generally, Jean Teillet “Exoneration for Louis Riel: Mercy, Justice, or Political Expediency?” (2004) 67 Sask L Rev 359.

¹⁴² Gwyn notes that facing the Crown, under Macdonald’s Conservative government, Riel’s defence team consisted of prominent Liberals, including Fitzpatrick, who went on to be appointed Chief Justice of the Supreme Court of Canada in 1906, by Liberal Wilfred Laurier, after a successful career in politics, *supra* note 102 Gwyn *Nation Maker*, at 458. See also <http://www.scc-csc.gc.ca/court-cour/judges-juges/bio-eng.aspx?id=charles-fitzpatrick>.

¹⁴³ Gwyn concludes, for example, that by the “rough” standards of the time, the trial and its outcome were “acceptably fair”, *supra* note 102, Gwyn, *Nation Maker*, at 462. Unsuccessful appeals to the Manitoba Court of the Queen’s Bench and to the Judicial Committee of the Privy Council were followed by a rejection of the recommendation of clemency by Parliament, which led to Riel’s execution. *Supra* note 138, McLachlin, “Louis Riel”, at 10.

The emerging role of lawyers over time to defend clients in state trials, as highlighted in the foregoing examples, has been associated with the emergence of modern understandings of both an independent Bar and the rule of law in both law and politics. As described earlier, an influential strain of this scholarship has been identified as “lawyers and liberalism” theory,¹⁴⁴ which associates the appearance of more modern democratic forms with the work of independent lawyers. However, proceedings and the actions of individual legal actors in Canada suggests only qualified support for a correlation between the advancement of liberal values and the increasing independence of the Canadian Bar.

Ultimately, in Canada there has historically been a tension between the ‘lawyers and liberalism’ hypothesis and the association of lawyers and law with the protection of private, elite and state interests and values. This tension is apparent throughout the historical development of the principle of independence of the Bar in Canada, and influenced the emergence of the modern Bar, which is the focus of the next section.

3.4 Change, Challenges and Transformation of the Legal Profession in Canada

Historical accounts of the legal profession in Canada mark an increasing transformation of the profession starting in the mid- to late 19th century. During this

¹⁴⁴ Leading proponents of this view as a legal theory include, *supra* note 7, Terence Halliday and Lucien Karpik, though aspects of this hypothesis has some purchase in other disciplines like political science and public administration, for example, Peter Russell, *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw-Hill Ryerson, 1987); as well as legal scholar Lorne Sossin’s “Democratic Administration” in *The Handbook of Canadian Public Administration*, ed Christopher Dunn (Toronto: Oxford University Press, 2002) 77 – 99.

period, Canada's economy, business sector and industrial capacity moved toward modernization. This provided an abundance of new and profitable opportunities for legal professionals. For example, from 1857 to 1870 the population of southern Ontario increased by 12% but the number of lawyers doubled.¹⁴⁵ For several decades thereafter, growth in the number of lawyers outstripped demographic growth.¹⁴⁶ Throughout the country, there was a wide "variety of pursuits" available to those with legal training in diverse areas such as banking and real estate.¹⁴⁷

Early on in this process of modernization, the development and consolidation of industrial power in Canada also led to some initial resistance against monopolies.¹⁴⁸ In this respect, concerns extended to the issue of control over the legal profession and the provision of legal services. In Ontario, this led to failed attempts in the 1850s to limit and reduce the virtually exclusive authority of legal regulators to licence and admit lawyers.¹⁴⁹ Elsewhere in Canada, efforts to curtail the authority of Law Societies found limited success. For example, in 1850, Nova Scotia passed legislation that granted taxpayers the right to appear in court with all the privileges of a barrister, though such legislation did not stand for an extended period.¹⁵⁰

¹⁴⁵ *Supra* note 95 Bloomfield, "Lawyers" at 119.

¹⁴⁶ *Ibid* at 119 – 120.

¹⁴⁷ *Supra* note 95, Swainger, "Ideology" at 377.

¹⁴⁸ *Supra* note 3, Girard "Historical Perspective" at 72.

¹⁴⁹ RD Gidney and WPJ Millar, *Professional Gentlemen: The Professions in Nineteenth Century Ontario* (Toronto: University of Toronto Press, 1994) at 60 – 69. The Legislature of Ontario retained the authority to admit lawyers by special statute until 1939, *supra* note 3 Girard, "Historical Perspective" at 67, citing Curtis Cole, "A Learned and Honorable Body: The Professionalization of the Ontario Bar 1867 – 1929" (Ph D dissertation, University of Western Ontario, 1987).

¹⁵⁰ Though the legislation was subsequently revoked in 1864, see Philip Girard, "The Roots of a Professional Renaissance: Lawyers in Nova Scotia 1850 – 1910", (1991) 20 *Man L J* 148 at 153.

The end of the 19th century also saw the rise of a new form of legal organization, the large ‘law firm’. During this period, many larger Canadian law firms were started, though they remained for some time as essentially family operations. Such firms may have been especially “vulnerable” to challenges presented by “heirs and protégés who expected a large income for indiscernible contributions.”¹⁵¹ Increasing “specialization” and the “exigencies of practicing law in a country where distances were so great” may also have spurred on the trend towards larger legal enterprises.¹⁵² The move toward bigger firms may have been catalyzed by additional legal work in the growing business of corporate law, especially following the implementation of Macdonald’s National Policy.¹⁵³ Where once the model of work for an advocate was as a sole practitioner, by 1912 there were over fifty ‘large’ law firms throughout Canada, whose focus increasingly turned to the new opportunities afforded in commerce, but also in the widening scope of the lawyer’s role in society.¹⁵⁴

Historical changes at this time had effects on the nature of legal practice, but also on the actual and perceived independence of lawyers from their clientele.¹⁵⁵ For

¹⁵¹ *Supra* note 54, Moore, *Law Society*, at 197 – 198.

¹⁵² *Supra* note 92 Wilton, “Introduction”, at 20 – 21.

¹⁵³ “The project of economic development was national because of the continuing need in British North America for the financing that a national government could best acquire. The 1879 National Policy of Sir John A. Macdonald, based on immigration, Railways, and tariffs, continued an established Canadian vision...the nation-state was seen as the appropriate unity for political and economic development,” in Timothy Lewis, *In the Long Run We’re All Dead: The Canadian Turn to Fiscal Restraint* (Vancouver: UBC Press, 2003) [Lewis, *In the Long Run*] at 25.

¹⁵⁴ *Supra* note 3 Girard, “Historical Perspective” at 73 where the author notes “large” law firms were defined as those consisting of more than 5 lawyers.

¹⁵⁵ *Ibid.*, at 73 – 74.

example, in examining the nature of this shift in legal work in Winnipeg from 1899 to 1959, Dale Brawn concluded there was a “highly differentiated and stratified bar dominated by members of large law firms.”¹⁵⁶ What was true of legal practice in Winnipeg was likely reflected in other urban centres across the country and “there is no reason to believe that the Manitoba capital was exceptional in this regard.”¹⁵⁷

One consequence of this shift in legal work was an enhanced focus on client values which appeared to be adopted by the top of Canada’s legal hierarchy.¹⁵⁸ The independence of the Bar from client values raised serious fears about what in the modern vernacular would be called ‘client capture’¹⁵⁹ amongst some in Canada’s legal establishment. These concerns were especially applicable to the creation of a new ‘species’ of lawyer, the ‘in-house counsel,’ who was initially employed by large rail interests.¹⁶⁰ However, as the trend towards expansion of the legal profession progressed into the 20th century, fears about ‘client capture’ disappeared, or were at least submerged by the wave of opportunities presented in the developing country. In the words of Gordon, “lawyers were able to parlay narrow monopolies of services that business

¹⁵⁶ Dale Brawn, “Dominant Professionals: The Role of Large-Firm Lawyers in Manitoba” in Carol Wilton ed, *Essays in the History of Canadian Law*, vol VII, *Inside the Law: Canadian Firms in Historical Perspective* (Toronto: University of Toronto Press for the Osgoode Society, 1996) (Brawn, “Dominant Professionals”) at 394 – 395.

¹⁵⁷ *Supra* note 3, Girard, “Historical Perspective” at 73.

¹⁵⁸ *Supra* note 160, Brawn “Dominant Professionals”.

¹⁵⁹ Built on Stigler’s economic notions of regulatory capture, see “The Theory of Economic Regulation” 2 *Bell Journal of Economic Science*, no 3, 3 – 18, which suggests that regulation is acquired by the regulated group for its own benefit. See discussion of the capture critique in the context of modern lawyer regulation, in *supra* note 63, Semple, *Legal Regulation*, 116 – 132.

¹⁶⁰ Jamie Benidickson, “Aemilius Irving: Solicitor to the Great Western Railway, 1855 – 1872” in Carol Wilton, “Introduction” to Carol Wilton, ed *Essays in the History of Canadian Law*, vol VII, *Inside the Law: Canadian Law Firms in Historical Perspective* (Toronto: University of Toronto Press for the Osgoode Society, 1996) at 8.

needed and only lawyers could provide into broad business opportunities; and the opportunities, in turn, brought them new clients.”¹⁶¹

While increased size may have been a trend for law firms within Canada’s larger centres at this time, in the smaller towns and rural byways general practice was still the rule.¹⁶² The continued presence of so many sole practitioners and small partnerships before the turn of the century may have provided some counterweight against too close an association with client interests that was feared for in-house counsel and in the ever growing number of larger firms.¹⁶³ The relative diversity of practice, between big firms and small, and between different kinds of lawyer, suggest that there was significant and ongoing degrees of “fragmentation” in the legal profession, despite more modern concerns about heterogeneous approaches to lawyering.¹⁶⁴

Other aspects of modern ideas of lawyer independence,¹⁶⁵ like the traditional duty of loyalty and the nature of conflicts, may not have been so evident at the turn of the last century. For example, modern ‘professionalism’ scholars sometimes focus on the jurisprudential definition of the modern duty to avoid conflicts of interest, which arises

¹⁶¹ Robert Gordon, “A Perspective From the United States”, *supra* note 92, Wilton, *Essays IV* at 425 [Gordon, “Perspective”].

¹⁶² *Supra* note 54, Moore *Law Society* at 198.

¹⁶³ *Supra* note 95, Bloomfield “Lawyers”, notes that while the legal system was still very decentralized and between 1860 and 1900, there was in Ontario a “golden age of local legal services for smaller cities, towns, and villages in the last third of the nineteenth century”, at 113.

¹⁶⁴ *Supra* notes 62 – 64 and associated text.

¹⁶⁵ Most recently the Supreme Court of Canada has recognized an aspect of a lawyer’s duty of loyalty, the duty of commitment to a client’s cause, as a fundamental principle of justice, deserving protection under certain sections of the Canadian *Charter of Rights and Freedoms*, see *Canada (Attorney General v Federation of Law Societies of Canada*, 2015 SCC 7, released February 13, 2015, [FLSC v AG], particularly at paras 84 – 113.

out of the duty of loyalty to the client.¹⁶⁶ However, in the early 1900s the idea of ‘conflicts’ was not well developed and there were “few” constraints on at least some lawyers, who readily mixed personal, financial and public interests. Wilton notes for example, the case of J.M. Gibson in Ontario, who acted as solicitor for a large corporation. At the same time Gibson was also an elected official who convinced his political colleagues to support legislation that favoured the financial interests of his client-company. Moreover, in the position of Attorney-General, Gibson vigorously defended the proposed bill, in the end retreating only in the face of vociferous opposition.¹⁶⁷

The example presented in the Gibson case of lawyer involvement in politics and of the difference in how ‘conflicts’ were perceived is part of a pattern of ongoing involvement by lawyers in politics and political scandal in Canada that dates back to at least the ‘Pacific Scandal’ of the 1870s,¹⁶⁸ and can be traced into modern times.¹⁶⁹ As an historical matter in Canada though,

the presence of so many lawyers at the heart of political scandals is neither accident nor coincidence. The subject requires further investigation, but clearly lawyers, as natural mediators between government and business, and as individuals with many and varied interests, have been particularly vulnerable to conflict situations. In addition, they have

¹⁶⁶ Most recently refined by the Supreme Court of Canada in *Canadian National Railway Co v McKercher*, 2013 SCC 39 [2013] 2 SCR 649, at para 23. The case is the latest in a modern jurisprudential line that continues to distill ‘conflicts’ law for lawyers.

¹⁶⁷ *Supra* note 92, Wilton, “Introduction”, at 25. Wilton cites to Nelles, *Politics of Development* at 90 – 102 and Christopher Armstrong *The Politics of Federalism: Ontario’s Relations with the Federal Government, 1867 – 1942* (Toronto: 1981) at 42 – 48.

¹⁶⁸ *Supra* note 153, Lewis, *In the Long Run*, where the author notes of Canada in the 19th century that “part of what supported the model of growth was immediate material interest, graft and corruption. Public office and private profit existed in a symbiotic relationship.” at 24.

¹⁶⁹ See for example, the case of Leo Landreville, who as a lawyer and municipal politician took money in a conflict of interest and was later the subject of a judicial inquiry for his actions that resulted in his resignation from the bench, William Kaplan, *Bad Judgment: The Case of Leo Landreville* (Toronto: University of Toronto Press, 1996).

operated at a level in the political culture where the attitude to conflicts of interest can best be described as ‘don’t get caught.’¹⁷⁰

There is often little critical or normative inquiry in historical and social analyses of the law.¹⁷¹ For example, the historical presentation of lawyers’ expanding role in commerce and politics often appears as a natural extension of the more ‘traditional’ role of a lawyer, who may be uniquely situated to act as an “intermediary between business groups” and with “state regulatory authorities.”¹⁷² In places outside Canada, though, lawyers did not play that role, which was instead taken on directly by business managers.¹⁷³ This comparative distinction between the role of the Bar in Canada and in other countries has not been well accounted for in the historical literature that deals with independence of the Bar.¹⁷⁴ Part of the explanation for the difference is that the centrality of courts as governance mechanisms within Canada’s federal system provided a distinct role for lawyers, which was played by more centralized bureaucracies in other places.¹⁷⁵ This view is consistent with the characterization of federal systems as fundamentally

¹⁷⁰ *Supra*, note 92 Wilton “Introduction” at 28.

¹⁷¹ *Supra* note 4, Kreitner & Hagan, “Future”.

¹⁷² *Supra* note 161, Gordon, “Perspective” at 426 – 428.

¹⁷³ *Ibid.* Lawyers have been similarly involved in law and politics in the USA, they have not played the same kinds of roles in Britain, Japan and in Europe, cited to Keith Hawkins, *Environment and Enforcement* (Oxford, 1984); Steven Kelman, *Regulating America, Regulating Sweden* (Cambridge, Mass: 1981; David Vogel, *National Styles of Regulation* (Ithaca, 1986).

¹⁷⁴ *Ibid.* Notwithstanding the apparent simultaneity between law and politics in Canada “the affinity between the legal profession and politics has been neglected in Canadian academic circles, although it has been commented upon (and criticized) in popular culture” *supra* note 96, Brunet, “Good Government” at 49 – 50 fn 1. By contrast in the United States there is a well-developed literature on the involvement of lawyers in government in politics and government, see, for example, William Miller, “American Lawyers in Business and in Politics: Their Social Backgrounds and Early Training”, (1951) 60 *Yale L J* at 66 – 76; Joseph A Schlesinger, “Lawyers and American Politics: A Clarified View”, (1957) 1 *Midwest Journal of Political Science* 1 at 26 – 39; Mark C Miller, *The High Priests of American Politics: The Role of Lawyers in American Political Institutions* (Knoxville: University of Tennessee Press, 1995).

¹⁷⁵ *Ibid* at fn 3.

‘legalistic’ in the sense that the bench and Bar are “inevitably called upon to interpret the constitution and define the respective powers of the two levels of government.”¹⁷⁶

Another part of the explanation for the lack of lawyer involvement in political leadership in other jurisdictions lay in a traditional ideal of lawyering that portrays the Bar as both ‘independent’ and ‘apolitical’ and therefore especially suited to objectively arrange private and public affairs.¹⁷⁷ In this sense, ‘independence’ can be used by lawyers to “legitimate” the conduct of clients by giving it a legal form, which is untainted by either personal or partisan political concerns. However, as noted, in Canada the association between lawyers and politics dates back to colonial times, and lawyers had close and early associations with the Canadian business community.¹⁷⁸

For the most part, this situation has historically appeared to provide Canadian lawyers with the best of both worlds. On one hand, they maintained the “core conception”¹⁷⁹ of traditionally independent lawyers as professionals primarily and objectively concerned with law. On the other hand, lawyers in Canada “threw themselves into business and politics”¹⁸⁰ and, for the most part,¹⁸¹ successfully exploited the

¹⁷⁶ *Supra*, note 100, Stevenson, *Unfulfilled Union*, at 15.

¹⁷⁷ Which is a theory of lawyer independence consistent with the modern lawyer professional concept of the ‘lawyer as advisor’, see Alice Woolley, “The Lawyer as Advisor and the Practice of the Rule of Law” (2014) 47 UBC LR at 18.

¹⁷⁸ For example, in Upper Canada in the early 1800s, “a focus on larger commercial cases led the whole court system to become closely associated with the interests of the merchant class”, *supra* note 50, Flaherty, “Essays”, William N T Wylie, “Civil Courts in Upper Canada 1789 – 1812” at 53.

¹⁷⁹ *Supra* note 161, Gordon “Perspective”, at 428.

¹⁸⁰ *Ibid.*

¹⁸¹ Though, as Swainger notes in his examination of the early Red Deer legal community in Alberta, factors such as populism and recession may have led to retreats by the legal community out of business and politics to “affairs of a strictly legalistic nature”, *supra* note 95 Swainger, “Ideology” at 392.

multitude of business and political opportunities that crystalized in the first part of the 20th century. Far from keeping law and politics at a distance as Valois suggests in the context of judicial independence,¹⁸² the independent Bar in Canada were historically the face of many political institutions, and often the ‘powers’ behind political thrones.¹⁸³ At the same time, and often overlapping with the political sphere, lawyers also provided substantial leadership within Canada’s business community.¹⁸⁴

3.5 Emergence of the Modern Bar

Starting in the early 1900s, the legal profession in Canada generally appears to have entered a more conservative phase. The conservatism of the legal community at this time is attributable in part as a reaction to broader social and political tumult in Canada through the first part of the 20th century. Many factors contributed to the tenor of the times:

Massive urbanisation, industrialisation, recession, war and growing xenophobia all took their toll. Economic dislocations corroded confidence in the future of governance. Class, ethnic, and rural-urban divisions were accentuated, culminating in a post-War burst of radicalism more pervasive than any other in North America...Buffeted by temperance, women’s suffrage, social gospel, labour radicalism, progressivism, the farmer’s and co-operative movements, socialism and maternal feminism, regional consciousness threatened to disintegrate...¹⁸⁵.

¹⁸² *Supra* note 16, Valois, *At a Distance*, whose sociological examination of the independent judiciary in Canada suggests a systemic imperative towards a separation from politics, which does not appear to apply to the same extent in the context of an independent Bar in Canada.

¹⁸³ Gwynn notes, for example, the significant role of Alexander Campbell, a lawyer and former law firm partner of Sir John A. Macdonald, as a ‘Mr. Fix-it’ for Canada’s 1st Prime Minister, *supra* note 102, Gwynn, *Nation Maker*. As another example, see James H Gunn, “The Lawyer as Entrepreneur: Robert Home Smith”, *supra* note 92, Wilton, *Essays IV the Law* at 235 – 262, that details a lawyer’s influence of Conservative politics from the early 1900’s into the 1930’s, particularly at 254 – 257.

¹⁸⁴ As highlighted in more detail in the series of essays contained in the volume edited by Carol Wilton, note 92, Wilton, *Essays IV*.

¹⁸⁵ W Wesley Pue, “Cultural Projects and Structural Transformation in the Canadian Legal Profession” in W Wesley Pue & David Sugarman, eds *Lawyers and Vampires* (Oxford: Hart Publishing, 2003) 367 – 391 as reproduced in *supra* note 7, Woolley, *et al Lawyers’ Ethics* at 99.

Once a leader in the concept of an independent Bar as institutionally self-regulated, the province of Ontario and its LSUC were being surpassed in the early 1900s by innovations in other jurisdictions.¹⁸⁶ Such innovations included a ‘revamped’ and more proactive role of Canadian Law Societies to govern ethics and lawyer discipline. In addition, new law schools were established in other provinces with updated curricula and teaching methods.¹⁸⁷ Such local changes to legal culture were complemented by the creation of new national bodies for lawyers, all of which influenced the emerging modern concepts of ‘legal professionalism.’¹⁸⁸

These changes began the modern transformation of the legal community at the start of the last century; however, some of these innovations also represented a reaction to the uncertainty of the period. As earlier noted, the larger legal community was already in the midst of a period of introspection, precipitated in part by criticism like that offered by realists such as Pound and Langdell. These criticisms cast doubt on the certainty of law and the role of legal actors like lawyers and sought to ground the law in the ‘action’ of real world events. In Canada, ‘real world events’ -- social and political pressures -- were compounded by additional developments within the profession itself. For example, in Ontario, the many business and other opportunities that had earlier emerged in the late

¹⁸⁶ *Supra* note 54, Moore, *the Law Society*, at 161.

¹⁸⁷ “The new model was explicitly cultural in content, university focused, rigorous, and taught in novel ways. New law schools emerged in Winnipeg, Regina, Saskatoon, Calgary, Edmonton, Victoria and Vancouver” *supra* note 5, Pue, “Historical Context” at 101.

¹⁸⁸ *Ibid* at 100. The Canadian Bar Association was established in 1914 and the provincial Law Societies formed the Conference of Governing Bodies in 1927, later to become the FLSC *supra* note 4, Moore, *Law Society*, at 205. Pue notes that western Canadian influences on legal professionalism were substantial in the 1st part of the 20th Century, *ibid*, at 97. The CBA developed and promulgated the 1st code of lawyer ethics in Canada in 1920.

19th century grew more limited. As a consequence, the growth in the lawyer-to-population ratio stagnated throughout the early decades of the 20th century.¹⁸⁹

The reduction in opportunity for lawyers was combined in some places with a growing sentiment that opposed the legal profession. Up to the early 20th century, the professional status of lawyers, along with their political and business leadership had provided many lawyers with a degree of eminence in the community. However, the association of lawyers with business and banking interests in Canada resulted in resistance from new populist political movements.¹⁹⁰ Such movements included the United Farmers of Alberta, who, along with a coterie of other new political parties, had a significant impact on Canadian politics in the early 1900s.¹⁹¹

While the collective prominence and relative success of some lawyers as a profession brought them under increasing scrutiny, as in the previous century, the opportunities presented by a career in law in the Canada of the 1900s were still not the exclusive preserve of economic or social elites. As in the 1800s, opportunities for

¹⁸⁹ *Supra* note 54, Moore *Law Society*, who notes at 171 that, despite growth in the Ontario population, the number of lawyers actually contracted by 7 percent between 1901 and 1911. While there was some growth in Ontario during the 1920's, "the Depression would cause legal business to plunge, and there would be no growth in lawyer numbers at all" at 196, cited to Curtis Johnson Cole "A Developmental Market: Growth Rates, Competition and Professional Standards in the Ontario Legal Profession, 1881 – 1936" *Canada-U.S. Law Journal* 7 (1984): 231 – 241, Figure 1.

¹⁹⁰ In addition to representing the interests of banks, many entrepreneurial lawyers in the Canadian actually played the role of financiers and lenders, that is, they were not only associated with larger business interests in their professional duties, they were the directing force, *supra* note 95, Swainger "Ideology", at 379.

¹⁹¹ For example, provincially the United Farmers of Alberta, which ultimately won the 1921 elections were joined by the United Farmers of Ontario, which had won election there in 1919, and a United Farmers government in Manitoba, which formed a broad based 'Agrarian movement' at the national level, in the form of the Progressive Party. Other new political parties established in this time included the Co-operative Commonwealth Federation (CCF) and the Social Credit Party, see Robert Bothwell, Ian Drummond, John English, *Canada 1900 – 1945* (Toronto: UTP, 1987) at 201 – 204 and 267.

substantial material and political success were often within reach for talented and hard working men. For example, in the early 1900s, Richard Bedford Bennett was the son of an alcoholic, bankrupt sailor, who entered law and enjoyed success as a prairie corporate lawyer. He later entered politics and rose to become Prime Minister of Canada in the 1930s and, after that, was appointed to the British House of Lords.¹⁹² While Bennett was exceptional in his achievements, his career path illustrates the point that the perspective of many lawyers during this time was grounded in a middle class outlook.

One of the substantial achievements of the Canadian Bar in the 19th century had been to extend law and the practice of lawyering beyond the upper classes.¹⁹³ Legal professional work environments during this period reflected these middle-class roots. For example, many lawyers of the time worked in ‘spartan’ conditions and while they might expect some material advantages from their profession, legal environments often exuded a down-to-earth “ambience”.¹⁹⁴

However, by the early 1900s, the largely middle-class background of lawyers went hand in hand with certain values and prejudices. Despite some increased economic and social opportunities at the end of the 1800s, the legal profession of the early 20th

¹⁹² See, Louis A Knafla “Richard ‘Bonfire’ Bennett: The Legal Practice of a Prairie Corporate Lawyer, 1898 – 1913” in *supra* note 92, Wilton, *Essays IV*, 320 – 376.

¹⁹³ Paul Axelrod, *Making a Middle Class: Students in English Canada during the Thirties* (Montreal: McGill-Queen’s University Press 1990), where at 169 the author defines ‘middle class’ as those “whose major income-earners were non-manual workers who enjoyed social states but exercised limited economic power, and whose standard of living ranged from the very modest to the very comfortable”.

¹⁹⁴ *Supra* note 54, Moore *Law Society*, at 196 – 197, who also notes that at some prominent Toronto law firms the wives of partners were expected to attend to clean the offices, cited to Valerie Schatzker, *Borden and Elliot: The First Fifty Years* (Toronto: Borden and Elliot 1986).

century still largely excluded from practising anyone other than male, white, Christians. Many of these prejudices were expressed openly and reflected broader societal attitudes, which were often reinforced by institutional constraints of the period.¹⁹⁵

Today, Robert Sutherland is acknowledged to have been the first ‘Black’ lawyer to be called the Bar in Canada in 1855.¹⁹⁶ Sutherland was a graduate of Queen’s College in Kingston, Ontario,¹⁹⁷ and later practised law in Walkerton, Ontario. Despite Sutherland’s pioneering achievement,¹⁹⁸ later Black law students were few and far between,¹⁹⁹ and would face significant obstacles.²⁰⁰ The first person to claim to be the first Black lawyer in Canada was Delos Rogest Davis.²⁰¹ Unlike Sutherland, Davis faced

¹⁹⁵ Though the historical record on this point is lacking since there are few if any studies analyzing the institutional discrimination at law schools and in law firm hiring. In this respect, “disadvantaged communities rarely maintain full accounts of their experiences of discrimination” see “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives, Chief Justice of Ontario’s Advisory Committee on Professionalism, 1st Colloquium (October 2004), available online at: <http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf>, at 2-2 [Backhouse, “Gender and Race”].

¹⁹⁶ Sutherland was the son of a Scottish father from Jamaica and an African-Jamaican mother, who identified himself as “coloured”, and did not receive public recognition as Canada’s 1st black lawyer until relatively recently, see Ian Malcolm, “Robert Sutherland: The First Black Lawyer in Canada?” *Law Soc’y of Upper Canada Gaz* 26:2 (June 1992).

¹⁹⁷ Queen’s college was originally chartered under the auspices of the Presbyterian Church, in 1841, but changed its name to Queen’s University in 1912 when the College was secularized, see Deidre Rowe Brown “Robert Sutherland: Celebrating the Legacy” (Fall 2009) 35 *Queen’s L J* 1, 401 at 405.

¹⁹⁸ Sutherland was also Canada’s 1st Black university student and graduate, see A R Hazelgrove, “Robert Sutherland: Queen’s First Black Student” (1974) 22 *Historic Kingston* 64; a leading member of the Walkerton community where he was elected Reeve and upon his death in 1878, a major benefactor of Queen’s College, *ibid* 414 – 416.

¹⁹⁹ *Supra* note 195, Backhouse “Gender and Race”, at 2-7, at footnote 14 where the author notes that from 1900 to 1923, one Black lawyer, Ethelbert Lionel Cross, was admitted by the Law Society of Upper Canada, and he was only the 4th Black lawyer to be called to the Bar at that point; see also Susan Lewthwaite, “Ethelbert Lionel Cross: Toronto’s First Black Lawyer” in *supra* note 99, Backhouse & Pue, *Promise and Perils*, at 193 – 223.

²⁰⁰ “The Black students who followed Davis throughout the first half of the twentieth century often had trouble finding articling positions, and typically worked only for other Blacks, or Jewish lawyers”, *ibid*, at 2-7.

²⁰¹ Lance C Talbot “History of Blacks in the Law Society of Upper Canada, *Law Soc’y of Upper Canada Gaz*, 24:2 (March 1990) 65 – 70; Robin W Winks, *The Blacks in Canada, A History* 2nd ed. (Montreal and Kingston: McGill University Press, 1997) at 328.

protests from the Law Society in Ontario when seeking accreditation to practice and, ultimately, he had to petition the Legislature for admission in 1884,²⁰² when he was unable to complete articles because no lawyer would take him on.²⁰³ As students-at-law through the early 20th century, Black students “typically worked only for other Blacks, or Jewish lawyers – neither Blacks nor Jews, it seems, fit the ‘professional’ mould according to those who set the dictates of the white, Protestant, wealthy men who had founded the Law Society and fashioned it in their own image”.²⁰⁴

For their own part, Jewish law students also faced widespread discrimination. While they did not face a formal ‘quota’ system designed to limit the numbers of Jews admitted to practise law,²⁰⁵ as in the practice of medicine,²⁰⁶ at the turn and into the early years of the last century they faced a rising trend of anti-Semitism and active opposition from the legal profession, which limited their prospects outside of their own

²⁰² *An Act to Authorize the Supreme Court of Judicature for Ontario to admit Delos Rogest Davis to practice as a solicitor*, S O 1884, c 94; *An Act to authorize the Law Society of Upper Canada to admit Delos Rogest Davis as a Barrister-at-Law*, S O 1886, c 94.

²⁰³ *Supra* note 195, Backhouse “Gender and Race” at 2-6.

²⁰⁴ *Ibid* at 2- 7. See also Charles C Smith, “Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of The Canadian Legal Profession” Chief Justice of Ontario’s Committee on Professionalism, 4th Colloquium, (March 2005), available online at: < <http://www.lsuc.on.ca/media/fourthcolloquiumsmith.pdf>> [Smith, “Who is Afraid”].

²⁰⁵ *Supra* note 54, Moore, *Law Society*, who notes at 200, “the Law Society evidently avoided formal discrimination, but that merely transferred the issue elsewhere. Access to law offices, rather than to the Law Society itself, still formed the crucial barrier for students, and here Jews faced massive resistance. Immigration of poor and distinctly ‘foreign’ Jews from Eastern Europe had given new impetus to Canadian anti-Semitism.”

²⁰⁶ Jacalyn Duffin, “The Quota: ‘An Equally Serious Problem’ For Us All” *Canadian Bulletin of Medical History* 19:2 (2002) 327 – 350; Charles Levi “The Jewish Quota in the Faculty of Medicine, University of Toronto: Generational Memory Sustained by Documentation” *Historical Studies in Education* 15:1 (Spring 2003) 130; WPJ Millar “We wanted our children should have it better: Jewish Medical Students at the University of Toronto 1910 – 51” *Journal of Canadian Historical Association* (2000) 109.

communities.²⁰⁷ Similar barriers to accessing legal education were also faced by other groups throughout Canada such as aboriginals and Asians.²⁰⁸

Racial, ethnic and religious tensions gave rise to increasingly open prejudices of the early 20th century, but also mirrored broader social attitudes. Outside of questions of access to legal education, discriminatory and bigoted statements were readily expressed members of the legal profession,²⁰⁹ and often supported by statute.²¹⁰ Though such historical prejudices may seem a long remove from the present day, these past experiences demonstrate the recursive aspect of such issues in the history of the Bar in Canada. For example, anyone familiar with modern obstacles to the legal profession

²⁰⁷ *Supra* note 54, Moore, *Law Society*, who notes “virtually all Jewish lawyers had to start their own practices, depending heavily on their own community for clients, and often supporting themselves by bill collecting and whatever other work they could turn up”, at 201. Bora Laskin, the future 1st Jewish Supreme Court Justice and Chief Justice, for example, could find no employment following completion of graduate work at Harvard Law School in the late 1940’s and initially supported himself by writing headnotes for a legal publisher before entering the academy, see Irving Abella, “The Making of a Chief Justice: Bora Laskin. The Early Years” *Law Soc’y of Upper Canada Gaz* 24, no 3 (September 1990) 187 – 195.

²⁰⁸ Joan Brockman, “Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia” in Hamar Foster and John McLaren eds *Essays in the History of Canadian Law: British Columbia and the Yukon*, v 6 (Toronto: The Osgoode Society, 1995) 508. At 519 – 25. Backhouse notes that the 1st aboriginal lawyer in Canada was Norman Lickers, who was called to the Bar in Ontario in 1938, *supra* note 195, Backhouse, “Gender and Race” at 2-12 fn 31.

²⁰⁹ “Historical court archives are also filled with examples of white male lawyers making blatantly racist and sexist arguments” in *supra* note 200, Backhouse “Gender and Race” at 2-22.

²¹⁰ For example, “Chinese, South Asian and Aboriginal peoples were prohibited from becoming members of the Law Society of British Columbia until 1947, and 1948 for people of Japanese descent. Further, until it was amended in 1951, the *Indian Act* required Aboriginal peoples to relinquish their status if they were to pursue higher education”, *supra* note 2, Smith “Who is Afraid”, at 3. See also *Indian Act, SC 1876*, c 18, s86 (1) and s 88.

faced by those of diverse backgrounds²¹¹ would undoubtedly find the past challenges faced by Blacks, Jews and others in law, all too familiar.²¹²

From an historical perspective, the recursivity of issues around women and the law in this period are also apparent. For example the first woman to practise law in Canada was Clara Brett Martin, who, like Delos Davis, had to petition the Ontario Legislature for the passage of special statutes to be called to the Bar in 1897.²¹³ For the next few decades following Martin's admission to practice, there were only a few women who became lawyers, and their opportunities were limited. With a few exceptions,²¹⁴ the presence of women in legal practice was largely unwelcome in the early 1900s.²¹⁵ Many in the Bar thought women were not suitable for appearance in court as litigators.²¹⁶ The lingering gender discrimination, in which female barristers faced limits on their careers and the chance to attain success at the highest levels, continues into the present day.

²¹¹ "Diversity" in this context includes those who may face challenges from traditional legal culture based on their colour, ethnicity, social or economic class, religion, age and gender, but also comprises a larger set of potential bases of discrimination based on things like gender orientation, sexuality, physical and mental disability and language. See for example discussion of this point, *supra* note 61, Hutchinson, *Legal Ethics* at 39 – 41.

²¹² See for example, Law Society of Upper Canada, *Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees*, presented to Convocation on October 30, 2014, available online: <http://www.lsuc.on.ca/racialized-licensees/>.

²¹³ *An Act to Provide for the Admission of Women to the Study and Practice of Law*, S O 1892 c 32 and *An Act to amend the Act to provide for the Admission of Woman to the Study and Practice of Law*, S O 1895, c 27. For discussion of the Martin's admission to the Bar see Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Women's Press, 1991, 293 – 326, 334.

²¹⁴ "Vera Parsons, Helen Kinnear, Margaret Hyndman, and others confronted this prejudice and built notable litigation practices, but they remained the exceptions" in *ibid*, at 203.

²¹⁵ *Ibid*, Moore notes the remarks of a judge swearing in new calls in Ontario in the 1920's, who said to 2 newly admitted female lawyers that "he did not welcome them and that he regretted the money their parents had wasted on their education", at 202.

²¹⁶ For example, *supra* note 54, Moore, *Law Society*, who notes women lawyers at this time were often directed to work in office law, family law, real estate and in trust companies, but not in litigation, at 202 – 203.

For example, in Ontario it was not until the 1940s that women stood as candidates in bencher elections, and not until the 1970s that a woman succeeded.²¹⁷ It was more than 80 years after the admission of the first female barrister in 1897 before the appointment of a woman to the Supreme Court in Canada.²¹⁸ It was not until the 1990s that the enrollment numbers of female law students throughout Canada were on a par with males.²¹⁹ Despite this apparent progress towards gender diversity within the legal profession, Constance Backhouse has documented the fact that women in the legal profession - students, lawyers, judges and legal professors -- have faced considerable harassment and discrimination,²²⁰ much of which appeared as exclusionary as the behaviour and practices that Clara Brett Martin faced in the 1890s. In the present day, modern commentators continue to note the lingering effects of what appear to be deeply embedded²²¹ and persistent discriminatory practices.²²²

²¹⁷ The first woman bencher in Ontario was Laura Legge. First elected in 1975, she became the first woman Treasurer of the Law Society of Upper Canada in 1983. In BC, the first woman to receive a QC designation, Mary Southin in 1969, was also the first woman elected as a bencher there in 1971. *Ibid* at 203.

²¹⁸ The 1st appointment was Justice Bertha Wilson in 1982, see for example, *Judging Bertha Wilson: Law as Large as Life* (Toronto: UTP, 2001).

²¹⁹ *Supra* note 61 Hutchinson, “Legal Ethics” at 39; Constance Backhouse, “‘A Revolution in Numbers’: Ontario Feminist Lawyers in the Formative Years 1970s to 1990s” in *supra* note 96 in Pue & Backhouse, *Promise and Perils*, where at 273 – 279 the author describes a ‘wave’ of feminist lawyers Canada starting during the 1970’s.

²²⁰ *Supra* note 195 Backhouse, “Gender and Race” at 2-13 – 2-21.

²²¹ The concept of “deeply embedded” values refers to beliefs and practices that are closely imbricated in a given culture. The concept is often employed in comparative politics to describe change resistant norms and values. See, for example, Francis Fukuyama, *State-building: Governance and world order in the 21st century* (Ithaca: Cornell UP, 2004) at 59.

²²² See, for example, Fiona Kay, *et al* for the Law Society of Upper Canada, “Turning Points and Transitions: Women’s Career’s in the Legal Profession” (September 2004). More recently in Canada, public attention has focused on the lack of gender and other diversities on the bench, and the continuing low rates of judicial appointments for women throughout Canada. See, for example, Rosemary Cairns Way, “Deliberate Disregard: Judicial Appointments Under the Harper Government” Ottawa Faculty of Law Working Paper 2014-08, June 19, 2014 available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456792.

One particular aspect of the historical challenges faced by women in law deserves particular illustration, since it shows that while some ‘liberal’ progress towards advancing human rights was occurring, it was also mingled with distinctly illiberal attitudes and practices. For example, while paving the way for other women to become lawyers in Canada, Clara Brett Martin also held distinctly anti-Semitic views.²²³ This is not the only example amongst women in Canadian legal culture that shows the dissonance between an association of law with the progressive advancement of rights and contrasting illiberal views and practices.

Another example, which also demonstrates the interactive simultaneity of law and politics is provided by Emily Murphy. Today, Murphy is perhaps best remembered as one of the “Famous Five” who challenged the constitutional definition of the term ‘persons.’²²⁴ This legal challenge succeeded in having the highest Court recognize, for the first time, that the definition of the term included women, who up to that point had been precluded from being appointed to the Canadian Senate because that were not

²²³ Martin’s anti-Semitism likely reflected broadly held attitudes towards Jews at the time. For a discussion see Constance Backhouse “Clara Brett Martin: Canadian Heroine or Not?” *Canadian Journal of Women and the Law* 5:2 (1992) 262 – 279; Lita-Rose Betcherman “Clara Brett Martin’s Anti-Semitism” *Canadian Journal of Women and the Law* 5:2 (1992) 280 – 297; Brenda Cossman & Marlee Kline “And if not now, when?: Feminism and Anti-Semitism Beyond Clara Brett Martin” *Canadian Journal of Women and the Law* 5:2 (1992) 298 – 316; Lynne Pearlman “Through Jewish Lesbian Eyes: Rethinking Clara Brett Martin” *Canadian Journal of Women and the Law* 5:2 (1992) 317 - 350; Constance Backhouse “Response to Cossman, Kline and Pearlman” *Canadian Journal of Women and the Law* 5:2 (1992) 351 – 4; Lita-Rose Betcherman “Response to Cossman, Kline and Pearlman” *Canadian Journal of Women and the Law* 5:2 (1992) 355 – 6.

²²⁴ Murphy was joined in the litigation by Irene Parlby, Nellie McClung, Louise McKinney and Henrietta Edwards, the latter’s name forming part of the style of cause in the decision in *Henrietta Edwards et al v Attorney General for Canada*, [1930] A C 125 (PC), reversing the Supreme Court of Canada in [1928] SCR 276 [*Edwards* or the “Persons” case].

‘persons’ under law. Lord Sankey’s decision of the Judicial Committee of the Privy Council in the *Edwards* case is remembered in legal history for providing the dominant interpretational metaphor, that Canada’s constitutional regime is like a “living tree,” which grows and adapts in response to new circumstances.²²⁵

Emily Murphy remains a leading figure in Canadian legal history. While she was never a member of the Bar, she was one of the first female judicial figures in the British Empire, and an elected member of the provincial Legislature. What is less well remembered about Murphy is that while she made significant strides to advance women’s rights in Canada, she was also a leading proponent of the eugenics movement in Canada.²²⁶ In fact, in later years, some lauded her work,²²⁷ not so much as a champion of human rights through public representation or in the *Edwards* case, but rather for Murphy’s success in promoting the passage into law of a statute that provided for the

²²⁵ Also known as the doctrine of progressive interpretation, the metaphor suggested by Lord Sankey in the *Persons* case, *ibid*, suggests that constitutional change is adaptive and depends on current context, as compared to the competing doctrine of originalism of intent or of meaning, which looks at meaning or intent at the time of formulation. Dynamic realism’s focus on context and balance fits within the dominant Canadian approach, though, as with the assessment of many phrases and concepts and law, the ‘living tree’ doctrine has not been well theorized, for discussion see, for example, Bradley W Miller, “Beguiled by Metaphors: The ‘Living Tree’ and Originalist Constitutional Interpretation in Canada” (2009) *The Canadian Journal of Law and Jurisprudence*, vol 22, 331 also available online, SSRN network: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272042.

²²⁶ Sheila Gibbons, “Our Power to Remodel Civilization: The Development of Eugenic Feminism in Alberta, 1919 – 1921”, *Canadian Bulletin of Medical History* (2014) Volume 31:1 123-142 [Gibbons, “Our Power”].

²²⁷ “The most advanced piece of legislature [*sic*] ever to be enacted” was the *Sexual Sterilization Act*, Statutes of the Province of Alberta, 21 March 1928, *ibid* at 125, citing *Eva Carter, Thirty Years of Progress: History of United Farm Women of Alberta* (Calgary: United Farm Women of Alberta, 1944) at 34.

forced sterilization of thousands of people over more than 40 years,²²⁸ who were thought to be “unfit” to have children.²²⁹

In the first half of the 20th century, the emergence of the modern Bar also provided more examples that demonstrate the gap between legal theory and practice where lawyers are concerned. These examples undermine the integrity of a view that wholly associates law and liberalism with the development of an independent Bar. As previously noted, in times of stress in Canada, there is an apparent and reflexive opposite reaction that associates law more with loyalty to the Crown than with the advancement of human rights. For example, loyalty to the nation, in the form of overt support for the War effort from 1914 – 1918, was obligatory. Those lawyers suspected of less than total commitment during this period might expect not just critical scrutiny and social approbation, but also professional disciplinary measures from the legal regulator.²³⁰ Attitudes that linked professional practice with the interests of the state persisted and were likely ubiquitous across the country.²³¹ One example is a lawyer in British

²²⁸ See, for example, Jana Grekul *et al* “Sterilizing the ‘Feeble Minded’: Eugenics in Alberta, Canada, 1929 – 1972”, *Journal of Historical Sociology*, 17, 4 (2004); Jana Grekul, “Sterilization in Alberta, 1928 – 1972: Gender Matters,” *The Canadian Review of Sociology*, 43,3 (August 2008):247

²²⁹ “In addition to being a prominent political figure in equal rights legislation, Murphy was also a vital contributor to programs which sought to improve the human race through forced sterilization of those deemed ‘unfit’” *supra*, Gibbons, note 226, “Our Power, at 124 and at 125 where the author notes the Eugenics Board established under the provincial legislation and which lasted until 1972, was responsible for the forced sterilization of approximately 2800 people during this time.

²³⁰ *Supra* note 54, Moore, “Law Society” at 193.

²³¹ For example, during the second World War one court quoted with approval a decision from 1918 that “war could not be carried on according to the principles of the *Magna Carta*”, *Ex parte Sullivan* (1941), 75 CCC 70 at 77 (Ont S C), quoting *Ronnefeldt v Phillips* (1918), 35 TLR 46 (CA). The court’s comments were in the context of the application of a series of executive orders during the War that restricted individual liberties in Canada, *infra*, note 240, Adams, “Guardians” at 180 – 182.

Columbia who, in later years, was disbarred for his political views and association with the Communist Party.²³²

An even more explicit example of the association of lawyers with state interests occurred in the period immediately after World War I, following the Winnipeg General strike of 1919. There a general strike by organized labour shut down the city, but was subsequently crushed through the direct intervention of the Royal Northwest Mounted Police. Though Manitoba had authority to pursue criminal sanctions against the strikers, the province chose not to do so. Fears of revolutionary intent initially seemed to be settled in the face of a subsequent inquiry, which confirmed that the action arose largely in response to poor labour conditions rather than as a radically inspired political movement.²³³

However, following the inquiry a self-appointed ‘Committee of 1000’ leading members of the business and professional community managed to persuade the federal government to fund a private prosecution of eight of the strike leaders for seditious conspiracy. This event represents an extraordinary presumption of state powers by private individuals, including members of the Bar, which resulted in the convictions of seven of

²³² *Martin v Law Society of British Columbia* [1950] DLR 173 (BCCA), where the court upheld the refusal of admission to the Bar on the grounds that the applicant belonged to a political party affiliated with communism. Compared to the American experience, explicit incidents of discrimination on political grounds have been rare in Canada. See Jerold S Auerbach, *Unequal Justice* (Oxford: Oxford University Press, 1976) at 127 – 128; Deborah Rhode, “Moral Character as Professional Credential” (1985) 44 *Yale L J* 491 at 501.

²³³ As found by Justice Robson following a Royal Commission, see ,Government of Manitoba (1919) *Royal Commission to enquire into and report upon the causes and effects of the General Strike which recently existed in the City of Winnipeg for a period of six including methods of calling and carrying on such a strike*, available online: < <http://peel.library.ualberta.ca/bibliography/4525.html>>.

those charged. Philip Girard is surely correct when he notes of the incident that “it is one thing for the state to over-react in a crisis. It is another altogether for private lawyers to assume the mantle of the state for their own purposes, supported by public monies for which neither they nor the relevant officials were ever held properly accountable.”²³⁴

There were some exceptions to the conservative trend within the Bar apparent at this time.²³⁵ However, generally, the more modern concepts of *pro bono*²³⁶ and the idea of access to justice for the politically radical and poor seems to have also reached a nadir during first part of the 20th century. During the social and economic devastation wrought by the Great Depression, for example, the legal profession took no special measures to change policies or to address the crisis in Ontario.²³⁷ The challenges being faced by the general populace were also apparent within the profession itself. In response to mounting accusations against lawyers of theft from their clients in the 1930s, the Law Society of Upper Canada’s response was to institute increased numbers of disciplinary proceedings.²³⁸

²³⁴ *Supra* note 3, Girard “Historical Perspective” at 76, which notes that the trials were further marred by allegations of jury tampering on the part of the representatives of the Committee of 1000. See generally, Tom Mitchell, “‘Legal Gentlemen Appointed by the Federal Government’: the Canadian State, the Citizens’ Committee of 1000, and the Winnipeg Seditious Conspiracy Trials of 1919 – 1920” (2004) 53 *Labour/ Le Travailleur* 9.

²³⁵ See, for example, Laurel Sefton MacDowell, *Renegade Lawyer: The Life of J. L. Cohen* (Toronto: University of Toronto Press for the Osgoode Society, 2001). Another exception was Arthur Eugene O’Meara, who unsuccessfully advocated to advance First Nations’ interests in the 1900s, see Hamar Foster, “If Your Life is a Leaf: Arthur Eugene O’Meara’s Campaign for Aboriginal Justice” in *supra* note 96, at 225 *Pue & Backhouse, Promise and Perils*.

²³⁶ For discussion of the principle as an aspect of modern Canadian lawyer professionalism see Lorne Sossin, “The Public Interest, Professionalism, and Pro Bono Publico” (2008) *Osgoode L J* 46 131-158.

²³⁷ *Supra*, note 54, Moore, *Law Society* at 210.

²³⁸ *Ibid* at 209.

As noted in **Part I**, there was a significant re-consideration of the role of both law and lawyers as a result of World War II. In particular, the world was shocked by the horrific actions of the Nazi regime in Germany. Throughout the worldwide legal community, the shock was compounded by the realization that the rule of law had not prevented the worst atrocities, and that the relatively well developed German legal system had been complicit in Hitler's rise and in the horrors that followed.²³⁹ Throughout the world the events of the war led to a fundamental reconsideration of the role of legal theory and practice, and a new focus on public law and legal rights.

Less serious, though significant, breaches of individual rights had also taken place in Canada,²⁴⁰ and were largely supported by the Courts.²⁴¹ Concerns about individual rights and the effects of the war led the Canadian Bar Association (CBA) to call for the entrenchment of a bill of rights in the Canadian constitution even before the conclusion of the fighting, in 1944.²⁴² While this initiative did not succeed, it did mirror some broader developments in the advancement of rights after the War,²⁴³ and presaged the articulation of a new discourse about the rule of law and individual rights in Canada. This included jurisprudential developments and political change that resulted in statutory enactments,

²³⁹ See, for example, Ingo Muller, *Hitler's Justice: The Courts of the Third Reich*, trans Deborah Lucas Schneider (Cambridge: Harvard UP, 1991). There is a debate that the ingrained positivism in German law paved the way for Nazism, see Lon Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) *Harvard L R* 630, 657 – 661.

²⁴⁰ For a recent review of wartime restrictions on individual liberty see Eric M Adams, "'Guardians of Liberty: RMW Chitty and the Wartime Idea of Constitutional Rights' [Adams, 'Guardians']", *supra* note 96, Backhouse & Pue, *Promise and Perils*, 173 – 190. The British also engaged in significant restrictions on individual rights during the War, see, for example, discussion by Richard Posner, *Overcoming Law* (Cambridge: Harvard UP, 1998) at 159 – 168.

²⁴¹ *Ibid* at 181 – 2.

²⁴² *Supra* note 240.

²⁴³ Such as the creation of the United Nations and the promulgation, in 1948, of the *Universal Declaration of Human Rights*, available online: <http://www.un.org/en/documents/udhr/>.

and culminating in fundamental Constitutional change. As will be examined in subsequent sections of this work, it was during this most recent period in the history of the Bar that lawyer independence became more closely linked to a public service perspective that placed special emphasis on the concept of access to justice. This perspective on Bar independence was also closely linked to emerging and modern concepts of judicial independence within independent courts in Canada.

Most historical accounts of lawyer autonomy in Canada conclude or trail off at some point in the mid-20th century. In this respect, historical and political factors on the development of the principle of Bar independence in recent times are often noted and explored, but are included as aspects of alternative approaches, such as the new ‘professionalism’ scholarship, which is the focus of Chapter Six of this work.

3.6 Conclusion

Independence of the Bar has not been well-examined or defined in the Canadian context. Like other aspects of law more generally, the analysis presented here suggests that the concept and principle of ‘independence’ has a large degree of indeterminacy. As it exists in Canada today, the idea of lawyer independence in particular relies heavily on an accepted narrative about the developing role of lawyers and its ties to longstanding British traditions. However, this examination of the emergence of Bar independence over time in Canada suggests that the emergence of the principle of independence diverges significantly from traditional accounts.

A purposive inquiry into the emergence of lawyer independence suggests instead that the principle developed recursively and in simultaneity with other historical and political events. Historical and political context significantly mediated both the theory and practice of independence in Canada, both in its early roots and in its later development. In this respect, traditional understandings of an independent Bar must be balanced against a more critical perspective that takes into account the mediating effects of law, history and politics.

At least some aspects of the concept of ‘independent’ lawyering pre-date singular associations with the mediaeval Inns of the Court in Britain. Bar independence likely has some grounding in basic social interactions, and its roots can be traced back to ancient times.²⁴⁴ While many histories of Bar independence closely associate the principle with the mediaeval Inns of the Court, these associations are attenuated in the Canadian context. In the end, practical aspects of the principle of an independent Bar emerged over a long period of time, from traditional ideas inherited from the Inns, but also from alternate sources in the legal profession,²⁴⁵ outside of Great Britain,²⁴⁶ and in the context of a separate and developing country in the northern half of North America.²⁴⁷

²⁴⁴ *Supra* note 15.

²⁴⁵ *Supra* note 7.

²⁴⁶ *Supra* note 28.

²⁴⁷ *Supra* note 50.

This analysis of the development of independence of the Bar also highlights the constitutive tension between law and politics as the principle emerged and adapted to the Canadian context. Law and politics are often considered separately as sources for law and only peripherally connected to the development of lawyer independence.²⁴⁸ However, in Canada there appears to be a close connection between the developing independence of the Bar, individual lawyers and political events. The significant involvement of lawyers as political and business leaders throughout Canadian history explains the historically weaker version of the claim made by some scholars that law and lawyers are associated with the advancement of liberal values and individual rights.²⁴⁹

The theoretical historical association between independence of the Bar and the dissemination of liberal political values appears to be rooted in the independent individual role of lawyers to represent clients. This representational function to defend and advance individual rights is linked, over time and across several jurisdictions, to the emergence of constitutionalism, to the concept of the rule of law and to access to justice.²⁵⁰ However, in Canada there is significant historical evidence that the ‘law and liberalism’ hypothesis has been substantially meditated by numerous examples of illiberal attitudes and practices.

²⁴⁸ *Supra* note 54.

²⁴⁹ *Supra* note 7.

²⁵⁰ *Ibid.*

Ultimately the theory connecting lawyers and liberal values has been limited in Canada by the practical political role that lawyers have played. In addition to protecting and advancing individual rights, lawyers have also been deeply imbricated in Canadian politics and have often been the face of political power. This involvement has contributed to the emergence of a distinct version of the principle of independence of the Bar, which has been and remains adaptive to Canadian legal and political culture.

Aspects of the principle of an independent Bar have been recognized as an essential part of legal culture that has received constitutional protection.²⁵¹ Together an independent Bar and bench support the operation of independent Courts in Canada. All aspects of the principle of independence, for lawyers, judges and in the justice system support the rule of law. The nature of the interrelationship between lawyer independence and the judiciary are the focus of the next Chapter, which starts by examining the development of judicial independence. The analysis of judicial independence in Chapter Four sets the stage in Chapter Five for an analysis of the operation of these concepts and practices within the Canadian court system.

²⁵¹ *Supra* notes 165 and discussion in text.

PART II

Chapter 4

Mediation of Traditional Judicial Independence in Britain and Canada

*It seems strained to extend the ambit of this protection by reference to a general preambular statement.*¹

4.1 Introduction

There is a significant body of literature that defines the modern principle of the independence of the Judiciary in Canada. This includes major approaches that examine the interaction between judges and government bodies, as well as perspectives that consider how institutional arrangements foster or impede independence across a range of categories such as “collective” and “personal” independence.² These approaches offer varying accounts of the scope and limits of the idea, focusing on things like the necessary or minimal conditions required to support independence,³ as well as technical questions about how to implement and sustain the principle.⁴

¹ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R v Campbell; R v Ekmecic, R v Wickman; Manitoba Provincial Judges Assn v Manitoba (Minister of Justice, [1997] 3 SCR 3 [Remuneration Reference]* at para 322. La Forest J, quoted in this preface, was the lone dissent.

² Micah B Rankin, “Access to Justice and the Institutional Limits of Independent Courts” (2012) 30 Windsor Y B Access to Just 101 [Rankin, “Access to Justice”]. At 9 the author characterizes such approaches as ‘Interactionalism’ where “independence is a state of affairs that obtains when judges and courts are able to exercise coordinate power in relation to other organs of the state”.

³ *Ibid.* Professor Rankin characterizes these as part of the “Institutionalist” approach.

⁴ “One notable trend in the Institutionalist literature is a tendency to define independence according to complicated and ever-subtler sub-categorizations”, in *ibid.*

A dominant theme in judicial independence literature is that it consistently places a high normative value on the existence of ‘judicial independence’ to support the rule of law.⁵ In Canada, the widespread acceptance of the principle in this manner is described by Professor Peter Hogg,

Judicial independence is rightly valued as a fundamental bulwark of the rule of law. However, in Canada, no one disagrees with this. The Prime Minister, the Premiers, the Attorneys General, and all their predecessors may from time to time have been irritated by some judicial decision or other, whether it is an acquittal or a lenient sentence in a criminal case or a civil judgment against the Crown. But the ministers all understand the fundamental importance of judicial independence. **They do not expect the judges to decide cases in conformity with their views and they make no attempt to bring the judges into line with government views by punishing them individually or collectively when they annoy the government.**⁶

Despite the substantial body of literature about independence of the Judiciary, the principle of an independent bench shares the substantial indeterminacy that permeates many important concepts in law.⁷ This lack of clarity about a fundamental term in law and the legal system creates additional complexity when considering judicial independence separately from lawyer independence, and both from the court system. In terms of the focus on judicial independence as described in this Chapter, Professor Rankin has succinctly summarized this challenge:

⁵ “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”, *supra* note 1, *Remuneration Reference* at para 122.

⁶ Peter Hogg, “The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries”, [Hogg, “Bad Idea”], in A Dodek & L Sossin, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) [Dodek & Sossin, *Judicial Independence*], 25 at 25 – 26, my bolding.

⁷ For example, Peter Russell notes the lack of clarity about judicial independence in “A General Theory of Judicial Independence Revisited” [Russell, “General Theory”] in Dodek & Sossin, *Judicial Independence*, *ibid.*, at 599 – 600, which builds on an earlier work, Russell & O’Brien, *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (Charlottesville, VA: University Press of Virginia, 2001).

The concept of judicial independence is open to endless debate and disagreement. For one thing, I suggest the very idea of ‘independence’ is itself ambiguous. Who, for example, is supposed to be independent? Is it judges or courts? Moreover, practically speaking, a complete separation between courts, judges and the state seems to be impossible and likely undesirable.⁸

The indeterminacy that surrounds the definition of the principle of ‘judicial independence’ provides one explanation for recent jurisprudential focus on the term.⁹ However, recent judicial decisions have layered additional complexity onto the principle. As a result, the practical applications of the theory of judicial independence in Canada have substantially expanded.

The first part of Chapter Four examines the link between modern jurisprudence and the ‘tradition’ of judicial independence. More specifically, the first section examines one of the modern extensions of judicial independence in Canada. The judicial reasoning for extending judicial independence protections, in cases like the *Remuneration Reference*, are critically examined in light of both the written and unwritten understandings of the principle. The Supreme Court’s reasoning in that decision -- to justify protecting the remunerative security of provincial court judges -- relied in part on the unwritten tradition of ‘judicial independence,’ though it did not, in my opinion, clearly describe the roots of that tradition.¹⁰ This section of Chapter Four more closely examines judicial independence and connects its origins to modern versions of the principle.

⁸ *Supra* note 2 at 10.

⁹ The modern line of Supreme Court of Canada jurisprudence dealing with judicial independence begins with its decision in *Valente v The Queen*, [1985] 2 SCR 673 [*Valente*] and extends to more than a dozen decisions in subsequent years, including the *Remuneration Reference*, *supra* note 1.

¹⁰ *Supra* note 6, Hogg, “Bad Idea”, at 28 – 30.

The analysis that begins in the second section of Chapter Four picks up the themes of context and balance through a purposive historical review. This review illustrates how the theory of judicial independence emerged, much later and over a longer period than is traditionally perceived, and has always been closely connected to the independence of the Bar. The tradition of judicial independence includes guarantees captured in the 1701 *Act of Settlement*,¹¹ but also includes several unwritten features. The third section of Chapter Four illustrates how certain aspects of the unwritten tradition of judicial independence continue to be contested within the contemporary Canadian constitutional regime.¹² Moreover, as described in the fourth section, even the written aspects of independence captured in the 1701 legislation continued to change and adapt for over a century in Britain.

The last sections of Chapter Four examine the mediation of judicial independence in the Canadian context. More specifically, section five examines the early experience of judicial independence in British North America. While in Britain the principle of judicial independence remained largely indeterminate throughout the 1700s and much of the 1800s, there was no consistent tradition of judicial independence recognized in Canada.¹³ However, with legislative recognition in the era of ‘Responsible Government’ and

¹¹ 13 William III (1701), c 2 [*Act of Settlement*].

¹² *Supra* note 6.

¹³ William Lederman, “The Independence of the Judiciary” (1956) 34 Can Bar Rev 769 – 809, 1139 – 1179, at 1179 – 1180 [Lederman, “Independence”].

constitutional entrenchment following 1867,¹⁴ the guarantees of independence became widely accepted in Canada. However, the review of independence of the Judiciary in the sixth section shows that political developments following Confederation meant that the practice of judicial independence, particularly in the separation of judges from politics, was significantly attenuated.¹⁵

The final substantive section of Chapter Four looks briefly at the ‘professionalization’ of the judiciary early in the 20th century. As with independence of the Bar, while judges became ostensibly ‘independent’ in the more modern sense of the term, there remained a strong tendency for judges at that time to be closely associated with state and other interests. Moreover, while law and the legal system have sometimes been associated with the advancement of liberal values and democratic practices,¹⁶ this time period also reflects a significant undercurrent that associates the bench with a substantial degree of illiberal attitudes, beliefs and practices.

Chapter Four concludes by emphasizing the concepts of both simultaneity and recursivity and demonstrates the early interrelationship between the bench and the Bar in Canada. This analysis sets the stage for the emergence of a contemporary paradigm about independence, which closely links the judiciary and the Bar to an enhanced emphasis on

¹⁴ *Constitution Act, 1867* 30 & 31 Victoria, c3 (UK), as amended.

¹⁵ See, for example, Joseph Swainger “Judicial Scandal and the Culture of Patronage in Early Confederation 1867 – 78, *Essays in the History of Canadian Law* vol X (Toronto: Osgoode Society) 240 [Swainger, “Judicial Scandal”].

¹⁶ Terence C Halliday & Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*. (Clarendon Press: Oxford, 1997) [Halliday & Karpik, *Lawyers*].

access to justice and the justice system, as part of the rule of law, which is the subject of examination in Chapter Five.

4.2 The Long Tradition of Judicial Independence

4.2.1 Tradition and New ‘Trails’ for Judicial Independence in Canada

As Peter McCormick puts it, the ongoing refinement and adaptation of the tradition of judicial independence in modern case law “is blazing highly interesting trails in something of a conceptual wilderness.” One of the most important of these new ‘trails’ was pioneered in the Supreme Court of Canada’s 1998 ruling in the *Remuneration Reference*.¹⁷ The Supreme Court of Canada decision in this case remains important for several reasons. First, the decision to extend independence guarantees for judicial compensation to lower courts represents a practical expansion of the concept of independence in modern times.

Earlier jurisprudence from the Court in the 1980s appeared consistent with the manifestations of judicial independence in the Canadian constitutional framework. In this respect, the independence of “superior, district and county courts” was constitutionally protected by judicial constitutional interpretations of sections 96-100 of the *Constitution Act, 1867*. The independence of other “inferior” courts was constitutionally protected as

¹⁷ Peter McCormick, *Judicial Independence and the Judicial Governance in the Provincial Courts*, Report Prepared for the Canadian Association of Provincial Court Judges, (April, 2004) online: < <http://judges-juges.ca/sites/default/files/publications/Judicial%20Independence.pdf> > at 9 [McCormick, *Judicial Independence*].

well, but only in criminal cases by virtue of section 11(d) of the *Charter*. However, the written text of the Constitution of Canada did not provide a basis for the constitutional protection of the judicial independence of inferior courts in non-criminal law cases. These earlier decisions “ignored” inferior courts outside the criminal context, as in both English and Canadian legal history they were not within the “magic circle” of recognized judicial independence protections.¹⁸

Second, the basic issue in the *Remuneration Reference* provides a modern illustration of the Court’s institutional role within the Canadian federal system. The central issue in the case dealt with the applicability of judicial independence constitutional requirements to determine remuneration at ‘inferior’ courts. As noted in **Part I**, this case provides an illustration of the political role Courts have played in Canada, in this case the Court mediating a dispute between the judicial and other branches of government. The case also shows in the modern context that, despite the trend towards a separation of law from politics, like independence of the Bar, the theory and practice of judicial independence have always been infused with political sensibilities in Canada.

At the time of the first decision in the series of judicial independence cases that led to the *Remuneration Reference*, there had been historically little jurisprudential

¹⁸ *Ibid.* Though this part of the decision was *obiter dicta*, as the matter was determined on the basis of 11 (d) of the *Charter*. However, in the next case raising this issue, *Mackin v New Brunswick* [2002] 1 SCR 405, Gonthier J, for the majority, relied on both the unwritten constitutional principle and 11 (d), at paras 34, 69 – 70 & 71 – 72.

consideration of the constitutional nature of judicial independence.¹⁹ However, the role of the judiciary was a significant subject of contemporary legislative consideration in the debate and negotiations leading to the implementation of Canada's new *Charter of Rights and Freedoms* in 1982.²⁰ That is, the explicit provisions of the written constitution had been recently considered by Parliament, which did not extend judicial independence protections.²¹

Prior to the decision in the *Remuneration Reference*, the legal scope of judicial independence was stable and appeared largely limited to 'superior' courts by virtue of sections 96-100 of the Constitution Act, 1867, and also 'inferior' courts in criminal law matters by virtue of section 11(d) of the Charter.²² However, the modern line of authority demonstrates that while 'judicial' independence may be an important part of the democratic rule of law, it is also changing and conditional in the Canadian context. In this respect, the majority in the *Remuneration Reference* decision found support for the recognition of the unwritten principle of judicial independence in its interpretation of the

¹⁹ One exception to the limited consideration of the principle in case law identified the "three principal pillars in the temple of justice" as the constitutional conditions of appointment, tenure during good behavior and the constitutional salary guarantees in Canada, see the JCPC decision in *Toronto Corporation v York Corporation* [1938] AC 415 at 426.

²⁰ Enacted as Schedule B to the *Canada Act 1982*, 1982, c 11 (UK), which came into force on April 17, 1982 *Charter* or *Charter of Rights*].

²¹ Including both Houses of Parliament, and 9 provincial Legislatures, the exception being the province of Quebec which has never ratified these changes.

²² Except in the criminal context for 'inferior courts'. From a Dworkinian perspective, traditional understandings of independence would have 'cohered' with the existing rules in a normatively compelling way in light of the principles of political morality that they presuppose., Ronald Dworkin, *Justice for Hedgehogs*, (Harvard University Press: Cambridge, 2011), particularly at 364. For discussion see, for example, W Bradley Wendel, "Professionalism as Interpretation" (2005) 99 NW U L Rev 1167 and David Luban, *Legal Ethics and Human Dignity*, (New York: Cambridge University Press, 2007) at 198 – 199 [Luban, *Legal Ethics*].

preamble to the *Constitution Act, 1867*.²³ This provision, in the view of the Court, transplanted the British historical tradition of judicial independence since Canada would have “a constitution similar in principle to that of the United Kingdom”.²⁴

Consequently the resulting majority judgment recognized independence protections as applying to ‘inferior’ judges outside the context of criminal matters,²⁵ for the first time. Justice LaForest’s consternation in his lone dissent in the decision, noted at the beginning of this Chapter,²⁶ was critical about the Court’s reasoning in that case.

Constitutional scholar Peter Hogg sums up the perplexing nature of the decision as follows:

One might have thought that, in a Constitution that contains rather detailed and carefully drafted guarantees of judicial independence, the last one introduced as recently as 1982, there would be little room for the courts to read in any additional guarantee of judicial independence. **But that would be wrong**...the judges of inferior courts of civil jurisdiction, who were left out of the written constitutional guarantees of independence, were now covered by the unwritten constitutional guarantee of independence.²⁷

²³ *Supra* note 14. There is a distinction in how preambles are interpreted as between statutory and constitutional provisions. The leading authority on the use of preambles in statutory interpretation is *Attorney General v Prince Ernest Augustus of Hanover* [1957] AC 436 (HL), particularly at 467. Justice La Forest’s concerns about the substantive use of a preamble in the *Remuneration Reference* were consistent with the limits described in this precedent and with concerns he raised in earlier cases at the Court. See, for example, La Forest J in *Re McVey* [1992] 3 SCR 475 at 525. However, in Canada, the practice has developed to “attach as much weight to the preamble as seems appropriate in the circumstances, in keeping with the modern emphasis on purposive analysis”, see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Toronto: Butterworths, 2002) at 299. By comparison, there is also long precedent for use of the constitutional preamble to justify substantive legal determinations in Canadian law, see, for example Justice Duff’s comments in the *Alberta Press* case, *Reference re Alberta Legislation*, [1938] 2 DLR 81, [1938] SCR 100 [affd [1938] 4 DLR 433, [1939] AC 117 *sub nom* AG Alta v AG Canada [1938] 3 WWR 337 (PC)].

²⁴ *Supra* note 13.

²⁵ While grounding the textual support for an unwritten principle in 1867, the Court declined to follow its general, and arguably more ‘originalist’ reasoning in other cases about court jurisdiction, notably decision in *Reference Re Residential Tenancies Act (Ontario)*, [1981] 1 SCR 714 [*Residential Tenancies*], which might have limited independence protections to what was in place in 1867. Instead the court relied on the more dominant interpretational metaphor of the constitution as something which evolves over time, like a living tree, *supra* note 225 in Chapter 3, to expand the scope of judicial independence, though this case was the first time such an evolution in terms of judicial independence was recognized outside the context of s 11 (d) of the Charter. At the same time, the Court also relied on an historical, pre 1867 understanding of the ‘tradition’ of judicial independence as it arose in Britain.

²⁶ *Supra* note 1.

²⁷ *Supra* note 7, Hogg, “Bad Idea”, at 28.

In short, in the *Remuneration Reference* the Court relied on the British historical tradition of judicial independence in part to justify the modern expansion of the principle.²⁸ The history and development of judicial independence theory represents fairly well-tilled scholarly ground. However, as the brief assessment in the next section demonstrates, the traditional history of judicial independence is one that often relies on accepted, but not necessarily accurate or complete, understandings of the development of the principle. Like the independence of the Bar, the principle of independence of the Judiciary emerged recursively and was mediated by the politics both in Britain and later in the Canadian context.

4.2.2 Early Traditions in the Development of Judicial Independence

Most accounts of judicial independence start with developments in the 16th and 17th centuries, culminating in the passage of the *Act of Settlement*. However, this period in legal history is *in media res*, and the legislative guarantees of independence captured in the *Act of Settlement* are neither the beginning, nor the end of the story.

As noted in **Part I**, the earliest experiences with idea of adjudicative ‘independence’ likely have some origin in human social interactions.²⁹ There is also an historical tradition of adjudication, in customary law and in both pre-historical and classical times,³⁰ though these historical antecedents are usually not highlighted in more

²⁸ *Ibid*, at 28 – 30.

²⁹ *Supra* Shapiro *Courts*, at note 155 in Chapter 2.

³⁰ See for example, Henry S Maine, *Ancient Law* (London: Murray, 1861).

modern analyses.³¹ Almost invariably, references to social or older historical sources are the precursor to consideration of the role of judges within inherited traditions that usually begins at some point in the last 900 years or so of British history.³²

However, like independence of the Bar, the emerging concept of judicial independence was also subject to multiple early influences. In addition to acknowledging customary and classical sources for the principle, Martine Valois's recent account of judicial independence is one exception that also takes into account the contemporaneous development of the judiciary outside of Britain, particularly through the auspices of the medieval Christian church,³³ and in France. As in England, the creation of distinct judicial offices in France began with the separation of the *curia regis*,³⁴ and the assignment of individuals, other than the King, to hear important judicial matters in itinerant proceedings throughout the country.³⁵

Two important developments during this early period distinguished the development of French judicial independence from the British. First, in both Britain and France, the earliest office holders were part of the King's Court and therefore were what

³¹ For example, the term 'rule of law' can be traced back to Aristotle in ancient Greece and during Roman times. As Tom Bingham, *The Rule of Law*, (Penguin Books Ltd: London, 2010) [Bingham, *Rule of Law*], notes the idea can be traced back to Aristotle, at 3.

³² *Supra* note 28.

³³ Martine Valois, *Judicial Independence: Keeping Law at a Distance from Politics*, (Markham: LexisNexis Canada Inc, 2013) [Valois, *At a Distance*], at 109 – 112.

³⁴ In England this included the King's immediate entourage and counsellors who acquired a wide legal jurisdiction under Henry II, *supra* note 13 at 772 – 3.

³⁵ "As with the travelling judges in England, the *Parlement* of Paris used the device of *Grand Jours*, sending some of its members out to the provinces to hear cases in the name of the king", *supra* note 33 at 153.

today we would think of as part of the civil service.³⁶ In France, the practice of employing civil servant adjudicators continued and eventually led to both the buying and selling of judicial office,³⁷ as well a strong association between judicial office in France and monarchial privilege and power. This association lasted at least until the French Revolution.³⁸ Whereas there was a similar later corruption of judicial power in British history, distinct historical and political developments led the two countries down very different paths.³⁹

In England, the early Kings moved from the appointment of royal clerks as judges toward the use of representatives of the emerging class of professional lawyers from the Inns of the Court.⁴⁰ As noted in **Part I**,⁴¹ four of the traditional Inns of the Court are today recognized as providing the roots of the principle of independence for lawyers.

³⁶ *Supra* note 13 at 776. Valois notes that the development of the separate *curia in parlamento*, which maintained the fiction of French monarchial unity through the development of retained and delegated jurisdictions, led to “the building of a full-blown state judicial system. The administration of justice became the first great public service”, *ibid* at 151.

³⁷ Marcel Rousset, *Histoire de la magistrature française* (Paris: Plon, 1957) at 95.

³⁸ The resulting distrust of the judicial function may have lasted until the 20th century in France, *supra* note 33 at 154. In continental systems of law generally, judges are also not as closely associated with the legal profession as “most judges never engage in private legal practice; but join the judiciary immediately after the completion of their professional education; for the rest of their career they are on a promotional ladder controlled by politicians or fellow judges”, *infra* note 74, Russell, *Judiciary* at 23.

³⁹ Given the variable indeterminacy of the principle of judicial independence, it does not appear rigorously ‘path dependent’. For further consideration of the considerable literature on the concept of ‘path dependency’ see, for example, James Mahoney, “Path Dependence in Historical Sociology” in *Theory and Society*, (Aug 2000) Vol 29 No 4 at 507 – 548. A better explanation may be that the practice of relying on the body of lawyers to be a pool for judicial appointment in England became a ‘deeply embedded’ practice, *supra* note 221 in Chapter 3, that carries a raft of values associated with the legal conventions about independence. This very close association, between judicial independence and role of the legal profession, was recognized by AV Dicey in *MacMillan’s Magazine* (April, 1874) at 477 – 8, and at 480 where he noted “the position of the judges has to a great extent depended upon the social status of the profession of which they are the leaders”.

⁴⁰ The English experience may have itself been influenced by the Catholic Pope, who had begun the practice of appointing lawyer experts in canon law to important tasks, *supra* note 13, at 776.

⁴¹ *Supra* note 19 in Chapter Three.

However the fifth traditional Inn of the Court was created and used by the Crown to provide a pool of trained legal professionals eligible for judicial office. Though not well remembered today, a call by order of the Crown to the Serjeants' Inn, formed in the early fourteenth century, was a requirement for an appointment to judicial office in England until 1873.⁴²

Within the developing court system in France, the *parlements* later provided an important space to nurture French lawyer independence.⁴³ However, despite some institutional moves towards independence,⁴⁴ these French legal forums remained largely dependent on the King,⁴⁵ and the adjudicative officials in these bodies never shook their close association with the *ancien regime*.⁴⁶ By contrast, the early turn toward the appointment of professional lawyers in England started with Edward I,⁴⁷ and facilitated the later development of the modern principle of judicial independence in Great Britain. In the words of Lederman, “henceforth judicial competence and integrity would depend in a large measure on the quality of the legal profession.”⁴⁸

⁴² “This order consisted of leading practitioners who were promoted to be members of the order by the crown; and, when the judges ceased to be chosen from the royal clerks, they naturally came to be chosen from this order of serjeants, and soon came to be chosen solely from its members” Holdsworth, Vol I, p 197, as cited in *supra* note 13.

⁴³ *Supra* note 16.

⁴⁴ For example, mirroring the conflicts between the Stuart Kings and Parliament, early in the reign of Louis XIV, the “*Parlement* of Paris adopted a 27-article declaration, notably requiring the *Parlement* consent to the creation of any new taxes. This period of challenge to the monarchical power, known as the “*Fronde parlementaire*”, lasted more than five years. It marked the beginning of a conflict between the kings and *parlements*, “which ended with both losing power” *supra* note 33 at 153 – 154.

⁴⁵ Though members of *parlements* often acted independently, they were also later subject to the “*paulette*”, which permitted the King to determine the buy-out value of judicial offices, which could greatly affect their value, *supra* note 13 at 153.

⁴⁶ *Supra* note 38.

⁴⁷ Lederman notes that the formalization of this practice in England may have also been influenced by the practice of the Catholic Pope at this time to appoint judge delegates from amongst the most respected ecclesiastical “practitioners of canon law”, *supra* note 13 at 776.

⁴⁸ *Ibid*, at 777.

For a long time in England, despite lacking specific independence protections, the judiciary remained largely independent in practice. It was not until the reign of the Stuart Kings in the 17th century that things began to change. The reasons this change occurred at this time are the result of several factors. By the early 1600s, there had been a long period of relative stability in judicial relations with the Crown.⁴⁹ In addition, unlike the later period when they had largely abandoned their educational role in the profession, by the early 1600s the newly recognized Inns of the Court had precipitated a “Golden Age” in legal education in England.⁵⁰

The security resulting from this period of stability, along with more sophisticated understandings of the law in the early 17th century, may have raised ‘legal consciousness’ amongst the bench and Bar and provided the confidence to challenge Royal authority.⁵¹ At the same time, the century long, “great constitutional struggle” of this period also reflected significant economic, social, religious and political challenges. Such challenges included a new middle class asserting its rights, civil war and religious strife. All of these

⁴⁹ Lederman notes that though appointed ‘at pleasure’ under the Tudors, “there had been in practice a real measure of judicial independence and security of tenure” *supra* note 13, at 780.

⁵⁰ *Ibid* at 780, who reports Holdsworth’s comments that this was “one of the main reasons why the common law showed so many signs of improvement and so marked a capacity for expansion. Those who administered it were not wholly untouched by the new learning. They could therefore in some degree emancipate their minds from barren technicalities, and appreciate the large changes which were taking place in all spheres of the national life” citing Vol V p 346.

⁵¹ I employ the term ‘legal consciousness’ to refer to what people did as well as said about law at the time. The term describes a process in which the meanings given by individuals to their world, and to the legal system, achieve stability. This term was first popularly employed in the 1970s and 1980s, particularly within critical legal studies. The theoretical concept, its development and adaptation is the subject of extensive scholarship, see for example Susan S Sibley, “After Legal Consciousness” (2005) *Annu Rev Law Soc Sci* 1:323-68, which describes the range of literature and the concept’s recent use within specific policy projects.

challenges contributed to a complex period of political change in which judges sometimes took an active and partisan role.

One viewpoint, advanced perhaps most famously by the Chief Justice of the Common Pleas, and then King's Bench, Sir Edward Coke, was that there were rights 'embedded'⁵² within the common law that could not be altered by the Crown acting alone or perhaps even the Crown acting through Parliament.⁵³ Lord Coke was dismissed from office in 1616, a reflection of the fact that this viewpoint about rights diverged from Stuart conceptions of an absolute monarchy.⁵⁴ Coke believed, and crown lawyers at the time did not, that royal power was equally subject to the law.⁵⁵ He thought that the King could not create special courts with special rules, or decide matters in which he had an interest.⁵⁶ Coke's views met with resistance from the Stuart kings, but they serve as the foundations of judicial independence in England and were accepted by the end of the seventeenth century.⁵⁷ Important formative aspects of what has become the modern

⁵² The 'embedded' nature of these rights is my characterization of Lord Coke's view, consistent with the idea that aspects of independence are similarly embedded, *supra* note 39.

⁵³ *Dr. Bonham's Case* (1610), 8 Co Rep 107a; *Case of Proclamations* (1611) 12 Co Rep 74.

⁵⁴ JGA Pocock's characterization of Lord Coke's views suggests they were based on a firm belief that English common law was a form of customary law that had existed since time immemorial – even seminal documents like the *Magna Carta* were only declaratory of the older common law, see *The Ancient Constitution and the Feudal Law: a Study of English Historical Thought in the Seventeenth Century, a Reissue with a Retrospect* (Cambridge: Cambridge University, 1987).

⁵⁵ *Ibid.* The law thus limited the king, who had no authority to seek enforcement by the courts for unlawful actions, see Ian Williams "Edward Coke" in *Constitutions and the Classics* ed Denis Galligan (Oxford: UP, 2014) at 95 [Williams, "Edward Coke"]. The viewpoint challenging Crown absolutism was not new but arguably took on new life during the Stuart period.

⁵⁶ By contrast, Lord Chancellor Ellesmere advised that, "as the supreme head of the courts, the king could also create new ones and even rule personally on disputes" *supra* note 33 at 159. For discussion and presentation of Lord Coke's views see Steve Sheppard, ed *The Selected Writings and Speeches of Sir Edward Coke* (Indianapolis: Liberty Fund, 2003) vol 1.

⁵⁷ During the Commonwealth period, for example, the appointment of judges was for good behaviour, instead of the previous practice of 'at pleasure' appointments. As a matter of recursivity, the later Stuarts reverted to 'at pleasure' appointments after the Restoration, *supra* note 13, at 781.

theory of independence can be identified within the body of Lord Coke's writings as follows:⁵⁸

- i) **Separation of Powers** – The King had largely surrendered judicial power to the Courts;⁵⁹
- ii) **Institutional independence and autonomy**– Judges should not be consulted individually, but as a body, and as a precursor to impartiality, that they should not be consulted at all about issues that might come before the Courts;⁶⁰
- iii) **Individual independence and neutrality** – Common law was an objective form of 'artificial reason' that was not the subjective product of one person, but could be best understood by judges and lawyers who had reflected on the collected wisdom of jurisprudential precedent.⁶¹

These emerging legal ideas swirled and collided as part of the explicitly political battles between Parliament and the Stuart Kings. The Stuarts stood on the exercise of their traditional prerogative authority. Contrary to the long-established practice, they used these powers extensively during the 1600s to dismiss judges with whom they did not agree. The result was a substantial degradation of the quality of the bench and, especially in the later Stuart reign, the existence of significant corruption amongst individual judges.⁶²

⁵⁸ Lord Coke apparently did not believe in life tenure for judges, except as provided for in a duly constituted statute, which of course ultimately occurred later with the passage of the *Act of Settlement* in 1701. See Joseph Chitty, *Prerogatives of the Crown* (Butterworth, London, 1820) at 76 as cited by Lederman, *supra* note 13 in footnote 43 at 785.

⁵⁹ *Prohibitions del Roy* (1607) 12 Co Rep 64.

⁶⁰ *Ibid* at 101. This was an issue in *Peacham's Case*, and Coke's opinion in that matter led to his dismissal by James I in 1616, though there is some question as to whether Coke was opposed to individual consultation as a matter of 'independence' or rather because *en banc* the judges could, in a group, provide better advice.

⁶¹ *Case of Proclamations* (1611) 12 Co Rep 74; *supra* note 33, Valois, *At a Distance*. For further discussion of 'artificial reason' A D Boyer "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review", (1998) *Boston College Law Review* 39, 43.

⁶² *Supra* note 13 at 781 – 2; David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2000) at 291 [Lemmings, *Professors*].

It was not just the judges who were subject to Stuart attempts to control the legal system; lawyers too felt the pressures of Stuart expectations.⁶³ However, it was the need to address the dysfunction resulting from judicial corruption, together with the emergence of complementary legal ideas, earlier popularized by Lord Coke, which ultimately made expedient the judicial independence guarantees, like tenure of office while of good behaviour and remunerative security, which are codified in the *Act of Settlement*.⁶⁴

4.2.3 The Unwritten Tradition of Independence in the Modern Constitution

The preceding section suggests that the *Act of Settlement* was an important marker in the development of judicial independence. However, just as it was only part of development of lawyer autonomy, the 1701 legislation was also a codification of only some features of the long tradition of judicial independence in Britain. Like other principles and practices in law, the broader principle of judicial independence has its roots in an earlier period. Many aspects of the principle raised fundamental questions about judicial independence which continue to present issues.

In this respect, the *Constitution Act, 1867*, Part VII describes the ‘Judicature’ provisions that match much of the wording of the *Act of Settlement*.⁶⁵ For example, section 100 provides for and fixes salaries of judges. Section 96 describes the authority of the Governor General to appoint Judges of Superior Courts. Section 97 provides for the appointment of judges from the Bars of the provinces in Ontario, Nova Scotia and New

⁶³ *Supra* notes 32 - 35, in Chapter 3.

⁶⁴ *Supra* note 13 at 781 – 782.

⁶⁵ *Supra* notes 14 and 11 respectively.

Brunswick to the superior courts of those provinces respectively, while section 98 similarly provides that Judges of the Courts of Quebec must be selected from the Bar of that province.⁶⁶ Section 99 sets the mandatory retirement date of judges at age 75,⁶⁷ and provides that superior court judges hold office during good behaviour and may not be dismissed except upon the addresses of both houses of the federal Parliament. Despite this constitutional recognition, as noted aspects of the principle have presented ongoing challenges and, for example, disciplining and removal of judges, under section 99, continues to be problematic into modern times.⁶⁸

In 1998 *Remuneration Reference*, the majority of the Supreme Court relied on some textual support for the unwritten ‘tradition’ of independence to justify expansion of guarantees to protect judicial remuneration at provincial courts.⁶⁹ Notwithstanding Chief Justice Lamer’s comments that Canadian courts had evolved, there is little evidence that lower Courts had evolved to the point of exercising traditional ‘judicial independence’ after Confederation. Nor had the *Act of Settlement*, or any subsequent developments in British or Canadian legal history for that matter, generally recognized judicial independence protections as encompassing a broad range of lesser judicial officials.

⁶⁶ Though as determined in *Quebec (AG) v Canada (AG)* [2015] SCJ No 22, judges of the Federal Courts, who may no longer be practicing lawyers in the province, are still eligible for appointment to Quebec Superior Courts.

⁶⁷ This age restriction was imposed by constitutional amendment, *Constitution Act, 1960*, 9 Eliz II, c 2 (UK), which came into force on March 1, 1961.

⁶⁸ No judge has ever been removed in Canada through the process of joint address established in the *Act of Settlement* and constitutionally protected in Canada starting in the mid 1800’s. The current process for judicial removal and discipline starts with the authority of the Canadian Judicial Council, which conducts investigations and inquiries and makes recommendations for removal to the government pursuant to its authority under ss 58 – 71 of the *Judges’ Act* RSC 1985 c J-1 [*Judges’ Act*]. In recent years, there have been multiple inquiries into judges’ behaviour at the federal level, see https://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_conduct_en.asp.

⁶⁹ *Supra* note 1.

However, in the earlier traditional description of judicial independence, set out above, there are parallels that do accommodate and rationalize the modern extension of judicial independence protections on a traditional basis.

For example, in the early 1600s jurists had to grapple with the question of how to regard special adjudicative bodies created by the King, like the Star Chamber and High Commission.⁷⁰ These tribunals presented a threat to the jurisdiction of the traditional judiciary and led to challenges of the authority of the King to create these bodies, and also of these authorities to act under special rules. In fact, Lord Coke's objection, noted above, to these new 'courts' was upheld during the 'Long Parliament' of the Commonwealth period, which later banned them.⁷¹

By comparison, in the *Remuneration Reference* the Court had to deal with 'inferior' courts, which up to that period were not covered by traditional judicial independence guarantees in non-criminal cases. However, the purely provincial and territorial courts in Canada had been gaining in status, jurisdiction and caseload throughout the previous several decades. The growing prominence of inferior courts, along with the creation of a number of statutory courts, and an increasing plethora of administrative bodies, also presented increasing challenges, some of which the Court had

⁷⁰ While early English Kings decided some judicial matters, this had ceased to be the practice, so James I presiding in the Star Chamber and giving judgment was 'unusual'. *Supra* note 13 at 778 citing Holdsworth Vol 1 500, Plucknett, p 152. Like the Star Chamber, the Court of High Commission had been originally been established in an earlier period, largely as an ecclesiastical court, but under the Stuarts these Courts both came to be regarded as instruments of Royal oppression, see also generally, online: < <http://www.britannica.com/EBchecked/topic/265134/Court-of-High-Commission>>.

⁷¹ *Supra* note 13 at 781.

in earlier case law attempted to address by shoring up the identifiable authority of Canada's constitutionally recognized superior courts.⁷² The challenge faced by the court system in addressing jurisdiction and the rise of new adjudicative bodies in the 1990s is comparable to the historical experience.

A second parallel lies in the older judicial independence tradition that existed for other judges in Britain in the 1600s in the Courts of the Chancery and Exchequer. There, as in France, some judicial officials such as the Master of the Rolls and Barons of the Exchequer had had tenure of office since mediaeval times.⁷³ In contrast to the French, however, the practice of alienating the life tenure for these judicial office holders as a matter of feudal right, never arose in Britain. The creation of a statutory life tenure during good behaviour in the *Act of Settlement* thus represented a broader generalization of this older and pre-existing feudal form of tenure of office for some judges.

In modern times, the logic of the *Remuneration Reference* presented a basic change in tack by the Court. In Lord Coke's time, and in modern Supreme Court cases like *Residential Tenancies*, the judiciary had sought to exclude some tribunals from challenging the recognized hierarchy of superior courts. However, by 1998, the

⁷² *Supra* note 25. Provincial courts handle the majority of court proceedings in Canada, see P H Russell (ed) *Canada's Trial Courts: Two Tiers or One*, (Toronto: U of T Press, 2007) at 4 – 12.

⁷³ *Supra* note 13 at 782 – 4. The *Act of Settlement* initially only applied to central courts of common law, and excluded judges like the Lord Chancellor or Exchequer. However, some judicial officials such as the Master of the Rolls or Barons of the Exchequer enjoyed security of tenure in their offices, but as the result of a feudal grant of life tenure, rather than as a statutory entitlement.

expansion of lower courts,⁷⁴ the addition of new courts⁷⁵ and the growing importance of administrative tribunals meant that these bodies were undertaking a wide array of important legal work. The continuing exclusion of these newer bodies from legal independence protections risked marginalizing traditional judges and courts.

Moreover, in terms of tenure of office, the ‘tradition’ represented by the *Act of Settlement* was not to recognize judicial independence for the first time, but rather to statutorily expand what had been feudal tenure protections limited to some judges, to a new class of judicial officials.⁷⁶ Just as the courts of common law in 1701 would thereafter enjoy statutorily the life tenure protections of other judicial officials, so too in the modern era would the Supreme Court extend judicial independence guarantees to inferior courts.

By expanding judicial independence protections, first to provincial judges in the *Remuneration Reference*, later to other judicial officials,⁷⁷ the judiciary asserted a measure of control over how these bodies would deal with legal issues which had previously been within the sole jurisdictional purview of traditional superior courts.

⁷⁴ *Supra* note 17, where at 13 the author notes “during the 1970s, province after province replaced [provincial ‘magistrates’ courts]...the size of the new court was increased substantially, and its jurisdiction expanded in comparable ways across the provinces”. Peter Russell notes the political challenge this presented in reviewing this process of expansion in *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) [Russell, *Judiciary*] at 48.

⁷⁵ *Ibid*, including new courts of appeal and federal courts.

⁷⁶ *Supra* note 74.

⁷⁷ Including: provincial Justices of the Peace, *Ell v Alberta* [2003] 1 SCR 857, 2003 SCC 35; Deputy Judges of Ontario’s Small Claims Court, *Ontario Deputy Judges Assn v Ontario* (2006), [2006 CanLII 17250 \(ON CA\)](#), 80 OR (3d) 481, [2006] OJ No 2057 (C.A.); Masters and Case Management Masters in Ontario *Masters Association of Ontario*, 2011 ONCA 243.

Henceforth, the capacity of inferior courts to deal with important legal issues would be enhanced.⁷⁸ In addition, given that the original *Act of Settlement* did not recognize, but merely expanded by statute existing judicial independence protections,⁷⁹ the comparable expansion of such protections in modern case law is consistent with the British tradition. In this sense, while being subject to at least some criticism by a few observers,⁸⁰ the inclusion of provincial court judges as within the ambit of constitutional judicial independence protections in the *Remuneration Reference* was, in fact, consistent with early development of adjudicative independence in England.

The developing ideas of judicial independence in theory and practice examined in the next section show that the modern version of independence of the Judiciary was a principle that took some time to emerge in Britain, and was mediated by later political events. In the end, this section further demonstrates the concepts of recursivity and

⁷⁸ The exclusivity of some legal issues as within the sole authority of superior courts was arguably based on their independence. By extending the ambit of this independence to other tribunals, the judiciary controlled the scope of authority that such lower courts could exercise. This view of ‘control’ or defence of a domain of knowledge or expertise, here the capacity of inferior court judges to determine certain matters, is consistent with one functionalist view of ‘professionalism’, which is set out in more detail in the context of the legal profession in Chapter 6. A similar characterization of these changes, that recent case law has expanded or enhanced the role of lower courts by recognizing their independent capacity to handle a wide range of legal matters, is also described by McCormick, *Judicial Independence*, *supra* note 17 at 9 and throughout.

⁷⁹ *Supra* note 74.

⁸⁰ “The Court had to wander to the realm of the preamble to the Constitution, beam itself to England, find there an unwritten principle about judicial independence (that raises deep questions regarding its boundaries, given the unique structure of the British judiciary) – and import this unwritten structure into Canadian constitutional law (which, since 1982, is based on codified norms). So the notion of relying on a rule of law is somewhat troubling when ascertaining such a rule requires such a serpentine route,” Amnon Reichman in “Judicial Non-Dependence: Operational Closure, Cognitive Openness, and the Underlying Rationale of the *Provincial Judges Reference* – The Israeli Perspective” in *supra* note 6, Dodek & Sossin, *Judicial Independence* at 439. For further critical commentary see eg Jeffrey Goldsworthy, “The Preamble, Judicial Independence and Judicial Integrity” (2000) *Constitutional Forum* Vol 11 60, particularly at 60, where the author describes the decision as follows: “the court employed the following stratagems to avoid the three obvious and fatal objections to its misuse of the Preamble: a self-contradiction, a vague reference to ‘evolution’ combined with a plainly false analogy, and an evasion”.

simultaneity, as well as the close ties to the complementary principle of independence of the Bar.

4.3 Development of Judicial Independence 1701

The efforts of the Stuart kings to control the legal system catalyzed a long period of reflection about the role of judges and lawyers in the legal system. Changing attitudes toward the justice system were precipitated by the dysfunction of the legal system in the later 1600s resulting from the arbitrary dismissal of ‘at pleasure’ appointments, and the resulting growth of extensive judicial corruption.⁸¹ Consequently, the need to formalize guarantees of judicial independence was made a priority within the legislation.⁸²

However, the reforms of the 1688 Revolution and the political wrangling resulting from ongoing uncertainty around the Crown succession, meant that formal changes to judicial independence took many years to implement.

One of the first actions of the new King and Queen in the 1690s,⁸³ was to reinstate the practice which had been followed during the Commonwealth period, of

⁸¹ The last Lord Chancellor before the 1688 Revolution, who had previously been Chief Justice, was Jeffreys, who was believed to have accepted bribes while in office and at the time of the Revolution, was forced to seek militia protection from an angry mob in the Tower of London, *supra* note 13 at 781.

⁸² *Ibid.*

⁸³ The Crown passed initially to William III and Mary II, who ruled jointly, then to Queen Mary’s elder sister, Princess Anne. When all of these monarchs died without eligible surviving children, the Crown passed to the children of James I granddaughter, the first of which became King George I in 1714. One of the main historical reasons for these changes, which was also codified in the *Act of Settlement*, was to avoid having a Catholic heir to the monarchy of England.

appointing judges to hold office for life while of good behaviour.⁸⁴ Still, at the time, the Crown was not required to make appointments of this nature, and it took several more years before the tenure requirement was eventually codified in 1701.⁸⁵ Several additional aspects of the concept of judicial independence as captured in the *Act of Settlement* deserve particular scrutiny. This includes how institutional guarantees of judicial ‘tenure’ affected judicial impartiality and how the recognition of security of judicial remuneration were ideas that only formed over the course of the next 150 years. Last it includes explicit and ongoing connection of the judicial function to an independent Bar.

4.3.1 Tenure

Despite its earliest roots in the feudal rights of some judicial officials, the statutory tenure accorded to the judiciary by the *Act of Settlement* had a number of limitations. First, it did not apply to all courts or judicial officials. So, for example, the reference to ‘judges’ in the legislation meant the central (London-based) courts of the common law.⁸⁶ Nor did it include all additional officials outside the central courts. One example was the position of Lord Chancellor, who always held the position *durante bene placito*, or at the King’s pleasure.⁸⁷ The position of Lord Chancellor was considered the

⁸⁴ *Supra* note 11.

⁸⁵ The provision reads “judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established: but upon the address of both houses of parliament it may be lawful to remove them”, *Act of Settlement* (1701) 12 and 13 William III, c 2. Due to continuing uncertainty about the succession of the Crown in England, the *Act of Settlement* was passed in 1701 but provisions related to succession did not take effect until 1714, with the accession of the first Hanoverian monarch, King George I, *supra* note 13 at 782.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

highest legal office in Britain and served as the buffer between judges, the Crown and politicians.⁸⁸

The most significant early limit on judicial independence was the lapse of judicial patents on the death of the reigning monarch. When the King or Queen died, all judicial offices were traditionally vacated. This historical limit on the tenure of the judiciary was finally modified by statutory change in Britain, but not until 1760.⁸⁹ Other aspects of judicial independence, such as remuneration, were similarly not fully guaranteed by the *Act of Settlement* and required later legislative remediation.

In this respect, to the extent that the *Act of Settlement* can be said to enjoy constitutional status, its provisions, including those related to judicial tenure, have always been subject to the principle of Parliamentary sovereignty and to alteration by simple statute.⁹⁰ That is, even though the judicial tenure provisions of the *Act of Settlement* were later largely copied into the written portion of the Canadian Constitution, the

⁸⁸ The Lord Chancellor was traditionally a judge, but also a member of cabinet and Speaker of the House of Lords though the office no longer plays these roles as the result of recent statutory changes in 2005, see Graham Gee, “Defending Judicial Independence in the British Constitution” [Gee, “Defending Judicial Independence”], in *supra* note 6 Dodek & Sossin, *Judicial Independence* at 381 – 410. However, when Vice-Chancellorships were created in the 19th century, they were later made ‘good behaviour’ appointments by statute, *ibid* at 784 citing 53 Geo III, c 24 and 5 Vict, c 5.

⁸⁹ 1 Geo III, c 23. The power to remove judges on the demise of the King resulted in judicial purges at times of succession in 1702, 1714, and 1727, *supra* note 62, Lemmings, *Professors*, at 273.

⁹⁰ Peter Hogg points out that the *Act of Settlement* “never had constitutional force in the United Kingdom in the sense of a restriction on parliamentary sovereignty, and the United Kingdom Parliament retained (and still retains) full power to impair judicial independence in the unlikely event that it should choose to do so” *supra* Hogg, “Bad Idea” note 6 at 29.

‘tradition’ of judicial independence in Britain has always been subject to legislative oversight.⁹¹

Up until recently, the legislative capacity to statutorily amend some aspects of judicial independence also appears to have been accepted in Canada. For example, changes to the life tenure granted to judges were made by legislation in the 1920s to Canada’s Supreme Court and Exchequer judges.⁹² Mandatory retirement dates of judges were more generally changed in Canada through a more formal, though largely uncontroversial, process of constitutional amendment in the 1960s.⁹³ However, more recently, the Canadian Judicial Council (CJC) was established by statutory enactment in the 1970s and was given primary responsibility for disciplining judges.⁹⁴ Despite the fact that removal of judges touches on both the written and unwritten constitutional principles of judicial independence, the operational process for judicial removal established by the

⁹¹ The ‘traditional’ view and experience with judicial independence in Britain seems in contrast to the developing Canadian view. A plain reading of the Supreme Court’s recent decision in the Reference re *Supreme Court Act* ss 5 and 6, 2014 SCC 21, [2014] 1 SCR 433 [*Nadon Reference*], suggests a process of formal constitutional amendment is now required to change certain statutory provisions touching on the independence of Supreme Court judges. In that case, the Court prohibited government attempts to legislatively alter the *Supreme Court of Act*, RSC, 1985, c S-26 [*Supreme Court Act*], by explicitly according one provision, ostensibly related to the ‘composition’ of the court, constitutional status.

⁹² *Supra* note 13 at 1175.

⁹³ *Supra* note 11, amended by the *Constitution Act, 1960*, *supra* note 67, 1961. The comparable statutory provision for Supreme Court judges is found at s 9(2) of that act, *supra* note 91.

⁹⁴ The failure to have a fair and regularized process was the subject of wide criticism, leading to statutory additions of Part II of the *Judges’ Act* which empowers the Council, *supra* note 68. For discussion see Martin Friedland, “Review of the Judicial Conduct Process of the Canadian Judicial Council – Background Paper”, Canadian Judicial Council, 25 March 2014, available online at: www.cjc.gc.ca. See also Ed Ratushny, *The Conduct of Public Inquiries Law, Policy and Practice* (Toronto: Irwin Law, 2009) at 35 – 38; Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canadian Judicial Council, 1995 [Friedland, *A Place Apart*] at 88.

CJC demonstrates that the process of removal from judicial office, has historically been amenable to some measure of statutory modification in Canada.⁹⁵

4.3.2 Security of Finance and Political Independence

It is sometimes said that the *Act of Settlement* reinforced independence for judges, because tenure, combined with security of finance meant that judges could be both autonomous and neutral, so subsequently had little reason not to be as impartial as possible.⁹⁶ In modern times, the reliance on judicial remuneration to bolster judicial impartiality is reflected within Canada's *Judges' Act* that provides that no judge shall "engage in any occupation or business other than his or her judicial duties."⁹⁷ However, the idea that judicial salaries would provide a sole source of income is also one that, like the recursive development of the principle of tenure, historically emerged over a long period.

While the 1701 legislation provided that salaries would be "ascertained and established,"⁹⁸ salaries could still be withheld and paid in arrears.⁹⁹ It was not until 1760

⁹⁵ Albeit consistent with the process set out in the *Act of Settlement*, the CJC's role has operationally changed the way in which this process unfolds. Changes establishing the role of the CJC did not require formal constitutional scrutiny and could be distinguished as mere statutory changes, not requiring formal amendment. However, such a view might now be challenged by what appears to now be the position of the Supreme Court in the *Nadon Reference* decision, that some statutory aspects of independence in Canada may now enjoy constitutional protection.

⁹⁶ The current reliance on judicial remuneration to protect the independence and impartiality of judges is reflected in section 55 of the *Judges' Act*, *supra* note 68, which precludes judges from engaging in "any other occupation or business". The comparable statutory provision for Supreme Court judges is at s 7 of the *Supreme Court Act*, *supra* note 91.

⁹⁷ *Ibid.*

⁹⁸ *Supra* note 11.

⁹⁹ Phillip Girard, "The independence of the Bar in Historical Perspective" [Girard, "Historical Perspective"], at 54 – 55 in *In the Public Interest*, The Report and Research Papers of the Law Society of

that statutory improvements provided further guarantees that judicial salaries would actually be paid.¹⁰⁰ Judicial pensions were similarly a matter of ‘grace’ until 1799.¹⁰¹ Even still the remuneration of individual judges was subject to further statutory refinement and not finally complete in England until the last quarter of the 19th century.¹⁰²

Given the apparent precariousness of judicial remuneration during much of the 1700s, it is not entirely surprising that British judges often did not rely exclusively on their judicial offices to support themselves financially.¹⁰³ For example, some judges at this time shared in the fees that litigants paid.¹⁰⁴ It was common practice for Chief Justices in particular to sell their patronage power to appoint individuals to non-judicial offices.¹⁰⁵ Moreover, just as the Crown managed lawyer independence in this period, through the use of things like appointments to the Serjeant’s Inn, or the awarding of KC designations, it also had similar tools to control the independence of the Judiciary. In this respect, the King had “a whole armoury of ‘sweeteners’ which might be used to reward judges, [like] peerages, extra allowances, and ‘petty sinecures’ for friends or family”.¹⁰⁶

Upper Canada’s Task Force on Rule of Law and Independence of the Bar, (Toronto: Irwin Law Inc, 2007) [LSUC, “*Public Interest*”].

¹⁰⁰ *Supra* note 89.

¹⁰¹ At least one judge complained in the 1700s that this discretion was used to punish him for unfavourable opinions, *supra* note 62 at 273, where at fn 93, Lemmings relates such a complaint by Sir John Fortescue-Aland.

¹⁰² *Supra* note 13, at 782.

¹⁰³ “Particularly for chief justices, the royal or parliamentary salary was at times quite a secondary source of income”, *ibid* at 789.

¹⁰⁴ In some ‘inferior’ courts in Canada, like the Small Claims Court in Ontario, this practice was still prevalent up until at least the 1970’s, Ontario Law Reform Commission, *Report on the Administration of Ontario Courts*, (1973) Part III at 349.

¹⁰⁵ *Supra* note 13 at 789.

¹⁰⁶ *Supra* note 62 at 273.

The vestiges of some of the mechanisms used by the Crown to manage judicial independence still exist in contemporary times. For modern lawyers, ‘Queen’s Counsel’ designations are still commonly awarded to members of the Bar.¹⁰⁷ While promotion to high office or an English peerage may not now be desirable, or is at least unlikely for most Canadians,¹⁰⁸ the executive branch of government still controls both initial judicial appointments as well as elevation to higher judicial office.¹⁰⁹ Superior Court judges, depending on their office, are still statutorily entitled to an array of allowances and reimbursements for incidental, representational and travel expenses.¹¹⁰ Moreover, as in the past, many judges still retain direct authority to appoint people to both non-judicial and judicial offices.¹¹¹

In contemporary times the kinds of judicial corruption which gave rise to the tenure and financial security provisions in the *Act of Settlement* no longer appear to exist.¹¹² Nor, given the general deference and respect in which the court system is

¹⁰⁷ Though some jurisdictions, such as Ontario, have eliminated this designation, lawyers who received such designations in the past or from other jurisdictions still often list these as part of their professional credentials.

¹⁰⁸ One well known modern exception in terms of elevation to a British peerage is Conrad Black, who received a Baroncy Life Peerage as Lord Black of Crossharbour under British legislation in 2001, though after losing a court challenge, he was required to abandon his Canadian citizenship to do so, see *Black v Canada (Prime Minister)* 54 OR (3d) 215 (OCA). Though better known as a businessman and newspaper owner, Black also studied law at Laval in Quebec.

¹⁰⁹ See, for example, Jacob Ziegel, “Promotion of Federally Appointed Judges and Appointment of Chief Justices: The Unfinished Agenda”, [Ziegel, “Promotion”] in *supra* note 6 in Dodek & Sossin, *Judicial Independence*, 151 – 190.

¹¹⁰ Section 27 of the *Judges’ Act*, *supra* note 68.

¹¹¹ For example, under Ontario’s *Courts of Justice Act* RSO 1990 Ch c 43, as amended, ss 21.13 (2) and 21.14(2) the Chief Justice of the Superior Court has authority to form local Community Liaison and Community Resource Committees in family law, and to appoint members; Regional Senior Judges under the same Ontario act can appoint Deputy Judges of the Small Claims Court under s 32; and all judges retain an inherent discretion, within criminal proceedings for example, to appoint *amicus curiae*.

¹¹² Though note some exceptions, such as the case of Leo Landreville, an Ontario judge who resigned in the 1960s rather than face an address before Parliament seeking his removal based on improper financial

held,¹¹³ would most think that ‘sweeteners’ like those employed by the Crown in England in the 18th century, would today have much effect on the individual independence of Canadian judges. Such graft, nepotism and inappropriate conduct, though not unknown in the Canadian past,¹¹⁴ would also run afoul of modern public administrative emphasis on the accountability and transparency of government.¹¹⁵ However, the past incentives employed to manage judicial independence have some parallel in the present day. As will be shown later in this Chapter in the context of the judiciary in Canada following Confederation, these mechanisms have some capacity to overwhelm more modern institutional guarantees of independence.

4.3.3 Independence from the Executive

While the tradition and legislation guaranteeing independence in England sought to protect the individual independence of judges, it also planted the seeds for a nascent institutional autonomy. As noted, the long history of independence for the judiciary had arisen over the decades of Tudor rule in Britain.¹¹⁶ Faced with new challenges from the Stuart Kings in the 1600s, Lord Coke popularized a group view of judges and their relationship to the government. This included the beginnings of the idea that the body of individual judges should receive a degree of group or institutional recognition from the

relations prior to his appointment, though his challenge to the investigative process that led to this was later upheld, see, *Landreville v Canada* [1977] 2 FC 726.

¹¹³ For example, the remarks of Chief Justice McLachlin that “Canada has a strong and healthy justice system. Indeed, our courts and justice system are looked to by many countries as exemplary. ... one that is the envy of the world”, *The Challenges We Face*, Presented at the Empire Club of Canada, Toronto, March 8, 2007, available online: < <http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2007-03-08-eng.aspx>>.

¹¹⁴ *Supra* note 15.

¹¹⁵ For example, Lorne Sossin, “Democratic Administration” in *The Handbook of Canadian Public Administration* ed Christopher Dunn, (Toronto: Oxford UP Canada, 2002) 77 – 99.

¹¹⁶ *Supra* note 49.

Crown.¹¹⁷ The notion of considering judges *en banc* arose in combination with the recognition that corruption and partisan activities of judges prior to the Glorious Revolution had led to a substantially dysfunctional justice system.¹¹⁸ In these concepts, rooted in the political events of the 1600s, lay the early roots of the modern doctrine of separation of powers.

Though the ‘separation of powers’ doctrine as part of judicial independence was not yet fully developed,¹¹⁹ the principle of some separation between law and politics was also recognized in the *Act of Settlement* in the sense that judges, with some exceptions,¹²⁰ could not simultaneously serve as members of Parliament.¹²¹ However, the absolute separation of powers has always been modified in the Westminsterian tradition by the unwritten recognition that Britain has a constitutional system that is both legal and political.¹²²

¹¹⁷ For example, that judges should be consulted by the Crown *en banc*, as a group rather than as individuals. *Supra* note 60.

¹¹⁸ *Supra* note 62.

¹¹⁹ Though the doctrine also had historical antecedents, the modern doctrine of ‘separation of powers’ is most frequently associated with the work of Baron de Montesquieu, particularly in 1748’s *Spirit of the Laws*, see Bok, Hilary, "Baron de Montesquieu, Charles-Louis de Secondat", *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition), ed Edward N Zalta, available online: <http://plato.stanford.edu/archives/sum2014/entries/montesquieu/>.

¹²⁰ In addition to the political role of the Lord Chancellor, until 1873 the Master of the Rolls was entitled to sit as a Member of Parliament – *supra* note 13 at 807 – 808.

¹²¹ Lederman notes this prohibition predated the *Act of Settlement* and was based in the historical practice that judges were under a standing liability to attend the King-in-Council and later the House of Lords as advisors, *Ibid* at 807.

¹²² *Supra* note 88, Graham Gee, "Defending Judicial Independence"; Graham Gee & Grégoire CN Webber, "What is a Political Constitution?" (2010) 30 *Oxford J of Legal Stud* 273 – 299; Robert Stevens, "Loss of Innocence? Judicial Independence and the Separation of Powers" (1999) 19 *Oxford J Legal Stud* 365 at 367; JAG Griffith, "The Political Constitution" (1979) 42 *MLR* 1 at 16.

While there was an early trend towards separating partisan concerns from legal matters, there was also a close association between the leaders of government and the judiciary. For example, it was not until the 1800s that the convention was established in Britain that sitting judges could not also be appointed to Cabinet.¹²³ Historically, and up until 2005, this simultaneous political function was best reflected in Britain by the role of the Lord Chancellor, who was a judicial Law Lord and was officially a member of both Parliament and of Cabinet.¹²⁴

4.3.4 Appointment and Removal

As Martin Shapiro points out, while the *Act of Settlement* sought to divorce judicial interests from those of the government, it also closely linked the judiciary with the legal profession.¹²⁵ First, as had been the developing practice, the appointment of judges from the emerging body of professional lawyers was provided for in legislation. In Canada this idea is constitutionally entrenched for superior court judges by sections 97 and 98 the *Constitution Act, 1867*, which states that superior court judges must be chosen from the Bars of the provinces.¹²⁶ In contrast to the independence of the Bar, which has had longstanding institutional recognition through bodies like the English Inns of the

¹²³ *Supra* note 13 at 783 citing Alpheus Todd, *Parliamentary Government in England* (London: Longmans, Green, and Co, 1887) Vol II p 198.

¹²⁴ *Supra* note 88, Gee, “Defending Judicial Independence” particularly at 390 – 402.

¹²⁵ *Supra* note 29 at 65.

¹²⁶ 30 & 31 Victoria, c 3 (UK), as amended by *Constitution Act, 1982*. Section 97 directs that judges must be appointed in Ontario, Nova Scotia and New Brunswick from the respective Bars of those provinces, while section 98 provides that Quebec judges must be appointed from the Bar of that province.

Court and, in Canada, regional Law Societies,¹²⁷ the judiciary had long had no separate organizational or putatively ‘professional’ body.

That is because, in addition to being appointed from the Bar, the professional reference group for judges has historically been the legal profession itself,¹²⁸ and there is an essential connection between the two:

Judges must not only be drawn from the ranks of lawyers but they must be lawyers in good standing who enjoy a solid reputation among their peers. Once appointed, judges in many ways are still lawyers, still members (albeit inactive ones) of their professional organizations. This effectively remains... the people to whom they justify their decisions, and the community whose respect they value and pursue. **It is this double anchoring in the autonomous legal profession – that functions more effectively than the increasingly nominal power of parliamentary removal to make judicial independence something other than a gratuitous grand of arbitrary power.** Judges in the English tradition are not ordinary citizens, or politicians, ...or career bureaucrats, but trained and experienced and respected lawyers.¹²⁹

As was the case in the 1600s in Britain, the removal of judges presented, and continues to present, a thorny conceptual and practical challenge. Under the *Act of Settlement*, the removal process was institutionalized so that judges who breached their ‘good behaviour’ obligations could be removed on the joint address of the two Houses of Parliament. Under legislative changes enacted in the 1970s, the federal *Judges’ Act*

¹²⁷ Amongst others, including the Faculty of Advocates in Scotland, attorneys and solicitor’s professional organization in England, now known there as the Law Society, as well as national professional groups, in Canada like the Canadian Bar Association and the Canadian Federation of Law Societies.

¹²⁸ This point builds on an observation made by others, including AV Dicey, who identified this connection between Bar and bench as an essential feature of the independence of judges in England, *supra* note 39.

¹²⁹ My emphasis, *supra* note 17 at 8. In this case, while ‘in many ways’ they are still lawyers, their membership in Canadian Law Societies ends on appointment.

established a regularized process to scrutinize the behaviour of individual judges as a preliminary step in the process of their removal from office.¹³⁰

To sum up this section, the *Act of Settlement* provided an important codification of aspects of judicial independence. However, the broader principle of independence also contains traditional elements, many of which are still unsettled today. In several respects, even those parts of the principle of judicial independence that were captured in the *Act of Settlement* were subject to further development and refinement, often through legislative enactment. However, from the traditional British perspective the conventional and legal aspects of judicial independence were largely established, for superior courts, by the early 1800s.

The British ‘tradition’ of judicial independence demonstrates that it has continued to develop. From early times it has been closely associated with the independence of the Bar, and both aspects of the principle have been mediated by simultaneous events. Like independence of the Bar, judicial independence has origins in several sources, which include unwritten conventions based on historical considerations, as well as legislative and constitutional roots. The next section briefly considers the development of independence as it was received and modified in response to the Canadian context. In Canada, the modern understanding of independence of the Judiciary did not emerge immediately. In this respect, the ‘tradition’ of independence includes the observation that

¹³⁰ *Supra* note 68.

many aspects of the principle were significantly mediated by events in early Canadian legal and political history.

4.4 Mediation of Judicial Independence in Canada

While ‘judicial’ independence may be regarded as a contemporary touchstone in terms of understanding the role of independent legal actors and their role in the justice system to support rule of law, much of the Canadian experience belies this general understanding in the development of independent courts. In this respect, the principle of independence of the Judiciary developed recursively in Britain, in simultaneity with historical and political events. By contrast to the British experience, the most salient feature of judicial ‘independence’ in early Canadian history is that, even if relatively indeterminate, the identifiable version of the principle existing in Britain at the time did not initially apply to the Canadian colonies.

4.4.1 Judicial Independence in Early Canadian History

In British overseas colonies the appointment of judges remained for some period entirely within the British Royal prerogative.¹³¹ This meant that, unlike the protected tenure rights of the British judiciary, all colonial judges were appointed ‘at pleasure’ and

¹³¹ Lederman notes that while legislation from colonial assemblies in the American colonies was frequently disallowed on this basis, *supra* note 13 at 1140 citing L W Labaree, *Royal Government in America* (New Haven: Yale U P, 1930) at 380. After 1782, the *Colonial Leave of Absence Act 22 Geo III (1782) c 75 (UK)* made any judicial dismissals in the colonies reviewable by the Judicial Committee of the Privy Council.

could be dismissed at any time.¹³² In addition, whereas the long tradition in British history had been to appoint judges from the ranks of the Bar, in Britain's North American colonies, there were few lawyers available for appointment in the early years. Given the lack of individuals qualified, those who did demonstrate the necessary skill to serve in a judicial capacity often did so as one amongst many occupations.¹³³

Though there was some political involvement in England by judges at the time, the steady trend there was toward the increasing separation of law from politics. By contrast, the paucity of talent available to take on these roles in the early colonial milieu meant that those who served as judges also often became involved in local politics.¹³⁴ This involvement set in place a connection between lawyers, politics, judges and the court system in Canada which continues to this day.

Ultimately in British North America, the trend towards a separation of the judicial function from government and politics was far behind the curve earlier established by the British legislation and tradition. During this time “judges were usually either pawns or partisans of the governor and were often leading members of the executive or legislative

¹³² *Ibid* at 1140. See also John McClaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800-1900* (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2011).

¹³³ “Though a real attempt to find a lawyer was usually made, often lawyers were unavailable for judicial office” *supra* note 14 at 1146 citing Hilda Neatby, *The Administration of Justice Under the Quebec Act* (Minneapolis: University of Minnesota Press, 1937) at 55.

¹³⁴ “The need to make diversified use of the talent of the few able people available in the early days of the colony also caused the partisan involvement of colonial judges in local politics and made imperial insistence on their tenure at pleasure understandable....”, *Ibid*.

councils, or both.”¹³⁵ Prior to the 1840s some local assemblies had made efforts to secure the independence of judges.¹³⁶ In addition, some steps were taken by London to reduce the involvement of judges in local political affairs. However, it was not until the advent of Responsible Government that judicial independence began to emerge more broadly, following Lord Durham’s Report which led to the Union of the Canadas in the 1840s.¹³⁷

In England, the *Act of Settlement* had set the judiciary on its path toward realizing the new concepts of judicial independence. However, in Canada there was a dissonance between these newer ideas about the justice system and the older ‘Baconian’ legal tradition that favoured loyalty to the Crown.¹³⁸ Just as members of the Bar grappled with challenges created by this tension in early Canadian history, so too did this tension between competing ideas about the role of the judiciary affect individual decision-makers.

¹³⁵ Such partisan involvement by judges in colonial politics led to the dismissal of a least two judges in Upper Canada in the early 1800s. Robert Thorpe was a judge who served in the assembly of Upper Canada after being appointed in 1806 who was later removed from office. Later still, John Walpole Willis was the first judge sent directly from the colonial office to Upper Canada since 1805 and was ultimately removed from office in 1829 in part because of his political association with Reformers. *Supra*, Lederman at 1148 – 9 citing *Canada and Its Provinces* (Toronto, 1913), Vol III at 184 – 85 and A Dunham, *Political Unrest in Upper Canada, 1815 – 1836* (Longmans, Green and Co. Ltd: London, 1927) at 111 – 115. See also *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800-1900* (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2011). See also Jim Phillips, “Judicial Independence in British North America, 1825 – 1867: Constitutional Principles, Colonial Finances, and the Perils of Democracy” paper presentation at the Faculty of Law, Queen’s University, 2014.

¹³⁶ Nova Scotia for example, passed legislation in the late 1700s that mirrored judicial independence guarantees in the *Act of Settlement*, though such legislation was still reviewable by London. In Lower Canada judges were statutorily ineligible to sit in the House of Assembly after 1812 and eventually, many years later, a similar statute was passed in Upper Canada”, *ibid* at 1149.

¹³⁷ The Earl of Durham, *A Report on Canada* (London, Methuen and Co Ltd, 1922) at 207 and 241.

¹³⁸ Some argue that in England there was an equal divide between judges who held either Baconian or Cokean views about the judiciary, see F Murray Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: The Osgoode Society for Canadian Legal History 1993) at 28 – 30.

For example, in Upper Canada the partisan activities of judges have led some to conclude that in the 1820s and 1830s the judiciary regularly used their position to favour the ruling elites.¹³⁹ The challenges in Upper Canada at this time echoed the earlier confrontations in English history. There, the tension between different viewpoints about the role of the judiciary had largely resolved itself in favour of a ‘Cokean’ view in England, following the Glorious Revolution in 1688. However, in Upper Canada, the period prior to the Rebellions of 1837 – 1838 was one in which many judges appeared to work with Tory elites to manipulate the legal system for their own purposes.¹⁴⁰

Balanced against accounts of maladministration in the justice system in the Canadian colonies are more favourable descriptions of some members of the judiciary during this period. Though imbued with an understanding of their role that may have favoured the Crown and elite interests, “what is remarkable is the extent to which the judges maintained a substantial degree of independence, as opposed to the extent to which they betrayed it.” For example, when one local magistrate resorted to ‘extra-legal’ methods, carrying out an assault on prominent reformer MacKenzie, the political motivation for the attack led the judge hearing the criminal matter to assess a “heavy penalty.”¹⁴¹ Despite their early ‘Baconian’ bent, and their sometimes overt political

¹³⁹ They had a “questionable role in a number of notorious cases, including sedition, treason, and murder trials, in which they allegedly distorted the ends of justice to serve either self-interest or the wishes of the ruling oligarchy.” Peter Oliver, “The Place of the Judiciary in the Historiography of Upper Canada” [Oliver, “Place of the Judiciary”] in G Blaine Baker & Jim Phillips eds *Essays in the History of Canadian Law* Vol VIII (Toronto: U of T Press, 1999) [Baker & Phillips, *Essays VIII*] 443 – 468 at 444.

¹⁴⁰ *Ibid.*

¹⁴¹ There is a considerable debate between those who view judges during this period as acting to advance state interests and those who regard the judiciary of the period as “hard-working, humane and merciful”, *supra* note 139, Oliver, “Place of the Judiciary” at 447 and at 460.

sympathies and associations,¹⁴² the judiciary maintained a commitment to rule of law, even if such rule was less ostensibly liberal or ‘democratic’ in the modern sense of the word.¹⁴³

Still, in Canada there is a parallel between the causes and outcomes of the English Glorious Revolution and the Rebellions of 1837-1838. To the extent that legislative initiatives following the Durham Report put in place general guarantees of judicial independence, such as appointment during good behaviour, Canadian history represents the implementation of these guarantees, but not until almost century and a half after they became institutionalized in England.¹⁴⁴ As noted, several aspects of the principle of judicial independence took decades to fully manifest in England, largely through a pattern of legislative changes up until the end of the 19th century. By comparison, the general recognition of judicial independence in Canada occurred relatively quickly, immediately before and after Confederation, but also took a few more years to develop practically. For example, in Canada, the participation of judges, particularly Chief

¹⁴² Chief Justice Robinson for example, published works following the rebellions that denounced both the Durham Report and the plan to unite the Canadian colonies, *Ibid* at 457

¹⁴³ Understandings of ‘rule of law’ in this context significantly pre-date the work of A.V. Dicey, for example *supra* Part I, Chapter 2 at notes 141 – 144. Like rule of law, the theory of ‘judicial independence’ was similarly relatively undeveloped at this time and “was open to different interpretations”, see Jeffrey McNairn, *The Capacity of a Judge: Public Opinion and Deliberative Democracy in Upper Canada, 1791-1854* (Toronto: University of Toronto Press, 2000) at 31.

¹⁴⁴ Acts of the Legislature of the colonies of Canada East and West were passed in the 1840’s to provide generally for ‘good behaviour’ appointments, *supra* note 13 at 1151. Similar legislation was passed in Quebec in 1843, Nova Scotia in 1848, 11 Victoria c 21. As noted by Jim Philips however, other jurisdictions, such as New Brunswick, Prince Edward Island, Manitoba and British Columbia, did not acquire the practice of good behaviour appointments for the judiciary until after Confederation in 1867, see “Judicial Independence in British North America, 1825 – 1867: Constitutional Principles, Colonial Finances, and the Perils of Democracy” paper presentation at the Faculty of Law, Queen’s University, 2014 at 3.

Justices on Executive Councils, provided those colonial bodies with appellate jurisdiction. However, from the 1830s onward, such direct involvement with executive authority was discouraged.¹⁴⁵

Although individual judges largely retreated from their explicit political role while on the bench, as with lawyers and politics in Canada, there remained a close association between politics, politicians, judges and the Court system. The continuing close association between judges and politics is partly the result of the close connection between judges and the important role of politics for lawyers in Canada.

As still sometime occurs today,¹⁴⁶ many Canadian lawyer politicians moved from their partisan political roles to serve as members of the judiciary. For example, half of the ‘Fathers’ of Confederation were lawyers, as noted in Chapter Three,¹⁴⁷ and more than half of them went on to serve as judicial officials. Moreover, while not prevalent, it was

¹⁴⁵ “About 1830 the imperial authorities made it clear that henceforth they would not appoint judges to the executive or legislative councils” *supra* note 13 at 1150. In Nova Scotia, it was Joseph Howe whose criticisms of the practice of permitting the Chief Justice to continue to sit in Council was part of the basis of his trial, *supra* William Annand, *The Speeches and Public Letters of the Honourable Joseph Howe* (Boston: Jewett & Co, 1858) Vol I, at 141 and 106. The removal of judges from the governing Councils of the colonies limited the traditional appellate jurisdiction of these bodies and ultimately created the need to establish appellate level superior courts. This took some time however and some provincial jurisdictions waited until well into the 20th century to create local Courts of Appeal. Up until the 1960s, only 5 Canadian jurisdictions had Courts of Appeal; Alberta (1919), British Columbia (1907), Manitoba (1906), Ontario (1874), Saskatchewan (1915), *supra* note 74, Russell *Judiciary in Canada*, at 291 - 2. In Quebec following Confederation, the Court of the Queen’s Bench exercised some appellate jurisdiction, though the province’s modern Court of Appeal was not established until 1974.

¹⁴⁶ The 2014 appointment of former Federal Conservative Minister Victor Toews to a superior court position in Manitoba is one such recent example. While the appointment has been criticized, in part, for its partisan overtones, there is, in fact, a pattern of appointing political office holders as judges in Canada stretching back to the 19th century, see “Pay of judge, former Tory minister Toews’ withheld over back rent” *The Globe and Mail* March 26, 2016 Tu ThanH Ha and Sean Fine, available online: <http://www.theglobeandmail.com/news/politics/vic-toews-judge-and-former-tory-minister-fights-salary-seizure-over-late-rent/article23635808/>, retrieved April 10, 2015.

¹⁴⁷ *Supra* note 91 in Chapter 3.

not particularly unusual for judges in Canada to leave the Bench to return to assume roles in high political office.¹⁴⁸

In an overview of Canadian legal history, the sustained frequency of individuals who have flowed from positions as lawyers, to become politicians, to later also become judges, and back again, suggests a close interrelation between law and politics throughout Canadian history. It was this close interrelation, between law and politics, lawyers, judges and politicians, and all of them with the court system, which led later to dysfunctions within the administration of justice. This dysfunction, particularly with respect to judicial independence, is the focus of the next section.

4.4.2 The Faltering Canadian Judiciary Following Confederation

The judiciary played a substantial role in the historical and political events that were transforming Canada following Confederation in 1867. The achievement of Responsible government in the 1840s had led to the inclusion of specific provisions guaranteeing judicial independence in the new Canadian Constitution of 1867.¹⁴⁹ As noted above, although Canadian judges moved publicly away from direct personal involvement in political matters, they were still closely tied to the Bar which, throughout the late 19th century, took on various leadership roles and were closely involved with

¹⁴⁸ As a few of the many examples: Oliver Mowat was a lawyer and judge who left his position as a Chancery judge in Ontario for the Premiership in 1872, *supra* note 16 at 236 – 7. The establishment of mandatory retirement at 75 for judges, *supra* note 93, combined with extended life expectancies mean that there is now a larger pool of retired judges, many of whom can re-activate their Law Society memberships, return to legal practice or politics. The role of former judges returning to legal practice has raised some issues in the modern context, see SGA Pitel & W Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2012) 34 Dal LJ 483.

¹⁴⁹ *Supra* note 14.

political issues. More directly, judicial independence following Confederation was sometimes substantially tainted by politics, partisanship and corruption.

In the past, institutional recognitions of the principle of independence had also created opportunities for elite manipulation in Canada. For example, the statutory creation of the Law Society in Upper Canada had served in part to preserve patronage opportunities for local elites in the early 1800s.¹⁵⁰ Similarly, the institutional entrenchment of judicial independence and the creation of federal authority and its assumption of appointment power for the bench after 1867 also served patronage political purposes. At this time, sustained partisan political activity was an unwritten “pre-requisite” for most lawyers who wished to be elevated to judicial office.¹⁵¹

In some cases, the political commitment of prospective appointees appeared at least as, if not more, important than capability.¹⁵² In addition, like the transforming legal profession in Canada at this time, judges also faced significant individual challenges presented by what today would be identified as bias and conflict.¹⁵³ Once appointed,

¹⁵⁰ *Supra* note 80, Chapter 3.

¹⁵¹ DG Bell, “Judicial Crisis in Post-Confederation New Brunswick” [Bell, “Judicial Crisis”] in *Glimpses of Canadian Legal History*, eds Gibson & Pue, (University of Manitoba: LRI, 1991) 189 at 193 Bell, G Stewart, “John A Macdonald’s Greatest Triumph” (1982) 63:1 *Can Hist Rev* 3 at 25, in considering judicial appointments in Ontario during this period.

¹⁵² Established in 1875, the first four of five judicial appointments to the new Supreme Court of Canada all had explicit political ties as politicians or high level political advisors (Justice Strong), the most obvious of which was Justice Fournier, who prior to his judicial appointment had been the Federal Minister of Justice at the time the *Supreme Court Act*, *supra* note 91, received passage in Parliament on April 8, 1875.

¹⁵³ The prevailing modern authority on judicial bias comes a line of cases starting with *R v RDS* [1997] SCJ No 84, [1997] 3 SCR 484, whereas the related concept of judicial conflict was dealt with in *Weywakum Indian Band v Canada*, [2003] SCJ No 50, 2003 SCC 45. For judges, understandings of these concepts are contained in the *Ethical Principles for Judges*, available online: < http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.

many Canadian judges of this period displayed what appears as a notable lack of independence, particularly in regard to the perception of the judiciary's separation both from their private interests and from politics and the government.

One good practical example of these phenomena is provided by the experience in New Brunswick.¹⁵⁴ There, following Confederation, newspapers railed against inept, partisan and corrupt judges.¹⁵⁵ The Court's response to some of these criticisms echoed the earlier treatment of Joseph Howe in Nova Scotia, who had also been critical of the judicial involvement in politics.¹⁵⁶ Consequently, in New Brunswick following 1867, the judiciary often used their contempt powers to prosecute critical editors.

For example, in one case, a Conservative-appointed returning officer disqualified a Liberal candidate who had run in Queens County in the 1887 Federal election. In response, local Liberals successfully applied to the county court for a recount. However, the Liberals were stymied when Conservatives then applied to New Brunswick Supreme

¹⁵⁴ Quantitatively the courts of New Brunswick had the worst reversal rate at the Supreme Court, of any jurisdiction during this period from 1875 – 1903, of 42%, as noted by JG Snell, "Relations between the Maritimes and the Supreme Court of Canada: The Patterns of the Early Years" in PB Waite, *et al Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) 143 at 163

¹⁵⁵ *Supra* note 151 Bell, "Judicial Crisis" at 197 – 8 and fn 33. Others included David Kerr of the *Saint John Evening News* in 1881 and Bruce MacDougall of the *Saint John Progress*. The Tuck/Ellis affair, related *infra*, is one of many prosecutions of newspaper editors at this time for critical commentary of the judicial system, the most famous of which was the 'Judicial Pooh-bah' affair in which editor John T Hawke compared Judge Fraser to a character in a contemporaneous Gilbert and Sullivan play, and since the fictional character was corrupt, the inference that the real-life judge was similarly corrupt was upheld resulting in Hawke's conviction for contempt, *In Re Hawke* (1889), 28 NBR 391 (SC). Similar prosecutions occurred elsewhere in Canada, including in Ontario against George Brown, *supra* note 16 at 240 – 41.

¹⁵⁶ *Supra* note 145.

Court Judge William H Tuck, a personal friend of Prime Minister Macdonald,¹⁵⁷ for an order of prohibition, which denied the jurisdiction to the county court judge to order a recount. When the editor of the *St. John Globe*, John V. Ellis, appeared overly critical of Judge Tuck in his paper, the provincial Supreme Court charged and convicted him with ‘scandalizing the court.’¹⁵⁸

The matter was subject to appeals that stretched out for the next several years.¹⁵⁹ One commentator notes, “the New Brunswick bench would probably have allowed [the matter] to remain dormant but for the fact that it was editor Ellis who in the summer of 1893 uncovered a \$5000 bribe” paid to Supreme Court Judge Palmer, who was much later forced to resign.¹⁶⁰ Consequently, the Court renewed their pursuit of Ellis for his journalistic attacks on Judge Tuck, and his sentencing was heard by a panel of New Brunswick judges that included the impugned Judge Palmer.¹⁶¹

In this respect, like the modern law of ‘conflicts’ for lawyers noted in Chapter 3,¹⁶² notions about judicial bias or conflict were comparatively undeveloped at this

¹⁵⁷ *Supra* note 15 at 198. Though he never held public office, Judge Tuck was a prominent Conservative organizer, who *inter alia*, as served as the first agent to John A. Macdonald in his capacity as Federal Attorney General in 1867.

¹⁵⁸ *Ex parte Baird: In re Ellis* (1888), 27 NBR 99 (SC). Aspects of the matter were appealed to the Supreme Court 1889 CanLii 54 (SCC), 16 Can SCR 147; later returned to the New Brunswick Court, which was again subject to appeal to the Supreme Court, *Ellis v the Queen*, 22 SCR 7, 1893 CanLii 60 (SCC), that upheld the conviction.

¹⁵⁹ *Ibid.*

¹⁶⁰ Acalus Palmer was one of two 19th century Canadian judges forced from the bench because of inappropriate behaviour. The other was Lafontaine – in both cases, judges chose to resign rather than to follow the procedure of a joint address before Parliament. Two others, Loranger and Wood were impugned, but the government did not proceed with their impeachment. *Supra* note 151 at 194.

¹⁶¹ *Ibid* at 198.

¹⁶² *Supra* note 165 at Chapter 3.

time.¹⁶³ The result was that Ellis was convicted and sent to jail, though not without widespread popular opposition and critical commentary about the court system.¹⁶⁴ For example, the matter garnered national attention, and resulted in extended debate in the Federal House of Commons which lasted for days.¹⁶⁵

Nor was the New Brunswick experience unique in Canada at the time. In concluding that following Confederation there was something “inherently wrong” with the judiciary in Canada, Joseph Swainger has deftly paraphrased the range of problems across the country:

Charges of imbecility, deafness, infirmity, partisanship, drunkenness, ignorance, fraud, and pig-headedness were common. **Although concerns ranged from the trivial to the extreme, the accumulated effect was that, between 1867 and 1878, almost every province provided a setting for judicial controversy or scandal. ... There is no question that turmoil was seen in every jurisdiction**, ranging from British Columbia’s Supreme Court and its squabbles over pensions, judicial rank, and battles over jurisdiction, the lamentable state of Manitoba’s judiciary during the 1870s, the deteriorating reputation of Ontario’s county courts, the increasing prominence of politics on that province’s high courts, the absolute chaos of Quebec’s judiciary, the judicial crisis in New Brunswick, the openly political character of appointing judges to Nova Scotia’s new county courts, and the Supreme Court’s faltering early years.¹⁶⁶

As Swainger notes, establishment of the Supreme Court of Canada also presented institutional challenges. Lower levels of pre-Confederation courts had served as ‘political

¹⁶³ In Canada, modern judges are guided by jurisprudence, but also by a set of judicial guidelines, that for federally appointed judges plays a similar institutional role as professional rules and codes of conduct for lawyers, *supra* note 153. One explicit historical example of a lack of appreciation of conflicts and the appearance of bias occurred in the trial following the assassination of Father of Confederation, D’arcy McGee, in which the judge presiding permitted Prime Minister Macdonald to sit on the bench beside him in the course of proceedings, see Richard Gwyn, *National Maker, Sir John A Macdonald: His Life, Our Times* (Toronto: Random House, 2011) at 59.

¹⁶⁴ “Ellis chose to go to gaol, where he was treated as a hero. Among his visitors were the lieutenant governor and the Anglican bishop. On release a crowd of 10,000 cheered him Saint John”, *ibid*, at 198 – 199.

¹⁶⁵ Canada, *Debates of the HC* (1894) vol II, 3670-3764, 3767 – 3866.

¹⁶⁶ *Supra* note 151 at 223.

battlefields' that often pit individuals and their lawyers against the government.¹⁶⁷ By comparison, in the last quarter of the 1800s, the highest courts also became the forum for an extended debate about the respective institutional interests of the newly formed Canadian provinces and the Federal government. Prior to this time, while it had been possible to appeal from local appellate courts to London, such proceedings were rare.

Parliament exercised its power under section 101 of the *British North America Act, 1867*, to create a "General Court of Appeal for Canada" when it established the Supreme Court of Canada in 1875. The initial delay was due in part to the perception that no such institution was thought necessary.¹⁶⁸ Later, some resisted because it was thought that a new high court would lead to judicial interpretations of the new constitution which would override the principle of Parliamentary sovereignty. In an echo of modern debate about the role of the Court,¹⁶⁹ early Parliamentarians recognized that modifying constitutional decisions of the Supreme Court might in the future require a formal process of constitutional amendment.¹⁷⁰

¹⁶⁷ *Supra* Chapter 3 at note 122.

¹⁶⁸ *Supra* note 151 at 197 at fn 32; "Though appeals from British American courts to the Privy Council had always been possible, this route was taken only rarely before the late 1800s. Contrary to what is often supposed...failure to create a Supreme Court of Canada in 1867 was not based on the assumption that it would be satisfactory for litigants to appeal from provincial tribunals was practically necessary. Paradoxically, it was only after the creation of the Supreme Court of Canada that appeals to the Privy Council became more common".

¹⁶⁹ See for example the well-known article by Peter Hogg & Allison Bushnell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) Osgoode Hall LJ 35:1, 75.

¹⁷⁰ By 1875 "the lively debate on the Court bill indicated a full appreciation of the likely role of the Court in settling disputes between the two levels of government...some feared that this role placed the Court above Parliament, since the only way to undo a decision of the Court on the meaning of the Constitution is to amend the Constitution", Jennifer Smith *Federalism* (Vancouver: UBC Press, 2004) at 57.

Although its creation had not been thought necessary at Confederation, by the early 1870s, the shape of coming legal debates at the new Court was increasingly taking form. However, the statutory establishment of a federal institution to hear appeals¹⁷¹ and the increasing assertion of provincial rights in that forum meant that instead, more and more often, the Privy Council in London became the court of last resort.¹⁷² The diverging and geographically fragmented political interests of Canadian lawyer elites following Confederation, such as Mowat in Ontario and Macdonald in Ottawa, served as background for these legal constitutional struggles in a series of subsequent decisions that shaped federal-provincial relations in Canada for years to come.¹⁷³ It is perhaps one of the great ironies of Canadian legal history that in asserting its independence to create the Supreme Court in 1875, the young Federation actually increased its dependence on the legal institutions of Britain.¹⁷⁴

The judiciary also had an ongoing role at the executive level in Canada.

Notwithstanding the removal of direct participation in governing councils, judges still

¹⁷¹ Though provision for an appellate level Federal court was described in section 101 of the *Constitution Act, 1867*, the Supreme Court of Canada was created by passage of *The Supreme Court Act* in 1875, *supra* note 91.

¹⁷² As noted by Bell, *supra* note 151, such appeals were also related to the nature of the questions before the courts which were, “of an unprecedented political character” at 196.

¹⁷³ At Confederation “there was a dim recognition of the possibility that such a court might play a role in interpreting the constitution (mainly by enforcing limits on the provinces) but no conception of a supreme court enforcing a broad set of constitutional guarantees against the political branches of government. Parliamentary sovereignty, not a liberal system of checks and balances, was the central principle in prevailing notions of good government”, *supra* note 74, Russell *Judiciary in Canada* at 335, citing “The Origins of Judicial Review in Canada” *Canadian Journal of Political Science* (1983) at 115.

¹⁷⁴ Appeals to the Privy Council were abolished in 1949. It should be noted that the connection to the British appellate court was in some judicial circles welcomed, as Canadian judges were occasionally provided the opportunity to sit on the Privy Council.

played significant roles in political governance.¹⁷⁵ In modern times, one vestige of the role of Chief Justices on governing councils from the 1800s are provisions for provincial Chief Justices and those of the Supreme Court of Canada to act in place of, respectively, the Lieutenant Governors or Governor General. At the federal level, this function has notably been performed for extended periods in the past by Chief Justices, but also occurs at the provincial level.¹⁷⁶

For the most part, this dual role has historically been largely uncontroversial, especially given the largely ceremonial role played by Vice-Regal authority in Canada in modern times.¹⁷⁷ However, as Canada's 2008 'prorogation crisis' demonstrated, these representatives of the Queen in Canada can still exercise substantial constitutional powers.¹⁷⁸ Were a Governor General to be unable to perform their office during some hypothetical, future crisis, it would be the Chief Justice of the Supreme Court who would fill this role, as the representative of Canada's Head of State. Given recent criticisms

¹⁷⁵ For example, "the political executive viewed the Supreme Court of Canada as an appendage of government whose members could be called upon to serve various political purposes" *supra* note 6, Dodek & Sossin, *Judicial Independence*, at 5, citing James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985) at 77, 86 – 88, 90 and 158.

¹⁷⁶ 1947 Letters Patent available online: < http://www.collectionscanada.gc.ca/obj/001060/f2/1940/cgc_p2-0_v081_n012_t002_000_19471001_p00000.pdf>. Chief Justice Taschereux played this role for several weeks in March – April 1967, following the death of Governor General Georges Vanier. Chief Justice Bora Laskin played this role for 6 months in 1974, when the Governor General was incapacitated. Chief Justice Lyman Duff acted for several months in this capacity in 1940.

¹⁷⁷ One historic exception were the events involving Prime Minister King and Lord Byng in 1926, in what became known as the 'King-Byng' Constitutional crisis see *Canada 1900 – 1945*, eds Bothwell, Drummond, English, (Toronto: U of T Press, 1987), at 205 – 208.

¹⁷⁸ The 2008 crisis arose when, after obtaining a minority in a recent previous election, the sitting government chose to suspend Parliament through prorogation for a period of time rather than face a confidence motion in the House of Commons. See Mark D Walters "The Law Behind Conventions of the Constitution: Reassessing the Prorogation Debate" (2010) 5 JPPL 127. The point made by Walters in this case that "the judicial narrative on unwritten constitutional principles builds upon rather than deviates from traditional ideas about constitutionalism", at 129 - 130, is consistent more generally with the dynamic realist assessment of the 'tradition' of judicial and lawyer independence presented in this work.

made publicly by members of the government of Supreme Court of Canada's Chief Justice McLachlin,¹⁷⁹ such a role could present both political and legal¹⁸⁰ challenges in the future.¹⁸¹

Following Confederation in 1867, while the judiciary had guarantees of independence institutionally protected, the constitutional recognition of independence did not lead in the ensuing period to increased impartiality, neutrality or autonomy for judges.¹⁸² It would not be until the 20th century that a more 'independent' judiciary began to emerge in Canada, which is the focus of the next section.

4.4.3 Emerging Canadian Judicial Independence in the 20th Century

As with other aspects of judicial independence, the political challenges of the judicial appointment process continue to present challenges in contemporary times.¹⁸³

¹⁷⁹ See, for example, Leslie MacKinnon, "Chief Justice Beverley McLachlin more than 'just a sitting judge'" retrieved online, April 13, 2015: <http://www.cbc.ca/news/politics/chief-justice-beverley-mclachlin-more-than-just-a-sitting-judge-1.2632765>.

¹⁸⁰ The exercise of authority is both ceremonial and largely prescribed by constitutional convention. However, challenges could arise in a unique situation, or where a Vice Regal representative chose not to follow accepted conventions, especially in the latter case since such conventions are not legally enforceable, *supra Re: Resolution to amend the Constitution*, [1981] 1 SCR 753. Challenges may be even more likely if, as suggested by one recent commentator, the Chief Justice is perceived to make public comments favouring policies associated with one political party over another. See, for example, Leonid Sirota, "A Voice of Moderation? Thoughts on the Chief Justice's Speech on 'Democracy and the Judiciary'" online: <https://doubleaspectblog.wordpress.com/author/enfantperdu/>, retrieved June 6, 2016.

¹⁸¹ McCreery, Christopher (2012), "Myth and Misunderstanding: The Origins and Meaning of the Letters Patent Constituting the Office of the Governor General, 1947", *The Evolving Canadian Crown*, Montreal and Kingston: McGill-Queen's University Press, pp. 38–52.

¹⁸² The appointment record of the Liberals has also been criticized. On the eve of his loss of power in 1878, Prime Minister Mackenzie doled out last minute "midnight appointments" of judges *supra* note 151 at 242.

¹⁸³ This is true at all levels of court in Canada, but has been particularly the subject of debate with respect to recent Supreme Court of Canada appointments, where it has been noted that Canada "is the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit on the country's highest court and interpret its binding constitution", "Peter Russell, A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada,

However, reduced partisanship and increased integrity in the judicial appointment process did occur during the long Prime Ministership of Wilfred Laurier, from 1896 - 1911.¹⁸⁴ In contrast to the late 1800s, the Laurier government did not appoint or promote judges on a strictly partisan basis, and judges with previous ties to both Liberals and Conservatives were elevated to and amongst the bench, though now seniority and ability were also important considerations. By comparison to the partisan appointment practices previously in place, Laurier's changes led to vast improvements in the quality of the bench.

At the beginning of the 20th century Chief Justice Meredith of Ontario provided an illustrative example of the improving quality of the judiciary during this period. He also typifies judicial attitudes towards the law and social issues in Canada. A lawyer, then a Law Society bencher, who later became a high ranking politician in Ontario, he was appointed to the bench in 1894. He later rose to become Chief Justice of the Court of Appeal in 1913.¹⁸⁵ As a Conservative politician in the 1800s Meredith had been known for supporting 'progressive' legislation.¹⁸⁶ By contrast, as a judge, he relied on strict

Brief to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, March 23, 2004, at 1, noting that New Zealand had a similar process, but that a committee of judges advised ministers in respect of judicial appointments. For a recent comparative overview of judicial appointments, see Kate Malleson & Peter H. Russell, eds, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto: University of Toronto Press, 2006).

¹⁸⁴ Philip Girard, "Politics, Promotion and Professionalism: Laurier's Judicial Appointments" *Essays in the History of Canadian Law: A Tribute to Peter N Oliver* eds J Philips, R Roy McMurtry, John T Saywell.

¹⁸⁵ Most notably as a politician in leading Ontario Conservatives to 4 defeats at the hands of Oliver Mowat in 1883, 1886, 1890 and 1894 Peter E. Paul Dembski, "MEREDITH, Sir WILLIAM RALPH," in *Dictionary of Canadian Biography*, vol. 15, University of Toronto/Université Laval, 2003-, accessed online April 13 2015: http://www.biographi.ca/en/bio/meredith_william_ralph_15E.html.

¹⁸⁶ *Ibid.* For example, he argued in favour of full male suffrage, including to male Indians on reserves, the appointment of factory inspectors and workers compensation plans.

precedent and even when sympathetic to the non-legal context of many issues, he advanced the prevailing formalist legal view limiting the role of individual judges to applying the law.¹⁸⁷

In this respect Meredith CJO's views represented many of the broader beliefs about law at the time. Other judges of the period also demonstrated attitudes and behaviour that were consistent with the conservatism that marked the Bar at this time. In this way the judiciary formed a part of broader legal culture whose members sometimes acted ambiguously towards more liberal ideas. Like the Bar in the early 20th century, some members of the bench also shared broader prejudicial and discriminatory social attitudes.

For example, descriptions of the earliest members of the Supreme Court of British Columbia suggest that early Chief Justices there sometimes acted antipathetically towards democracy.¹⁸⁸ Judicial paternalism also sometimes protected disadvantaged groups who were thought of as 'despised' minorities,¹⁸⁹ like the Chinese.¹⁹⁰ However, these attitudes

¹⁸⁷ "The Law existed independently of the judges, and their function was to administer it 'according to law' in an impersonal and autonomous way. There was some room for 'sympathy', but he had no coherent sense of its limits or justification or of how it should be integrated with the law or autonomous administration", RCB Risk, "Sir William R Meredith, CJO" in *A History of Canadian Legal Thought: Collected Essays* RCB Risk, eds Baker & Phillips, (Toronto: Osgoode Society, 2006) [Baker & Phillips, *Canadian Legal Thought*] at 199. Risk goes on to suggest in his review of 750 decisions written by Meredith that he demonstrated some of the characteristics of formalism, but that a strict or American definition of 'formalism' may not be entirely accurate in the Canadian context.

¹⁸⁸ John McClaren, "Race and the Criminal Justice System in British Columbia, 1892-1920: Constructing Chinese Crimes" in *supra* note 139, Baker & Phillips, *Essays VIII*, 398 – 442, at 403.

¹⁸⁹ *Ibid* at

¹⁹⁰ John McClaren, "The Early British Columbia Supreme Court and the "Chinese Question": Echoes of the Rule of Law", (1991) 20 Man L J 107.

were mixed with a condescension towards disadvantaged groups and individuals. Such groups were often the subject of close scrutiny by the legal system, whose judges often preserved and advanced stereotypical presumptions.¹⁹¹ Such paternalism and scrutiny were also directed towards other vulnerable groups, including women¹⁹² and workers.¹⁹³

As noted in the context of the independence of the Bar in Chapter Three, there was also a close association between the courts and the goals and politics of the state in both World Wars.¹⁹⁴ While many of the limitations on rights during 1940s are relatively well remembered today, perhaps less well remembered are the significant limits imposed during the Great War. Restrictions on freedoms during World War I included the open-ended invocation of the *War Measures Act*, the internment of thousands, mostly Ukrainians, in forced labour camps,¹⁹⁵ the registration of tens of thousands of naturalized Canadians, widespread censorship, and strict limits on basic freedoms like association. Prosecution of those found in breach of the new rules was widespread and sometimes resulted in “severe” penalties by the courts.¹⁹⁶ In these cases, the importance of individual

¹⁹¹ About “Chinese deviancy” including the propensity for uncleanness and disease, as well as activities such as gambling, opium smoking and prostitution, *supra* note 188 at 405 – 423.

¹⁹² See, for example, “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives” Chief Justice of Ontario’s Advisory Committee on Professionalism, 1st Colloquium (October 2004), available online at: < http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf>.

¹⁹³ While there were some moves towards a more liberal approach to labour, such as the establishment of workers’ compensation, on the other hand, widespread labour unrest throughout the early 1900s, political radicalism and later the Bolshevik revolution all contributed to ongoing repression of the labour movement, see, for example, Gregory S Kealey, “State Repression of Labour and the Left in Canada: 1914 – 1920” (Toronto: U of T Press, 1992) [Kealey, “State Repression”].

¹⁹⁴ As previously noted in Chapter 3, *supra* note 240, during World War II courts also supported the curtailment of general civil rights.

¹⁹⁵ *Supra*, note 193.

¹⁹⁶ *Ibid* at 301. In his review of 214 charges laid under these rules, in late 1918 and 1919, Kealy notes that only 5 were dismissed, and of those convicted, many faced years in jail for what appear to be the relatively minor offences like possession of restricted propaganda.

rights, and or of constitutional government more generally were secondary to the needs of the state. In the words of Arthur Lower, “Canada replaced Parliamentary government during the First World War with order-in-council government.”¹⁹⁷

The judiciary in Canada continued to be associated with state interests in other ways as well. One of the policy tools used by Canadian governments to manage difficult political and social issues has been reliance on judges to lead public inquiries and commissions to address these matters.¹⁹⁸ Despite the removal of judges from governing bodies in the late 1800s, and the advent of less partisan appointment practices at the start of the 20th century, the close association of judges with the often ‘political’ goals of these commissions has always had the capacity to compromise judicial independence and the appearance of impartiality vis-à-vis the state. In this case, the role of judges in such proceedings throughout Canadian history has not been “at a distance” from politics,¹⁹⁹ but rather immersed in it.

¹⁹⁷ *Colony to Nation: A history of Canada* (Toronto: McClelland & Stewart 1969) at 473. See also Thomas S Harrison, “Commentary to In Defeat, 1918” in Arthur Milnes ed, *Canada Always: the Defining Speeches of Sir Wilfrid Laurier* (Toronto: McClelland Stewart, 2016) at 448.

¹⁹⁸ “Public inquires have a strong pedigree in the United Kingdom...Canada inherited this penchant for public inquires and their popularity stretches back beyond Canada’s founding in 1867”, Adam Dodek, “Judicial Independence as a Public Policy Instrument” in *supra* note 6 Dodek & Sossin, *Judicial Independence* at 296. As noted by Dodek, at fn 4, there have been over 200 federal commissions of inquiry since Confederation. See also Thomas J Lockwood, “A History of Royal Commissions” (1967) 5 Osgoode Hall L J 172; Watson Stellar, “A Century of Commissions of Inquiry” (1947) 24 Can Bar Rev 1.

¹⁹⁹ *Supra* note 33. Though note it remains ‘at a distance’ in the sense that even within a judicial inquiry, judges are expected, at least aspirationally, to remain impartial and unbiased, see: *Pelletier v. Canada (Attorney General)* [2008] F.C.J. No. 1006; *Chrétien v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)* [2008] F.C.J. No. 973 [aff’d 2010 FCA 283]. I think the actual past conduct of some judges in this respect might be challenged, but it is also possible as argued *ibid*, that the use of judges and reliance on the principle of independence for these purposes might also be having a debasing effect on the principle.

In terms of applying the ‘law and liberalism’ hypothesis to the judiciary in Canada, the historic involvement of judges in political issues through their participation on inquiries has produced mixed results. For example, when Justice Meredith led a Commission into labour conditions in Ontario in 1912, testimony from workers presented their view that Courts were imbalanced in favour of government and business.²⁰⁰ Notwithstanding these views, and Meredith’s own formalist approach which limited his view on the function of law and the legal system, this commission established the basic early framework for worker’s compensation legislation. As another example, in the case of the Winnipeg General Strike, described in Chapter Three,²⁰¹ the initial inquiry of Justice Robson appeared to relieve unfounded fears of political radicalism and to provide a constructive basis to address the issues that gave rise to the strike in 1919.

Other cases, however, suggest that, like the legal profession, there was an illiberal countercurrent that recursively persisted amongst the judiciary. A very good example of this in terms of judicial inquiries is provided by the events surrounding the Kellock-Taschereaux Commission.²⁰² In 1945, a clerk at the Soviet embassy in Ottawa defected with information that raised fears about a widespread communist conspiracy. Before the matter was publicly disclosed, the government issued a secret order-in-council authorizing the arrest and detainment of anyone suspected of espionage.²⁰³

²⁰⁰ *Supra* note 187, at 198 – 9.

²⁰¹ *Supra* notes 233 - 234 at Chapter 3.

²⁰² Canada. The report of the Royal Commission appointed under Order in Council P C 411 of February 5, 1946 to investigate the facts relating to and the circumstances surrounding the communication, by public officials and other persons in positions of trust, of secret and confidential information to agents of a foreign power, June 27, 1946. Ottawa: E. Cloutier, Printer to the King, 1946.

²⁰³ *Supra* note 99, at 78, “the defection was not revealed publicly while the King government passed a secret order in council, PC 64444”, under the *War Measures Act*, (1915) 5 Geo V, Ch 2.

Following the advice of a senior member of the Bar that regular criminal proceedings would not lead to convictions,²⁰⁴ the government then established the Commission in 1946 led by two Supreme Court judges to investigate the matter.²⁰⁵ The Commission had wide powers to force testimony and the Commissioners used this authority to gain evidence from multiple individuals who had been detained. Despite the involvement of Supreme Court Judges, the appointment of the President of the Canadian Bar Association as Commission counsel, as well as a senior member of the Quebec Bar, all of the suspects were denied access to legal counsel. Their forced testimony, provided without benefit of legal advice, was later used as evidence against them in subsequent criminal proceedings.²⁰⁶

The events following the defection of Igor Gouzenko in 1945, described above, also stand as evidence for the proposition that the older ‘Baconian’ legal tradition, in which loyalty to the state trumps concerns for individual freedoms, has affected the practices of judicial independence, and of individual lawyers and judges, into more modern times. Notwithstanding the public indignation which followed this apparent abuse of power,²⁰⁷ the lawyers and judges who acted in the “debacle” of the Kellock-Tascheruex Commission later enjoyed substantial additional success in their individual careers.²⁰⁸ Lead Commission counsel, E.K. Williams was appointed Chief Justice in

²⁰⁴ *Ibid.*

²⁰⁵ Justices Kellock and Tachereau.

²⁰⁶ Leading to multiple criminal convictions, perhaps most notably, that of Fred Rose, a communist Member of the House of Commons.

²⁰⁷ It “helped spark the Canadian civil liberties movement”, for example, *supra* note 99 at 78.

²⁰⁸ *Ibid.*

Manitoba. The second Commission counsel, Gerald Fanteux, was later appointed to the Supreme Court of Canada. Justice Taschereux went on to become Chief Justice of the Supreme Court. As Philip Girard has noted, “it is hard not to see in these career paths a reflection of the patterns characteristic of eighteenth century judges, where conspicuously loyal service was the principal path to preferment.”²⁰⁹

In contemporary times, courts are sometimes portrayed as the “last bulwark of the citizenry against the arbitrary encroachments of the state.”²¹⁰ However, a more balanced review, weighs the aspirational characterization of judges and the court system as democratic defenders of liberal rights against historical practices. If the last quarter of the 19th century demonstrated that judges could be corrupt and openly partisan in Canada, the first half of the 20th century provided many examples where the courts reinforced discriminatory views, and also sometimes worked to bolster the political interests of state actors.

The challenges of the first part of the 20th century included social and political tumult, two World Wars, and economic dislocation, especially during the Great Depression. These turbulent times served as the background for a group of Canadians who often held views in keeping with the American school of legal realism. In the United States, the legal realist movement described in Chapter Two crested in the 1920s. The

²⁰⁹ *Ibid* at 79.

²¹⁰ Jules Deschenes, “Toward an Independent Judiciary: Canada and International Perspectives” in Shimon Shetreet & Jules Deschenes eds *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985) at 514.

economic and political challenges largely submerged the new school of legal thought, which, after the war competed with a more dominant dialogue about positivism and the moral underpinnings of law. Canadians who were exposed to legal realist thought brought it back to Canada. Many of these individuals, such as future Supreme Court Chief Justices Ivan Rand and Bora Laskin, later became prominent leaders within the emergence of a new political and legal culture, focusing on rights and access to justice, which followed the Second World War.²¹¹

Unlike many accounts of the independence of the Bar in Canada, studies of the judiciary in Canada continue to chart the development of the principle of judicial independence through the next several decades. The effects of World War II, and new approaches to law and the legal system catalyzed legal culture in Canada. After the War, the evolution of judicial independence, and of the entire legal system, was closely tied to a view of the law that emphasized the public purposes of the justice system and highlighted the importance of access to justice. Later, these were all connected to the developing Bar and to the emergence of a new perspective on legal ‘professionalism’. The new emphasis on the role of independent courts in Canada, to promote access to justice, is the focus of the next Chapter.

²¹¹ RCB Risk, “The Many Minds of WPM Kennedy” *supra* note 189, where at 313, the author discusses the influence of the legal realist movement on the thinking of these individuals. Risk does not identify Justice Rand as part of this group, but the timing of Rand’s attendance at Harvard and his later achievements as a lawyer and judge arguably support my inclusion of him in this list, as set out in detail in the next Chapter.

4.5 Conclusion

As shown by the Supreme Court's decision in the *Remuneration Reference*,²¹² the principle and practices of judicial independence in Canada have been the subject of considerable refinement in recent years. Jurisprudential changes to independence have been based on identifiable aspects of the principle, such as the written provisions of the Canadian constitution. The Supreme Court has also relied on an unwritten 'tradition' of independence to justify changes to judicial independence in Canada. Like the origins of an independent Bar, examined in Chapter Three, the tradition of independence of the Judiciary is one that is largely based on British historical traditions.

Recent changes to judicial independence confirm the dynamic and adaptive aspects of the principle. The unwritten tradition of independence has developed in a recursive fashion, both before and after the passage of the 1701 *Act of Settlement*, which is usually considered one of the foundations of judicial independence. The tradition of independence also contains multiple elements, some of which remain indeterminate. These ambiguous aspects of the tradition of independence continue to present legal and political challenges up to the present day. Practically speaking, at all points 'judicial independence' has been informed by context and has been mediated by historical and political events.²¹³

²¹² *Supra* note 1.

²¹³ Girard makes an arguably more limited version of this argument when he says that, in Canada, the distinctly independent role was modified by the imperative of also responding to local needs, see "Liberty, Order, and Pluralism: The Canadian Experience" in Jack P Greene ed, *Exclusionary Empire*, (Cambridge UP: 2012) at 160 – 163

One important aspect of the tradition of judicial independence was an early reliance on a professional and independent Bar and the ongoing association of judges with the legal profession. As compared to France, where the judiciary remained tied to direct employment by the King, British judicial independence was closely tied to the emerging professional autonomy of British lawyers. As with the Bar, the various written and unwritten elements of independence in the judicial context also reflect the constitutive tensions present in larger legal culture. This includes gaps between the theory and practice and the tension between law and politics.

Tensions in judicial independence theory include different understandings of the concept in the 1600s. These views coalesced in favour of a ‘Cokean’ approach to judicial independence, much of which was codified in the *Act of Settlement* in 1701.²¹⁴ However, like the similar tension arising from the emerging professional autonomy of lawyers, aspects of an older ‘Baconian’ approach have continued to influence the development of the principle. In addition, while some of the modern changes to judicial independence in Canada appear to lack a solid foundation, there are historical parallels between the past and the modern development of judicial independence. These include historical similarities to the expansion of tenure protections to judges in the 1700s and the recent expansion of judicial independence protections to new classes of judicial officials.

²¹⁴ *Supra* notes 139 – 141.

While the provisions of the *Act of Settlement* from 1701 are an important marker in the development of independence for judges, some aspects of the tradition were not captured or fully developed in the legislation. For example, the tradition of judicial independence includes the fact that it has been subject to legislative oversight, in both Britain and Canada in the past. In this respect, even those parts of the tradition codified in the *Act of Settlement* were subject to ongoing refinement for many decades thereafter in Britain. Similarly, important aspects of tenure have also been the subject of past statutory modification in Canada.

One underemphasized fact about judicial independence protections is that they were enacted because of dysfunctions in the British justice system in the late 1600's. One of the significant causes of this dysfunction was the lack of independence of some British judges, including partisanship and instances of judicial corruption. Even with entrenched guarantees of tenure and remuneration, it took many more decades for these aspects of independence to fully emerge in Britain. In receiving the British tradition of judicial independence, the British colonies in North America initially faced similar challenges.

Even the limited form of judicial independence that was developing in Britain following the *Act of Settlement* did not initially exist in Canada. Unlike the perception that law is separate from politics, or that judges should be independent of the executive branch of government, early Canadian judges were deeply immersed in politics and partisan activities, and were often associated with the interests of ruling elites. Despite guarantees of independence, first legislated in the 1840s and later entrenched with the

Canadian constitution at Confederation, partisan corruption and the historical association of judges with elite interests and the state intensified in the decades following 1867.

Even in the early 1900s, while the judiciary became less overtly partisan there was still a close association between judges, politics and politicians. In addition, judicial actions and attitudes suggests an ongoing tension in the principle of independence between the Baconian tradition, that favours state interests and loyalty, over a Cokean viewpoint, that associates independence with representational and democratic interests. In this respect, in the recursive and simultaneous development of independence in the Canadian context, independence for both the bench and Bar has responded to similar historical, social and political considerations.

This tension, between the association of independent judges with liberalism on the one hand and with illiberal practices and attitudes on the other, continued throughout the first part of the 20th century. Following the Second World War, Canadian legal culture began a period of transformation. This transformation was provoked in response to developing critical attitudes toward the function of the legal system under the rule of law. A new emphasis on rights, and concepts of the law and the legal system as part of the democratic function shaped a view of both judges and lawyers as acting in the public service. This view of legal actors also occurred contemporaneously with social, political and legal events that ultimately led to a significant period of change, constitutional, legislative and theoretical.

For judges and lawyers within a democratic legal system operating under the rule of law, changes to legal culture emphasizing public service also led to the emergence of access to justice as a dominant value underlying the legal system. The inter-related stories about independence, for judges and lawyers, and their function to support an independent and public court system, is the focus of Chapter Five.

Part II

Chapter 5

“Challenge and Change to Independent Courts”

Ensuring access to justice is the greatest challenge to the rule of law in Canada today..... Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.¹

5.1 Introduction

This Chapter demonstrates the main theme of this work, ‘between principle and practicality,’ by focusing on the concepts of mediation and emergent analytics, to examine independence and its relation to rule of law and access in the justice system. Generally, the first part of Chapter Five builds on the previous analysis of independence for lawyers and judges to examine more recent events related to the emergence of an emphasis on the role of the justice system in the protection of individual rights. The second part of this Chapter presents a case study of Ontario’s Small Claims Court, using a dynamic realist approach, to illustrate the practical role of independence in a specific aspect of the justice system.

More specifically, the first section examines an emerging discourse in Canada that is focused on the protection of individual rights in the legal system. The second section describes complementary events in the 1960s, which precipitated an historic change in

¹ *Hryiniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 1.

the nature of judicial governance. Section 5.3 describes and analyzes related structural and governance changes, which were introduced later throughout the Canadian justice system. Like the earlier enhanced focus on individual rights in Canada, structural and governance changes during this period ostensibly enhanced the capacity of an independent legal system to protect individual rights. Section 5.3.1 examines political ideas underlying much of the structural and governance changes and examines related public policy directions in the justice system at this time.

New conceptions of the role of the legal system, its judges and lawyers supported substantial changes to court procedures, which are briefly examined in section 5.4. Together, the increased focus on individual rights, structural and governance reforms, and changes to legal processes, all fundamentally affected the independent roles of actors in independent courts. However, the justice system was also informed by a constitutive tension, which had both policy and political dimensions. This tension remains a competing narrative within the justice system, and is examined in section 5.4.1.

Section 5.6 of Chapter Five presents a case study that practically examines the role and function of independence at Ontario's Small Claims Courts. As an emergent analytic, the recursive and simultaneous experience with small claims illustrates the role of the principle of independence in courts and its close association with ideas related to

access to justice, such as those suggested by the Supreme Court in its decision in *Hryniak*, set out at the start of this Chapter.²

Following a brief introduction to this case study, section 5.6.2 examines the development of small claims adjudicative forums in Canada and discusses the historical context of the court in section 5.6.3. Section 5.6.4 describes the institutional emergence of the modern ‘Small Claims’ courts in Ontario, in the context of the changes that transformed the justice system in the late post-War period. Section 5.6.5 of the case study looks at small claims adjudication through an examination of recent modifications to process before the Court and through an examination of statutory and jurisprudential developments, which are discussed in section 5.6.6.

The last section of the case study, 5.6.7, uses a quantitative metric, court utilization, to assess the effects of recent changes at the Small Claims Court. While many changes have enhanced independence of the Court, the frequency of small claims adjudication has declined significantly in modern times. In addition, this decline in the numbers of small claims proceedings appears to reflect some broader trends within the legal system. I conclude from this case study that the principles of independence, rule of law and access are practically interrelated. However, more work must be undertaken to

² *Supra* note 1.

ensure that the ideals these principles represent are better realized practically within small claims and within the larger justice system.

Chapter Five addresses the proposition that no thorough understanding of law would be complete without an appreciation of how concepts, like ‘rule of law,’ ‘independence’ and ‘access to justice’ interact and operate in the real world.³ This examination begins, in the next section, with a look at the new emphasis on the role of courts in protecting individual rights after World War II in Canada.

5.2 Canada’s ‘Rights’ Decade in the 1950s

After World War II, there was increased attention on the role of the justice system in the protection of individual rights. Increased focus on rights foregrounded the principle of independence as functioning to protect individual rights under the rule of law. The result was an enhanced emphasis on the role of independent lawyers, acting for clients before independent judges, as part of an independent court system that considered ‘access to justice’ as a primary normative value.

The post-conflict focus on individual rights played out in a widespread, if not global fashion, but in different ways in different contexts. At a broad level, the

³ *Supra* note 269 in Chapter 1.

importance of individual rights was supported by the UN declaration of Human Rights, passed in 1948.⁴ In the United States, the legal departure point for the later civil rights movement in the 1950s was a series of American Supreme Court decisions about rights. These decisions highlighted important cleavages, particularly with respect to race relations, that have marked American history.⁵

Canada had its own separate ‘rights’ movement, especially apparent throughout the 1950s.⁶ During this time the Supreme Court of Canada emerged as a significant catalyst of change.⁷ These changes led to an increased emphasis on the role of Courts to protect individual rights.⁸ One of the principal contributors to these changes during the post-War years was Supreme Court Justice Ivan Rand. While Rand’s achievements at the highest levels of the law were substantial, like many other figures in Canadian legal culture, his origins were typical of the Canadian legal profession.⁹

⁴ *Universal Declaration of Human Rights* (10 December 1948). See also David Keane, “Survival of the Fairest? Evolution and the Geneticization of Rights” (2010) *Oxford Jour LS*, vol 30, 3.

⁵ See for example, *Brown v Topeka Board of Education*, (1954) 347 US 483.

⁶ Though the ‘rights’ movement in Canada started earlier, see “Report of Committee on Civil Liberties” in *Minutes of Proceedings of the Twenty-Seventh Annual Meeting of the Canadian Bar Association* (Ottawa: National Printers, 1945) 184, reprinted at “Report of the Committee on Civil Liberties (1944) 22 *Can Bar Rev* 598. Previous calls for an entrenched Bill of Rights in Canada had come from the radical left, see Eric M Adams, “‘Guardians of Liberty’: RMW Chitty and the Wartime Idea of Constitutional Rights” in C Backhouse & W Pue eds, *The Promise and Perils of Law: Lawyers in Canadian History*, (Toronto, Irwin Law, 2009) [Backhouse & Pue, *The Promise*] 173 – 290 at 185.

⁷ “It is clear that the Court has not hitherto been regarded by the public at large as a potent element in Canadian self-government”, Bora Laskin in “The Supreme Court of Canada: A Final Court of and for Canadians” (1951) 29 *Can Bar Rev* 1038 at 1040.

⁸ See Eric M Adams, “Building a Law of Human Rights: *Roncarelli v Duplessis* in Canadian Constitutional Culture” (2010) 55 *McGill LJ* 437 [Adams, “Building”].

⁹ *Supra* notes 197 – 199 in Chapter 3.

Rand's background was middle-class, as the son of a rail mechanic, who nonetheless succeeded well enough academically that he was able to attend Harvard Law School.¹⁰ He later returned to Canada, was called to the Bar in 1912 and went to Alberta to practice law.¹¹ The year 1920 found Rand facing in the West the kinds of economic and social turbulence that were prevalent throughout Canada in the early part of the 20th century. Consequently, Rand returned to his home province of New Brunswick, where he entered politics, served briefly as a Liberal representative in the Legislature and as Attorney General, before becoming counsel to CN railways in 1926. Rand was appointed by Liberal Prime Minister MacKenzie King to the Supreme Court of Canada in 1943.¹²

In retrospect, Ivan Rand appears as a complex figure, some of whose personal characteristics do not always mesh well with today's generally positive remembrance of his legal contributions. For example, William Kaplan describes Rand as an ill-tempered bigot, who personally held highly discriminatory views and whose relationships and attitudes present something of a mixed legacy.¹³ On the other hand, Rand contributed to the fundamental restructuring of Canadian legal culture and institutions. One commentator notes in the context of developing understandings of the 'rule of law' and

¹⁰ William Kaplan, *Canadian Maverick: The Life and Times of Ivan C Rand* (Toronto: U of T Press for the Osgoode Society for Canadian Legal History, (2009) [Kaplan, *Canadian Maverick*] at 9 – 11. Like Bora Laskin, who also received legal training in the USA during this period, Rand would similarly likely have been exposed to the most important elements of the American new legal realist critique.

¹¹ In *Medicine Hat*, *ibid* at 4.

¹² *Ibid*. See also Matthew Lewans "'The Maverick Constitution' A Review of Canadian Maverick: The Life and Times of Ivan C. Rand" (2011) 48 *Alta L Rev* 795 – 800 at para 7.

¹³ Viewed as "aloof" by clients, staff, and colleagues, Rand displayed deep prejudices against Acadians, Roman Catholics and Jews, *supra* note 10 Kaplan, *Canadian Maverick* at 315, 23, and 92.

the design of a distinctive labour relations regime in Canada that he helped to build the modern “collectivist” state....that brought Dicey’s nineteenth century world to an end”.¹⁴

The other major contribution for which Rand is remembered is his contribution to the development of ‘rights talk’ within Canadian common law in a series of cases in the 1950s.¹⁵ These cases culminated in the *Roncarelli* decision, at the Supreme Court in 1959,¹⁶ in which Justice Rand penned what became an influential decision.¹⁷ In that case, Mr. Roncarelli was a tavern owner who was arbitrarily denied the renewal of a liquor license. The denial also involved the direct intervention of the Premier of the province of Quebec.

Underlying the main facts at issue in the case was the fact that Roncarelli was also a member of a religious minority, the Jehovah’s Witnesses, who were the subject of extraordinary scrutiny, within a Quebec community that was heavily influenced by the Roman Catholic Church. This scrutiny included frequent arrests of Jehovah’s Witnesses throughout the 1940s for what were minor infractions.¹⁸ When Mr. Roncarelli posted bail

¹⁴ Mark Walters, “Legality as Reason: Dicey, Rand and the Rule of Law”, 55 McGill LJ 568 at 573.

¹⁵ Described as the “golden moments of the civil liberties decades”, see Max Cohen “The Judicial Process and National Policy – A Problem for Canadian Federalism” (1970) 16 McGill LJ 297 at 301, perhaps the most famous of these cases are *Boucher v R* [1951] SCR 265; *Saumur v Quebec (City of)* [1953] 2 SCR 299; *Switzman v Elbling* [1957] SCR 285 [Switzman]. Other cases included in this line also often considered: *Reference Re Alberta Legislation* [1938] SCR 100; *Winner v SMT (Eastern) Ltd* [1951] SCR 887; *Smith & Rhuland Ltd v Nova Scotia* [1953] 2 SCR 95; *Henry Birks & Sons v Montreal (City of)* [1955] SCR 799; *Chaput v Romain* [1955] SCR 834; *Lamb v Benoit* [1959] SCR 321.

¹⁶ [1959] SCR 121, 121 DLR (2d) 689, [*Roncarelli*, cited to SCR].

¹⁷ Though much of Justice Rand’s decision was separate from the majority findings of the Court.

¹⁸ That is, handing out pamphlets on municipal streets.

for hundreds of members of his religious community that had been arrested, he drew the ire of some public officials. From the particular standpoint of independence of the Bar, the case also provides another example of the archetypal legal “hero,” rising to defend the rights of the individual against the discriminatory abuse of state discretion. Perhaps the most notable of a trio of ‘last lawyers in town’ to represent Roncarelli was F.R. Scott.¹⁹

Scott had a wide ranging career, *inter alia*, as a political activist, poet, and law professor at McGill University in Montreal. However, he was an unlikely choice to defend Roncarelli since as a lawyer he had little litigation experience.²⁰ Scott was also unlikely because he was a Protestant Anglophone. In a tacit acknowledgment of the importance of Quebec’s distinct French language and culture, Roncarelli’s legal team had initially sought the aid of several French Canadian lawyers, however none of them would take the case.²¹

Much of law is an attempt to infuse past events with present meaning.²² This observation applies to the long traditions of independence for the Bar, and the bench, but

¹⁹ Lawyers Albert Louis Stein and Glen How completed Roncarelli’s legal team. Scott was a Rhodes Scholar, and a founder of the Co-operative Commonwealth Federation, Scott appeared as something of a ‘Renaissance’ man, who later also won the Governor-General’s award for literature twice: Allan C Hutchinson, *Is Eating People Wrong?: Great Legal Cases and How They Shaped the World*, (Cambridge: Cambridge UP, 2010) at 52 [Hutchinson, *Eating People*].

²⁰ See Sandra Djwa *The Politics of Imagination: A Life of FR Scott* (Vancouver: Douglas & McIntyre, 1989) at 307. At the time of the case, Scott was uncertain whether he had even paid his bar fees, *ibid* Hutchinson, *Eating People*, at 52.

²¹ “Stein needed some help, and he reasoned the best co-counsel he could get would be a prominent French-Canadian, Roman Catholic lawyer. Of the half dozen or so whom he approached none would agree to help” see *Canadian Constitutional Law*, 2nd ed, Macklem *et al* eds, (Toronto: Emond Montgomery, 1997) at 551.

²² *Supra* note 1 at Chapter 3.

is also a facet of more recent developments in Canadian legal culture, including the Supreme Court of Canada's decision the *Roncarelli* case. As an icon for particular values, approaches and characterizations of law, this decision is perhaps now best remembered as typifying the Canadian legal approach to the limits on executive powers. Mr. Roncarelli's lawsuit challenged the legality of a purported absolute executive discretion. An important holding in the case, the proposition that executive authority is subject to legal review, that there is no such thing as an absolute discretion and that "no discretion shall go untrammelled"²³ remains one of the hallmarks of Canadian public law.²⁴ Largely based on this holding, the Supreme Court's decision *Roncarelli* is one of the most commonly cited public law decisions in Canada.²⁵

However, at the time, other aspects of the case were also highlighted and given equal, if not greater emphasis. While largely remembered as an important public law case, the Court's *ratio decidendi* dealt with the fact that *Roncarelli* was actually a private lawsuit involving two individuals, which tested the application of provincial legislation.²⁶ Some accounts situating the importance of the decision also emphasized its importance to explain the scope of freedom of religion.²⁷ Last, at the court, and later in legal

²³ *Supra* note 10, at 140.

²⁴ *Supra* note 8 Adams, "Building" who concludes that the case is now more closely associated with rule of law, constitutionalism and limits on governmental authority, at 91.

²⁵ The *Roncarelli* decision, *supra* note 10, plays a similar role in Canadian legal culture as that played by the American case of *Marbury v Madison*, 5 USSC 137, which established judicial review of legislation and of executive action.

²⁶ Under Quebec's *Civil Code of Lower Canada*. See Claude-Armand Sheppard, "*Roncarelli v Duplessis*; Art 1053 CC Revolutionized" (1960) 6 McGill L J 75.

²⁷ In oral argument Scott downplayed the question of religious freedoms "wishing to avoid possible prejudices on the Court", *supra* note 8 Adams, "Building" at 443.

classrooms, the case is often highlighted for its importance in describing common law legal rights within the Canadian constitutional regime.²⁸ This includes a focus on the case, particularly in Anglophone Canada, as one in a series that developed the ostensibly new idea that the common law contained certain implied or ‘embedded’ individual rights,²⁹ which courts were obligated to protect.³⁰

The post-War focus on individual rights took place in the context of a constitutional regime that accorded individual legal rights on the basis of an amalgam of written and unwritten guarantees, but that did not yet recognize them separately in a formal document. The broader dialogue about the nature of individual rights ultimately contributed to an emerging process of legal and political reform. This process was an important factor in the passage of a federal statutory ‘Bill of Rights’ in the period immediately following the decision in *Roncarelli* and was part of a pattern that led to fundamental Constitutional reform in the 1980s.³¹

²⁸ *Ibid* at 456 - 458.

²⁹ The idea of ‘implied’, or ‘embedded’ rights recursively echoes the similar argument about the common law, championed by Lord Coke in the 1600’s, discussed in Chapter 4. Adams, *supra* note 8 “Building” credits F Andrew Brevins as the 1st to use the phrase ‘implied bill of rights’ in a case commentary on the *Switzman* case: “Case Comment on *Switzman v Elbling* (1957) 35 Can Bar Rev 554 at 557.

³⁰ “Commentators in Anglophone Canada in the late 1950s and 1960s read *Roncarelli* through a lens shaped by contemporary debates about the nature of constitutional rights and citizenship” *supra* note 8 Adams “Building” at 441.

³¹ *Canadian Bill of Rights* SC 1960, c 44 [*Bill of Rights*]. Scott supported the further entrenchment of civil rights, see FR Scott, *Civil Liberties & Canadian Federalism* (Toronto: U of T Press, 1959) at 28. These were included in Canada’s repatriated Constitution in 1982, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK) 1982 c 11 [*Charter of Rights and Freedoms*].

There was, at least, one other notable recursive aspect to the case. First, while the role of individual judges in Canada and at the Supreme Court is usually today regarded as both impartial, neutral and autonomous, some discern an undercurrent of politics informing the respective positions of the judges in this line of cases. For many in Quebec, federal courts were often regarded as trenching provincial sensibilities and rights. In this respect, in every one of the major ‘implied bill of rights’ cases,³² all Quebec francophone judges took distinct positions, and in *Roncarelli*, found for Duplessis. Though outright partisanship amongst the judiciary in their legal decisions had seemingly disappeared by the post-War period, these dispositions suggest that political sensibilities and backgrounds remained important factors in judicial decision-making.³³ Given the long involvement of the JCPC in shaping Canadian legal culture,³⁴ the recursive question of how the British body might have dealt with the appeal from this decision, will also remain forever as a matter of historical speculation.³⁵ In this respect, the death of Premier Duplessis shortly after the decision effectively ended the litigation and any possible appeal.³⁶

³² *Supra* note 29.

³³ “These results they suggest that the background and political affiliation of a particular judge is far from irrelevant to their legal disposition of cases” *supra* note 19 Hutchinson, *Eating People*, at 65; see also Mandel, *Legalization* at note 60 in Chapter 1. In modern times in Canada, there are similar criticisms involve a wide understanding of policy and political influences, which have been identified as important factors in judicial decision making, see eg, Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013).

³⁴ *Supra* note 10. The litigation commenced in 1946 and appeals were not ended from the Supreme Court until 1949. In effect, though the decision was rendered well after appeals were ended, because of its prior start date the litigation was still subject to review at the British JCPC.

³⁵ The JCPC had a long history of upholding claims characterized as being within provincial rights and also had not necessarily upholding individual, rights-based claims, like the ones in this case, see for example, *The Co-operative Committee on Japanese Canadians and another v The Attorney-General of Canada and another* [1946] UKPC 48, [1947] AC 87 (2 December 1946), in which the Privy Council allowed the wartime deportment of Japanese Canadians.

³⁶ In the end, Premier Duplessis died shortly after the release of the decision and an appeal was not pursued.

Ultimately the *Roncarelli* decision proved to be one in a body of law which typified changes in Canada after the War. During this period, the conceptual and practical meanings of the rule of law in the Canadian context were more clearly delineated and increasingly protected individual rights.³⁷ All these factors contributed to the milieu that informed the passage of the Canada's *Bill of Rights* in 1960.³⁸

Limits on the *Bill of Rights* along with recognition of this 'rights' discourse throughout the early post-War period was background to constitutional talks of the 1960s and 70s in Canada.³⁹ This discourse led to the patriation of the Canadian Constitution and its amendment to include the *Charter of Rights and Freedoms* in 1982.⁴⁰ Ultimately the post-War emphasis on rights in Canada continued and expanded to include the importance of courts in advancing and defending individual rights. This included efforts to modernize the court system and its judges. The events leading to these important changes within Canada's justice system are the focus of the next section.

5.2.1 Judges, Lawyers & Changes to Judicial Governance

Supreme Court Justice Rand was also a central figure in an event that became a departure point for significant developments in judicial independence in Canada. The

³⁷ *Supra* note 14, Walters, "Legality as Reason".

³⁸ *Supra* note 31.

³⁹ It applied only to federal legislation and was statutory and therefore not entrenched within the constitution.

⁴⁰ *Supra* note 31.

events in the Landreville affair, set out below, raised questions about Bar and judicial autonomy that highlights recursive aspects of the development of independence. In an earlier era, attempts to remove a judge from office in Upper Canada had galvanized reformers. The incident was a *cause celebre* that later helped statutorily guarantee judicial independence in British North America.⁴¹ By comparison, more modern attempts to remove a superior court judge from office in Ontario also led to basic changes in judicial governance in Canada a half a century ago.

In the early 1960s, Supreme Court of Ontario Justice Leo Landreville became the subject of an RCMP investigation. Landreville was a lawyer who also served as mayor of Sudbury before his appointment to the bench in 1955. During his time in municipal politics, Landreville had accepted shares in a gas pipeline company, which was seeking to do business with several Northern Ontario towns, including Sudbury. After his appointment to the bench, Landreville was able to dispose of the shares at a significant personal profit.⁴² A criminal investigation into the matter resulted in Judge Landreville being cleared.

⁴¹ “An Act to Render the Judges of the Court of the King’s Bench in this Province Independent of the Crown”, *Statutes of Upper Canada*, 1834, c 2. The removal of John Walpole Willis from judicial office in 1828 made him a “poster boy” for the later campaigns of reformers, see “The Many Meanings of Judicial Independence: Examples from British North America” by Jim Philips in *Law in Context* (Toronto: Federation Press, 2015) at 107. For the Willis Affair see also McLaren, *Dewigged, Bothered and Bewildered*, (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2011) at 74 – 87.

⁴² Landreville reportedly made 117,000\$ in the transaction, see William Kaplan, *Bad Judgment: The Case of Mr Justice Leo A Landreville*, (Toronto: The Osgoode Society, 1996), at 71.

However, the resulting public scandal led several “other judges” to advise the Prime Minister of their disapproval of Landreville’s extra-judicial conduct. For his part, Prime Minister Pearson personally intervened, to call another judge who relayed a message that the former mayor of Sudbury should resign his judicial position, though it was to no avail.⁴³ At this stage, the Law Society of Upper Canada (LSUC) became involved. Despite lacking jurisdiction over a member of the judiciary, and having no statutory authority to do so, Ontario’s legal regulator established an investigation committee to examine Judge Landreville’s alleged misconduct.

In the end, the report of the special Committee of the Law Society recommended, with one dissent,⁴⁴ Landreville’s removal from judicial office. However, the manner of the investigation and inquiry compounded the initial irregularity of the Law Society’s assumption of authority in the matter. In this respect, there were several notable procedural lapses in the conduct of the investigation.⁴⁵

Nevertheless, the LSUC report about Landreville in 1967, the subject of a summary release to the press, resulted in a public inquiry into the affair. Appointed to lead the inquiry was Supreme Court Justice Ivan Rand, who by this time had retired from the bench. In the end, Rand’s report found that Landreville had not misconducted himself as a judicial officer, but nonetheless recommended his removal because of his extra-

⁴³ *Ibid*, at 97.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*, who describes the investigation as a “kangaroo court”, at 99.

judicial conduct. On the basis of an apparent promise of maintaining a judicial pension, Landreville chose to resign his judicial office.⁴⁶

The Landreville case highlighted several features of the operation of the principle of independence in the mid post-War period. These features demonstrate the recursive character of the role of independence in the Canadian justice system. In retrospect, the role of lawyers in seeking the removal of a judge underscores the question about the purpose of independence of the Bar, and of the role of self-regulation by Law Societies throughout Canadian history.

The Landreville investigation presents a more modern instance of the Bar's assertion of authority over a matter, namely the disciplining and removal of a judge, something normally outside its authority. In this respect, it is hard not to think of past examples, such as the prosecution of Winnipeg general strike leaders in 1919, where members of the legal profession also cloaked themselves with the mantle of authority to take on a role, one in that case which was normally assumed by the state.⁴⁷

Public concerns about the handling of the Landreville affair also highlighted several ongoing concerns about the justice system. The specific example of an attempt to remove a federally appointed judge in the absence of a practical process for doing so

⁴⁶ *Ibid.*, at 158 – 166.

⁴⁷ *Ibid.*

highlighted the indeterminacy of the longstanding constitutional requirement of judicial tenure during ‘good behaviour’.⁴⁸ At the time, the Landreville affair consequently focused attention on the fact that there was a lack of distinct judicial governance mechanisms within the Canadian legal system.⁴⁹

The Landreville affair was a prominent event at the beginning of a second series of reforms that transformed the legal system during this period. The first of these waves of change was the rights ‘revolution’ following the Second World War, described in the first section of this Chapter. A second, complementary wave of change, led to institutional and structural change to the Canadian court system. These changes, which had an important impact on the operation of the principle of independence, are examined in further detail in the next section.

5.3 Challenge & Structural Change in Courts

The period from the late 1960s to the 1980s also witnessed multiple fundamental practical changes to the Canadian court system.⁵⁰ These changes transformed the role of

⁴⁸ Back to the *Act of Settlement*, 1701 (12 and 13 William III) c 2 [*Act of Settlement*], and entrenched in the *Constitution Act, 1867* 30 & 31 Victoria, c 3 (UK) at s 99.

⁴⁹ Despite Landreville’s belief the government intended to provide his judicial pension, payments were subsequently denied. Landreville was finally able to obtain a payment to cover his lost pension in 1978 in a court decision that described the Law Society actions in this matter as “puzzling” and “unwarranted”. The court was also critical of Justice Rand’s handling of the Inquiry, *Landreville v Canada* [1980] FCJ No 92, [1981] 1 FC 15 at para 32.

⁵⁰ Though “many of the standard accounts simply slide by the 1970’s as the quiet decade between the provocative but ultimately disappointing experiment with the Bill of Rights in the 1960’s, and the major nation-building constitutional battles of the 1980s, see Peter McCormick, *Judicial Independence and the*

independent courts, and substantially affected the role of independent judges and lawyers in the legal system. One of these important changes was precipitated by the investigation into Justice Leo Landreville and the attempt to remove him from office. Though the formula for removal had been established by the adoption of the *Act of Settlement* provisions on judicial tenure in Canada,⁵¹ no judge in Canadian history has ever been removed according to that process. On the heels of public criticism about the handling of the Landreville affair, the government of the day moved to create a new judicial administrative body to enhance the governance structure of the federal judiciary through the establishment of the Canadian Judicial Council (CJC) in 1971.

The CJC is composed of all Chief Justices and Associate Chief Justices of superior level courts, as well as the Chief Justices of the Federal and Tax Courts in Canada, and Senior Federal territorial judges. The CJC is chaired by the Chief Justice of the Supreme Court of Canada.⁵² Throughout the long Anglo-American tradition of judicial independence, the predominant professional reference group for judges was lawyers. However, by the 1970s, incidents like the Landreville affair highlighted distinct challenges in the judicial role and reinforced the need for a differentiated approach to governance of the judicial function.

Judicial Governance in the Provincial Courts, Report Prepared for the Canadian Association of Provincial Court Judges, (April, 2004) online: < <http://judges-juges.ca/sites/default/files/publications/Judicial%20Independence.pdf> > [McCormick, *Judicial Independence*], at 11.

⁵¹ *Supra* note 48.

⁵² See Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) at 35 – 38; Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canadian Judicial Council, 1995 at 88.

While the judiciary was still closely identified with the legal profession, the CJC was among the first of a set of new institutional arrangements that were primarily focused on judges. At the national level, other new bodies included the establishment of the National Judicial Institute,⁵³ and the Canadian Institute for the Administration of Justice.⁵⁴ These new bodies supplemented the creation of a more active role for the Federal Commissioner of Judicial Affairs in judicial selection,⁵⁵ and the expansion in activities by Judges' Associations.⁵⁶ The new functions and differentiated roles of these governance bodies marked a significant break from traditional practices for the judiciary.⁵⁷

For the judiciary, some of the changes to institutional governance echoed previous developments in Canada in the emergence of an independent Bar. In earlier times, the establishment of professional self-regulation had marked an important organizational milestone in the training of individual lawyers in Canada. For example, Ontario's Law

⁵³ Established in 1988, "the National Judicial Institute (NJI) is an independent, not-for-profit institution committed to building better justice through leadership in the education of judges in Canada and internationally", see online: < <https://www.nji-inm.ca/index.cfm/about/about-the-nji/>>.

⁵⁴ Though the CIAJ is not limited to judicial membership, see DC McDonald, "The Role of the Canadian Institute for the Administration of Justice in the Development of Judicial Education in Canada" in W Kaplan & D McRae, eds, *Law, Policy and International Justice, Essays in Honour of Maxwell Cohen* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 455-480.

⁵⁵ Since 1988, Judicial Appointments Advisory Committees have made recommendations about prospective judicial candidates and are managed by the Office the Commissioner for Judicial Affairs, see Jacob Ziegel, "Promotion of Federally Appointed Judges and Appointment of Chief Justices: The Unfinished Agenda, in A Dodek & L Sossin, *Judicial Independence in Context* (Toronto: Irwin Law, 2010), [Dodek & Sossin, *Judicial Independence*], 151 – 190 at 151 – 160.

⁵⁶ For example, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*; *R v Campbell*; *R v Ekmecic*, *R v Wickman*; *Manitoba Provincial Judges Assn v Manitoba (Minister of Justice)*, [1997] 3 SCR 3 [*Remuneration Reference*]

⁵⁷ Systems theorists regard this differentiation as an aspect of the auto-poietic evolution of judicial independence, *supra* Martine Valois, *Judicial Independence: Keeping Law at a Distance from Politics*, (Markham: LexisNexis Canada Inc, 2013) at 15 [Valois, *At a Distance*].

Society was established and initially viewed largely as an educational institution for the professional training of independent lawyers.⁵⁸ For judicial independence by comparison, in the 1970's there was also a shift towards a more formal institutional self-governance model for all judges that also emphasized judicial education and training.⁵⁹

The establishment of the CJC and other national bodies was mirrored by the creation of similar judicial bodies at the provincial level throughout the country.⁶⁰ These new judicial organizations were part of a series of institutional and structural changes that began to transform the Canadian justice system in the 1970s.⁶¹ One examination of the Ontario justice system at this time provides specific examples of the changes occurring more broadly within the administration of justice in Canada.

Ontario's *McRuer Report* emphasized the role of the legal system in protecting the exercise of individual rights and freedoms from arbitrary action by the state.⁶² For these purposes, the regular common law courts were critical. Consistent with the post-War focus on individual rights, the report emphasized that it was the courts that citizens

⁵⁸ *Supra* note 84 in Chapter 3.

⁵⁹ The statutory objects of the CJC are to "promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts", *Judges Act* RSC 1985 c J-1 s 63 (3) [*Judges Act*].

⁶⁰ See Peter McCormick, "Judicial Councils for Provincial Court Judges in Canada" *Windsor YB Access To Justice* Vol 6 (1986).

⁶¹ In the context of the judicial role, these changes formed what has been described by Peter McCormick as the "Great Canadian Judicial Revolution" of the 1970's and 1980's *supra* McCormick, *Judicial Independence* at note 50, at 10 – 16.

⁶² *Royal Commission -- Inquiry into Civil Rights* (Toronto: Queen's Printer, 1968-1971) [*McRuer Report*]. See also Patrick Boyer, *A Passion for Justice* (Toronto: University of Toronto Press, 1994) which describes the establishment and work of the Commission, particularly at 298 – 306. Other reports in Ontario included The Ontario Law Reform Commission's *Report on Administration of Ontario Courts, Part I* (1973), the Ontario government's White Paper on Court Reform (1976); and the *Zuber Report* (1987).

should be able to look to as the primary protector of their vital legal interests.⁶³ In Ontario, this report led to broader changes, namely the establishment of new courts and administrative reorganization, across the legal system.⁶⁴

Changes in the administration of justice in Ontario were part of a pattern of transformation at virtually all levels,⁶⁵ across the country.⁶⁶ This included the establishment of new courts of appeal,⁶⁷ the creation of the Federal Court of Canada structure,⁶⁸ and a ‘consolidation movement’ to create one level of provincial superior courts in all jurisdictions. The reforming impulse within the administration of justice also reflected broader social and political currents. Though sometimes overlooked, as a matter of simultaneity, reforms during this period correlate to other more progressive political changes that occurred in the late post-War period.⁶⁹

Structural and governance changes also occurred in the context of a newly recognized field of study that examined the justice system from the point of view of

⁶³ David J Mullan, “Willis v McRuer: A Long-Overdue Replay with the Possibility of a Penalty Shoot-Out” (2005) 55 UTLJ 535 at 6) [Mullan, “Willis”].

⁶⁴ Including Ontario’s Divisional Court, the later establishment and expansion of Unified Family Courts and the creation and ongoing modification of a new Small Claims Court.

⁶⁵ McCormick notes, for example, that “if anything the ‘purely provincial’ courts underwent the most massive changes of all” at *supra* McCormick, *Judicial Independence* at note 50 at 12.

⁶⁶ Nor were these changes confined within Canada – for the similar experience in New Zealand *supra* Mullan, “Willis” at note 63 at 2.

⁶⁷ Up from 6 that had such bodies in the 1960’s, *supra* note 50, McCormick, *Judicial Independence* at 12.

⁶⁸ The new Federal Court of Canada was created as a two-tier structure to provide a forum for judicial review of federal government action. Some see the creation of this court as a distinct break, contrary to the English Dicean experience, see Ian Bushnell, *The Federal Court of Canada: A History 1875 – 1992* (Osgoode Law Society: U of T Press, 1997).

⁶⁹ *Supra* note 50, McCormick, “*Judicial Independence*”, at 14 and 11.

‘judicial’ or ‘courts administration.’⁷⁰ Increased attention to the importance of the administration of justice supported initiatives that sought to establish structures to enhance the management capacity of the courts.⁷¹ The result was the creation of a “strong modern public service” that had the independent capacity to practically implement an agenda of political change.⁷²

Within the justice system, the creation of a trained cadre of administrators with a technocratic expertise in the administration of justice reflected the larger public administrative trend.⁷³ At the same time, efforts were also made to ‘professionalize’ the adjudicative function.⁷⁴ For example, just as the Bar had developed a role-specific ethics code of behaviour for lawyers early in the 20th century, the federal judiciary followed a similar course in the 1970s with the creation of a guideline of *Ethical Principles for Judges*, endorsed by the Canadian Judicial Council.⁷⁵

⁷⁰ See Perry S Millar and Carl Baar, *Judicial Administration in Canada* (Kingston & Montreal: McGill-Queens U P, 1981) [Millar & Baar, *Judicial Administration*].

⁷¹ *Ibid.* Millar & Baar, “*Judicial Administration*” where the authors note the establishment of the National Association of Canadian Courts’ Administrators at 17 – 18.

⁷² *Supra* note 50. Some descriptions of government officials in this period are consistent with the broader principle of independence in that they were expected to be: impartial; neutral; enjoyed tenure of office and fixed salaries; and, were expected to separate the public administrative function from partisan politics, see Lorne Sossin, “Democratic Administration” [Sossin, “Democratic Administration”] in *The Handbook of Canadian Public Administration*, ed Christopher Dunn (Don Mills: Oxford University Press, 2002) [Dunn, *Handbook*] at 77 – 99, at 79, citing Max Weber, *The Theory of Social and Economic Organization*, trans AM Henderson (New York: Free Press, 1947) at 328 – 40.

⁷³ Carl Baar, “Judicial Administration” in *ibid* 369 – 381, where the author notes the 1st graduate-level course of study in court administration was established in 1980 at Ontario’s Brock University, at 370.

⁷⁴ *Supra* note 50, McCormick, “*Judicial Independence*”, at 14; *infra* Russell, *Judiciary* at note 120 at 208.

⁷⁵ Available online: < http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.

Despite initial broad support for justice system reforms, resistance to change quickly gave rise to a tension within the administration of justice. For independent courts, this tension highlighted different approaches to questions about the social and political role of the legal system. As with the independence of the Bar and independence of the Judiciary, this tension was informed by interrelated political factors. These factors and the effects of the resulting changes on independence within the administration of justice are examined, starting in the next section.

5.3.1 “New Left” in the Administration of Justice

Changes within the court system and courts’ administration in the 1970s may have appeared unopposed; however, a more balanced view is that opposition initially took a less overt political shape in the form of developing conceptual challenges to the understanding of the function of the public and private spheres. The counter-currents to structural and governance reform efforts at this time in the legal system mirrored, and were mediated by, concurrent social and political developments. These developments reflected a constitutive tension in the different approaches to the administration of justice.

On one hand, the legal system of courts is regarded as a public institution that provides ‘public goods,’⁷⁶ and whose fairness is subject to the transparency based on the

⁷⁶ To the extent that the justice system and access to it has traditionally been a state monopoly it fits within general politico-economic descriptions of ‘public goods’, see, for example, Frank Stilwell, *Political Economy: The Contest of Economic Ideas* (Victoria: Oxford UP, 2001) at 201.

principle of open courts.⁷⁷ Traditionally this has meant that within the court system, though both are important, the principle of effectiveness was paramount over the principle of efficiency.⁷⁸ However, competing policy narratives arose that challenged these traditional concepts within the court system.

For example, in the 1970s some criticized the legal system based on a ‘citizen-oriented’ approach to government.⁷⁹ From an ideological perspective, this kind of criticism was part of a broad school of thought identified generally as part of the ‘New Left’.⁸⁰ On one level, proponents of this viewpoint distrusted government and its officials. Yet, many in this movement also identified a positive role for the state through direct public involvement, citizen engagement and participation in social movements. Their distrust of government was contrasted with a view that the state could still be useful to regulate the market economy or to address injustice through the legal system.⁸¹

⁷⁷ The ‘open courts’ principle has considerable jurisprudential support in Canada, *eg* see *AG (Nova Scotia) v MacIntyre*; *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480, at para 23.

⁷⁸ Many of these reforms were associated with Thatcher Conservatives in Great Britain in the late 1970’s and the Reagan administration in the USA in the 1980s. See Peter Aucoin, “Beyond the ‘New’ in Public Management Reform in Canada: Catching the Next Wave?”, [Aucoin, “Beyond the New”], in *supra* note 72 Dunn, *Handbook*, at 38 – 52. See also Donald Savoie, *Thatcher, Reagan, Mulroney: In Search of a New Bureaucracy* (Toronto: U of T Press, 1994).

⁷⁹ The later development of this kind of ‘citizen-centred’ approach to government emphasized “first and foremost citizens with rights, entitlements, and obligations. Only secondarily, if at all, are they ‘consumers’, let alone ‘customers’”, *ibid* Aucoin, “Beyond the New” at note 94 at 47. See also Brian Marson, “Citizen-Centred Service: Canadians’ Service Expectations, Satisfaction, and their Priorities for Improvement”, in *Public Sector Management*, (1999) 9, 3 at 10 – 12.

⁸⁰ On New Left administration and the relation to law generally see Gerald Frug, “The Ideology of Bureaucracy in American Law” (1984) *Harvard L R* 97 1276 – 1388; Gerald Frug, “Administrative Democracy”, (1990) *UTLJ* 40, 559 – 86.

⁸¹ *Supra* note 78.

The 'New Left' perspective was supported by the first wave of change in the justice system in the post-War period, which emphasized the importance of individual rights and focused on individuals and their capacity to participate in the legal system. This approach to the role and function of courts was further supported by developments in legal theory that highlighted the importance of law as one of many forms of social ordering. New Left approaches, together with increased emphasis on individual rights, combined with much of the emerging legal discourse to foreground the role of professional advocates in the legal system.⁸²

Lon Fuller's view, for example, described the legal process in a way that made the individual behaviours of judges, lawyers and participants interdependent. In one influential article Fuller explicitly connected the representational role that lawyers play to the independent features of decision-makers and of individual claimants. In this case, the interaction of parties in the adversarial presentation of a legal claim was also the source of a significant aspect of judicial independence. In practice judicial impartiality did not arise as a product of the rules or as part of the office of the judge. Instead, the role of adversarial presentation by counsel was the key factor in permitting a judge to impartially hold a potential outcome undetermined during legal argument that proposed two different, sometimes opposite interpretations.⁸³

⁸² The different modes of interaction between participants is what distinguishes different forms of social ordering, see Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard L Rev 353 at 357 [Fuller, "Forms and Limits"]. Some extend this view to regard the social ordering within the legal process as part of a broader political process, *eg*, Owen Fiss, "Social and Political Foundations of Adjudication" (1982) "Law and Human Behavior" Vol 6 No 2 [Fiss, "Social and Political"].

⁸³ This description also underscores the primary constitutive tension in dynamic realism of indeterminacy in that the decision, what will be a form of 'law' as jurisprudence, remains uncertain until the judicial determination.

Fuller's focus on the role of individuals in the justice system as a form of social ordering was part of a body of scholarship that placed new emphasis on the legal system as part of a set of social systems that work to establish and maintain democratic rule of law.⁸⁴ An important complement to Fuller's perspective was also an emerging ideological commitment by many, including lawyers,⁸⁵ to social justice, and a renewed emphasis on interest-based litigation.⁸⁶ These developments mixed with the waves of structural and procedural change affecting the court system. One result was an enhanced emphasis on the democratic implications of lawyer behaviour within a public legal system.

The enhanced emphasis on the role of lawyers as 'professionals' and its importance as an emergent analytic for understanding independence of the Bar is examined in further detail in Chapter Six. However, for present purposes it is sufficient to acknowledge that the re-emergence of a strong 'professionalism' discourse in Canada is closely tied to the idea of all lawyers, to some extent, as public officials who have certain duties and obligations beyond their primary duty of loyalty to their clients.⁸⁷ This new

⁸⁴ See, for example, Samuel Donnelly, "Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions" (January, 2006) 603.

⁸⁵ "We are seeing the emergence of a small group of qualified lawyers who are prepared to sacrifice both professional fees and professional prerogatives in order to serve community group at a cost and in a manner they wish" in Harry W Arthurs, "Counsel, Clients and Community" (1973) Osgoode LJ 11.3 437 at 446.

⁸⁶ Owen Fiss distinguishes between the traditional triadic form of litigation with two individuals before a judge, with 'structural reform' of this period where the justice system is used by a "multiplicity of parties...an array of competing interests and perspectives organized around a number of issues. *Supra* note 82 Fiss, *Social & Political*, at 125, some viewed structural litigation "as a means of perfecting the political process", citing J H Ely, *Democracy and Distrust* (1980).

⁸⁷ See in Woolley *et al* eds, *Lawyers' Ethics and Professional Regulation* (Markham: LexisNexis Inc 2008) [Woolley, *Lawyers' Ethics*] at 456 – 459.

emphasis on the public role of law and lawyers in a democratic system, along with structural and governance changes, was further reinforced by a third wave of change, this one to court procedures, which is the focus of the next section.

5.4 Procedural Change in the Justice System

Structural and governance changes to the court system during this period were complemented by an additional wave of procedural changes within the justice system. Many of these changes were based on a significant theoretical re-conception of the nature of conflict.⁸⁸ This included an increased recognition of the many dimensions of potential conflicts, including their perception and developmental stages, as well as their transformation within the legal system. Increasingly, the nature of conflict was differentiated along a spectrum that supported the introduction into the legal system of a wider range of mechanisms to address social disputes that had legal dimensions.⁸⁹

At the same time from a practical viewpoint, new perspectives on the role of law and the justice system, along with the increased emphasis on the importance of individual rights, also supported the implementation of new approaches to adjudication. In the

⁸⁸ This includes the fact that potential conflicts may not necessarily be perceived as such by prospective litigants, see Felstiner, Abel and Sarat “The Emergence and Transformation of Disputes: Naming, Blaming and Claiming (1980 – 81), 15 *Law and Society Review*, 631, at 633 where the authors describe “unperceived injurious experiences”; or that conflict participants may use a range of strategies to respond to a conflict, including avoidance and accommodation [Felstiner, *et al* “Emergence”].

⁸⁹ There is a significant literature on the characterization of disputes and the categorization of different processes. A good summary and overview of these different approaches can be found in J Goss, “A Spectrum of ADR Processes (1995), 34 *Alta LR* 1.

traditional British Westminsterian tradition, the judicial function was historically characterized as one performed by a largely detached and authoritative figure.⁹⁰ In this tradition, the role of the judge was to settle disputes by applying the law in a disinterested and largely detached manner.⁹¹ Predictably, modern changes to court procedures altered this traditional mode of adjudication.

Process changes included the accommodation of a bundle of alternative approaches to the settlement of legal disputes that fall under the category of Alternative Dispute Resolution (ADR).⁹² These processes fundamentally altered the traditional role of judges and lawyers. For example, many new procedures were more flexible than established court procedures and re-oriented a large part of the justice system away from the traditional adversarial model. Ultimately, the recognition of new approaches to dispute resolution required some skills beyond traditional lawyer and judge competencies, that included an expert knowledge of law or legal reasoning skills.⁹³

For lawyers, their advocacy role in the modern courtroom still might include adversarial clashes under traditional court rules. But more often, the Bar was also

⁹⁰ This characterization excludes possible differences arising out of the civil law tradition.

⁹¹ See, for example, Richard A Posner's treatment of the historical characterization of the "judge as spectator" in *Overcoming Law* (Cambridge: Harv UP, 1995) at 126 – 134. The traditional role of a decision-maker in a legal process is consistent with the dynamic realist characterization of formal approaches to law, in which judges act only to apply the law, *supra* Hanoach Dagan, "The Realist Conception of Law", (2007) 57 UTLJ 607 [Dagan, "Realist Conception"] at 3.

⁹² Which includes negotiation, mediation, settlement, and arbitration. For description and discussion of the processes in the Canadian context see generally Julie Macfarlane, *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery, 1999).

⁹³ For a general description of the challenge and its application in a specific legal context see Johnathan T Malot, "An Old Judicial Role for a New Litigation Era" (2003) Yale L J 113, 27. For a description of how these procedures affect traditional lawyer competencies see K Kruse *et al* "Client-Problem Solving: Where ADR and Lawyering Skills Meet, (2015) 7 Elon L Rev.

expected to be able to engage in behaviours beyond their traditional role as ‘zealous advocates.’⁹⁴ Such behaviours were encouraged by procedural changes to the justice system, but also by the trend towards increased self-representation on one or both sides of a dispute.⁹⁵ These factors had similar consequential effects on the judicial role.

Just as lawyers might be required to alter their traditional role as zealous advocates, so too were judges now more often expected to abandon their appearance as neutral and impartial arbiters, instead making active interventions in the progress of litigation.⁹⁶ As a consequence, at a time when the role of judges and lawyers as part of an adversarial system was being highlighted as a key determinant of independence by scholars like Lon Fuller,⁹⁷ both judges and lawyers were relying less on these traditional modes of behaviour.

From a critical perspective, procedural change in the justice system also raised concerns about the institutional function of the court system under the rule of law. In this respect, the development and implementation of ADR methods and practices acknowledged the differentiated nature of social conflict in order to enhance access to justice.⁹⁸ But the implementation of less formal legal processes often occurred outside the traditional court system, and beyond direct oversight by court officials. The

⁹⁴ See Lord Brougham’s comments in *2 Trial of Queen Caroline* 3 (1821); Monroe H Freedman, “Henry Lord Brougham and Zeal”, *Hofstra Law Rev*, Vol 34, No 4 1319.

⁹⁵ For description of the challenge see, for example, Jeffrey S Leon, “Responding to Needs of Unrepresented Litigants: A call to Action” (2006) Remarks to the *Into the Future Conference* (Montreal)

⁹⁶ The incorporation of ADR into the formal justice system often placed responsibility on judicial officials to act in mediation, settlement, case management outside their traditional functional roles.

⁹⁷ *Supra* note 82, Fuller, “Forms and Limits”.

⁹⁸ *Supra* note 82, Fiss, “Social and Political”.

‘outsourcing’ of the public adjudicative function of court in this way raised concerns that the public role of the established court system was being diminished.⁹⁹

For example, some commentators noted at the time that the public interest was best served when the resolution of all disputes took place within the justice system.¹⁰⁰ They argued that since the legal system performs a public function, increased resolution of matters outside the spotlight of public scrutiny challenged a basic tenet of ‘open courts’ in the modern justice system.¹⁰¹ These concerns appeared partly justified in the face of a competing public policy perspective that emphasized the private aspects of individualism. In the administration of justice, this competing viewpoint fell under a broad category of scholarship and practices that was dubbed the ‘New Right,’ which is the focus of the next section.

5.4.1 ‘New Right’ in the Administration of Justice

During the 1970s and 1980s, a competing narrative proposed an alternative perspective on the role of individuals in relation to democracy, government and the justice system. While the ‘New Right’ also emphasized the importance of choice, it was distinguished from the New Left discourse by its preference for the right of individuals to

⁹⁹ ‘Outsourcing’ of court proceedings to alternative processes such as mediation and arbitration is a major cause of decreased use of some aspects of the public court system in the USA, *supra* Judith Resnik & Dennis Curtis, *Representing Justice*, (New Haven: Yale University Press, 2011), [Resnik & Curtis, *Representing Justice*].

¹⁰⁰ David Luban, “Settlements and the Erosion of the Public Realm” (1995), 95 *Georgetown LJ* 2619, at 2659 – 2662, where the author suggests the lack of scrutiny over private settlements may pose a risk to the public interest in having an open court system. See also Owen Fiss, “Against Settlement” (1984) 93 *Yale LJ* 1073.

¹⁰¹ *Ibid.*

make private, rather than public choices. Such choices were contextualized in the justice system primarily through analogies to choice in the economic marketplace.

For example, during this period, ‘New Right’ approaches to public administration increasingly sought to organize government on the basis of a private and corporate model.¹⁰² One of the more prominent of these approaches was labelled the ‘New Public Management’ (‘NPM’).¹⁰³ NPM had a number of identifiable characteristics, which were described in language borrowed largely from economics scholarship. These included treating citizens as ‘consumers’ or ‘clients’, and characterizing government as a ‘business’ premised on an organizational model that preferred private sector notions of both efficiency and accountability.¹⁰⁴

Utilizing a business model as a basis to restructure government services held out the promise of significant benefits for individual citizens.¹⁰⁵ However, despite the significant influence of this administrative model, it was also the subject of substantial criticism. For example, some argued the NPM’s treatment of government as a business

¹⁰² See, for example, John Shields and B Mitchell Evans *Shrinking the State: Globalization and Public Administration “Reform”* (Halifax: Fernwood, 1998) [Shields & Evans, *Shrinking*].

¹⁰³ See Peter Aucoin *The New Public Management: Canada in Comparative Perspective* (Ottawa: Institute for Research on Public Policy, 1995).

¹⁰⁴ Shields & Evans note that this approach relies on a thesis of state marketization which converts “citizens into consumers and commodifies public goods,” *supra* note 102, Shields & Evans, *Shrinking*, at 56.

¹⁰⁵ The Citizen’s Charter in the UK, for example, “has given users of public services a tangible advantage in terms of courtesy, access to information, and responsiveness” *supra* note 72, Sossin, “Democratic Administration” at 86.

appeared to conflate personal choice in the marketplace with other kinds of choice, such as in politics.¹⁰⁶

Such criticisms are based on a recognition of the contextual limits on choice in different forums and are also applicable to the legal system. Whereas the marketplace is premised on notional equilibrium based on consumers' choice to demand goods and services, the nature of choice for those engaged in the legal system is more limited.¹⁰⁷ This potential conflict between an NPM approach to government and core democratic values was realized to an extent following the erosion of the post-War welfare state from the 1970s to the 1990s, when governments at all levels dealt with a period of fiscal constraints and limits on economic growth.¹⁰⁸

At the level of theory, NPM approaches in public administration supplemented legal approaches, which also emphasized economic theory and behaviours. In this respect, in the area of public policy, including justice sector policy, NPM was a natural complement to neo-formal theories of law, which relied on the mechanisms of the

¹⁰⁶ For example, some public goods, such as the provision of 'justice' may not be easily commoditized or fit neatly into the 'customer'; or 'client' paradigm in the sense that the freedom to choice is limited.

¹⁰⁷ *Ibid*, increased choice in the marketplace might improve quality and efficiency, but as a democratic matter of public administration "it does not lead to substantive citizen influence over the decision-making process", *supra* note 72 Sossin, at 87. Market approaches may result in reductions in 'public content', *supra* Diana Woodhouse, *In Pursuit of Good Administration: Ministers, Civil Servants and Judges* (Oxford: Clarendon Press, 1997) at 221 – 232, which in the context of the justice system is in tension with the principle of 'open courts', *supra* note 77.

¹⁰⁸ There is a substantial literature on the association between the rise of the post-War welfare state and its relation to public administration in Canada, see, for example, Keith Banting *The Welfare State and Canadian Federalism*, 2nd ed (Montreal & Kingston: McGill-Queen's UP, 1987); D Guest, *The Emergence of Social Security in Canada*, 2nd ed (Vancouver: UBC Press, 1985).

marketplace to inform legal concepts. From the legal realist viewpoint, many neo-formal theories of law attempt to substitute economics in place of the old formalist reliance on ‘scientific’ legal principles.¹⁰⁹ To the extent that NPM approaches to public policy also used an economic perspective to prioritize fiscal considerations in government, this has heightened some tensions within the administration of justice.

As ‘New Right’ approaches like NPM gained currency, they raised questions that challenged a ‘business’ approach to the provision of public services. For example, one longstanding democratic convention applied in approving government expenditures is the historical requirement of Parliamentary authorization for the use of public monies. In Canada today, this accepted practice is reflected in the current official procedure that fiscal requests originate in the legislature and are approved by the elected assembly.¹¹⁰ However, in some cases, administrative practices that did not adequately ensure acceptable levels of access to justice have led to judicial decisions requiring the expenditure of public money.

In Canada, this includes a raft of decisions in recent years, including those related to institutional delay,¹¹¹ the provision of court interpreters,¹¹² the determination that some

¹⁰⁹ *Supra* Victoria Nourse & Gregory Shaffer “Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?” (2009) 95 Cornell L Rev 61 at 74.

¹¹⁰ Though in practice the Crown acts on the advice of Cabinet, see Canada, House of Commons (Table Research Branch), *Precis of Procedure*, November 2003: online <http://www.parl.gc.ca/information>.

¹¹¹ *R v Askov* 2 SCR 1199.

¹¹² *R v Hannemann*, 2001 CanLii 28423 (ON SC).

litigants may not be required to pay court fees,¹¹³ and recognition of litigant's right to counsel in some circumstances, including requiring Legal Aid to provide counsel to a criminal defendant who would not have otherwise qualified financially for the government funded program.¹¹⁴ As described by one commentator, the cumulative effect of these increased tensions has raised questions about the effectiveness of traditional public administrative approaches to courts' administration and led to "an erosion of trust and confidence in the systems of court governance now in place in Canada."¹¹⁵

Waves of change emphasizing individual rights, as well as structural and procedural changes, fundamentally affected the environment of independent courts. Given the increased emphasis post-War on access to justice and the legal system, it is notable that at least one of the outcomes of these changes appears to have decreased access to the justice system.¹¹⁶ The nature of this decreased access to the justice system, as well as the practical effects of many of these changes, are illustrated in the examination of Ontario's Small Claims Court, presented in the second part of this Chapter.

¹¹³ *Polewsky v Home Hardware Stores Ltd*, 2003 CanLii 48473 (ON SCDC).

¹¹⁴ In the recent Ontario case of *R v Moodie* (2016) ONSC 3469, the Court criticized the low income cutoff limit for the Legal Aid program and stayed criminal charges until Legal Aid covered the costs of a lawyer, even though the defendant did not qualify in terms of income limits for the program. Note however there is no general right to counsel recognized in legal proceedings in Canada see *British Columbia (Attorney General) v Christie* [2007] SCJ No 21, 2007 SCC 21 [*Christie*]. See also Micah B Rankin, "Access to Justice and the Institutional Limits of Independent Courts" (2012) 30 Windsor Y B Access to Just 101.

¹¹⁵ Lorne Sossin, "Constitutional Accommodation and the Rule(s) of the Courts, (2005) 42 ALTA LR 607 at 616.

¹¹⁶ *Supra*, Resnik & Curtis, "Representing Justice" at note 99.

5.5 Discussion and Analysis

The post-War period in Canada experienced a transformation of the justice system. Many of these changes were initially driven by a new emphasis on individual rights. In Canada, this focus on rights was reflected in a series of court decisions starting in the 1950s. The new ‘rights talk’ associated with this jurisprudence ultimately precipitated a decades-long process of constitutional change that resulted in the implementation of the Canadian *Charter of Rights* in the 1980s.¹¹⁷

This discourse also supported later widespread structural and governance change to the court system. The focus on rights along with structural and governance change, were complemented by a reconsideration of the legal process itself, which led to an array of new procedures incorporated within the justice system. All of these changes significantly influenced the principle of independence for participants in the justice system.

The development of independence within the administration of justice has always been informed by a range of values. However during this time, a stronger emphasis was placed on access to justice, which associated the justice system as a mechanism of legal governance and part of democratic practices. This new emphasis on the democratic role of courts itself faced tensions, particularly in new approaches that sought to privilege the private nature of choice and individual rights.

¹¹⁷ *Supra* note 33.

Some recent changes also de-emphasized the traditional role of the public court system, proposed alternatives that were less adversarial, and often occurred in settings external to the courtroom. Alternatives to adversarial court proceedings also supported the increased privatization and outsourcing of disputes outside of the legal system. While many of these changes occurred at the level of theory and principle, they had significant practical impacts on the role and function of independence for judges, lawyers and on the justice system itself.

Some of the practical implications of the waves of change that have washed over the justice system in the last decades are highlighted above. However, at a practical level the question remains as to what effects these changes have had on the justice system, and the extent to which the normative purpose, which I have identified as access to justice, has been addressed. The next part of this Chapter further develops the concept of ‘emergent analytics’ to flesh out these issues from a practical perspective.

5.6 Independence at Ontario’s Small Claims Court – Case Study

An important theme in the dynamic realist perspective is the balance between principle and practicality. In this case no theoretical consideration of law would be complete without an operational understanding of how legal concepts and principles are realized within the legal system. In this respect, this case study examines the operation of Ontario’s Small Claims Court. As a small, but illustrative part of the Canadian justice

system, the analysis of small claims is a good choice to examine the operational context of the principles informing the justice system, including independence, for several reasons, set out below.

5.6.1 Introduction

The important historical role of small claims has been largely overlooked in Canada.¹¹⁸ Small claims adjudication has a longstanding history, which dates back to colonial times. The relative inattention to small claims is partly attributable to the inherent nature of the litigation before the court, which has historically involved matters of relatively minor monetary and civil legal jurisdiction.¹¹⁹ At the same time, the limited jurisdiction of the court has resulted in the close historical association of these legal forums with individual experiences within the justice system.¹²⁰

The emergence of the modern Small Claims Court has also occurred in the context of the Court's perceived role to facilitate access to justice. In considering the

¹¹⁸ There have been some studies examining small claims forums in various settings, eg, EH Steele "The Historical Context of Small Claims Courts" (1981) AM B Found Res J at 295; CJ Whelan ed *Small Claims Courts: a Comparative Study* (Oxford: Clarendon, 1990). In Canada, there have been some past attempts to examine the function of the court empirically, see eg Kai Hildebrandt, Brian McNeely & Peter P Mercer, "The Windsor Small Claims Court: An Empirical Study of Plaintiffs and Their Attitudes" (1982) Windsor YB [Hildebrandt, *et al* Windsor" at 86, perhaps most notably in recent years in the context of Quebec Small Claims, see Seana C McGuire & Roderick A Macdonald, "Small Claims Court Can't" (1996) Osgoode Hall L J 509 [McGuire, Macdonald, "Small Claims"]. See also "Evaluation of the Nova Scotia Small Claims Court", *Final Report to the Nova Scotia Law Reform Commission*, March 2009, online: <http://www.lawreform.ns.ca/Downloads/SmallClaimsFinaReportFINAL.pdf> [Nova Scotia LC, *Final Report*]; Shelley McGill, "The Evolution of Small Claims Court: Rising Monetary Limits and Use of Legal Representation" (2015) 32 Windsor Y B Access Just 173 [McGill, "Evolution"].

¹¹⁹ *Ibid.* The relative inattention to small claims may reflect a broader antipathy towards the importance of legal history and historiography in Canadian legal culture, *supra* Wesley Pue, "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers", (1995) 33 Alta L Rev 730.

¹²⁰ Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 244 [Russell, *Judiciary*].

relationship between access to justice and access to the justice system, ‘small claims’ Courts provide a distinct treatment of these terms. Such forums are often viewed as integral in providing access to justice.¹²¹ In this respect, the Small Claims Court is one of the most common ways that people access the justice system and has been characterized in modern times as the ‘People’s’ Court.¹²²

In recent years some scholars have also recognized a gap between theory and principle, and the practicalities of implementing legal concepts within the justice system.¹²³ This gap has encouraged increased empirical work, to assess the actual function of legal ideas in practice. This has resulted in several studies over the years, which have addressed the experiences of participants in the system.¹²⁴ However, it is also important to understand these qualitative experiences within the framework of a practical assessment of the operation of the system.¹²⁵

¹²¹ *Supra* note 118, McGuire, Macdonald, “Small Claims”.

¹²² *Supra*, Russell, *Judiciary* at note 120 at 244.

¹²³ Jeremy Waldron “Concepts and the Rule of Law” (2008) 43 Ga L Rev 1 at 55.

¹²⁴ Recent studies have also considered qualitative perceptions in terms of access to justice more generally, see *eg*, The Ontario Civil Legal Needs Project Steering Committee, “Listening to Ontarians: Report of the Ontario Civil Legal Needs Project” (Toronto: Law Society of Upper Canada: May 2010), online: LSUC <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf>; Trevor CW Farrow, Diana Lowe, QC, Bradley Albrecht, Heather Manweiller & Martha E Simmons, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System: A White Paper Prepared for the Association of Canadian Court Administrators* (Toronto & Edmonton: Association of Canadian Court Administrators, 27 March 2012), online: CFCJ <<http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf>>. Action Committee on Access to Justice in Civil and Family Matters, *Report of the Court Processes Simplification Working Group* (May 2012) available online: <<http://www.cffc.org/sites/default/files/docs/2013/Report%20of%20the%20Court%20Processes%20Simplification%20Working%20Group.pdf>>. See also Hazel Genn *et al*, *Paths to Justice: What People do and Think About Going to Law* (Oxford: Hart, 1999) at v-vi, 12; Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007).

¹²⁵ Lewis Kornhauser makes a similar point about the need for studies of the performance of courts and judges in practice; “Is Judicial Independence a Useful Concept?” in Stephen B Burbank & Barry Friedman

Consequently, one additional component is a quantitative analysis, to examine the function of independent actors within the modern Small Claims Court to enable ‘access to justice’. This case study incorporates a purposive empirical approach to court utilization as an aspect of access over the last few years in Ontario.

The empirical portion of this case study presents a ‘snapshot’ of the justice system in microcosm, but some of the statistical conclusions also appear to reflect a broader trend: evidence of an ongoing decline in the use of the civil justice system. In this case, the study suggests that judges and lawyers have played an important role to protect rights in a reformed institutional setting. However, the decline in usage also suggests that changes to enhance the independent role of the Court and improve access to justice have not wholly succeeded in improving access to the legal system.

The first section of the case study highlights the principles of recursivity and simultaneity in the historical development of the Court. For example, concerns about small claims venues, about access to justice and about the function of these courts, have remained substantially the same over a long period of time. In addition, the historical timing of changes to the Small Claims Court are often concurrent with other changes to the justice system, but also frequently occur contemporaneously along with broader political and social change.

eds, *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks: Sage Publications Inc, 2002) at 45.

The historical context lays the groundwork for a consideration of the emergence of the modern institution of the Small Claims Court in the second section of the case study. The waves of change affecting the broader legal system, highlighted at the beginning of this Chapter, were also reflected in changes to small claims proceedings. For example, structural and governance changes in the larger court system starting in the 1970s are also apparent within the context of Ontario's small claims regime.¹²⁶ Similarly, the procedural changes within courts more generally also affected the small claims environment.

The case study also identifies some jurisprudential developments that have further entrenched the role of the Small Claims Court, but have also dealt with repeating historical issues, including the function of independence and its relation to access to justice. Changes resulting from jurisprudence and procedural modifications are considered in light of the declining numbers of new proceedings over the last few years. This last section highlights the tension and dissonance in the relationship between access to justice and access to the justice system in the context of small claims. This case study starts in the next section, with a consideration of the historical approaches to small claims adjudication.

¹²⁶ *Supra* note 120, Russell, “*Judiciary*” at 237 - 251

5.6.2 Recursivity and Simultaneity in Development of Small Claims Forums

Today in Ontario, the Small Claims Court is a statutory branch of the Superior Court of Justice. It is authorized pursuant to the province's *Courts of Justice Act* to hear civil matters where the monetary value does not exceed \$25,000.¹²⁷ Matters are heard under a procedural regime that is "less complex" and "streamlined."¹²⁸ Proceedings are heard at over 90 locations throughout the province by judicial officials known as Deputy Judges, who are lawyers who work part-time.¹²⁹ The approximately 400 part-time Deputy Judges "provide an affordable, accessible and timely forum for over 40% of all civil proceedings in the province."¹³⁰ On the basis of its current role and function within the administration of Ontario's courts, Small Claims Court appears to provide a readily available and independent public forum that supports access to justice.

However, the current status of the Court is only one facet of a dynamic realist analysis. An historical examination of small claims adjudication in Ontario, for example, reveals many similar concerns recurring over time up to the present day. These include concerns about access to justice, jurisdictional issues and questions about the independence of these forums. Ultimately, all of these issues have manifested themselves,

¹²⁷ As of January 1, 2010, under O Reg 626/00 and O Reg 439/08, under *Courts of Justice Act*, RSO 1990, Chap C 43, as amended [*CJA*].

¹²⁸ Superior Court of Justice-Small Claims Court, online: Ontario Courts <<http://www.ontariocourts.ca/scj/en/scct/>>.

¹²⁹ *Ibid.* Also see section 32 of the *CJA*, *supra* note 127.

¹³⁰ Opening of the Courts, September 12, 2012, Remarks of Ontario Superior Court Chief Justice Heather Smith, online: Superior Court of Justice <<http://www.ontariocourts.ca/scj/en/about/ocs.htm>>.

in different ways, throughout the development of ‘small claims’ adjudication. The history of small claims adjudication in Ontario begins in the latter part of the 18th century.

5.6.2.1 Early History - 1764 to 1791

In 1792, one of the first Acts of the newly formed colony of Upper Canada¹³¹ was to create a “small claims” court, known as the Court of Requests.¹³² The creation of this forum came before even the establishment the more general Court structure in 1794 and was a significant institutional marker in the evolution of Ontario’s Courts.¹³³ However, the establishment of a practice to distinguish ‘small claims’ actually began prior to the organization of Upper Canada as a separate political entity in 1791. There are several factors that led to the enactment of this legislation so early in colonial history.

Prior to 1791, much of what is now Ontario was part of the western portion of the colony of Quebec.¹³⁴ Under the colonial administration of 1764, the government set up civil courts in British Canada and included an ordinance to provide limited civil jurisdiction to individual justices of the peace to hear matters, where the amounts did not exceed five pounds. The authority for justices of the peace to hear these “small claims” was annulled in 1770, but could have continued under ‘special commission’ thereafter.¹³⁵

¹³¹ *Constitutional Act of 1791*, 1791 (31 Geo III), c 31 (UK).

¹³² 1792 (32 Geo III), c 6 (UC).

¹³³ 1794 (34 Geo III), c 2 (UC). See also Margaret A Banks, “Evolution of Ontario Courts 1788 – 1981” in ed David H Flaherty, *Essays in the History of Canadian Law*, vol II (Toronto: Osgoode Society, 1983) 492 – 572, at 492 [Banks, “Evolution”], [Flaherty, “*Essays II*”].

¹³⁴ *Ibid*, Banks, “Evolution”, notes that ‘Ontario’ was not adopted until Confederation in 1867 at 518.

¹³⁵ Adam Shortt, Arthur G Doughty, eds, *Documents Relating to the Constitutional History of Canada, 1759 - 1791* vol 1, “An Ordinance For The More Effectual Administration of Justice, And For Regulating The Courts Of Law In This Province” (Ottawa: J de L Tache, Printer to the King, 1918), [Shortt, Doughty,

However, as the American Revolutionary War came to a close in the 1780s, groups of Loyalist refugees began to arrive in the territory. These new settlers found little in the way of justice system infrastructure on the ‘north shore’ of the Great Lakes, with the nearest courts in distant Montreal.¹³⁶ As a result, some of the early Loyalists petitioned the colonial administration for a means to better protect their civil rights in the newly developing territory.¹³⁷ In response, the council in Quebec renewed some of the “small claims” jurisdiction for justices of the peace in 1785, though only in the newly settled portions of the colony.¹³⁸

Another factor in the early establishment of a special court for ‘small claims’ was likely the influence of a budding merchant class. In more settled areas like Kingston, the needs of the new colony provided the basis for a prosperous commercialism. It was these early settlers and “regional merchants [who] made the first demands for the extension of court and other government institutions”.¹³⁹ However, a focus on larger commercial cases led the whole court system to become closely associated with the interests of the

Part 1, “Documents”] at 401, available online: <
<http://archive.org/stream/documentsrelatin01publuoft#page/402/mode/2up>>.

¹³⁶ *Supra* note 133, Banks, “Evolution”, at 497.

¹³⁷ Adam Shortt & Arthur G Doughty, eds, *Documents Relating to the Constitutional History of Canada, 1759 - 1791* vol 1, “An Ordinance For The More Effectual Administration of Justice, And For Regulating The Courts Of Law In This Province” (Ottawa: J de L Tache, Printer to the King, 1918), [Shortt, Doughty, Part 2, “Documents”] “Petition of Sir John Johnston, Bar and other in Behalf of Loyalists settled in Canada”, April 11, 1785 , at 773, available online: University of Toronto Archives <
<http://archive.org/details/documentsrelatin02publuoft>>.

¹³⁸ *Supra* note 133 Banks, “Evolution” where the author notes, “they were to hear and determine without appeal suits involving personal rights, and for the recovery of debts of not more than 5 pounds; for any case involving more than 2 pounds, two justices of the peace were necessary” at 498.

¹³⁹ *Supra* note 133, Flaherty, *Essays II*, William N T Wylie, “Civil Courts in Upper Canada 1789 – 1812” at 6 [Wylie, “Civil Courts”].

merchant class,¹⁴⁰ whom the leaders of the burgeoning colony “distrusted”.¹⁴¹ This close and early association of the court with business interests, remains an ongoing issue in the design and function of forums to hear small claims matters.¹⁴²

As with the judiciary more generally, there were also early challenges to judicial independence at this time in small claims matters. For example, despite some success in addressing smaller civil claims in early Upper Canada, Justices of the Peace rarely circuted outside of major centres of population.¹⁴³ The result was a geographical obstacle to accessing the courts that “effectively placed the machinery of justice out of reach of most rural settlers.”¹⁴⁴ Thus, with the creation of the new colony of Upper Canada in 1791, little time was wasted in establishing a regionalized system of inferior courts.¹⁴⁵ Concerns about the physical availability of such courts as proximate to litigants, and the need for travel to court, are a further repeating concern that remains an issue in contemporary times.¹⁴⁶

5.6.2.2 ‘Small Claims’ in Upper Canada - 1791 to 1840

At its foundation in 1791, the laws of Upper Canada were designated the same as those in Quebec, except where subsequently varied.¹⁴⁷ The first Act of the first

¹⁴⁰ *Ibid*, where Wylie notes “the credibility of the courts had been damaged by their close association with merchants of the Laurentian trading system” at 13.

¹⁴¹ *Ibid* at 14.

¹⁴² *Supra* note 118, McGill “Evolution”.

¹⁴³ *Supra* note 139, Wylie “Civil Courts”, at 6 where the author notes they typically presided over larger commercial proceedings.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid*, where Wylie notes colonial leaders wanted a regional system “supervised by professional judges rather than laymen”.

¹⁴⁶ *Supra* note 118, McGill, “Evolution”.

¹⁴⁷ The only difference initially was that the Governor or the Lieutenant Governor and the Executive Council of Upper Canada which constituted a Court of Appeal in civil cases, *supra* note 131 at ss 33 - 34.

legislature of Upper Canada was, therefore, to repeal the provision of the *Quebec Act*,¹⁴⁸ which followed the “Paris Custom”¹⁴⁹ of civil law, to instead receive the “laws of England” in civil matters.¹⁵⁰ The new colony also passed a law for “the more Easy and Speedy Recovery of Small Debts,”¹⁵¹ the earliest version of ‘small claims’ court in Canada.¹⁵² By contrast, the larger structure of the Court system in Upper Canada was not established until the passage of the colony’s ‘Judicature Act,’ some two years later in 1794.

The Court of Requests functioned as a formal hearing place for local disputes, but also served as a kind of community gathering spot.¹⁵³ Characterized as “six penney chanceries,”¹⁵⁴ the Courts of Requests were also known both as ‘Saturday Courts,’ because of their practice of opening on alternate Saturdays, and as the ‘Court of Petty Sessions.’¹⁵⁵ While typically hearing matters involving promissory notes and actions on accounts, their more general community functions included administering oaths for minor office holders and hearing other matters of interest to the colonists, like the construction of roads.¹⁵⁶ Concerns about physical proximity of the Courts were addressed in the legislative design since new courts could be established to suit the “evolving patterns of

¹⁴⁸ 1794 (34 Geo III) c 83, s 8 (UK).

¹⁴⁹ John EC Brierley & Roderick A MacDonald, *Quebec Civil Law: An introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 7 – 8.

¹⁵⁰ 1792 (32 Geo III) c 1, s 1 (UC).

¹⁵¹ *Supra* note 132.

¹⁵² *Supra* note 118, Nova Scotia LC, *Final Report*, at 8.

¹⁵³ J H Atchison, “The Courts of Request in Upper Canada”, *Ontario History* XLI (1949) 125 – 132, [Atchison, “Courts”], at 127 – 8.

¹⁵⁴ *Supra* note 120, Russell, “*Judiciary*” at 238.

¹⁵⁵ *Supra* note 153, Atchison, “Courts” at 127.

¹⁵⁶ *Ibid* at 128.

settlement.”¹⁵⁷ The low jurisdiction and relative informality meant that matters were often heard in non-institutional settings, such as the dwelling place of the justices appointed to act,¹⁵⁸ a practice that was still present up until the 1970s.¹⁵⁹

Despite its important role in the lives of early settlers, some of the Court of Requests’ shortcomings became the focus of early reform efforts. Even prior to the War of 1812, the previous association of the Courts with business interests continued. For example, at the time allegations also appeared of ‘trader magistrates’ who used their ostensibly independent judicial offices to their own advantage locally.¹⁶⁰ In this respect, questions about judicial independence have presented ongoing challenges throughout the history of small claims adjudication.

For example, in the early 1800s there were complaints about the education, training and appointment process for lay Justices of the Peace who presided in the Court. In addition, while Court locations tended to be informal, the fact some were held in taverns, where parties and officials were accused of drinking to excess,¹⁶¹ likely did not enhance the public perception of the regularity of proceedings, or of the fairness of its independent officials. Such officials often appeared to have little appreciation of

¹⁵⁷ *Supra* note 139, Wylie, “Civil Courts” at 15.

¹⁵⁸ *Supra* note 153, Atchison, “Courts” at 126.

¹⁵⁹ Ontario Law Reform Commission, *Report on the Administration of Ontario Courts*, (1973) Part III at 349.

¹⁶⁰ *Supra* note 139, Wylie, “Civil Courts” at 17.

¹⁶¹ *Supra* note 153 Atchison, “Courts”, citing Assembly Debates as reported in the *Kingston Chronicle*, 16 May 1823, at 129 under note 14.

procedure and the law,¹⁶² and there was no provision for appeal of their judgments.¹⁶³

There was also no effective means to discipline or remove Justices from the Court of Requests,¹⁶⁴ all of whom were political appointments of the government of the day.¹⁶⁵

Concerns about the function of the Court of Requests led to changes in the 1830s. Changes included extensions of the monetary jurisdiction of the Court, and the creation of a class of lay officials known as “Commissioners,” who could hear small claims matters, but did not have to be appointed Justices of the Peace.¹⁶⁶ Efforts to improve the Courts of Requests in the 1830s ultimately proved unsuccessful.¹⁶⁷ However, the advent of broader political changes,¹⁶⁸ and the institutional re-design of the court system generally, also offered the opportunity to re-shape the adjudication of small claims matters in Upper Canada.

5.6.2.3 The Division Courts – ‘Small claims’ 1841 to 1970

The Canadian rebellions of 1837-1838 in Upper and Lower Canada provided a “catalyst of fundamental change”¹⁶⁹ in British North America, and beyond.¹⁷⁰ One

¹⁶² *Ibid*, at 120.

¹⁶³ *Supra* note 139, Wylie, “Civil Courts” at 18.

¹⁶⁴ *Ibid*, where Wylie notes “the only means of proceeding against misbehaviour was by dismissing the magistrates or by bringing criminal charges against them. Examples of either were rare”.

¹⁶⁵ *Supra* note 153, Atchison, “Courts” at 130.

¹⁶⁶ 1833 (3 Wm IV) c 1, s 3 (UC), which extended jurisdiction to 10 £. The jurisdiction of the Court of Requests had earlier been increased, to 5 £ under 1816 (56 Geo III), c 5, s 5 (UC).

¹⁶⁷ *Supra* note 153 Atchison, “Courts”, at 131.

¹⁶⁸ Most notably the union of the colonies of Upper and Lower Canada, pursuant to the *Act of Union*, 1840 (3&4 Vict) c 35 (UK).

¹⁶⁹ Richard Gwynn, *John A, The Man Who Made Us: The Life and Times of John A. MacDonald*, Volume One: 1815 – 1867 (Random House: 2007) at 91.

¹⁷⁰ *Ibid*, “[The] recommendation for Responsible Government began a fundamental reordering of the Empire,” at 96.

result was the union of the Canadas into one colony in 1840.¹⁷¹ At the same time, broader political change also precipitated a re-organization of the Court system in the territory, which included substantial changes to the way ‘small claims’ matters were heard.

Following the *Act of Union*, in 1841 the province passed legislation to replace the Court of Requests with the ‘Division Courts.’¹⁷² While the new Division Courts continued to hear matters consistent with the previous monetary limit, lay Justices and Commissioners were replaced by District Court judges.¹⁷³ At this time, parties were also provided with the right to request a jury, which made small claims more consistent with practices in the broader civil justice system.¹⁷⁴

The Division Courts proved largely successful, but also continued to be subject to minor jurisdictional modifications throughout the subsequent years. For example, by Confederation in 1867, the Courts exercised a jurisdiction up to \$100 in contract and debt, and \$40 in both tort and replevin, if the value of goods did not exceed \$40.¹⁷⁵ One specific change to the Division Courts that occurred in 1880 was a limited provision of appeal, if the value of a claim exceeded \$100.¹⁷⁶

¹⁷¹ *Supra* note 168.

¹⁷² “*An Act to repeal the Laws now in force in that part of this Province, formerly Upper Canada, for the recovery of Small Debts, and to make other provisions therefor*”, 1841 (4 & 5 Vict), c 3, s 1 (P of Can).

¹⁷³ 1841 (4 & 5 Vict), c 8, ss 2, 3 (P of Can).

¹⁷⁴ 1841 (4 & 5 Vict), c 3, ss 20, 28 – 29, 44 (P of Can).

¹⁷⁵ *Division Courts Act, Consolidated Statutes of Upper Canada*, 1859, c 19, s 55.

¹⁷⁶ 43 Vict (1880), c 8, (Ont), ss 2-3, with appeals provided for in s 17.

At the same time the overall monetary jurisdiction of the Division Court for contract and debt proceedings was increased to \$200, for contract and debt proceedings with limits on other proceedings extended to \$60. Given the doubling of Court's monetary jurisdiction in 1880, the creation of rights of appeal may have been regarded as a prudent procedural safeguard. The inclusion of 'small claims' appellate rights also moved the Division Courts one step closer to procedures associated with the broader court system.

Similar to the experience within the more general court system¹⁷⁷ there were few changes to the operational role played by the Division Courts within the justice system after the late 1800s.¹⁷⁸ However, smaller changes and adjustments to the Division Courts occurred periodically over the years, including occasional increases every few decades to the monetary jurisdiction of 'small claims' matters heard at the Courts.¹⁷⁹

5.6.3 Analysis of Historical Context

Questions about access to justice have always been closely tied to jurisdictional concerns about the scope of legal authority in small claims forums. Throughout the

¹⁷⁷ "By and large, the Canadian judicial system in the late 1960s looked little different that it had at the turn of the century," McCormick, "*Judicial Independence*" *supra* note 50; Perry S Millar and Carl Baar, *Judicial Administration in Canada* (Kingston & Montreal: McGill-Queens University Press, 1981) [Millar & Baar, "*Judicial Administration*"], particularly at 51.

¹⁷⁸ One exception was a criminal jurisdiction to hear summary conviction appeals from 1905 to 1933, authorized by 1905 (4 & 5 Edw VII) c 10, s 1 (Can), under the *Criminal Code*, RSC 1906, s 749.

¹⁷⁹ 1920 (10 & 11 Geo V) c 34, s 1 (Ont); 1937 (1 Geo VI), c 20, s 4 (Ont); 1949 c 29, s 1 (Ont); (1965) c 32, s 2 (Ont). Monetary jurisdiction often varied as between kinds of proceedings.

history of small claims courts in Ontario there have also been concerns about the judicial officials who preside in these forums. As observed throughout the historical overview, changes to the structure and function of small claims adjudication often paralleled both overall modifications to the justice system and broader political changes.

Many issues in this presentation of small claims adjudication have their modern day parallels. For example, many concerns about how these courts facilitated access to justice, and the independence of these forums and their officials, remain consistent throughout their 200-year history. The most prominent of these has been the question of jurisdiction of the court, but there have also been recurring issues involving geographical access to justice, the influence of political factors, particularly in favouring business claimants before the court, and the independence of court officials and the court itself.

The issues form a consistent thread through the historical emergence of the court into its modern institutional re-creation. The next section focuses on the emergence of the modern Small Claims Court in the context of these themes, highlighting correlations between the waves of change occurring simultaneously in the larger justice system.

5.6.4 Emergence and Mediation of the Modern ‘Small Claims Court’

Changes within Canadian legal culture starting in the 1950s had focused attention on the importance of rights and the capacity of individuals to enforce and individually defend themselves in the court system. In the 1960s this led to renewed focus on court

structure and procedure to enhance access. In this respect, structural changes to the Small Claims Court in the 1970s mirrored other institutional and governance changes that were occurring across the Canadian justice system.

In Ontario ‘small claims’ modifications started with an historical name change with the passage of the *Small Claims Court Act*, which came into effect on January 1, 1971.¹⁸⁰ While change occurred relatively quickly compared to the long period of institutional stasis that preceded it,¹⁸¹ change did not occur all at once and reforms to small claims adjudication appeared only “haltingly” over the next few years.¹⁸²

For example, small claims matters in Ontario were treated relatively informally as compared to rest of the court system. While under the new legislation full-time Small Claims Court judges could hear disputes, this was rarely the case. The majority of litigation in the 1970s was likely presided over by part-time adjudicative officials who were lawyers appointed to act as ‘Deputy Judges.’¹⁸³ The fact that some Deputy Judges ran court proceedings out of their own houses, with staff paid from the fees they collected, harkened back to informal practices that had been common in small claims matters since the 1800s.¹⁸⁴

¹⁸⁰ RSO 1970, c 439.

¹⁸¹ Changes came about following the *McRuer Report*, *supra* note 62.

¹⁸² *Supra* note 120, Russell, *Judiciary* at 239.

¹⁸³ Who were authorized pursuant to the new *Small Claims Court Act* RSO 1970, c 439, s 13.

¹⁸⁴ *Supra* note 161.

As with the administration of justice more generally, attention to small claims matters was influenced by new concerns about the public and democratic role of the justice system. Studies in both Canada and the U.S. indicated that small claims venues often functioned as alternative debt collection services for businesses. In this respect, “there was increasing concern that consumers who did not pay their bills because they were dissatisfied with the product or service purchased were at a considerable disadvantage in the small claims process.”¹⁸⁵ While such modern ‘consumer’ concerns may have been new, many of these criticisms of the Small Claims Court also echoed historical complaints about the influence of commercial interests in small claims adjudication.¹⁸⁶

By the end of the 1970s, part of the Small Claims Court was re-structured to become a division of the Provincial Court, with a monetary jurisdiction to hear matters up to \$3,000.¹⁸⁷ The Provincial Court (Civil Division) was presided over by full-time provincially appointed judges, but initially operated in Toronto only as pilot project. Established for a three-year “trial period,” the Toronto pilot was made permanent in 1982.¹⁸⁸ Under further changes in 1984, the Small Claims Court outside of Toronto was amalgamated into the Provincial Court (Civil Division), though the lower \$1,000 limit

¹⁸⁵ *Supra* note 120, Russell *Judiciary*, at 238.

¹⁸⁶ *Supra* notes 160.

¹⁸⁷ *Provincial Courts (Civil Division) Project Act*, RSO 1980, c 397, s 6(1).

¹⁸⁸ Ontario Ministry of the Attorney General, *Civil Justice Review, First Report*, (Toronto: Publications Ontario, March 1995) at 287 [MAG, “*Civil Justice Review – First Report*”].

was kept in place outside of the Provincial capital, where Deputy Judges continued to be utilized.¹⁸⁹

The Provincial Court (Civil Division) continued only until 1990. In that year, the Ontario Court system underwent major structural reforms.¹⁹⁰ The superior courts of the province previously divided between the old High Court of Justice and District Courts were merged to form one trial court of superior jurisdiction for Ontario – the Court of Justice (General Division). At the same time, the Provincial Court (Civil Division) was subsumed as a statutory branch of the new superior court and became known, once again, as the ‘Small Claims Court’.¹⁹¹

Changes to the structure of small claims forums during this period were typical of many of the larger institutional reforms that were revolutionizing the justice system.¹⁹² By 1990, the major features and institutional elements of today’s Small Claims Court had been established. However, the Small Claims Court in Ontario continued to evolve, and many of the more recent reforms have resulted from legislative and procedural adjustments. These changes, along with some jurisprudential modifications, are consistent with the wider wave of reforms to process before the Courts and are highlighted in the next section.

¹⁸⁹ *Supra* note 120, Russell, “Judiciary”, at 240, under the *Courts of Justice Act, 1984*, SO 1984, c 11, which came into force on January 1, 1985 and replaced several pieces of legislation, including the *Judicature Act*, RSO 1980, c C 43.

¹⁹⁰ Which was part of the broader efforts, across the country, at court consolidation.

¹⁹¹ Pursuant to changes authorized under the *Courts of Justice Amendment Act, 1989*, SO 1989, c 55, which organized the Small Claims Court under s 23 of the revised *Courts of Justice Act*, RSO 1990, c 43, in force September 1, 1990.

¹⁹² *Ibid.*

5.6.5 Recent Legislative, Procedural and Jurisprudential Changes

While the institutional structure of the small claims system had largely been established by the early 1990s, the Court continued to be affected by ongoing changes. As with the court system more generally, alterations to the small claims environment in Ontario were the result of legislative efforts and procedural changes to practices at the court. Changes also stemmed from new jurisprudence, which has been a significant recent catalyst in the development of the adjudicative environment.

In 1995 – 1996 the Ontario Ministry of the Attorney General conducted a comprehensive review of the civil justice in the province. The results were two reports that provided a point-in-time picture of the province’s civil court system.¹⁹³ This view of civil courts included an analysis of the modern role and function of the Small Claims Court, and also involved several related aspects of the civil justice system. The *Civil Justice Review*, also provided a departure point for a series of further legislative and regulatory changes to the process of small claims adjudication in Ontario, which have continued up to the present day.

¹⁹³ *Supra* note 188, MAG “*Civil Justice Review – First Report*”, and Ontario Ministry of the Attorney General, *Civil Justice Review – Supplemental and Final Report*, (Toronto: Publications Ontario, November 1996) [MAG “*Civil Justice Review – Final Report*”]. Both reports available online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/>.

As highlighted in the emergence of the modern structure of small claims institutions,¹⁹⁴ during this period, adjudication was undertaken largely by Deputy Judges. Since the 1970s, legislation had allowed for the appointment of lawyers, who were appointed as part-time judges to preside in small claims matters.¹⁹⁵ By the 1990s, the handful of full-time Provincial Court judges who heard small claims were overshadowed by presence of approximately 800 of these Deputy Judges.¹⁹⁶

During the 1990s, Deputy Judges heard claims in an institutional setting that, despite structural enhancements, was still intended to be relatively relaxed environment compared to regular court proceedings. As with the introduction of ADR approaches in the larger court system at this time, in some locations Deputy Judges were implementing alternative dispute approaches to facilitate early resolution, settlement and the streamlining of matters.¹⁹⁷ These kinds of less formal approaches were complemented by the nature of the adjudicative environment, which did not impose strict procedural rules.¹⁹⁸ Changes designed to foster a less formal approach in small claims and in the role of the decision-maker in small claims paralleled judicial role changes occurring throughout the legal system.

¹⁹⁴ *Supra* notes 75 and 76.

¹⁹⁵ *Ibid.* Provincial Court Judges assigned to the previous Civil Division prior to September 1, 1990, could still continue to hear and determine small claims matters, but by 1995 there were only 13 such judges remaining, *supra* note 188 MAG, “*Civil Justice Review – First Report*”, at 288 and 292. Deputy Judges are provided for in *supra* note 127 CJA, at s 32 and *Small Claims Court Rules*, RRO 1990, Reg 221, as amended.

¹⁹⁶ The appointment of hundreds of ‘Deputy Judges’ to hear small claims matters in Ontario appears to have occurred in a very short time frame, since as of 1985, it was reported that there only 23 Deputy Judges in Ontario, *supra* note 120 Russell, *Judiciary* at 240 citing *The Law Society of Upper Canada Gazette* (Mar 1985) at 27.

¹⁹⁷ *Supra* note 188, MAG, “*Civil Justice Review – First Report*”, at 290.

¹⁹⁸ Deputy Judges, for example, could admit any evidence based on “relevance”, *supra* “CJA” at note 127, at section 27.

Moreover, in a small claims forum with relaxed procedural rules, where some parties might not have the benefit of representation by a legal professional, ‘effective’ small claims judges sometimes took a less adversarial approach to proceedings, to explain rules and law, interpret, mediate and sometimes act as advisors to the parties.¹⁹⁹ While it was thought that the introduction of less adversarial methods might enhance the quality of small claims justice, others were critical of the new adjudicative environment that was modelled on the traditional adversary system, but relied on a new set of activist judicial skills and the widespread adoption of ADR, all in a setting without appropriate supports for litigants.²⁰⁰

Echoing historic complaints, the *Civil Justice Review* also noted several criticisms about the inconsistency of judgments, as well as the lack of training and the variable adjudicative backgrounds of Deputy Judges,²⁰¹ who performed their judicial tasks as “volunteers in essence”, given their low rates of *per diem* pay.²⁰² By comparison with the broader justice system, criticisms related to the role of judges had led to the establishment of the CJC in the 1970s. The establishment of this federal judicial body was an institutional innovation in judicial governance that was mirrored in Ontario’s small claims environment in the 1990s. One response to these criticisms of Deputy Judges was the establishment of a new governance body in Ontario called the ‘Deputy Judges

¹⁹⁹ *Supra* note 120, Russell, *Judiciary* at 243.

²⁰⁰ *Ibid* at 244. Studies in Quebec also suggested that some judges preferred the adversarial model of full-time judges, see, SC McGuire & RA Macdonald, “Judicial Scripts in the Dramaturgy of the Small Claims Court” (1996) 11 *Can J L & Soc’y* 63.

²⁰¹ *Supra* note 188, MAG, “*Civil Justice Review – First Report*”, at 292.

²⁰² *Ibid*.

Council' in 1995. Similar to the earlier establishment of the CJC for federal judges, the purpose of the DJC was to review standards of conduct, oversee continuing education and make recommendations on matters affecting Deputy Judges.²⁰³

5.6.5.1 Independent Advocacy in Small Claims

Developing perceptions of the Small Claims Court as a kind of democratic 'People's' Court, where individuals could have their matters heard directly and informally, also meant that parties "frequently" chose to represent themselves.²⁰⁴ In other kinds of litigation, the representational presence of lawyers may be preferred,²⁰⁵ especially where it was thought necessary to assist litigants in dealing with a set of complex legal issues and procedures.²⁰⁶ However, small claims presents an instance where the generally accepted and sometimes required role of professional advocates has been less clear given the relative informality of the forum.²⁰⁷

Over the years there have also been issues about the role played by professional advocates in small claims matters.²⁰⁸ Other jurisdictions like Quebec had addressed

²⁰³ *Courts of Justice Statute Law Amendment Act, 1994*, SO 1994, c 12, amended to the *CJA*, *supra* note 131, to include s 33 (6), which describes the statutory responsibilities of the Deputy Judges Council, proclaimed in force February 28, 1995.

²⁰⁴ *Supra* note 188, MAG, "Civil Justice Review – First Report", at 289.

²⁰⁵ Though in Canada, the presence of counsel is not a general right, *supra* note 144 *Christie*.

²⁰⁶ *Supra* note 118 Hildebrant, *et al* "Windsor", where the authors suggest that since small claims is designed to operate without lawyers, their presence may actually prejudice the court against represented claimants, at 109.

²⁰⁷ *Ibid.*

²⁰⁸ See, for example, Weller, Ruhnka and Martin, *Small Claims Courts: A National Examination*, (Williamsburg, Va: National Center for State Courts, 1978; Goerd, *Small Claims Courts: Case Management Procedures, Case Characteristics and Outcomes in 12 Urban Jurisdictions*, (Williamsburg, Va: National Center for State Courts, 1992).

concerns about the use of counsel and their association with business interests by banning the use of lawyers, or limiting the recovery of costs.²⁰⁹ Such limitations were justified by those who noted the presence of counsel might, in some cases, actually hinder the effective and fair resolution of small claims cases.²¹⁰

Such observations were supported in the small claims environment by studies examining outcomes between those who utilized counsel and those who did not, which revealed that the presence of professional representation yielded mixed results.²¹¹ In one early study of Windsor's Small Claims Courts, for example, it was noted that only a small minority of claimants chose to be represented, and of those who did, the presence of professional advocates did not seem to enhance outcomes.²¹² Alternatively, rather than hire a lawyer, individuals could choose to have an agent or paralegal act on their behalf.

Even so, the Court continued to have specific statutory authority to bar agents, who were not lawyers, where they appeared to be either incompetent or did not act as responsible advocates.²¹³ Following the *Civil Justice Review* in 1995 - 1996, the role of paralegals and their informal status as legal professionals in Ontario continued to be the subject of study. As a result, there was increasing support for the use of non-lawyers

²⁰⁹ See note 120, Russell, *Judiciary* at 240.

²¹⁰ *Ibid.*

²¹¹ *Supra* note 118 Hildebrandt, *et al* "Windsor Small Claims"

²¹² *Ibid.*

²¹³ *Supra*, "CJA" at note 127, s 26.

acting in a professional advocacy role who, it was thought, might improve access to parts of the justice system, including small claims matters.²¹⁴

Ultimately, in 2006, the Ontario government passed legislation to provide for the licensing and regulation of paralegals by the LSUC, which subsequently also specifically recognized their role in Small Claims Court proceedings.²¹⁵ By 2012, there were over 4,000 licenced paralegals operating in Ontario,²¹⁶ with hundreds more being trained yearly through Ontario's college system.²¹⁷ One recent empirical study of Toronto small claims suggests that individuals are increasingly resorting to the use of legal representatives in the last few years.²¹⁸ While the decrease in self-representation at the 'Peoples' Court' is likely due in part to the increased access of individuals to professional legal advice, through things like the availability of paralegals, it also correlates with recent jurisdictional changes.

Throughout its long history, the question of access to justice in small claims matters has been tied to the Court's limited jurisdiction. Over the years, small claims monetary jurisdiction was subject to regular periodic increases. However, since the early

²¹⁴ See eg Peter de C Cory, *A Framework for Regulating Paralegal Practice in Ontario*, (Toronto: Ontario Ministry of the Attorney General, 2000); The Law Society of Upper Canada, *Regulating Paralegals: A Proposed Approach* (Toronto: Law Society of Upper Canada, 2004).

²¹⁵ *Access to Justice Act, 2006*, SO 2006 c 21, that amended the *Law Society Act*, RSO c L 8 [“*Law Society Act*”], to permit the licensing and training of paralegals by the Law Society of Upper Canada, effective May 1, 2007.

²¹⁶ The Law Society of Upper Canada, “Five-Year Report to the Attorney General”, (Toronto: The Law Society of Upper Canada, 2012) at 21.

²¹⁷ Kendyl Sebesta, “LSUC touts success of Paralegal Regulation” *Law Times* (16 July 2012) online: <http://www.lawtimesnews.com/201207169220/Headline-News/LSUC-touts-success-of-paralegal-regulation>.

²¹⁸ *Supra* note 118 McGill, “Evolution”.

1990s, monetary jurisdictional increases have accelerated their upward trend. This includes increases to \$6,000 across the province in 1993, and further increases to \$10,000 in 2002.²¹⁹ Throughout this period jurisdictional increases were regarded as important steps to enhancing the accessibility of the Court.

In 2007, the civil justice system in Ontario was subjected to another public examination with a view to implementing further reforms. The stated goal of the resulting report was to put forward recommendations to make it more accessible, affordable and effective.²²⁰ Following on the heels of this report, the Ontario government moved to implement several reforms, including a further increase to the jurisdiction of Ontario's Small Claims Court to \$25,000 in 2010.²²¹

At the same time as procedural changes were modifying the operations of the Small Claims Court, further changes were precipitated by a series of court decisions. These decisions have complemented previous alterations and are an important further component in the changing face of small claims adjudication. A number of these changes are described and analyzed in the next subsection.

²¹⁹ Under the "CJA", *supra* note 127, O Reg 92/93, which came into force on April 1, 1993 and under O Reg 626/00 which came into effect on April 1, 2002.

²²⁰ Ontario Ministry of the Attorney General, *Civil Justice Reform Project*, November 2007, available online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/Default.asp> [MAG, "CJRP"].

²²¹ Under O Reg 439/08, amending O Reg 626/00 under the "CJA", *supra* note 127, effective January 1, 2010.

5.6.5.2 Independent Courts and Judges

Modern jurisprudence has led generally to refinements to judicial and lawyer independence. Similarly, recent Court decisions have been a catalyst for further development at Ontario's Small Claims Court. Many of these decisions build on the recursive and simultaneous issues apparent in the history of small claims adjudication in Ontario. These decisions have related to historical questions about the Court's jurisdiction, touched on related policy issues affecting the court system more broadly and have also reflected the broader trend towards jurisprudential refinement of the institutional aspects of the Court and its officials.

For example, one important recent decision built on the ongoing pattern of extended jurisdiction for the Court, to include additional substantive authority for the Court in equity. Previously, the 1989 decision of *Moore v Canadian Newspapers Co* found Ontario's Small Claims Court to have no equitable jurisdiction to issue injunctive relief.²²² In 1994, the provision codifying equitable jurisdiction of the Superior Court in Ontario was amended to specifically exclude the Small Claims Court.²²³ On a plain reading of the law it appeared "clear that the Small Claims Court cannot give equitable relief or a declaratory judgement."²²⁴

²²² 69 OR (2d) 262.

²²³ Pursuant to *An Act to amend the Courts of Justice Act and to make related amendments to the Freedom of Information and Protection of Privacy Act and the Justices of the Peace Act*, SO 1994 (3d Sess), c12, Ontario, 1994 (assented to June 23, 1994), which amended the "CJA", *supra* note 127 "CJA", particularly at ss 96(3) and 97.

²²⁴ Watson & McGowan, *Ontario Civil Practice* (Scarborough, Ont: Carswell, 1995), as cited in *Hodgins*, *infra* note 225 at 732.

However, a recent case reviewed this jurisprudence and legislation and modified the law.²²⁵ Despite a long history in which it did not exercise authority in equity, the Court of Appeal found this jurisdiction as within the capacity of the modern Small Claims Court, based on its interpretation of the enabling legislation and the history of the court. The result recognized a new and substantial equitable jurisdiction for these courts.

Moreover, just as the broader court system faced a constitutive tension between New Left and New Right approaches to the administration of justice, so too have there been effects of these political influences at Ontario's Small Claims Court. Some recent changes are consistent with the increased new policy approaches to public administration.²²⁶ Within the administration of justice, focus on "New Right" approaches has led to a shift away from a consideration of the broader public purposes of the legal system and increased attention to its fiscal performance.²²⁷ One effect of this approach in the justice system has resulted in increases in court fees in many Canadian jurisdictions.²²⁸ This recent emphasis on fiscal efficiency and on treating the court

²²⁵ *Grover v Hodgins* 103 OR (3d) 721 (2011) [*Hodgins*].

²²⁶ On the 'New Right' generally see R Campbell, "The Fourth Fiscal Era: Can There Be a "Post-Neo-Conservative" Fiscal Policy?" in Leslie A Pal, ed *How Ottawa Spends. 1999-2000. Shapeshifting: Canadian Governance Toward the 21st Century*. (Toronto: Oxford UP, 1999) at 113 – 150.

²²⁷ For judges this focus has led to increasing calls justifying expenditures such as on judicial remuneration, but also with regard to perceived risks to the administration of justice. From a professional regulatory view, it has also put some pressure on lawyers and law societies to justify their independent and public role, while at the same time acknowledging the business/professional dichotomy, discussed in the next Chapter.

²²⁸ For example, by 2006 in the province of Alberta, court fees had tripled within only a few years, see L Sossin, "Constitutional Accommodation and the Rule(s) of the Courts", (2005) 42 *Alta L Rev* 607 [Sossin, "Constitutional Accommodation"].

system like a ‘business’ now means that “at a minimum, the civil justice system is expected to operate on a near cost recovery basis.”²²⁹

Within this broader context, at the Ontario Small Claims Court, the *Polewsky* decision is an important decision at the intersection of public administrative approaches to the justice system and access to justice.²³⁰ There, an Ontario Court found merit in the argument that a plaintiff has a constitutional right to pursue litigation, *in forma pauperis*, without paying fees, and imposed a positive obligation on the Ontario government to enact legislation to permit such claims to proceed.²³¹ While reflecting the wider trend towards treating government and the administration of justice ‘as a business’, the Court upheld a view that such administrative approaches in the legal system were constrained by the public role of the courts, and the common law rights of individuals to access the justice system.

Another series of recent decisions has examined the status of the Small Claims Court and its judicial officials. The vast majority of Ontario Small Claims ‘judges’ are now lawyers, appointed to act part-time as Deputy Judges.²³² Just as other Canadian judges had earlier sought enhanced status and intervened directly in a legal proceeding,²³³

²²⁹ *Ibid*, at para 20.

²³⁰ (2003), 66 OR (3d) 600 (Div Ct), [“*Polewsky*”].

²³¹ The province implemented legislation in January 2005, that provides for a fee waiver mechanism, see the *Budget Measures Act, (Fall) 2004*, SO 2004, c 31, Schedule 1, which amended the statute that governs fees in the Ontario courts system, *Administration of Justice Act*, RSO 1990, c A6.

²³² *Supra* note 127, “*CJA*” at s 32.

²³³ *Supra* note 56, *Remuneration Reference*.

so too have Deputy Judges sought and received recognition of their right to an independent remuneration commission to determine their salaries.²³⁴

Similarly, while judges of lower courts in Canada had earlier raised questions about their status and independence in the judicial hierarchy,²³⁵ Deputy Judges have also raised questions about their terms of appointment and tenure.²³⁶ Under the applicable legislation, Deputy Judges are appointed as part-time adjudicative officials for a term of three years.²³⁷ Appointments to the Small Claims Court are made by a special class of senior administrative judicial officers in Ontario called Regional Senior Judges.²³⁸ The initial three-year term of appointment for a Deputy Judge is subject to renewal. However, unlike other kinds of judicial appointments by the executive branch of government, Deputy Judge renewals are only on the authority of the Regional Senior Judge and are independent of the appointment powers of the executive.²³⁹

²³⁴ *Ontario Deputy Judges Assn v Ontario*, (2005) 78 OR (3d) 504 [“ODJA Remuneration”]. The Association also unsuccessfully sought support for research and secretarial assistance, at 505 – 506. The right of the province to reduce recommended increases was later upheld, consistent with the treatment of judicial remuneration commissions in Canada more generally. See *Ontario Deputy Judges Assn v Ontario (Attorney General)*, [2009] OJ No 2880, 251 OAC 241, 98 OR (3d) 89 (Div Ct); *Provincial Court Judges’ Association v New Brunswick* [2005] 2 SCR 286. *Per diem* rates of pay for Deputy Judges consequently increased from \$232 to \$475 as of January 1, 2005 with modest yearly increases thereafter. As of January 1 2012, Deputy Judges are paid \$537 daily, O Reg 161/08, under *supra* note 127, “CJA”.

²³⁵ *Supra* note 56, Remuneration Reference

²³⁶ *Ontario Deputy Judges Assn v Ontario (Attorney General)*, 108 OR (3d) 429 (2011), [“ODJA, Tenure”].

²³⁷ *Supra* note 127, “CJA”, at s 32.

²³⁸ Subject initially to the approval of the provincial Attorney General, *supra* note 131, *CJA*, at s 14. The function of Regional Senior Judges, to act locally on behalf of the Chief Justice, is distinct to the province of Ontario.

²³⁹ *Supra* note 127 *CJA*, at s 32(2).

In its recent decision, Ontario’s Superior Court determined that the fixed-term appointments at Ontario’s Small Claims Court satisfied the requirements of judicial independence, which also applied contextually to judicial officials in small claims matters.²⁴⁰ The Court also upheld the constitutionality of the Regional Senior Judge, a member of the judicial branch of government, rather than the executive, having sole responsibility for renewal of Small Claims Court appointments.²⁴¹

5.6.6 Discussion of Recent Changes

Recent jurisprudence involving small claims in Ontario has continued to solidify the growing institutional role that the Small Claims Court plays within Ontario’s justice system. The *Polewsky* decision acknowledges the important historical role that small claims Courts have played to provide access to justice. Recent decisions involving the nature of the Court, Deputy Judge remuneration and tenure also touch on historical concerns about the institutional status of small claims matters within Ontario’s legal system. The Small Claims Court has now been recognized constitutionally and small claims judicial officials in Ontario are now acknowledged as ‘judges,’ who deserve at least some of the independence protections generally afforded to the judicial branch of government.

²⁴⁰ *Supra* note 236 “ODJA Tenure” at 438.

²⁴¹ *Ibid.*, at 400. The Ontario Court of Appeal later upheld the decision, see *Ontario Deputy Judges’ Assn v Ontario (Attorney General)*, [2012] OJ No 2865; 2012 ONCA 437.

While through its history, the Small Claims Court has been a relatively relaxed forum, the recognition of the Court and its Deputy Judges is a pivot towards a more formal and constitutional acknowledgement of the importance of small claims proceedings. In this respect, the ongoing institutionalization of the Court is consistent with a trend that stretches back at least several decades toward the increased ‘professionalization’ of the courts, its judges and its lawyers.²⁴²

Recent jurisprudence recognizing the status of Deputy Judges and the role of the Court should also be considered in the context of other changes, as a forum that now has an enhanced monetary and equitable jurisdiction.²⁴³ In addition, with the recognition of paralegals as legal advocates in Ontario, who are now overseen by the provincial Law Society along with the traditional Bar, legal disputes are now more likely to be presented by professional advocates.²⁴⁴

Ultimately, small claims proceedings occur before more ‘professional’ judges, in a constitutionally recognized environment that has a relatively broad civil and equitable jurisdiction. When considered in the context of recent institutional and procedural changes, these jurisprudential developments have further solidified ‘small claims’ adjudication within the court system. Institutional, procedural and jurisprudential

²⁴² *Supra* notes 74-5.

²⁴³ *Supra* note 225, *Hodgins*.

²⁴⁴ *Supra* note 118, McGill, “Evolution”.

modifications to small claims litigation have enhanced the independent environment of the Small Claims Court, and particularly reinforced the independent role of judges and professional advocates, lawyers or paralegals, in the small claims forum. In this respect, the culmination of recent changes appears to support the primary normative value underlying the justice system of enhancing access to justice. However, as a matter of purposive empiricism in the administration of justice, the question remains about how best to assess the actual performance of the Small Claims Court in light of these changes. This question is addressed through a limited empirical analysis in the next subsection.

5.6.7 Empirical Observations

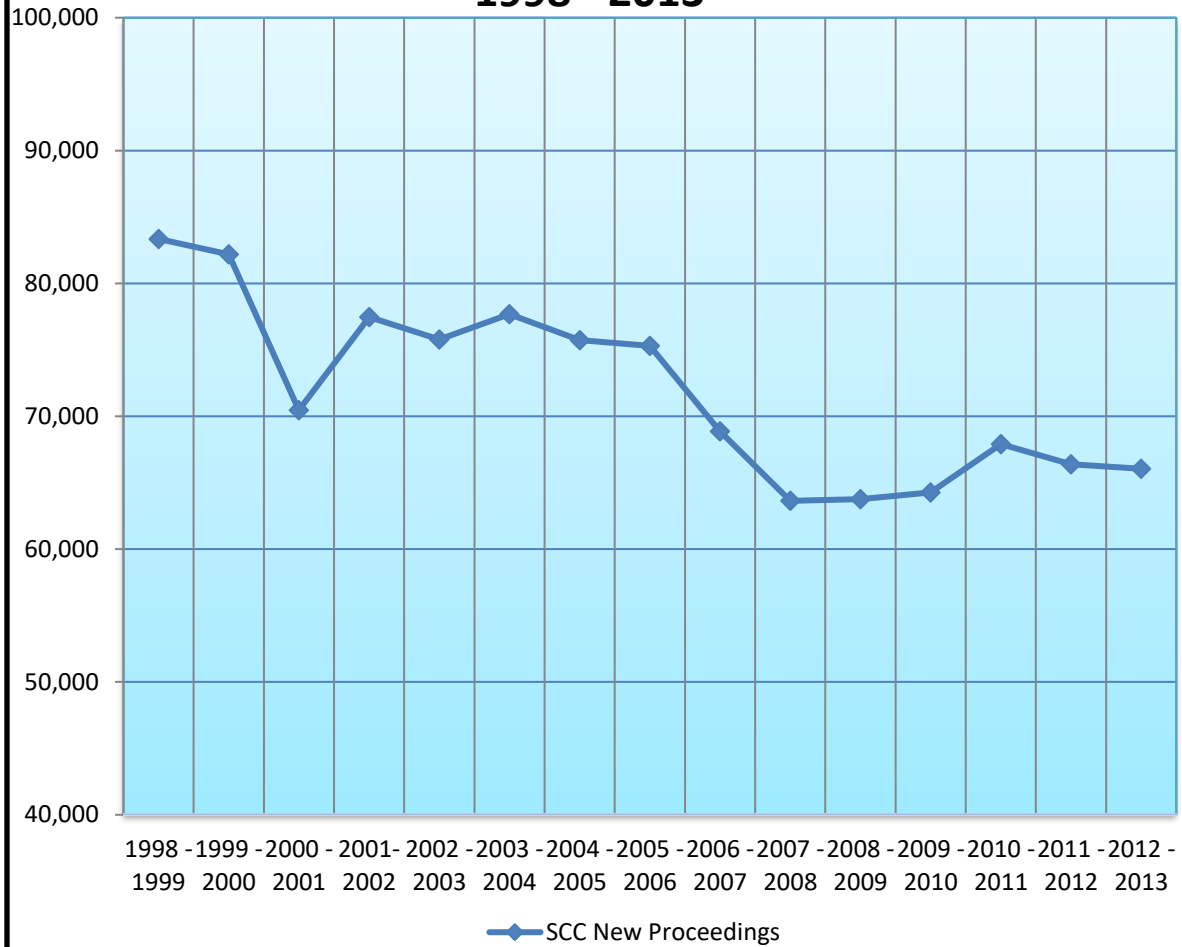
Despite its traditional reputation for informality, iterations of the Small Claims Court have always been a part of the independent and public court system. In this respect, questions about access to justice have been a central and ongoing small claims issue. Recent jurisdictional increases, and modifications resulting from structural, procedural and jurisprudential change are all consistent with a broader trend in the justice system to enhance access to justice. However, one gap in the literature examining courts and the legal system is a lack of metrics about the actual performance of the system.

As identified in the first part of the Chapter, the post-War focus on access to justice has been encouraged by recent systemic and procedural enhancements, to the court system generally and to the Small Claims Court in particular. These include changes to the roles and behaviour of the principle of independence in that forum for

judges and lawyers. The systemic performance of the Court, in correlation with these changes, provides a glimpse at how recent changes in the justice system have been mediated in small claims adjudication.

Chart A, below, summarizes the performance of the Small Claims Court in terms of the number of new litigation files opened in the Court in Ontario over a fifteen-year period starting in 1998.

**Chart A: Ontario Small Claims New Proceedings
1998 - 2013***



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²⁴⁵ In 2012 – 2013, new Small Claims Court proceedings were 66,059, while new civil proceedings were 80,566. Changes to monetary jurisdiction pursuant to O Reg 92/93, under the “CJA”, *supra* note 16, which came into force on April 1, 1993. All figures for Ontario new civil and new small claims proceedings from 1998 to 2013, as cited and set out in Charts A and B, compiled from Ontario Ministry of the Attorney General, Court Services Division for the following years, available online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/default.asp>: *Annual Report 2012 – 2013* at 30 and 35; *Annual Report 2010 – 11*, at 30 and 35; *Annual Report 2009 - 10*, at 30 and 35; *Annual Report 2008 - 09*, at 31 and 36; *Annual Report 2007 - 08*, at 28 and 33; *Annual Report 2006 – 07*, 2005 - 06, at 29 and 33 [CSD “*Annual Report 2005 – 07*”]; *Annual Report 2004 - 05*, at B3, B47 and B49; *Annual Report 2003 – 04*, at 20 and 23; , *Annual Report 2002 - 2003*, at 12 and 15. In a departure from its established practice, the most recent Annual Report, for 2014, no longer provides these detailed statistical breakdowns of proceedings filed.

The data presented in Chart A is a quantitative metric that provides an additional ‘emergent analytic’. The performance of the Court in terms of new proceedings over a period of years can also be cross-referenced with the recursive and simultaneous presentation of the emergence of the modern small claims forums and issues affecting independent courts more broadly. This correlation provides additional context and descriptive balance to better understand how features of the principle of independence and access to justice have been practically affected by recent changes in the legal system.

Chart A illustrates a significant and long-term downward trend in utilization of Ontario’s Small Claims Court. Related to the downward trend in new proceedings are several anomalies in the number of new claims filed, that correlate with recent changes to the jurisdiction of the Small Claims Court. For example, over the period under consideration, the monetary jurisdiction of the Small Claims Court has been increased twice, in 2002 and in 2010. In both cases, there was a significant decline in the number of new proceedings before monetary jurisdictional increases were implemented.²⁴⁶

Moreover, in the periods immediately following jurisdiction changes, in 2002 and 2010, there were corresponding rebounds in the number of proceedings initiated. A reasonable presumption may be that increasing the monetary jurisdiction of the Court would lead to more claims being filed. However, in fact, the rebounds in additional new

²⁴⁶ *Ibid.* In 2001 – 2002 total proceedings declined by more than 10,000, but only rebounded by approximately 7,000 following the jurisdictional increase from \$6,000 to \$10,000. In the 3 years prior to the 2010 increase, new proceedings stabilized at around 63-64,000, after peaking in 2003 – 2004 at 77, 678.

claims, following jurisdictional increases in 2002 and 2010, never rose to previous highs of new proceedings experienced in earlier years.²⁴⁷

Ultimately it appears that recent increases to the monetary jurisdiction at the Small Claims Court, have had little effect on the overall decline of new proceedings being filed, and illustrate the longer term downward trend. For example, as noted earlier, from the early 1990s to today, there are fewer than half the number of proceedings before the Small Claims Court.²⁴⁸ Even within the fifteen-year time frame of available yearly figures set out in Chart A, there has been a significant decline of about twenty percent of the total number of new proceedings at the small claims level. This overall decline in the number of proceedings has occurred when, at the same time, the monetary jurisdiction of the Small Claims Court has risen significantly to today's limit of \$25,000.

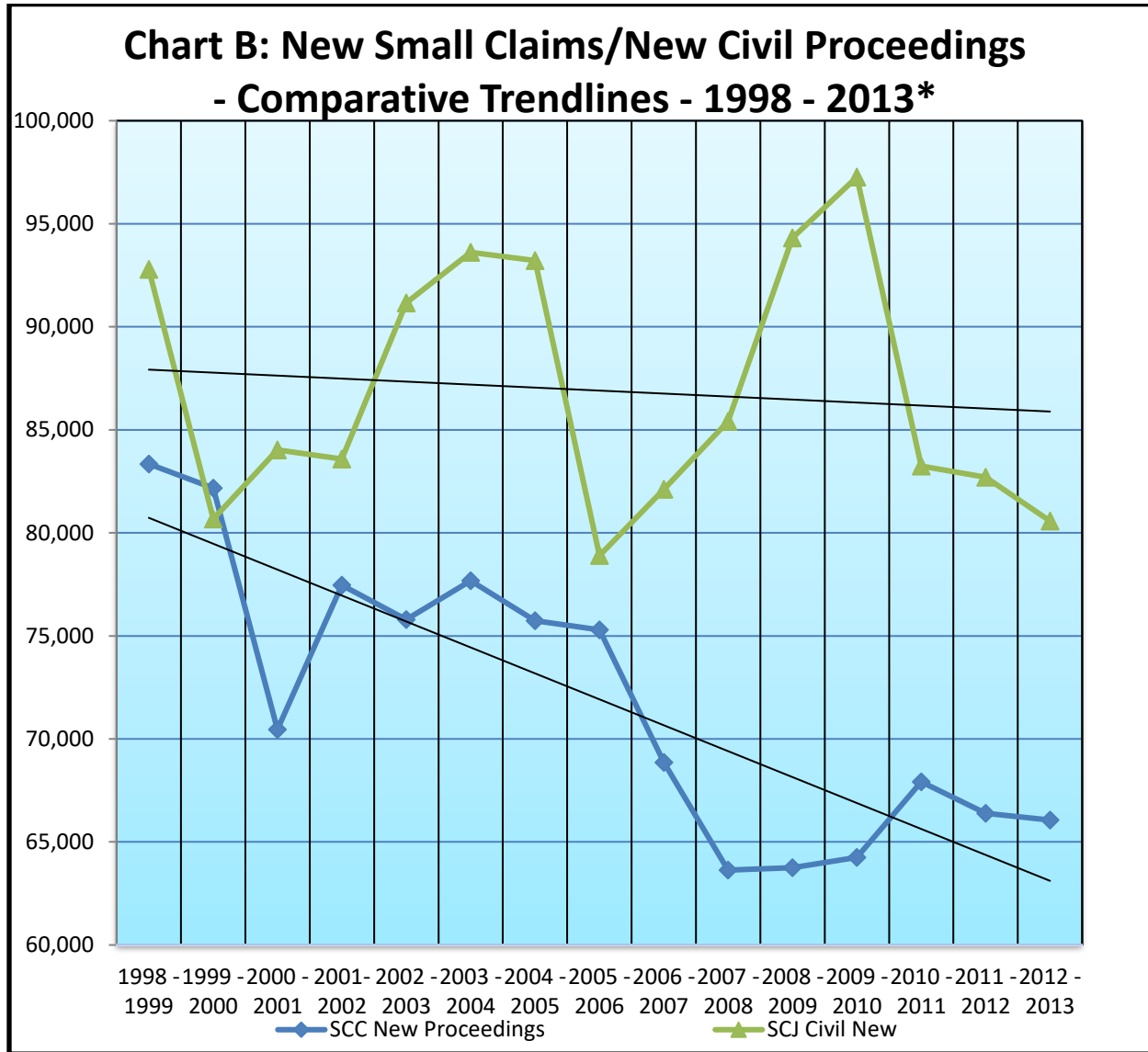
As discussed below, declines in small claims proceedings are consistent with other decreases in proceedings in the justice system. There has also been an historical overall decline in the number of new civil claims filed from the 1990s until today.²⁴⁹ The statistical declines in civil and small claims proceedings over the last few years in Ontario are presented comparatively in Chart B, below.²⁵⁰

²⁴⁷ *Ibid.* In 2010 – 2011, the first year of the increase from \$10,000 to \$25,000, new proceedings expanded by approximately 3,700, but were still significantly below the totals of new proceedings in many previous years.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ In the last few years new civil claims have fluctuated within a range between 80,000 and 95,000 new claims per year, *infra* note 251 and Chart B, though both the high and low points represent historical declines in the volumes of the court, the downward trend in numbers of civil proceedings in Ontario is less pronounced.



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As reported in the *Civil Justice Review*, in 1993-1994 there were 178,000 civil proceedings commenced in other areas of the Ontario’s superior court.²⁵² By contrast, the 2013 figures for new civil proceedings started in Ontario are at less than fifty percent of the total number from two decades ago. At the Small Claims Court, the *Civil Justice*

²⁵¹ *Supra* note 245.

²⁵² *Supra* note 188, MAG “*Civil Justice Review – First Report*”, at 282.

Review also reported approximately 135,000 new small claims issued yearly, with a monetary jurisdiction that had increased to \$6,000 across the province.²⁵³ As is the case with general civil claims, new claims at the SCC in 1993-1994 are more than double those being reported in 2013.

While some caution is warranted in making the comparisons over long periods of time,²⁵⁴ the numbers of new proceedings in both general civil, and small claims proceedings appear to have substantially declined since the early 1990s. In addition, one figure appears to corroborate the historical trend towards declining small claims proceedings. In 2013 there were only half as many Deputy Judges hearing matters in the Small Claims Court as compared to twenty years ago.²⁵⁵ The fifty percent decline in the number of Deputy Judges corresponds with the decline in the number new proceedings over the same period and corroborates the conclusion that the total number of recent Small Claims Courts proceedings have declined significantly.

Overall declines in civil and small claims proceedings do not appear explainable by reference to other factors. For example, declines in the number of proceedings are not

²⁵³ In 2012 – 2013, new Small Claims Court proceedings were 66,059, while new Civil proceedings were 80,566. Changes to monetary jurisdiction pursuant to O Reg 92/93, under the “CJA”, *supra* note 127, which came into force on April 1, 1993.

²⁵⁴ *Ibid*, CSD “*Annual Report 2005 – 07*”, where the Ministry advises, “Province-wide combined data from the FRANK and SUSTAIN systems became available as of April 2005 and has replaced the manual collection of data for civil, Small Claims Court, family and criminal proceedings in the Superior Court of Justice that was previously reported. Older Court statistics derived from manually collected data are not comparable with data from the new system,” at 27.

²⁵⁵ Guide to Ontario Courts – Superior Court of Justice, online: Small Claims Court <http://www.ontariocourts.ca/scj/en/scct/deputyjudges.htm>, provides a current list of all acting Deputy Judges.

consistent with the possible effects of economic inflation on the numbers of small claims matters over time.²⁵⁶ Declines in small claims matters, as well as matters before the civil justice system, appear at odds with other factors that might have increased utilization of the court system, such as population growth.²⁵⁷

There also appears to be only a limited correlation between the number of new ‘small claims’ at given times and the number of new civil proceedings more generally. For example, a strong correlative relation might suggest that jurisdictional enhancements to monetary limits or authority of the Small Claims Court might result in fewer new civil proceedings, since a certain percentage of low civil claims would subsequently proceed as small claims matters.

However, at the time of the 2002 increase to the Small Claims Court’s monetary jurisdiction, there was substantial rise in new civil proceedings in the three years following the small claims court increase.²⁵⁸ By comparison, the 2010 increase to \$25,000 was preceded by a significant drop in new civil claims in the years prior. However, the relatively small corresponding increase in new small claims does not

²⁵⁶ Based on the Consumer Price Index for the 19 year period from 1993 to 2012, the compounded inflation rate in Canada was about 42%, well below the approximately 830% increase in the monetary jurisdiction of the Small Claims Court during this same period, see Statistics Canada: Consumer Price Index, historical summary (1993 to 2012) available online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ46a-eng.htm>.

²⁵⁷ From the 1996 census to the estimated population in 2013, there was approximately 28% growth in Ontario’s population, available online: < <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm>>; see Statistics Canada, available online: <http://www12.statcan.gc.ca/English/census96/data/popdwell/Table.cfm?T=102>.

²⁵⁸ *Supra* note 257 and Chart A. From approximately 84,000 new civil proceedings in 2000 – 01, to peak at approximately 93,000 new civil proceedings in 2003 – 2004.

support a conclusion that the decrease in civil claims at this time resulted wholly from larger civil claims being diverted to the Small Claims Court.²⁵⁹

These variations, highlighted above, occurred at the same time as other, additional changes, were introduced to make the overall Court system more accessible. For example, access to legal information and advice from paralegals, since 2007, might be expected to have enhanced the capacity and numbers of individual claimants seeking to enforce and defend their rights at the Small Claims Court.²⁶⁰ Moreover, the adjudication of small claims by Deputy Judges, who now benefit from ongoing training and education, may have addressed earlier concerns about the quality of adjudication in these forums. Such complementary changes, to increase access and enhance the professional role of adjudicative officials, were designed to improve the functionality of the Court in a manner that sensibly might have been expected to encourage increased utilization by individuals.

These legislative changes to Court processes, to jurisdiction, to the function of Deputy Judges, and to licence paralegals, have occurred in the context of further legislative changes to the Small Claims Court, but also throughout civil proceedings in Ontario more generally.²⁶¹ While many of these legislative changes have been designed

²⁵⁹ *Ibid.* New civil claims dropped by over 14,000, while new Small Claims Court proceedings increased by approximately 3,500. Both new small claims and new civil claims actually decreased in the following year.

²⁶⁰ Though it is possible that the presence of lawyers increases the likelihood of legal proceedings, *supra* note 88 Felstiner *et al* "Emergence".

²⁶¹ A detailed description and summary of changes, as of 2010, is available at Ministry of the Attorney General, online:

http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp. In his report, Coulter Osborne noted changes, since 1996, introducing simplified procedures (Rule 76), case

to increase access to justice, the comparative statistical analysis of new proceedings presented here suggests that all of these recent legislative and procedural changes have had little effect in improving access to Small Claims Court as measured by court utilization.

5.7 Conclusion

Small claims proceedings have long played an important role in Ontario's court system. As it has developed, Ontario's small claims regime has changed in response to recurring concerns about access to justice and access to the justice system in the province. Throughout its history, access to justice in small claims matters has been intertwined with related concerns about the function of small claims forums, the role of judicial officials and ongoing questions about the jurisdictional limits of the Court within the administration of justice.

All of these concerns have led to multiple efforts to enhance small claims forums. Consistent with the waves of change present within the broader court system in contemporary times, enhancements and adjustments have led to a re-structuring of the Court, alterations to procedures, and efforts to increase access to professional advocates.

management, and mandatory mediation in civil proceedings in Ontario, as well as highlighting several reform efforts through the years, *supra* MAG "CJRP" at note 230, at 1 -2, such as changes to discovery procedures, pre-trials, expanding the jurisdiction of simplified proceedings, as well as numerous rule amendments.

Adjustments have also been the result of jurisprudential modifications that have extended the scope of the small claims system and its availability to the average Ontarian.

These observations and conclusions characterizing the nature of the Court are supported by the relatively scarce empirical research undertaken in the administration of justice in this area to date. For example, one study completed a few years ago suggests that access to the justice system may not be the predominant way in which individuals choose to resolve minor disputes.²⁶² If most people choose not to institutionalize minor social conflicts, then changes designed to enhance access to justice, such as those implemented generally and in small claims matters in recent years, may have only limited effect. It may also be true that many people, past and present, prefer not to ‘have their day in court’ to resolve minor conflicts, that rise to the level of a ‘legal dispute,’ but instead to address these conflicts through alternative dispute resolution mechanisms.²⁶³

The less pronounced but still declining overall trend in civil proceedings in Ontario suggests that access to the justice system is also being curtailed in other venues as well, and reflect similar declines in other jurisdictions in Canada. As one example,

²⁶² Neil Vidmar, “The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation “, (1984), *Law and Society Review*, v 18 no 4. See also Neil Vidmar, “Seeking and Finding Justice? An Empirical Map of ‘Minor’ Dispute Behaviour in English Canada,” paper presented to the annual meeting of the Canadian Law and Society Association, Montreal, May 31 1985, at 27 as cited in *supra*, Russell, *Judiciary*, note 120 at 247.

²⁶³ *Supra* note 88. See also T Farrow, *et al*, *Everyday Legal Problems and the Cost of Justice in Canada* (2016) where, at 9 the authors report that of the 48.4% of Canadians that experience a family or civil legal problem in any given 3 year period, only 7% of those seek resolution through the court and tribunal system.

over a comparable time period, from 2000 – 2014 in British Columbia, Small Claims Court new proceedings have also fallen to 50 percent of their previous levels, which is consistent with declines in Ontario.²⁶⁴ Such declines also reflect a long-term decrease in utilization of civil courts in Ontario, which may also be apparent more broadly.²⁶⁵

Declines in court utilization have also been identified within some proceedings in the USA.²⁶⁶ American scholars Dennis Curtis and Janet Resnik have noted decreasing numbers of court proceedings, which they attribute to broader patterns within the justice system.²⁶⁷ In their view, such declines have resulted from causes such as outsourcing of the adversarial process, devolution to other forums, like administrative tribunals, and privatization of the traditional publicly oriented adversarial process. The question of whether people are choosing not to go to court, or whether the court system has become less available remains a live issue that has not received much study or attention.

²⁶⁴ In 2000, small claims in BC were 26,761, but had fallen to 13,680 by 2014. See Ministry of Justice – Court Services *Court Services Branch Fifteen Year Comparison 2000 – 2014*, retrieved online September 22, 2014, available at: < <http://catalogue.data.gov.bc.ca/dataset/courts-new-court-cases-15-year-provincial-report-by-court-level-division-and-class/resource/6906bbe6-4c1c-48e1-b8bb-8a333e3ec76f>>. The BC statistics suggest that there is a broader downward trend not attributable, as suggested by one early reviewer, to the adoption of no-fault auto insurance, which occurred in Ontario in 1990. In addition to being considerably outside the period examined in this work, BC courts have experienced a similar recent decline in new small claims proceedings and does not have no-fault auto insurance.

²⁶⁵ The Canadian Centre for Justice Statistics only relatively recently began compiling nation-wide data on general civil claims and in the period for which it is available, from 2009 – 2014, new civil claims in general across Canada have been declining, from 519,058 to 480,230. Given the short time frame, and the variability in such claims depending on economic conditions, it remains to be seen if a more general declining trend has developed and/or continued. See Statistics Canada, “Table 259-0011 1 Civil court survey, civil court cases (initiated, active and active with disposition) by level of court and type of case - annual (number)” available online: <http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2590011&pattern=&tabMode=dataTable&srchLan=-1&p1=-1&p2=9>.

²⁶⁶ *Supra* note 99.

²⁶⁷ *Ibid.*

However, the declining number of court proceedings in small claims in Ontario, and elsewhere, appears to be a realization of the criticisms about changes to the adjudicative processes that have made them less public.²⁶⁸

One conclusion drawn from this presentation of independence and its relationship to rule of law within independent courts is that, particularly since the Second World War, a primary normative purpose of independent judges and lawyers is to provide access to justice. However, in order to provide this access meaningfully, an independent Judiciary and Bar must work to establish and maintain an independent, public forum in which justice can be rendered. On one hand, the independence of actors like judges and lawyers in independent courts has been subjected to increasing scrutiny and theoretical support, at the Small Claims Court, but also more generally throughout the Canadian justice system. However, as has been the case in the past with the justice system, the institutionalization of independence protections does not necessarily lead to increased independence or, it would seem, to increased access to justice, despite the increased focus on this value within the justice system.²⁶⁹

In the end, modifications to the justice system that do not adequately take account of “social, economic, and political structures of a society, as well as the internal logic of

²⁶⁸ *Supra* note 100.

²⁶⁹ A separate, but related issue, is that it appears that structural and procedural changes to the court system may have only a limited effect on actually enhancing access to justice for some social and demographic groups, *supra* note 118, McGuire, Macdonald, “Small Claims”.

an adjudicative institution, [serve] largely to create an illusion of improvement.”²⁷⁰ The emergent analytics presented here suggest that prudence is warranted in further adjustments to small claims, and to the justice system more generally. In particular, changes to the independent roles of judges and lawyers in independent courts that serve the underlying primary normative value of access to justice, must also take into account a more holistic range of interactive and dynamic factors affecting rule of law, independence and access to justice.

On this note it is also important to recall that, throughout its history, changes to small claims have often occurred at the same time as other changes to the justice system, but often also simultaneously with broader political change. The fact that the decline in new proceedings in small claims in Ontario has occurred within a time frame in which there are similar questions being raised about declining participation in social and political institutions more generally raises an interesting issue.²⁷¹ Given that the Small Claims Court may represent one of the most common entry points for citizens to participate in the legal system, but also within the broader framework of legal governance,²⁷² any correlation between declining participation at the Court and more generally is a question that warrants further exploration. Ultimately, examinations focusing on access to the justice system should situate procedural access to justice within

²⁷⁰ *Ibid.*, at para 89.

²⁷¹ See, for example, Robert Putnam, “Bowling Alone: America’s Declining Social Capital”, (1995) *Journal of Democracy*, 6.1 65 – 78.

²⁷² As Lon Fuller describes it, adjudication is a form of social ordering not unlike contracting, or popular elections and is a way “in which the relations of men to one another are governed and regulated”, *Principles of Social Order*, K Winston ed, (Durham: Duke University Press, 1981) at 40.

the broader framework of substantive justice and take into account the inherent dynamism of Canadian legal culture.²⁷³

The history of small claims in Ontario demonstrates a longstanding commitment to both procedural and substantive concepts of access to justice. While there is some constitutive tension between these principles in action, these concepts are often associated with broader political and democratic ideals, like the rule of law. In this respect, there needs to be a better focus on understanding the operational relationship between the principles of access to justice and access to the justice system and how both are supported by independent decision-makers and professional advocates in the justice system. The picture of small claims court proceedings presented in this Chapter reinforces the conclusion that changes in the justice system, that would be expected to enhance access to justice, may not always do so. In this respect, future efforts to reinforce the independence of the adjudicative environment and to enhance access to justice, must consider a holistic range of factors, grounded in both principle and practice.²⁷⁴

²⁷³ For example, Professor RA Macdonald has argued that access to justice should be approached holistically with a view to achieving social justice in "Access to Justice and Law Reform", (1990) 10 Windsor YB Access Just 287 at 290.

²⁷⁴ See, for example, Ramsay, I, "Small claims courts: A review," in *Rethinking civil justice: Research studies for the Civil Justice Review*, (Toronto: Ontario Law Reform Commission 1996) 491 – 541, where the author advocates for studies to include "meaningful" statistics on the operation of courts, at 534.

Part III

Chapter 6

‘Professionalism’ Approaches to Independence of the Bar

Over two thousand years ago, Seneca observed attorneys acting as accessories to injustice, ‘smothered by their prosperity’, and Plato condemned lawyers’ ‘small and unrighteous souls.’¹

6.1 Introduction

Previous Chapters examined the emergence and mediation of independence in the Canadian justice system. In terms of the principle of Bar independence, one additional important feature has been the emerging school of ‘professionalism’ scholarship. Consequently, this Chapter examines and assesses the contributions of lawyers’ professionalism literature as a precursor to the final Chapter, which unites the consideration of independence for the Bar and bench in the administration of justice.

An understanding of the principle of ‘independence’ of the Bar, its purpose and function, is highly dependent on context. Context includes the recursive and simultaneous emergence of the principle for lawyers, the interaction with an independent judiciary, as well as its mediation within the administration of justice. In this respect, the content, function and purpose of the principle reflects constitutive tensions in understandings of

¹ Deborah L Rhode, “The Professionalism Problem” (1998) 39 WM & Mary L Rev 283 at 284, quoting Plato, *The Dialogues of Plato*, 175 trans B Jowett (Random House: 1937) and Online Exchange, *Legal Times*, April 1, 1996, at S39.

‘independence’ that are part of larger tensions within legal theory and practice. The separate but interrelated features of independence also reflect the influence of distinctly Canadian factors.

One such factor has been the increasingly important influence of perspectives about lawyer ‘professionalism’. As suggested by both Plato and Seneca in the prefatory passage, critical examinations of lawyer behaviour are not novel and complaints about the conduct of lawyers can be traced through much of recorded history.² However, the increased focus on individual rights after World War II focused attention on the role of independent courts and their officials. During this time, increased attention highlighted the function and the limitations of the public role of the lawyer acting within the legal system.³ Examinations of lawyer behaviour coincided with changes in the justice system in the 1970s and led to new considerations about the role of the lawyer as a ‘professional.’

Following this Introduction, the second section of Chapter Six situates the new legal professionalism scholarship within the significant developments in Canadian legal culture following World War II. This section serves as a departure point to describe and assess the legal professionalism literature in terms of the previous analysis of the principle of independence. While there is no one literature of independence of the Bar, or

² *Ibid.*

³ As discussed in Chapter 5.

of lawyer professionalism, the most significant analyses of professional lawyers are examined in turn, and can be categorized as within three broad schools: Functionalism, rooted in sociological scholarship; a Formal approach, which focuses on public law, and; an emerging school of professionalism that focuses on lawyers' ethics. The final section of this Chapter assesses the contributions of the various schools of professionalism and synthesizes them with the principle of independence of the Bar.

6.2 Lawyers as 'Professionals' in the Post-War Period

The function of the principle of independence has always been mediated by its relation to repeating historical and interrelated political events. Historically, there have also been multiple values underlying the principle of independence, for the Bar, the bench and in the administration of justice. For example, the roles of independent judges and lawyers are often closely associated with the progressive advancement of public values, such as liberalism and democracy, to support modern concepts about the rule of law, which includes access to justice.⁴

⁴ This is the 'law and liberalism' hypothesis, initially identified in Chapter 2 in the context of lawyers, see Terence C Halliday and Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*. (Clarendon Press: Oxford, 1997) [Halliday & Karpik, *Lawyers*].

However, traditional explanations about the role of lawyers and judges in independent courts was also historically mixed with a range of values. The analysis of independence presented **Part II** of this work suggests that its development over a lengthy period of time was also subject to a mix of constitutive tensions, including associations with public and private ends, sometimes illiberal in nature, such as the advancement of private, state or elite interests. Despite recent emphasis on the rule of law and access to justice, these different values and tensions continue to mediate the operation of the principle within independent courts.

The balance between values and tensions in the legal system helps explain the apparent paradox of the emergence of independent judges and lawyers, and their association with democracy, prior to the wider acceptance of liberal democratic practices.⁵ In this respect, ‘independence’ has developed over time, from multiple sources and in response to contextual historical and political factors. Despite reliance on traditional accounts of its development, understandings of both the principle and practice of independence for judges and lawyers in the modern court system did not emerge until well into the 20th century.

One additional component that underlies modern conceptions of an independent Bar in Canada has been an emergent perspective on the principle as an aspect of

⁵ *Supra* note 216 and associated text in Chapter 2.

‘professionalism.’ As examined in Chapter Five, after the Second World War there was a new focus on the role of lawyers, particularly their role in legal governance in Canada and in the administration of justice. On a practical basis, the post-war economic boom in Canada also brought a return to prosperity for the legal profession more generally that had since the turn of the 20th century remained largely stagnant.⁶

Following the War, economic expansion supported exponential growth in the numbers of lawyers.⁷ Increased numbers of lawyers in turn catalyzed the ongoing enlargement in the size of law firms, which by the 1980s experienced “explosive growth.”⁸ As with economic and fiscal trends in Canada more generally, it wasn’t until the 1990s that the legal profession was forced to confront the “limits of growth.”⁹ Dissonant characterizations of the legal practice as either a ‘profession’ or as a ‘business,’ that later became an important part of the new professionalism discourse, were initially obviated in Canada by the relative breadth of opportunity at the start of the post-War period.

The increase in business opportunities in law was complemented by an expansion in the size of government after the War. The rise of the ‘administrative state’ and the new

⁶ *Supra* discussion in Chapter 3 and Christopher Moore, *The Law Society of Upper Canada and Ontario Lawyers, 1797-1997*, (Toronto: University of Toronto Press, 1997), [Moore, *Law Society*] at 171.

⁷ In 1951 there were 9000 lawyers in Canada. By the early 21st century there were 85, 863 lawyers, *supra* Allan C Hutchinson, *Legal Ethics and Professional Responsibility* 2nd ed, (Toronto: Irwin Law Inc, 2006) [Hutchinson, *Legal Ethics*], at 38.

⁸ *Supra* note 6 Moore, *Law Society* at 238.

⁹ *Ibid* at 239.

focus on the importance of public law and access to justice,¹⁰ also provided increased opportunities for lawyer employment. Increased opportunities for legal professionals were accompanied by significant modifications to the legal training in Canada during this time. Such changes included the creation of today's standard course of legal education and the establishment of new law schools,¹¹ all of which fed a growing demand for legal services.

Changes after the War also went hand-in-hand with the emergence of a newly focused examination of law and the role of lawyers within legal culture and within democratic courts. The enhanced focus on improving access to justice and the justice system more generally was complemented by new interest and scholarship related to the concept of 'lawyers as professionals' in Canada. The 'professionalism' perspective on lawyers' independence has developed several distinct approaches. The first of the different categories of professionalism literature, Functionalism, is the focus of the next section.

6.3 Functionalism

Functionalism has historically been one strand of scholarship that has dominated general professionalism studies. Functionalism literature focuses on the role of

¹⁰ *Supra* Chapter 5

¹¹ *Supra* note 6, Moore, *Law Society* at 261 – 262.

professional bodies in relation to how a community maintains “cultural conformity in order to achieve a service relationship.”¹² The early influence of sociologist Emile Durkheim permeates this school of professionalism scholarship. For example, Durkheim described the function of ‘occupational associations’ within society, which can provide an integrative structure to inculcate common practices, norms and values in a societal group.¹³ In general, functional perspectives can be grouped into categories that include public and private interest approaches, as well as those that incorporate a significant element of jurisdictional control over areas of knowledge. These categories are highlighted with some additional details starting in the next subsection.

6.3.1 Public Interest Functionalism

Functionalist scholarship about ‘professionalism’ generally was especially prevalent between the 1930s and the 1970s. In terms of legal professionalism, the public interest perspective continues to exert influence, through the work of people like Terrence Halliday, Elliot Freidson, and Russell Pearce.¹⁴ Contemporary public interest functionalists focus on how society works and use arguments such as altruism or social contracting to justify lawyer independence.¹⁵

¹² *Supra* note 4, Halliday & Karpik, *Lawyers* at 15.

¹³ Murray E G Smith, ed, *Early Modern Social Theory: Selected Interpretive Readings*, (Canadian Scholars’ Press Inc: Toronto, 1998), at 135 – 6.

¹⁴ Respectively see: *Beyond Monopoly: Lawyers, state crises, and professional empowerment* (Chicago: University of Chicago Press, 1987); *Professionalism: the Third Logic: On the Practice of Knowledge* (Cambridge: Polity Press, 2001), and; Russell Pearce & Eli Wald, “Rethinking Lawyer Regulation: How a Relational Approach Would improve Professional Rules and Roles”, (2012) *Mich St L Rev* [Pearce & Wald, “Rethinking”].

¹⁵ Noel Semple “Professionalism and Independence Theories in Lawyer Regulation” May 8, 2013, available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262518, [Semple, “Professionalism”]

For functionalist scholars like Russell Pearce, self-regulation is made “acceptable” when it is combined with a public-service altruism. Such altruism combines to form a kind of social bargain or contract.¹⁶ Public-service altruism can be explicitly in the public service, or it may be for other transcendent values within the justice system,¹⁷ including simultaneous political associations with the rule of law.¹⁸

Some functionalist scholars supplement these justifications with the idea that autonomous professions may act as a kind of *corps intermediaries* between the state and the individual.¹⁹ French philosopher Montesquieu first examined the role of intermediate organizations such as the nobility, the clergy or local government to play this role in pre-revolutionary France’s *ancien regime*.²⁰ In its more modern application in the legal context, Robert Nisbet has asserted that a *corps intermediaries* is an “intermediate layer of value and association”, which could serve as a bulwark against state tyranny.²¹

at 3. Professor Semple’s article has more recently been expanded and incorporated into *Legal Services Regulation at the Crossroads* (Northampton: Edward Elgar, 2015), particularly at Chapters 8,9, and 10.

¹⁶ *Ibid.* See also William J Goode, “Community Within a Community: The Professions”, (1957) *American Sociological Review* 22(2): 194 – 200 at 196.

¹⁷ *Ibid.* Semple observes that appeals to transcendent values are consistent with Friedman’s findings that professions are united by devotion to a “larger and putatively higher goal”, see Milton Friedman, *Capitalism and Freedom*, (Chicago: University of Chicago Press, 2002) at 122 – 3.

¹⁸ For example, Rajesh Anand has argued that client service is merely a means to “sustain a universe of political meaning that appears as the rule of law”, in “The Role of the Lawyer in the American Democracy”, (2009) *Fordham Law Review* 77 1611- 1634 at 1622 – 3.

¹⁹ Anni Greve, 1998, “Emile Durkheim revisited: Les corps intermediaires” *Citizenship Studies* 2 (2): 313 – 328.

²⁰ Montesquieu, Charles de Secondat, Baron de, *Esprit des Loix (Spirit of the Laws)*, (London: G Bell & Sons Ltd, 1802).

²¹ Robert Nisbet, *Quest for Community*, (New York: Oxford Press, 1953) at 202.

Ideas about the body of lawyer-professionals tied to both public service and democratic values appear closely aligned with some traditional descriptions of lawyer independence. This includes a view of lawyers that associates them with the advancement of liberal values like rule of law and access to justice.²² More recently, public interest functionalism also complemented New Left approaches to the administration of justice, which became prominent in Canada in the 1970s. These approaches highlighted the role of legal advocates to represent the interests of clients.²³ Developments and perspectives on the functional role of lawyers were also closely connected to developments in legal theory at this time, which emphasized lawyers as part of a democratic system of basic governance.²⁴

However a similar perspective, which also considered the social influence of lawyers as a body, viewed professional lawyers as an intermediate body that instead resisted radical social change.²⁵ In this way traditional functional perspectives are divided between those who suggest the role of individual lawyers is to promote liberal values or, by contrast, to reinforce less public interests. This distinction within functionalist literature appears to colour historical examinations of lawyers. As noted in

²² *Supra* note 4.

²³ *Supra* discussion at Chapter 5.

²⁴ *Supra* eg, Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard L Rev 353 at 357 [Fuller, "Forms and Limits"]; *supra* discussion in Chapter 5.

²⁵ *Supra* Chapter 3. See also Alexander Carr-Saunders & P A Wilson, *The Professions*, (Oxford: Oxford U P, 1933).

Chapter Three, on the one hand stand accounts of the development of lawyer independence which associates law and lawyers with liberal values. By contrast some accounts examine instances where the Bar has preferred to support state, private and elite interests.²⁶

Starting in the 1970s, one additional viewpoint focused on the public role of lawyers within open courts. As described in Chapter Five, the administration of justice has also been subject to a recent public policy and political tension.²⁷ This alternative perspective examines the public and private distinction to highlight the individual rights of people to make private choices. Similarly, there is a division in professionalism theory amongst Functional theorists who focus on the role law and lawyers play to facilitate private relations, which is the focus of the next subsection.

6.3.2 Private Interest Perspective

Public interest functionalist approaches have been challenged by those who employ a private interest perspective on lawyer professionalism and independence. In a latter generation, realists like Roscoe Pound could say that “gaining a livelihood is incidental, whereas in a business or a trade it is the entire purpose.”²⁸ The views expressed by Pound reflect a longstanding concern within the broader legal professional

²⁶ *Supra* note 4.

²⁷ Especially between the ‘new left’ and ‘new right’, *supra* discussion in Chapter 5.

²⁸ Roscoe Pound, *The Lawyer From Antiquity to Modern Times*, (St Paul, Minnesota: West, 1953) at 5.

community, which dates back well over a century.²⁹ That is, what is the acceptable level of commercialism within the practice of law, before it detracts from ‘law as a profession’?

Consequently, private interest functional approaches examine the legal profession primarily from the point of view of the economic marketplace. These scholars examine lawyer independence and professionalism as a socio-economic phenomenon and often identify lawyers’ self-interest, to achieve greater status or wealth, as the principal explanation and result of independence of the Bar.³⁰ This private interest approach focuses on the dichotomy between public interest characterizations of professional groups and their economic role as for-profit businesses.

In the case of the Canadian legal profession, the private interest perspective suggests that the advancement of private interests is accomplished by managing participation in the legal marketplace. Control of the admission process for lawyers, through Law Societies, serves to limit the supply of legal services. In turn, reducing the supply of those authorized to practice law creates a cartel that ensures higher prices for legal services, thus directly benefiting individual lawyers. In this respect, since a self-regulator is theoretically ‘independent’ in that it is accountable only to its membership of

²⁹ *Supra* note 1, at 283

³⁰ See, for example, Richard L Abel, *American Lawyers* (New York: Oxford University Press, 1989), particularly at 14 – 40.

lawyers, self-regulation is inherently self-serving.³¹ As proof of this, some scholars point to the aspects of lawyer regulation in Canada, like professional discipline, that is deployed either ineffectively, or to advance the elite or private interests within the legal profession.³²

Such views about the self-serving nature of independence of the Bar likely inform and underlie many modern changes to legal self-regulation around the world. While as an historical matter traditional accounts of independence of the Bar in Canada and elsewhere may have included some degree of institutional self-regulation,³³ this organizational form is becoming increasingly rare. As noted by some, North America is quickly becoming a ‘last bastion’ of traditional lawyer self-regulation.³⁴

A milder version of the private interest functional perspective proposes that the mechanism of lawyer self-regulation dominant in Canada aligns individual acquisitiveness with a service orientation.³⁵ In this respect some commentators have claimed a positive empirical relationship between professionalism and profit.³⁶ A related

³¹ See, for example, Mario Pagliero, “What is the Objective of Professional Licensing? Evidence from the US Market for Lawyers”, (2011) *International Journal of Industrial Organization* 29.

³² Harry Arthurs, “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?”, (1995) *Alta Law Rev* 33 [Arthurs, “Dead Parrot”].

³³ Through the Inns of the Court in England, for example.

³⁴ Alice Woolley, *Understanding Lawyers’ Ethics in Canada*, (Markham: LexisNexis, 2011) at 4.

³⁵ *Ibid* at 4.

³⁶ See, for example, Neil Hamilton & Verna Monson, “The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law”, *Georgetown Journal of Legal Ethics*, (2011) 24 at 140.

viewpoint balances profit motives against the high value of reputational interests in legal culture. In some cases, the value of reputation, particularly in the legal community, may supersede commercial interests. In the words of one commentator “the invisible hand of reputation, and not economic efficiency, drove the legal service market.”³⁷ While both profit and reputation appear as very different, potentially opposite motivations animating legal professionalism, both are also inherently self-serving, and bolster the private interests of lawyers.

Many who assert the importance of a private interest perspective on lawyer professionalism often acknowledge that lawyering involves a balance. On one side stands the aspirational conceptions of the practice of law as a public service or as an altruistic behaviour, as noted above. On the other side, there is the very real need of all lawyers to sustain themselves commercially. One recent initiative that describes this balance was the creation of a document, the ‘Elements of Professionalism,’ by Ontario’s Chief Justice’s Committee on Professionalism.³⁸ This document, which attempts to define the nature of modern legal professionalism describes ‘balanced commercialism’ as one of the substantial attributes of the modern Canadian lawyer.

³⁷ Russell Pearce, “How Law Firms Can Do Good While Doing Well (And the Answer is Not Pro Bono)” (2005) *Fordham Urban Journal* 33 at 1245.

³⁸ Chief Justice of Ontario’s Advisory Committee on Professionalism, Working Group on Definition of Professionalism, “Elements of Professionalism” at 8 – 10, available online: <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>.

Some who accept a profit motive as a substantial motivation driving lawyer professionalism also assert a ‘declinist’ version of the Bar and modern lawyering. From this viewpoint, aspirational and altruistic professional attributes are part of a traditional historical past, and have declined in the face of the modern commercialization of law.³⁹ Yet, as discussed throughout Chapter Three, accounts of lawyers that rely on such traditional narratives often appear inaccurate. In this case, while ‘declinist’ complaints may respond to modern commercial pressures and the perceived need to maintain a balance between the business of law and its larger social role, similar, ongoing concerns about the role of lawyers can be traced throughout much of history.⁴⁰ In this way, declinists appear to rely on a presumption of continuity in the role of lawyers, which when examined more closely, often appears based on a romanticized account of historical professional behaviours.⁴¹

6.3.3 Jurisdictional Control

A variant of the functional approach to legal professionalism examines the public role of the independent Bar as against the self-interests of individual lawyers and of the legal profession as a matter of jurisdictional control over a domain of knowledge. This approach “treats the deployment of knowledge for the creation and defence of work

³⁹ See, Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Professionalism* (Cambridge: Harvard UP, 1995); Russell G Pearce, “The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar”, 70 NYU L Rev 1229, 1257 (1995) [Kronman, *Lost Lawyer*].

⁴⁰ *Supra* note 1.

⁴¹ Wesley Pue, “In Pursuit of Better Myth: Lawyers’ Histories and Histories of Lawyers”, (1995) 33 Alta L Rev 730 [Pue, “Better Myth”].

jurisdictions as a way to define boundaries between work domains.”⁴² In this case, expert or specialized knowledge may be employed to create a space for individuals to carry out activities without interference.⁴³

One stream of legal professionalism scholarship that relies on a variation of a jurisdictional control approach prominently features the deployment and defence knowledge as a discourse that regards ‘law as craft’.⁴⁴ From the point of view of independence of the Bar, one variation of this approach⁴⁵ uses an inward-looking focus to attend to factual differences in cases and to adjust the legal treatment of such matters accordingly.⁴⁶

One version of this approach also encourages an inward and reflective focus, in both law school education and in practice.⁴⁷ ‘Reflective practice’ is perhaps best

⁴² *Supra* note 4 Halliday & Karpik, “Politics Matter” at 15.

⁴³ For systems theorists, the use of expert or specialized knowledge lies at the heart of the differentiation of knowledge, which created a class of individuals who could wield such expertise. In systems theory the explanation for ‘jurisdictional control’ is regarded primarily as an aspect of auto-poietic self-replication which insulates the law, judges and lawyers, from other forms of cultural legitimation whereas more general ‘professionalism’ discourses regard it as an aspect of group functioning. *Supra* Martine Valois, *Judicial Independence: Keeping Law at a Distance from Politics* (Markham: LexisNexis Canada Inc, 2013) [Valois, *At a Distance*]; and discussion in Chapter 2.

⁴⁴ See, for example, Brett G Scharffs, *Law as Craft*, (2001) 54 Van L Rev 2245, particularly at 2274-2322.

⁴⁵ Dagan and Kreitner identify the main strands of this legal discourse – institutional and individual skill-based considerations. *Supra* Hanoeh Dagan, Roy Kreitner, “The Character of Legal Theory”, 96 Cornell L Rev (2011) 671 at 672 [Dagan & Kreitner, “Character”] at 678 – 680. In my view, the institutional variation of this approach fits better within the Formal approaches to professionalism discussed *infra*.

⁴⁶ *Ibid* at 679. Which appears to be a similar process to the idea of ‘reflective equilibrium’, see R Dworkin, *Taking Rights Seriously* (Cambridge: Harvard UP rev ed 1978) at 81-130.

⁴⁷ The term was developed by DA Schon, *Educating the Reflective Practitioner* (San Francisco: Jossey-Bass, 1987). [Schon, *Educating*] at 31. See also, DA Schon, *The Reflective Practitioner: How Professionals think in action* (New York: Basic Books, 1983)

understood as a mode of how professional knowledge is created and expertise is gained. Skill and expertise arise from actual practice, where the practitioner progressively gains knowledge about how to deal with complexity, indeterminacy and values within their professional field.⁴⁸ In legal education, such approaches have been especially influential in the past in clinical settings and in teaching methods of mediation.⁴⁹ However, approaches to practice based on a ‘reflective’ model are slowly being broadened,⁵⁰ based on several concerns about legal professionalism and the role of an independent Bar. Concerns include the perceived need for ongoing skills development, legal services enhancement, access to justice and professional well-being.⁵¹

One further version of a jurisdictional control perspective relies on a regulatory efficiency argument to justify institutional independence of the Bar. The strong version of this claim argues that lawyers are uniquely situated to understand and apply their professional knowledge and practice to regulate their peers. As ‘legal experts,’ only lawyers have the skills to evaluate lawyer competence and diligence.⁵² A weaker version

⁴⁸ *Ibid*, at 3 and 18.

⁴⁹ See JP Ogilvy & Karen Czanpansky. “Clinical Legal Education: An Annotated Bibliography (Revised, 2005)”, available online: <http://faculty.cua.edu/ogilvy/biblio05clr.htm>; Julie Macfarlane, “Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model” (2002) 40:1 *Osgoode Hall L J* 49; Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008).

⁵⁰ See, for example, Michele Leering, “Conceptualizing Reflective Practice for Legal Professionals” (2014), *Journal of Law and Social Policy*, 23 83-106.

⁵¹ *Ibid*, at 87 – 90. One recent study shows that American lawyers much higher rates of problem drinking and depression than the general population, Patrick Krill *et al*, “The Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys” (2016) 10 *Journal of Addiction Medicine* 1 46 – 52.

⁵² See, for example, Elizabeth H Gorman & Rebecca L Sandefur, “Golden Age, Quiescence, and Revival: How the Sociology of Professions Became the Study of Knowledge-Based Work”, (2011) *Work and Occupations*, 38 at 278.

of this proposition suggests that while others may regulate the profession, only lawyers have the requisite legal skills and knowledge to govern the Bar at no or minimal cost to the state.

Traditional sociological approaches to ‘professionalism’ have been criticized as inadequate to describe the wider role of an independent Bar within the legal system. For example, Pue argues that the focus of ‘professionalism theory’ on comparing the work of lawyers to that of other professions has in fact “obscured the relationship between legal services, the rule of law, and constitutionalism.”⁵³ While lawyers may share much in common with a range of other professions,⁵⁴ they are distinct in their relationship to their work in law and in relation to courts, the state and society. Such criticisms emphasize the distinct constitutional and democratic role played by lawyers, which may not be fully captured by functional approaches to ‘professionalism’ theory.⁵⁵

Consistent with such criticisms in the post-War period, there was an increased focus on examination of the role of judges and lawyers within the legal system from a public law perspective. While more traditional functional ‘professionalism’ perspectives

⁵³ W Wesley Pue, “Death Squads and ‘Directions over Lunch’” [Pue, “Death Squads”] at 88, in *In the Public Interest*, “The Report and Research Papers of the Law Society of Upper Canada’s Task Force on Rule of Law and Independence of the Bar”, (Toronto: Irwin Law Inc, 2007) [LSUC, *Public Interest*].

⁵⁴ Including clergy, barbers, medical occupations and possibly mediums, see Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labour* (Chicago & London: University of Chicago Press, 1998) at 1 – 31. See also Law Reform Commission of Manitoba, *Regulating Professions and Occupations* (Manitoba Law Reform Commission, 1994 Report #84.

⁵⁵ *Supra* note 53, Pue, “Death Squads”.

continue to inform lawyer independence, ‘Formal’ approaches have also become an influential body of literature in understanding independence of the Bar.⁵⁶ Such Formal approaches focus on aspects of the structure of the formal justice system, such as constitutional and statutory provisions, as well as public law jurisprudence and are the focus of the next section.

6.4 Formal Approaches to Lawyer Professionalism

Formal approaches to professionalism rely largely on the historical roots of lawyer independence and through its emergence in statute and common law. A common starting place in modern case law for understanding Formal approaches to lawyer professionalism is the House of Lords decision in *Rondel v Worsely*. In an echo of Lord Brougham’s 19th century description of the ‘zealous advocate,’ the more modern British case of *Rondel v Worsely* highlights the contemporary duty of advocates to “fearlessly raise every issue, advance every argument, and ask every question, however distasteful” which will help a client’s case.⁵⁷ Despite some indeterminacy as to its precise nature, the principle of Bar independence has been generally accepted in Canada and elsewhere.⁵⁸

⁵⁶ The term ‘Formal’ approaches in the context of lawyer professionalism is my characterization and is unrelated to the broader “formal” or neo-“formal” schools of legal theory, *supra* note 6 in Chapter 2. I have capitalized the term in the lawyer professionalism context to distinguish it from the legal school of ‘formalism’ discussed earlier.

⁵⁷ [1969] 1 AC 191 at 227 (UK HL).

⁵⁸ In Canada, see eg, *Federation of Law Societies of Canada v Canada (Attorney General)* 2002, 57 OR (3d) 383 (SCJ). Internationally see eg, United Nations. *Basic Principles on the Role of Lawyers*, in Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Havana, 27 August — 7 September 1990, UN Doc A/CONF 144/28/Rev 1 New York: United Nations, 1991, 118.

Formal descriptions suggest both a wide and a narrow account of independence of the Bar, examined in the next sub-sections.

6.4.1 Wide Formal Accounts of Independence of the Bar

Similar to the recent jurisprudential focus on the meaning of ‘judicial’ independence, contemporary case law has also overtly acknowledged the role that lawyers play in Canada. For example, from a public law perspective, the 2002 Supreme Court decision in *Lavallee* noted that the justice system relies on both independent judges and lawyers.⁵⁹ In the circumstances of that case, the Court perceived a need to protect the independent role of lawyers to confidentially represent clients. The decision also stands for the broader principle that the Canadian justice system largely relies on independent advocacy by legal professionals in order to ensure that it operates properly. In other cases the Court has suggested that the presence of professional legal advocates in the court system is closely linked with the need to provide access to justice.⁶⁰

Wide Formal accounts of independence of the Bar emphasize the institutional manifestations of the principle, in the written constitution and in legislation and public law. For example, in the view of constitutional scholar Patrick Monahan,⁶¹ the independence of the Bar is a constitutional principle that can be inferred from the written

⁵⁹ *Lavallee Rackel & Heintz v Canada (Attorney General)*, [2002] 3 SCR [“*Lavallee*”].

⁶⁰ *Ibid* at paras 64 – 65.

⁶¹ Patrick J Monahan, “The Independence of the Bar as a Constitutional Principle”, at 117 [Monahan, “Independence”] in *supra* LSUC, “*Public Interest*” at note 53.

requirements set out in the *Constitution Act*.⁶² As highlighted in Chapter Four, the constitutional protections promoting judicial independence are consequently further reinforced by connections to the pool of potential judicial candidates. That is, federally appointed judges must be appointed exclusively from the ranks of the provincial and territorial Bar, who have historically independently performed their individual and institutional roles.⁶³

The Formal development of the institutional aspects of an independent Bar are also affected by the Constitutional division of powers. Under these provisions, the responsibility for ‘property and civil rights’, as well as for the ‘administration of justice’⁶⁴ falls within provincial authority. As noted in the analysis of the emergence of an independent Bar in Canada,⁶⁵ every provincial and territorial jurisdiction has passed legislation to establish professional lawyer bodies like the Law Society of Upper Canada in Ontario.⁶⁶ Across the country, legislation has created a broad statutory authority for these bodies, composed mainly of lawyers, to regulate the legal profession.⁶⁷ Though in

⁶² *Constitution Act, 1867* 30 & 31 Victoria, c3 (UK), as amended, [*Constitution Act, 1867*] at sections 97 and 98.

⁶³ R Millen “Unwritten Constitutional Principles and the Enforceability of the Independence of the Bar (2005) 30 SCLR 463 at 512. Monahan, *supra* note 61 “Independence” notes “the *Constitution Act, 1867* assumes the continued existence of independent Bars in the provinces, as an essential element in the protection of the independence of the judiciary”, at 131.

⁶⁴ *Supra* note 62 *Constitution Act, 1867* at sections 92 (13) and 92(14); see also *Law Society of British Columbia v Mangat* 2001] 3 SCR 113 at paras 38 – 42.

⁶⁵ See Chapter 3.

⁶⁶ Ontario’s LSUC was the first in 1797, see *An act for the better regulating the Practice of Law*, 37 Geo 3 (1797), c 13 (UC) and discussion in *ibid*.

⁶⁷ And to regulate outside the explicit scope of their statutory authority in some instances, see *eg Law Society of British Columbia v Jabour*, [1982] 2 SCR 307.

some cases only recently acknowledged statutorily, this includes authority to act on an institutional basis in the public interest.⁶⁸

There is some dispute from a Formal perspective whether the recognition of the individual independence of lawyers also requires the institutional recognition of independence of the Bar through self-regulation. By contrast to Canada, lawyer independence in terms of self-regulation has been supplanted by state-dominated “co-regulation” in many jurisdictions. Despite this more modern trend, the tradition of self-regulation remains a distinct element of lawyer regulation in North America.” Self-regulation of the legal profession, by the legal profession, is even clearer in Canada where professional bodies, led and elected mostly by lawyers, are largely responsible for professional rule enforcement.⁶⁹

6.4.2 External Controls on Bar Independence in Canada

Even within Wide Formal accounts, there is a recognition that the individual and institutional independence of the Bar is subject to a number of external controls. While perhaps ‘independent’ in the sense that they are statutorily authorized to be self-regulating, all Canadian jurisdictions subject their legal regulators to some degree of

⁶⁸ *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, where at 887 the Court stated, “the self-governing status of the professions, and of the legal profession in particular, was created in the public interest.”

⁶⁹ Though note the complementary additional authority of others, such as the courts; *supra eg* Salyzyn, Amy Salyzyn, “Judicial Regulation of Lawyers in Canada” (Fall 2014) Dal LJ 37 2 [Salyzyn, “Judicial Regulation”] at 481 – 526

external oversight through their legislation.⁷⁰ So for example, as previously noted in Chapter Three,⁷¹ despite its traditional place as a structural landmark of independent legal professionalism in Canada, the Law Society of Upper Canada has always been subject to at least some degree of control and review by the Legislative and Executive branches of the provincial government.⁷²

Across the various present-day Canadian jurisdictions, such external control varies, but includes the authority to appoint non-members as benchers,⁷³ the presentation of Annual Reports by the regulator to the Legislature,⁷⁴ and in the case of Saskatchewan, a requirement for legislative review of professional rule amendments and the power of invalidation in certain circumstances.⁷⁵ Like other aspects of independence, the institutional autonomy of legal regulators is thus not absolute. Even in Ontario, the historical originator of legal regulation in Canada through Law Societies, the legislature provides for some oversight and limits on the organizational independence of the Bar,⁷⁶

⁷⁰ *Supra* note 65 Monahan, “Independence”, at 144.

⁷¹ *Supra* Chapter 3.

⁷² See eg, J Bosschart, “Lawyers and Lawmakers: A Statutory History of the Law Society Act, the Barristers Act and the Solicitors Act, 1785 – 1993”, (1994) 28 *Gazette* 171.

⁷³ The *Law Society Act*, RSO 1990 c L 4, gives the provincial cabinet the power to appoint up to 8 non-members as benchers under s 23 (1) [LSA].

⁷⁴ Under Alberta’s *Legal Profession Act* RSA 2000, c L-8, s 5(4).

⁷⁵ Under Saskatchewan’s *Legal Profession Act* SS 1990 – 91, c L-10.1.

⁷⁶ Monahan notes in Ontario “the legislature has provided for significant controls over the Law Society, including the fact that powers of the Law Society are set forth and limited by statute, the provincial government appoints a number of benchers, certain regulations of the Law Society are subject to approval, and the attorney general is general a bencher ex officio, with a mandate to uphold the public interest” *supra* note 61 Monahan, “Independence” at 144.

including statutory provision for appellate review of individual disciplinary matters, as well as possible judicial review of the institutional decisions of the regulator.⁷⁷

In addition to statutory limits on lawyer independence in provinces and territories, some commentators also note that while independence may mean freedom from control by the executive branch of government, there are nonetheless a number of additional external controls placed on the independence of the Bar. Such additional external controls are those imposed outside the traditional and statutory framework of lawyer self-regulation in Canada. Perhaps the most obvious of these external influences in relation to control of individual lawyer behaviour is exercised by the Courts.

The capacity of the Court to control the legal profession is both institutional and conventional. It is institutional in the general sense that historically, throughout the common law world, judges have taken an active role in oversight of lawyers.⁷⁸ Even within the increasingly distinct self-regulatory framework in Canada, there is significant capacity for oversight and involvement by the judicial branch of government.⁷⁹ For example, courts have an unwritten, but constitutionally recognized authority sometimes

⁷⁷ *Supra* note 66.

⁷⁸ *Supra* note 69, Salyzyn, “Judicial Regulation”. In Canada, this was also historically the case as a matter of practice. In Ontario the statute creating the Law Society included a recitation that they were made “under the inspection and with the approbation of the judges of the province as visitors” as noted by Mark Orkin, *Professional Autonomy and the Public Interest: A Study of the Law Society of Upper Canada* (doctoral thesis, Osgoode Hall Law School of York University, 1971) at 58 – 59.

⁷⁹ *Ibid.*

referred to as ‘inherent discretion.’⁸⁰ This authority has been recognized as a “reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so.”⁸¹

In Canada, this authority has been recognized by the Supreme Court,⁸² which has imbued it with constitutional legitimacy as an “immanent attribute” of the Courts.⁸³ This includes a capacity of judges to manage lawyer behaviour by directing procedures in litigation before the courts.⁸⁴ It also includes some capacity by judges to engage in lawyer regulation through sanctions.

Sanctions by judges against lawyers include the direct ability to control lawyer behaviour through recognized powers like contempt and the impositions of costs.⁸⁵ The capacity for judge-imposed discipline also includes indirect sanctions through critical commentary in decisions of the Court,⁸⁶ and direct referrals that may be investigated as

⁸⁰ It is also sometimes also referred to as the “inherent powers” doctrine, especially in the American context, see Felix Stumpf, *Inherent Powers of the Courts: Sword and Shield of the Judiciary* (National Judicial College, 1994).

⁸¹ I H Jacob’s “The Inherent Discretion of the Court”, (1970) 23 *Curr Leg Prob* 23.

⁸² See, for example, *College Housing Co-Operative Ltd v Baxter Student Housing Ltd*, [1976] 2 SCR 475, though note the Court recognized a purported limit on the power which cannot conflict with a rule or statute, at 480. See also *Crevier v Attorney General of Quebec*, 1981 2 SCR 220 which outlines the contours of the principle.

⁸³ *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, per Lamer J at para 30.

⁸⁴ In addition to the inherent jurisdiction power of judges, many applicable procedural regimes provide a regulatory authority for judges to alter the applicable rules. See, for example, Rule 2 of Ontario *Rules of Civil Procedure* RRO 1990, Regulation 194 under the *Courts of Justice Act*, RSO 1990 c C 43 [CJA].

⁸⁵ There is little doubt as to the validity of the Courts power in these circumstances; see P Perrell, “Ordering a Solicitor Personally to Pay Costs” (2001) 25 *Adv Q* 103.

⁸⁶ See, for example the case of *R v Felderhoff* [2003] OJ No 4819, 180 CCC (3d) 498 at 535-539 (Ont C A), which resulted in Law Society disciplinary proceedings against counsel for the defence, Joseph Groia, *infra Groia* at 118.

disciplinary matters by Law Societies.⁸⁷ Consequently, there is some ambiguity in the respective roles played in Canada by the courts and the legal regulator in managing lawyer professional behaviour.⁸⁸

Some commentators also note the role of additional external controls that may be imposed through voluntary membership in professional lawyer organizations.⁸⁹ These include organizations such as the Canadian Bar Association and other specialist bodies.⁹⁰ In most cases, the degree of regulation by these entities may be “uncertain,” since participation by lawyers may not be mandatory.⁹¹ However, there is at least one example, the Advocates’ Society in Ontario, of a private professional lawyers’ organization whose guidelines for professional behaviour, the *Principles of Civility for Advocates*,⁹² have been recognized and enforced by the Courts against lawyers and others.⁹³ Last, there is

⁸⁷ In Ontario, the Law Society publishes ‘protocols’ for complaints against lawyers by judges and administrative adjudicators, available online: < <http://www.lsuc.on.ca/with.aspx?id=642>>.

⁸⁸ *Supra* note 69.

⁸⁹ *Lawyers’ Ethics and Professional Regulation*, 2nd ed, Woolley, Devlin *et al* (Toronto: LexisNexis, 2013) [*Lawyers Ethics*] at 114 – 115.

⁹⁰ In Ontario, for example, the County and District Law President Association (CDLPA), now known as the Federation of Law Associations (FOLA), has represented an influential body of local professional lawyer organizations. Other bodies in Ontario include the Criminal Trial Lawyers Association, and organized bodies to represent the interests of government lawyers such as the Association of Law Officers of the Crown (ALOC) and the Ontario Crown Attorneys’ Association (OCA).

⁹¹ *Supra* note 89.

⁹² Available online: < <http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf>>.

⁹³ See *Penney v Penney*, [2006] OJ No 4802 (SCJ); including SRLs, see *Radonicich v Reamey*, [2008] OJ No 2210 (SCJ), *infra Groia* at note 118.

also some authority for other external adjudicative bodies other than the courts to manage lawyer behaviour,⁹⁴ including rules crafted by extra-national authorities.⁹⁵

From a Formal viewpoint, many note that independence of the Bar may not require institutional self-regulation. However, a narrower Formal account nonetheless still often advances a case for at least some institutional recognition of independence of the Bar as an aspect of professionalism. These narrower Formal approaches, largely tied to the scope of individual lawyers' responsibilities, are the focus of the next subsection.

6.4.3 Narrow Formal Accounts

Narrow Formal accounts of lawyer professionalism often regard the principle as tied to specific lawyerly duties.⁹⁶ For example, independent lawyer discretion is necessary as an aspect of a number of fundamental professional obligations. This includes lawyer obligations: to address the duty to avoid conflicting interests, in client selection, as well as for lawyers to individually assess their competence to handle specific legal matters.⁹⁷

⁹⁴ For example, *Wilder v Ontario (Securities Commission)*, (2001) 53 OR (3d) 519 (CA).

⁹⁵ From the USA see, *Sarbanes-Oxley Act* Pub L 107 – 204 116 Stat 74; for an example of the extra-territorial reach of Canadian law see *Corruption of Foreign Officials Act* SC 1998 C 34.

⁹⁶ Some commentators integrate both narrow and broader conceptions of the Bar. For example, Archibald Cox suggests that, on a narrow conception, an individual lawyer can only provide effective independent advice to clients when a structural framework of the independence of the profession as a whole is in place; “The Conditions of Independence for the Legal Profession” in *The Lawyer’s Professional Independence: Present Threats/ Future Challenges* (American Bar Association, 1984) at 53 – 54.

⁹⁷ Professional rules governing competence, as well as other obligations, are set out in respective rules of conduct in each Canadian jurisdiction.

There is also a range of obligations to exercise discretion independent of the client on the basis of a lawyer's role as an 'officer of the court.'⁹⁸ There may be additional obligations or circumstances that require independent discretion on the part of some lawyers, depending on their particular role, for example, as counsel in organizational settings.⁹⁹ In all cases, individual members of the Bar require independence because of "the professional's distinctive relations of trust and authority with clients...and his or her need to exercise independent discretionary judgment."¹⁰⁰

As noted above, narrow Formal professionalism descriptions do not posit a constitutional requirement for a self-regulatory body to protect lawyer autonomy. However, they do include "preservation of the independence of lawyers from direct control by the executive government." In this sense, the independence of the individual members of the legal profession takes its place alongside other related constitutional principles like the individual and institutional independence of judges to form a vital component of the rule of law.¹⁰¹ In the words of the Supreme Court of Canada,

⁹⁸ *Supra* eg note 73 *LSA* at s 29

⁹⁹ See, for example, William H Simon, "Whom (or What) Does the Organization's Lawyer Represent? An Anatomy of Intra-client Conflict" (2003) 91 *Cal L Rev* 57.

¹⁰⁰ Robert Gordon, "Can Lawyers' Professional Values be Saved? Are They Worth Saving" (October 1999) as cited by , *supra* note 38, Chief Justice of Ontario Advisory Committee on Professionalism, "Elements of Professionalism" at 4.

¹⁰¹ *Supra* note 61 Monahan, "Independence". See also Jack Giles, QC , "The Independence of the Bar" (2001) 59 *The Advocate* 549, where the author notes, "The principle of an independent Bar, like the principle of an independent judiciary, is an idea that has a fundamental constitutional character. This is so because where it is interfered with all other constitutional rights including the rule of law itself are placed in jeopardy."

professional lawyers form an independent Bar that is “vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.”¹⁰²

As the principle of independence of the Bar has developed it has interacted with simultaneous factors which have associated the lawyerly function with the rule of law and the maintenance of the legal system, including recent developments affecting both independent judges and independent courts. In this respect, the longstanding connection between independence, the rule of law and the scope of lawyerly duties has been further strengthened in Canada since 1984, by the connection between the range of lawyerly duties to the specific rights enumerated in the *Charter of Rights and Freedoms*.¹⁰³

For example, the *Charter* has been interpreted as supporting the principle of independence of the Bar with regard to the right to the effective assistance of counsel, in at least some circumstances.¹⁰⁴ Under the section 7’s “life, liberty or security of the person” provision, the right to counsel is a “principle of fundamental justice”.¹⁰⁵ Similar

¹⁰² *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, at 187 – 188.

¹⁰³ Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), [*Charter*].

¹⁰⁴ For example, see David M Tanovich, “Charting the Constitutional Right of Effective Assistance of Counsel in Canada” (1994) 36 CLQ 404.

¹⁰⁵ See *R v GDB*, [2000] 1 SCR 520, at para 24.

rights to access legal advice through counsel have also been recognized in the context of the *Charter* requirements of fairness in the trial process¹⁰⁶ and upon arrest or detention.¹⁰⁷

Courts have also protected the right of clients to have private communications with their independent lawyers through a series of cases in Canadian law that have defined the nature of privilege, which is also recognized as a ‘principle of fundamental justice.’¹⁰⁸ Other aspects of the independence of the Bar have also received similar constitutional protection. One recent case before the Supreme Court demonstrates the constitutional recognition of aspects of lawyer autonomy, but also how Bar independence is a changing principle that continues to be refined in the Canadian context.

In 2015’s *Canada (AG) v Federation of Law Societies of Canada* the Supreme Court considered the nature of the duty of loyalty owed by lawyers to their clients.¹⁰⁹ The case involved the potential application to the legal profession of anti-money laundering terrorist financing legislation. The Court determined that the legislation should be read down to exclude legal counsel and law firms because it interfered with

¹⁰⁶ Under section 11 (d) of the *Charter*, *supra* note 59, *Lavallee*, at para 65.

¹⁰⁷ Under section 10 (b) of the *Charter*, *R v Burlingham*, [1995] 2 SCR 206, at para 14.

¹⁰⁸ *Supra* note 59, “*Lavallee*”, particularly at para 68. Though there are some recognized exceptions, the Court has taken recent steps to bolster this aspect of the lawyer-client relation. Under a set of companion cases, the Supreme Court identified one legislative exception that permitted the federal taxing authority to demand names and lawyer accounts in government tax audits, but the Court found this unconstitutional as a breach of the individual’s right to privacy protected under s 8 of Canada’s *Charter of Rights*, *supra* note 109, see *Canada (Attorney General) v Chambre des notaires du Quebec* (2016) SCC 20; *Canada (National Revenue) v Thomson* (2016) SCC 21, both decisions released June 3, 2016.

¹⁰⁹ [2015] 1 SCR 401, 2015 SCC 7 (CanLII) [*FLSC v Canada*].

lawyers' duty of loyalty. In addition to confidentiality obligations, the duty of loyalty consists of three parts; a duty of candour, a duty to avoid conflicting interests, and a duty of commitment to a client's cause.¹¹⁰ In this case the court determined that duty of commitment to a client's cause met the test to be recognized as a new principle of fundamental justice.¹¹¹

From a Formal professionalism perspective, the recent *FLSC* case provides further support for the constitutional recognition of an independent Bar in Canada. However, some question the scope of the principle. For example, nowhere does Canada's written constitution contain explicit reference to the principle of 'independence of the Bar.'¹¹² To the extent that the principle has been recognized in case law and by the Supreme Court of Canada, the limits on Bar independence remain subject to future determination. In this respect, substantial legal issues about the individual independence of the Bar, and the institutional role of Law Societies are the subject of current litigation before the Courts.¹¹³ Nonetheless, the ongoing development of the independence of the

¹¹⁰ *Ibid.* The Court affirmed this description, earlier set out in *R v Neil*, [2002] SCJ No 72 [2002] 3 SCR 631, a central decision in the law of lawyer conflicts in Canadian jurisprudence.

¹¹¹ *Ibid* at paras 94 and 103. Though the Federation had also sought constitutional recognition of independence of the Bar, the Court declined in this case to determine that aspect, at para 80.

¹¹² *Supra* note 53 Pue, "Death Squads", at 87

¹¹³ For example, the case of *Edgar Schmidt v AG (Canada)*, 2016 FC 269 touches on the independent obligations of government lawyers. Trinity Western University's attempts to seek accreditation for its law school from provincial law societies, in the face of a potentially discriminatory behavioural covenant imposed on its students, also seems a likely candidate for future review by the Supreme Court, see, for example, *Trinity Western University v LSUC* 2015 ONSC 4250 (Canlii); *Trinity Western University v LSBC* 2015 BCSC 2326; *The Nova Scotia Barristers' Society v Trinity Western University*, (2016) NSCA 59.

Bar as a Formal matter of jurisprudence in the Canadian context reflects the dynamic nature of the principle in law.

One additional approach to considering independence from a professional perspective is an emerging school of scholarship. While blending Functional and Formal perspectives, the emerging school of contemporary lawyer professionalism highlights the ethical role of the legal profession. This approach has become a significant factor in legal professionalism scholarship. The development of this emerging approach to professionalism and its relation to the principle of independence of the Bar is the focus of the next section.

6.5 Contemporary Lawyer ‘Professionalism’ Scholarship

Much of the recent interest in independence of the Bar has resulted from a heightened concern about lawyer ‘professionalism,’ as well as the changing nature of the legal culture, the role of lawyers and their relation to the marketplace. Traditional historical accounts of lawyering often inaccurately suggested a past period in which the Bar had a singular view of its role and function. By contrast, in recent times it is not uncommon for those who study the independence of the Bar to observe an apparent ‘fragmentation’ in the legal profession.¹¹⁴

¹¹⁴ *Supra* discussion at notes 61 – 65 and associated text in Chapter 3.

In this respect, traditional descriptions of ‘independence of the Bar,’¹¹⁵ underplayed the significant differences between practical functions that legal professionals perform and tended to obscure differences in conceptions of lawyers.¹¹⁶ Nonetheless, challenges posed by the modern perception of ‘fragmentation’ include questions about things like the appropriate models of lawyering and a recognition of increased diversity amongst the members of the profession.¹¹⁷ Increased diversity within the profession and the range of lawyer models make it difficult to develop a unitary approach to legal professionalism. In recent years, these observations have substantially challenged traditional ideas of a unified Bar, which previously had a putatively ‘homogenized’ approach to law.¹¹⁸

The new professionalism literature is also distinguished by its emphasis on the legal ethical behaviour of lawyers. There is often a close association between concepts of

¹¹⁵ That relied upon an understanding of the term as kind of singular occupational association, *supra* note 13.

¹¹⁶ *Supra* notes 63 – 66 and discussion in Chapter 3.

¹¹⁷ For example, Professor Hutchinson’s ‘expansive’ definition of diversity, which refers “not only to race, ethnicity, or national origin, but also to gender, language, religion, sexual orientation, differing learning abilities and styles, physical and mental capabilities, and even economic status”, *supra* note 7 Hutchinson, *Legal Ethics* at 39.

¹¹⁸ See, for example, David Luban, “The Adversary System Excuse” in *Legal Ethics and Human Dignity*, (Cambridge: Cambridge University Press, 2007), particularly at 32 – 64, where the author discusses the standard conception of the lawyers’ role. The traditional model usually regarded as based on Lord Brougham’s ‘zealous advocate’, *supra* note 61. Some commentators have adapted the traditional model to suggest an overriding role for principles like integrity; see Alice Woolley, “Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer” (1996) 9 Can J L & Juris 6; or to suggest new approaches, see TCW Farrow, “Sustainable Professionalism”, (2008) 46 Osgoode Hall LJ 51. A case in point is a recently released disciplinary decision in which both the majority and the dissent endorse a characterization of the lawyer as a ‘zealous advocate’, despite the fact this term does not appear within Ontario’s professional rules, *Groia v The Law Society of Upper Canada*, (2016) ONCA 47 [*Groia*].

‘professionalism’ and legal ethics. The word ‘ethics’ is derived from the Greek *ethike*, which dealt with the science of character and considered the application of particular rules to the development of good judgment. In terms of lawyers’ ethics, ‘good judgement’ includes a behavioural component as well as “a vital moral dimension that defines who lawyers are and what they aspire to be, individually and collectively.”¹¹⁹

Consequently, the concept of the lawyer as independent moral agent is an important aspect of contemporary legal professionalism scholarship. In many cases, moral and ethical considerations form a core part of ideal models. Ideal models that incorporate strong ethical components include examples such as the “lawyer as moral activist,”¹²⁰ but may also touch on less obvious descriptions such as the “lawyer as statesman.”¹²¹ The new professionalism scholarship also examines ethical considerations through the course of the individual lawyer’s career, from the requirement that prospective lawyers be of ‘good character,’ to ongoing concerns about the definition and scope of extra-professional behaviour or ‘conduct unbecoming a barrister and solicitor’ as a regulatory disciplinary category.¹²²

¹¹⁹ *Supra* Hutchinson *Legal Ethics* at note 7 at 54.

¹²⁰ David Luban, *Lawyers and Justice: An Ethical Study*, (Princeton: Princeton University Press, 1988).

¹²¹ *Supra* Kronman, *The Lost Lawyer* at note 39. Ethical considerations may also form an important part of less obvious ideal models such as ‘the lawyer as gentleman’, see, for example Thomas L Shaffer, “The Gentleman in Professional Ethics” (1984) *Queen’s LJ* 10.

¹²² Conduct unbecoming a barrister and solicitor has been used to sanction lawyers for behaviours outside of their practices, though, in theory, touching on their professionalism or the perception of the administration of justice. However, this has included sanctions for a wide range of behaviours, like public nudity, failure to care for animals and writing a bad cheque to a landlord, *supra* note 89 Woolley, Devlin *et al*, *Lawyers’ Ethics* at 676.

However, a more developed perspective and a scholarly focus on ‘professionalism’ from an ethical perspective, including its connection to the principle of an independent Bar, has emerged only in the last few years in Canada. An examination of the new ethical perspective on lawyer professionalism and its relation to independence is the focus of the next subsection.

6.5.1 Independence, Professionalism and Legal Ethics in Canada

Independence of the Bar and its association with legal ethics and ‘professionalism’ was long under-studied in Canada.¹²³ One exception adopted an historical view to argue that the roots of the modern understandings about lawyers’ professionalism and ethics in Canada are products of the significant efforts of lawyers in Western Canada in the early part of the 20th century.¹²⁴ Such observations appear consistent with a description of the relative conservatism of Canadian legal culture during this period.¹²⁵ In the face of tumultuous times, social and political upheaval, war and economic dislocation that typified the early 1900s, ‘professionalism’ and ethical considerations became an important focus for many lawyers.¹²⁶

¹²³ Adam Dodek, “Canadian Legal Ethics: A Subject in Search of Scholarship” (2000) 50 UTLJ 115 [Dodek, “Subject”].

¹²⁴ W Wesley Pue “Cultural Projects and Structural Transformation in the Canadian Legal Profession” in W Wesley Pue & David Sugarman eds *Lawyers and Vampires* (Oxford: Hart Publishing, 2003) 367 – 391.

¹²⁵ Examined in Chapter 3 starting at section 3.5.

¹²⁶ *Ibid.* The CBA adopted a ‘Canon of Ethics’ for lawyers in 1920.

By contrast to the general trend in Canada, the study of legal professionalism from an ethical perspective in the United States has a more developed history. One explanation sometimes offered for the difference between the two countries is the observation that Canada never had its own ‘Watergate’ moment to crystalize concerns about lawyer conduct. In many respects, the criminal acts associated with this American political scandal from the 1970s and the recognition that lawyers were significantly involved in the crimes, “unleashed a flood of self-reflection in the American legal establishment, [that] ultimately led the American Bar Association to require law students to complete a course in legal ethics.”¹²⁷

In Canada, recent developments have encouraged a substantial re-consideration of the place of legal ‘professionalism.’¹²⁸ These developments have occurred in different contexts. However, one common result has been to draw attention to the practical ethical conduct of lawyers, both as individuals and in groups, in terms of how these behaviours reinforce or constrain their public role within the legal system. Several examples below provide an illustration of the ways in which these developments have affected principled approaches and practical applications of the lawyers’ ethics and professionalism perspective in Canada.

¹²⁷ Adam Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century at Last” (2008) Osgoode Hall LJ 46 1, [Dodek, “Ready”] at 2 – 3.

¹²⁸ *Ibid.* Professor Dodek’s article provides a thorough survey of the factors influencing the recent development of legal ethics scholarship in Canada.

There have been several recent court cases that focused significant attention on individual lawyer conduct in Canada. One of the best known is the case of *R v Murray*,¹²⁹ from 2000. There, Ken Murray was a criminal defence lawyer who confidentially received real evidence of a crime, in the form of several video tapes of criminal acts from his client, serial killer Paul Bernardo. Murray secretly retained the potentially incriminating evidence for many months without notifying authorities.

Though later criminally charged with obstruction, Murray was subsequently acquitted based on the Court's finding that he had an honest belief that the videotapes had exculpatory uses and that, in his capacity as defence counsel, Murray intended to use them in this manner at his client's trial.¹³⁰ The case highlighted the significant challenges and the various, sometimes ambiguous role moralities faced by defence lawyers in the criminal justice system.¹³¹ Despite the notoriety of this case, there still remains no definitive guidance within mandatory lawyers' professional codes about how to deal with real evidence of a crime.¹³²

¹²⁹ [2000] OJ No 2182, 144 CCC (3d) 289.

¹³⁰ *Ibid*, at paras 151 – 155.

¹³¹ For a discussion of this challenge see David Tanovich "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dalhousie L Rev 267 – 310.

¹³² FLSC Model Code recommendations on this rule have been adopted inconsistently across the country, see Alice Woolley, "A National Code of Conduct?" online weblog *Slaw*, May, 11 2016, available at < <http://www.slaw.ca/2016/05/11/a-national-code-of-conduct/>>. This is consistent with the dynamic realist primary constitutive tension of indeterminacy. The substantive issues in this case and in dealing with real evidence of a crime is the subject of discussion in Austin Cooper QC, "The Ken Murray Case: Defence Counsel's Dilemma" (2009) *Criminal Law Quarterly* vol 47.

Other recent developments have also drawn attention to ambiguities in the obligations that all lawyers owe to their clients, such as through the duty of loyalty. An important component of this fiduciary obligation is the regulatory duty to avoid conflicting interests. The question of conflicts of interest for lawyers is one that has been a matter of continuous concern throughout the history of the profession.¹³³ However, this fundamental part of a lawyer's role has also been the subject of consideration and refinement in recent years in Canada.

In particular, there has been a series of cases before the Supreme Court involving the duties and obligations that lawyers owe to their clients in the face of conflicts of interest.¹³⁴ In several cases, the Court has rendered divided decisions that became the subject of considerable discussion in Canadian legal circles.¹³⁵ Most recently, the 'conflicts' issue returned again to the Supreme Court in 2013, for further consideration in the context of an exception to the conflicts rule for 'professional litigants.' In that instance, though the Court rendered a unanimous decision, it described several possible exceptions and declined to rule on the question of the appropriate remedy where a law firm may be in conflict. Consequently, there also remains some indeterminacy about the precise application of the conflicts rule in Canadian law.¹³⁶

¹³³ *Supra* notes 159 – 61 and associated text in Chapter 3.

¹³⁴ *Ibid.* These cases are known as the 'conflicts trilogy', which includes: *Macdonald Estate v Martin*, [1990] SCJ No 41, 3 SCR 1235; *R v Neil*, [2002] SCJ No 72, [2002] 3 SCR 631 [*Neil*] and, *Strother v 346920*, [2007] SCJ No 24, [2007] 2 SCR 177.

¹³⁵ See, for example, Adam Dodek, "Conflicted Identities: The Battle Over the Duty of Loyalty in Canada", (2011) 14 *Legal Ethics* 193.

¹³⁶ On appeal from *Wallace v Canadian National Railway*, [2011] SJ No 589, 2011 SKCA 108. The Supreme Court rendered its decision on July 5, 2013, *Canadian National Railway Co. v. McKercher LLP*,

Other events have heightened interest in the ethical aspects of lawyer professionalism in terms of lawyers' personal and private interests. For example in 2007, a matter involving the head of Canada's largest legal regulator, the LSUC, raised awareness about some of the personal ethical challenges that some lawyers face in client relations.¹³⁷ In this respect, the head of the LSUC¹³⁸ became involved in an inappropriate intimate physical relationship with a client over several years. George Hunter, who was also a senior and respected lawyer, resigned his position as Treasurer and faced disciplinary proceedings before the Law Society as a result of his conduct.¹³⁹ Though the matter precipitated widespread consideration of the limits of the lawyer-client relationship, it did not result in definitive procedural guidelines for other lawyers in their personal relations with clients.¹⁴⁰

Moreover, the incident involving Hunter was all the more significant because of the distinct institutional role played by legal regulators in Canada.¹⁴¹ As Treasurer of

2013 SCC 39. The case confirmed the 'bright line test' set out in *Neil*, *supra* note 134, but also left open the question of remedy.

¹³⁷ See, for example "Sex with client sinks top lawyer" by Tracey Tyler, *Toronto Star*, (3 February, 2007), accessed online at < http://www.thestar.com/news/2007/02/03/sex_with_client_sinks_top_lawyer.html>.

¹³⁸ The head of the Ontario's 'Law Society of Upper Canada' is the Treasurer, pursuant to s 7 of the *LSA*, *supra* note 73.

¹³⁹ The regulator imposed a 60 day suspension and \$2,500 fine, see *Law Society of Upper Canada v George Douglas Hunter*, 2007, ONSLHP 27 CanLii, at paras 61 – 62.

¹⁴⁰ In contrast to other professions, like medicine, whose 'zero tolerance' policy in Ontario for intimate personal relations with clients has been upheld by the courts, see *Mussani v Ontario College of Physicians and Surgeons* (2003) 64 OR (3d) 641 (Div Ct).

¹⁴¹ There is a growing body of work that critically examines the role and function of self-regulation of the Bar. See, for example, Alice Woolley, "Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation", (2012) 45 UBC L Rev 145 [Woolley, "Rhetoric"].

Ontario's LSUC, Hunter was elected by the Bar as the leader of province's independent statutory governing body for lawyers. From colonial times, lawyer self-regulation has been a distinctive feature of the principle of the independence of the Bar throughout Canada.¹⁴² In this respect, incidents such as the Hunter disciplinary proceeding focused scrutiny on the integrity of members of the legal profession, but also raised questions about the sustainability of a self-regulatory model for lawyers in the modern legal services marketplace.¹⁴³

The major consequence of these developments has been a new emphasis placed on lawyer professionalism as it relates to ethical behaviour. While there has been a substantial increase in scholarship examining professionalism from this ethical perspective, there have also been practical changes that have resulted. For example, in 2009 the FLSC, a national co-ordinating body for all fourteen of Canada's provincial and territorial legal regulators, recommended that legal education be modified to include a mandatory course in ethics and professionalism at all Canadian law schools.¹⁴⁴ In this respect, professionalism scholarship from an ethical perspective continues to develop in both its theoretical viewpoint and in its practical effect on understanding independence of the Bar in Canada.

¹⁴² See Richard Devlin & Patricia Heffernan, who characterize lawyer self-regulation in Canada as a "sacred cow" in "The End(s) of Self-Regulation(?)", (2008) 45 *Alta L Rev* 169, at 169.

¹⁴³ *Supra* note 141, Woolley, "Rhetoric" and *supra* note 20.

¹⁴⁴ Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree, Final Report* (2009) available online: <http://flsc.ca/wp-content/uploads/2014/10/admission8.pdf>. The recommendation was subsequently approved by the Canadian Council of Law Deans.

6.6 Discussion and Analysis

Modern professionalism scholarship revolves around conceptions or models of lawyering within different contexts. Within Canadian legal culture, the post-War period saw an increased focus on the role of independent lawyers within independent courts. During this time, as the demand for legal services increased, lawyers were increasingly subjected to scrutiny about the nature of their professional role and its connection to the principle of independence. Despite the continued influence of traditional historical accounts of the professional role of advocates,¹⁴⁵ professionalism scholarship about lawyers has provided a further component in understanding the role and function of independence of the Bar.

As a kind of ‘law of lawyering,’ legal professionalism scholarship can be understood as a distinct subject area that has several different variations. All of these variations contribute valuable elements to understanding both the principles and practicalities of lawyer professionalism and its relation to independence of the Bar. For example, functional approaches examine what the Bar actually does from several different perspectives, including distinctions between the public and private justifications for independent lawyers and the Bar as a whole.¹⁴⁶

¹⁴⁵ *Supra* note 41 and discussion at section 3.6 of Chapter 3.

¹⁴⁶ *Supra* notes 120 - 130 and associated text in Chapter 5.

Public interest functional approaches appear largely consistent with some traditional accounts that emphasize the association between lawyers and public values, like rule of law and access to justice. The focus on public law within the school of legal professionalism is also consistent with broader recent trends within Canadian legal culture. As discussed throughout Chapter Five, the increased attention to the court system has contributed to the significant reconsideration of the role and function of courts particularly since the middle of the twentieth century. This reconsideration has emphasized the public role of courts under the democratic rule of law to provide access to justice.

By comparison, private interest functional approaches also mirror critical examinations of lawyers that examine instances where lawyers have acted in furtherance of less public and sometimes illiberal values, which include personal, private or elite interests.¹⁴⁷ One influential variation of this scholarship examines the role of the legal profession to maintain jurisdictional control over legal knowledge.¹⁴⁸ This variation has an individual dimension, in that it has become an important aspect of legal education and training.¹⁴⁹ As a characterization of the professional function, the jurisdictional control

¹⁴⁷ *Supra* discussion at section 3.3.1 in Chapter 3.

¹⁴⁸ The kinds of distinctions set out by professionalism scholars from a Functional perspective appeared consistent with policy and tensions apparent in the administration of justice, starting in the 1970s, identified in Chapter 5.

¹⁴⁹ To the extent that this viewpoint emphasizes mastery over a domain of knowledge through individual reflection it also dovetails with professionalism scholarship from an ethical perspective that underscores individual responsibility and continuing legal education in terms of competence and diligence..

perspective also appears consistent with central aspects of some alternative approaches to the role and function of the principle of independence, which emphasize control of knowledge by individuals and groups in the legal profession.

The emphasis on public law in approaches to legal professionalism is similarly consistent with post-war shifts in legal culture in Canada. Consistent with this movement, articulations of the underlying professional and independent obligations of legal advocates have occurred through public law, constitutionally, in statute and in the common law. As a recursive matter, Chapters Three and Four of this work illustrated how lawyer and judicial independence have developed in an interrelated fashion. To the extent that Formal approaches to professionalism also rely on jurisprudential development of the principle of an independent Bar, this perspective on lawyer professionalism is consistent with the dynamic and complementary trend, highlighted in Chapter Four, which has refined the concept of independence of the Judiciary in common law.¹⁵⁰

Like judicial independence, professional independence for lawyers is adaptive in nature and illustrates contextual features of the underlying principle. The Formal perspective of lawyer professionalism has a broad institutional aspect, but also considers the individual manifestations of the principle of professional independence, especially in the context of specific duties and obligations of lawyers. In considering some of the

¹⁵⁰ *Supra* note 103, *Charter. Supra* note 109, *FLSC v Canada*

specific duties and obligations of individual members of the Bar, Formal perspectives dovetail with a new ethical perspective of legal professionalism. This emerging scholarship, which also tends to focus on the professional responsibilities of individual lawyers, has provided distinct insights and applications to lawyer professionalism and the role of an independent Bar. While emphasizing the conduct of lawyers from an ethical perspective, the new lawyer professionalism scholarship also has the capacity to inform and accommodate professionalism viewpoints from both functional and Formal perspectives.

Lawyer professionalism perspectives have provided a mediating influence on the development of the principle of independence of the Bar. Professionalism scholarship is linked to independence by the general association of ostensibly professional values with the public interest. In this manner, lawyer independence is justified by its functional association with the public role of members of the Bar to provide objective representation for individuals, to uphold rule of law values, or to act for example, as ‘officers of the court’ to further the democratic goals of the justice system. In this way, much of the professionalism literature as it pertains to lawyers is consistent with the post-war emphasis on the primary normative value underlying the Canadian legal system: access to justice.

6.7 Conclusion

Lawyer professionalism scholarship is an important additional emergent analytic to understanding the role of an independent Bar and how it interrelates with other aspects of the principle of independence. In this respect, while delineating aspects of what is ‘professionalism’ for lawyers, this literature is also a genre of scholarship that examines the nature of independence of the Bar. In this sense, the new focus on ‘professionalism’ for lawyers did not arise in isolation and is interrelated with other discourses that highlight the overall scope and limits of the principle of independence. In particular, and as noted in Chapter Five, the growth in lawyer professionalism scholarship, focusing on both individual lawyers and the institution of self-regulation, has been mirrored by an interrelated increase in concerns about the effectiveness of the overall justice system.¹⁵¹

These concerns include questions about the function of ‘professionalism’ to inform the principle and practice of an independent Bar through, for example, examinations of the role of lawyers, their relation to non-lawyer legal professionals,¹⁵² and institutional criticisms of lawyer self-regulation.¹⁵³ Lawyer ‘professionalism’ scholarship also practically illustrates these various aspects of the principle in the modern context in terms of lawyers’ relations with clients, with judges, all within the court

¹⁵¹ *Supra* eg note 1 in Chapter 2 and, generally, discussion in Chapter 5.

¹⁵² On May 1, 2007, Ontario became the 1st jurisdiction in Canada to license paralegals through its lawyer regulatory body, *supra* note 73 *LSA*, under ss 25.1 and 25.2.

¹⁵³ *Supra* note 15, Semple “Professionalism”.

system. These aspects of lawyer professionalism connect the independence of the Bar with issues raised in a broader context of the administration of justice.

These issues include the function and purpose of judicial independence,¹⁵⁴ and concerns about judicial conduct,¹⁵⁵ as well as examinations of the administration of justice within Canada's highly decentralized federal framework.¹⁵⁶ One result has been a significant body of writing addressing concerns about the justice system and the role of its independent officials.¹⁵⁷ The next Chapter of the work seeks to respond to this critical perspective by synthesizing the analysis of independence presented throughout this work, to present a unified perspective on the principle.

¹⁵⁴ A Dodek and L Sossin eds, *Judicial Independence in Context*, (Irwin Law: Toronto, 2010), [Dodek & Sossin, "Judicial Independence"]. In particular, see Adam Dodek "Judicial Independence as a Public Policy Instrument" at 295.

¹⁵⁵ Federally appointed judges are subject to discipline through the CJC, authorized pursuant to ss 58 – 71 the federal *Judges Act*, RSC 1985, c J-1.

¹⁵⁶ See, for example, CJC, *Alternative Models of Court Administration*, (Queen's Printer: Ottawa, 2006), available online < www.cjc-ccm.gc.ca >.

¹⁵⁷ See, for example, the 2007 *Civil Justice Reform Project* undertaken by Ontario's Ministry of the Attorney General, available online at < <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/> >; Current Supreme Court of Canada's Chief Justice McLachlin also established the National Action Committee on Access to Justice in Civil and Family Matters, which has produced several recent reports, available online < <http://www.cfcj-fcjc.org/collaborations> >.

PART III

Chapter 7

Questions About the Principle and Practice of Independence in the Canadian Justice System

“For the study of human affairs, there is a strategic question that directs inquiry.... That question is: why?”¹

7.1 Introduction

Dynamic realism provides a framework and methodology that builds on the legal realist approach. It seeks coherence and correspondence with legal principles through its consideration of context. It also employs a range of emergent analytics to seek balance in its contextual findings against the principled characterizations of important aspects of the law and the legal system. Based on this perspective, this work has examined the nature of ‘independence’ in the Canadian justice system and has highlighted lawyer independence.

This final Chapter draws together the observations, analysis and conclusions about the principle and practice of independence in the justice system set out in the earlier Chapters. It confirms the principle of independence as an integral aspect of democratic ‘rule of law,’² and its normative purpose as access to justice. In modern

¹ Grégoire Webber, “Asking Why in the Study of Human Affairs” (2015) *The American Journal of Jurisprudence* 1 – 28 at 4.

² Though both ‘independence’ and ‘rule of law’ demonstrate definitional indeterminacy, *supra* discussion in Chapter 2.

times, this purpose has become a primary value underlying independence for lawyers and judges in the Canadian court system.³

The themes of context and purposive empiricism inform specific methodological concepts and tools of this analysis.⁴ The specific concepts of recursivity and simultaneity have been applied to challenge traditional accounts of the development and determinacy of independence for both lawyers and judges. Traditional accounts of independence often minimize political factors in development of the principle or, alternatively, highlight continuous association between independence and public values like rule of law and access to justice.⁵ This analysis suggests instead that the principle of independence for judges and lawyers has multiple sources, is subject to recursive and simultaneous factors, and is underlain by a variety of both public and private values, all of which have mediated independence in practice for judges and lawyers operating within the Canadian legal system.

Part II of this work examined the role and function of lawyers and judges in the legal system. Independent courts, peopled by independent decision-makers like judges and lawyers, are an essential feature of the democratic rule of law. However, while understandings of independence have been refined, this has not necessarily enhanced the primary normative purpose of the principle and practice of independence, which is access

³ As set out in Chapter 5.

⁴ As set out in Chapter 2.

⁵ Terence C Halliday and Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*. (Clarendon Press: Oxford, 1997) [Halliday & Karpik, *Lawyers*].

to justice. In terms of highlighting the principle of independence in relation to the Bar, Chapter Six examined how Bar independence has been further mediated by a recent focus on lawyer behaviour as an element of a new ‘professionalism’ discourse in Canada. This literature on lawyer professionalism, which includes scholarship and public law, provides an additional emergent analytic highlighting recent developments in the principle of independence of the Bar.

The interrogative focus in this work has been on ‘what’ is the principle and practice of independence. However, the dynamic realist framework also provides a basis to detail a broader inquiry. In particular, though often considered at the end of the priority of inquiry, as suggested in the prefatory passage, the final question of ‘why’ provides a basis to unite the different elements of the principle of independence.⁶ That is, the separate threads of the principle for lawyers and judges operating in independent courts can be viewed individually. The answer to the question of ‘why’ is strategically important in understanding the concept because it weaves the separate threads of independence into one strand that connects it to other concepts like the democratic rule of law.

Following this introduction, the second section of this Chapter compares and contrasts the previous analysis of Bar and judicial independence. Descriptions of lawyer and judge independence focus on the contextual manifestations of the principle. Despite some similarities between independence for lawyers and judges, contextual descriptions

⁶ In this sense the ‘why’ question has strategic priority, *supra* note 1 Webber, “Asking Why” at 25 – 27.

do not completely address the main question of ‘what’ is independence. In this respect, the second section identifies and describes a proposed framework, drawn from the earlier dynamic realist perspective, which may serve as a common basis for understanding ‘what’ independence is, in context. The proposed framework identifies the features of impartiality, neutrality and autonomy as a unified basis underlying the principle of independence for lawyers and judges.

Section 7.3 of Chapter Seven draws together the threads of analysis in **Part II** to briefly describe when, where, and to whom the principle of independence applies. All three of these inquiries appear as relatively straightforward questions. However, the analysis presented in this work suggests that each question overlays the operation of independence with an additional stratum of complexity in the Canadian context.

Section 7.4 of this Chapter looks at how independence works. It identifies an existing description of how judicial independence functions, which is consistent with a broad dynamic realist understanding of the judicial role. This section then proposes an extension of the functional description of the judicial role to the operation of the independence of the Bar. In this respect, despite contextually different roles in the justice system, both lawyers and judges function independently to apply, protect and improve the law.⁷

⁷ This part relies on an extension of Leslie Green’s analysis in “The Law and Role of a Judge” (September 2014) Paper No 47/2014, University of Oxford Legal Research Paper Series, available online: www.ssrn.com/link/oxford-legal-studies.html. [Green, “Role of a Judge”].

The fifth and last section of this final Chapter looks at the purpose of independence. This work has followed the model of many legal scholars in starting with the ‘what’ question. However, in many ways the strategic priority of ‘why’, in this case an inquiry into the purpose of the principle, draws the different aspects of independence together. As suggested in **Part I** of this work, and described throughout **Part II**, access to justice has become a primary normative value within the Canadian legal system. In this respect, the answer to the question of ‘why independence?’ highlights its main justification and purpose.

In the end, my perspective of independence in Canada suggests that it can be regarded as a single principle, which operates in modern times to support the primary normative value of access to justice. This Chapter concludes by reviewing conclusions about independence for judges and lawyers in independent courts, and situates the findings in the context of the need for further work to develop a better balance between principled and practical approaches to questions in law. This includes the need to better problematize the actual functional performance of the justice system and its component parts, in order to understand how independence and access to justice may be hindered or enhanced in the future.

7.2 What is Independence of the Bench & Bar?

7.2.1 Independence of the Bench

The judiciary is a common starting point for considering the principle of independence and a departure point for better understanding Bar independence. As previously noted,⁸ approaches to judicial independence include perspectives that examine the interaction between judges and government,⁹ perspectives that consider the effects of specific institutional mechanisms and practice on “collective” and “personal” independence,¹⁰ as well as technical questions about how to implement and sustain the principle.¹¹

However, arguably the most important elements in these approaches in modern times, like the Formal approach to lawyer professionalism, deal substantively with public law requirements. These requirements have been set out in contemporary Canadian jurisprudence dealing with judicial independence. Until relatively recently there was little jurisprudential focus on the independent role that judges played in the Canadian legal system.¹² However, the first wave of post-War change to the justice system centred new attention on the role of the court and its officials to protect individual rights. The protection of individual rights was further emphasized in subsequent waves of structural governance and procedural changes in the legal system.¹³

⁸ *Supra* identified in Chapter 3 and 4; see also Micah B Rankin, “Access to Justice and the Institutional Limits of Independent Courts” (2012) 30 Windsor Y B Access to Just 101 [Rankin, “Access to Justice”].

⁹ At Chapter 3.

¹⁰ *Supra* note 8, Rankin “Access to Justice”. Professor Rankin characterizes these as part of the “Institutionalist” approach, at 9.

¹¹ “One notable trend in the Institutionalist literature is a tendency to define independence according to complicated and ever-subtler sub-categorizations”, in *ibid*.

¹² One exception was *Toronto Corporation v York Corporation* [1938] AC 415 (JCPC) at 426.

¹³ *Supra* discussion at pp 203 – 209 in Chapter 5.

Following the implementation of Canada's *Charter* in the 1980s,¹⁴ the judiciary was formally recognized as the principal interpreter of constitutional rights and obligations. This led to further refinements to the principle of independence, which built on earlier, more traditional understandings.¹⁵ What most accounts of judicial independence have in common is that they focus on these 'dimensions' of independence for judges. In this respect, rather than focus on basic definitional questions of 'what' it is, this emphasis relies on the jurisprudential identification and description of environmental conditions required for a necessary degree of judicial independence to exist. A brief review of these conditions of judicial independence is the focus of the next subsection

7.2.1.1 'Conditions' of Judicial Independence

The Supreme Court of Canada considered the modern nature of judicial independence in its 1985 decision in *Valente*.¹⁶ The question before the Court was whether a lower provincial court was independent enough to meet the *Charter* standard of an independent and impartial tribunal. In its unanimous decision confirming the constitutional independence of provincial judges, the Court set out a modern description of basic 'conditions' or 'dimensions' of judicial independence. The three fundamental conditions of judicial independence are:

- Security of tenure;
- Financial Security; and,
- Administrative Independence.¹⁷

¹⁴ Enacted as Schedule B to the *Canada Act 1982*, c 11 (UK), [*Charter* or *Charter of Rights*].

¹⁵ As noted in Chapter 4, traditional accounts of judicial independence date back to before the *Act of Settlement* in 1701.

¹⁶ *Valente v The Queen* [1985] 2 SCR 673 [*Valente*].

¹⁷ Which in *Valente*, *ibid* at 706, the court determined had all been met for the provincial judge.

While these conditions have their roots in the development of an independent bench,¹⁸ they have also been subject to considerable qualification and deconstruction in recent years. For example, before turning to consider these specific conditions of judicial independence, it is worth noting that in its later decisions the Court further emphasized that all the conditions of independence have both individual and institutional aspects.¹⁹

Thus, what initially appear as three dimensions or conditions must be doubled to six, to consider both personal and organizational aspects of a judge's independence. Subsequent jurisprudence by the Court has also clarified that the principle also provides for independence from the executive branch of government, but also from the Legislative branch,²⁰ other judges,²¹ as well as influences external to government.²² Thus the six possible aspects of judicial independence must also be considered within a diversity of different potential contexts. A brief description of some of the relative considerations and qualifications on the three fundamental conditions, based on recent jurisprudence, is set out below.

¹⁸ As identified and discussed throughout Chapter 4.

¹⁹ Particularly *Beauregard v The Queen* [1986] 2 SCR 56.

²⁰ *Ibid.*

²¹ *Ibid.* See also *R v Lippe* [1991] 2 SCR 114, where Chief Justice Lamer's comments, at para 138, that 'other judges' included a Chief Justice and any relevant judicial council. In what appears as something of a *non-sequiter*, Justice Lamer also included judicial independence from Law Societies, though it is possible he was indirectly referencing the extraordinary behaviour of the Law Society of Upper Canada in the Landreville affair, discussed in Chapter 5.

²² *Ibid.*, the majority concurred with the Chief Justice, but also broadened the scope of potential interference interests to include corporate interests.

7.2.1.1 Tenure

In terms of security of tenure, the principle of judicial independence means that judges hold their offices for life, subject to certain conditions.²³ Whereas the 1701 *Act of Settlement* contemplated life tenure during ‘good behaviour’ for independent judges, this aspect of tenure developed over many years, and did not exist in Canada at least until the middle 1800s.²⁴ In addition, the modern principle of tenure for life in Canada was constitutionally modified for federally appointed judges in the 1960s, to impose a mandatory retirement date of 75.²⁵ The authority to investigate and recommend the removal of judges was also further supplemented when this power was delegated statutorily, with the establishment of the Canadian Judicial Council (CJC) in 1971.²⁶

While judicial tenure protections historically only protected federally appointed superior court judges, the *Remuneration Reference* and several subsequent decisions have extended these protections to include other judicial officials, like Justices of the Peace, Masters and Small Claims Court Deputy Judges.²⁷ The variety of judicial officials to which constitutional independence protections applies means that modern courts must consider the context in which individual adjudicative officials operate, to ascertain the

²³ While they remain of ‘good behaviour’ under (1701) 13 William III, c 2 [*Act of Settlement*].

²⁴ *Supra*, Chapter 4 particularly discussion starting at p 187.

²⁵ *Constitution Act, 1960*, 9 Eliz II, c 2 (UK), which came into force on March 1, 1961. Such changes were part of a larger raft of structural and governance changes that affected the judiciary and administration of justice during this time, as identified in more detail throughout Chapter 5.

²⁶ It may be arguable as to whether this simply ‘supplemented’ or more fundamentally modified the constitutional power of removal. For description of the establishment of the CJC see Ed Ratushny *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) at 35 – 38; Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, CJC, 1995 at 88.

²⁷ *Ell v Alberta* [2003] 1 SCR 857, 2003 SCC 35; *Ontario Deputy Judges Assn v Ontario* (2006), [2006 CanLII 17250 \(ON CA\)](#), 80 OR (3d) 481, [2006] OJ No 2057 (C.A.); *Masters Association of Ontario*, 2011 ONCA 243

scope of the applicable tenure protections. So, for example, whereas historically tenure meant for life, or in Canada to age 75, the court may consider tenure for shorter periods as acceptable for some judicial officials depending on the circumstances.²⁸

In terms of the institutional aspects of tenure, recent jurisprudence has also recognized and reinforced the relatively new role played by Judicial Councils, since the 1970s, to be involved in the investigation and disciplining of judges for misconduct.²⁹ The role of Judicial Councils to protect the principle of tenure through what amounts to a form of institutional self-governance of the judiciary has now been well accepted in Canada. Judges found in violation of their longstanding ‘good behaviour’ obligations remain subject to removal. Removing a federally appointed judge now follows a recommendation by the CJC to the Minister, upon a joint address before Parliament.³⁰

However, there have been increasing concerns raised about the processes employed and the results obtained in the investigation and discipline of judges.³¹ No federal judge in Canada has ever been removed by this mechanism.³² By comparison, some have questioned the integrity of lawyer discipline by self-governing bodies because

²⁸ *Ibid.* For example, as noted in Chapter 5 at note 237, tenure protections for Deputy Judges of Ontario’s Small Claims Court, are for a very short fixed period of time, a minimum of 3 years.

²⁹ *Supra* note 26.

³⁰ The current statutory authority for this process is set out at ss 58 – 71 of the *Judges’ Act*, RSC 1985 c J-1 [*Judges’ Act*].

³¹ For example, public concerns were expressed about the CJC hearing, involving the former Associate Chief of Manitoba’s Court of the Queen’s Bench, for what some felt were extra-judicial behaviours, that especially targeted her as a woman, see *eg*, Kyle Kirkup, “The legal inquiry into Justice Lori Douglas must end”, *Globe and Mail* October 14, 2014, available online: <http://www.theglobeandmail.com/globe-debate/the-legal-inquiry-into-justice-lori-douglas-must-end/article21217665/>.

³² *Ibid.*

of its apparent lack of effectiveness.³³ Similar questions in recent judicial council proceedings against judges may also raise questions about both the efficacy and the fairness of the current judicial discipline and removal process in Canada.³⁴

One secondary aspect of judicial independence, that nonetheless forms a critical part of the principle of tenure, is the principle of judicial immunity. Judicial immunity prevents the naming of judges as parties to legal disputes as the result of their adjudicative duties. As public officials in the ‘good faith’ performance of their judicial role, judges cannot be personally named as defendants in civil or criminal proceedings. This longstanding aspect of judicial independence has both a common law and a statutory basis.³⁵ One point of contention in relation to tenure is the extent to which the principle of immunity protects judges from disciplinary scrutiny for conduct ostensibly outside their judicial role.

On one hand, behaviour that clearly touches on the ability or perception of individuals to discharge their adjudicative responsibilities appears to be well within the jurisdiction of Judicial Councils. However, as the role of the judiciary has evolved, and the role of Judicial Councils has expanded since the 1970s, the precise scope and

³³ *Supra* Harry Arthurs, “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?”, (1995) *Alta Law Rev* 33 [Arthurs, “Dead Parrot”].

³⁴ The CJC has recently (2015) revised its process, following consultations resulting from the Douglas Inquiry, *supra* note 31. One such revision permits the CJC to self-initiate a complaint against a judge, which it did recently in the case of Federal Court Justice Robin Camp. More recently, the government has undertaken as of the summer of 2016 a public consultation with a view to amending the judicial discipline process, see Government of Canada, Department of Justice, “Judicial Discipline Process Reform”, available online: <http://justice.gc.ca/eng/cons/index.html>.

³⁵ In Ontario, for example, the statutory basis is captured in s 82 of the *Courts of Justice Act* RSO 1990, as amended, c C43 [CJA].

limitations on the consideration of extra-judicial behaviour by judicial disciplinary bodies remains unsettled.³⁶ A related phenomenon is the potential regulation of the behaviour of retired judges, who may rely on their former judicial status in the pursuit of a wide range of activities, including their return to be active members of the Bar or to seek political office.³⁷

7.2.1.3 Financial Security

The modern constitutional guarantees of financial security build on the initial guarantees of fixed salaries in the *Act of Settlement*.³⁸ Like other aspects of judicial independence, the initial guarantees only served as a starting point for the development of the principle of remunerative security, which did not become fully established until the 1800s.³⁹ Despite its longstanding recognition as an important part of judicial independence, the principle of financial security also remains a subject of contestation in Canada.

In modern times, the Supreme Court decision in the *Remuneration Reference*⁴⁰ resulted in the requirement that governments establish Remuneration Commissions to

³⁶ This challenge is described in the CJsC's judicial guideline for conduct, *Ethical Principles for Judges*, particularly under "Impartiality" at sections C and D, available online: < https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf >.

³⁷ See, eg SGA Pitel & W Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2012) 34 Dal LJ 483; see eg, Glen McGregor, "NDP taps 2 former judges as star candidates, but 1 of them left the bench in disgrace in 2007," *National Post* March 20, 2015. This aspect of professional lawyer rules is currently the subject of public consultation, see FLSC, "Post-Judicial Return to Practice Discussion Paper" (May 2016) Standing Committee on the Model Code of Professional Conduct, document on file with author.

³⁸ *Supra* note 23.

³⁹ *Supra* discussion at Chapter 4.

⁴⁰ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R v Campbell*;

objectively determine appropriate judicial salaries.⁴¹ However, later jurisprudence substantially modified this independent mechanism. The Court held that Remuneration Commission recommendations may be rejected or modified provided the government articulated a legitimate reason, based on a reasonable factual foundation, and that the government had respected the commission process in preserving judicial independence.⁴²

In addition, the principle of financial security for judges could be interpreted to mean that judges should obtain income only from their salaries, and would perform judicial duties exclusive of other activities. However, there is a long history of judicial involvement, outside of their judicial duties, in governmental functions, and at the executive level. Historically judges have also frequently resorted to income from other sources, as noted in Chapter Four. Within the modern Canadian judiciary, some sources of additional compensation remain available.⁴³

Moreover, the expansion of the constitutional independence guarantees to other judicial officials means that some, like Deputy Judges in Ontario, do not perform their judicial duties on a full time basis.⁴⁴ In this respect, the expansion of judicial independence guarantees to a variety of officials in different contexts means that the

R v Ekmecic, R v Wickman; Manitoba Provincial Judges Assn v Manitoba (Minister of Justice), [1997] 3 SCR 3 [Remuneration Reference].

⁴¹ Incorporated by amendment to the *Judges' Act* RS 1985 C J-1, s 26(1).

⁴² In this case, the Court balanced the principle of Parliamentary approval of public monies against the principle of judicial independence on the basis that the principal responsibility for allocation of public resources belongs to legislatures and to governments, see *Bodner v Alberta* [2005] 2 SCR 286.

⁴³ *Supra* note 110 and text in Chapter 4. Moreover, since judges may retire at age 75 and return to practice, this may also raise questions about judicial remuneration and pensions.

⁴⁴ Who are lawyers appointed as part-time Deputy Judges, *supra* discussion in Chapter 5.

principle of financial security is flexible, and depends to some degree on situational circumstances.

An aspect related to financial security is the idea that salary guarantees mean that judges will devote themselves exclusively to their judicial duties. However, as an historical matter, judges have a tradition of a wide range of involvement and participation in outside activities. In modern times, despite the idea that individual judges would remain insulated from politics, there is a sustained involvement of members of the judiciary directly in politics, and in the formation of public policy, especially through public inquiries. Mandatory age 75 retirement dates also mean that, in a time of increasing life expectancies, more and more former judges will continue to remain professionally active, and as has been the past practice in Canada, at the end of their judicial careers, some judges will return to active politics.⁴⁵

7.2.1.4 Administrative Independence

Like other dimensions of independence, autonomy over administrative matters has both individual and organizational dimensions. Despite its explicit jurisprudential and constitutional recognition, one of the best examples of the idea of administrative independence is the unwritten ‘reserve of powers’ known as inherent discretion. The principle of inherent discretion provides judges with virtually complete control in practice and proceedings over which they preside. This principle is not wholly individual, in that judicial administration may also be granted all of the authority of individual judges

⁴⁵ *Supra* note 37.

to act in areas of law within judicial authority, such as assignment and scheduling.⁴⁶ The inherent discretion of the court arguably also extends to any particular court as a whole and supports the promulgation of policy instruments, like practice directions before the court.⁴⁷

At the institutional level, the principle of administrative independence most directly touches on the relation between the judiciary and the government and reinforces the modern political notion of the separation of powers. In recent years this separation has proven increasingly problematic in several respects. For example, there have been issues with respect to the appropriate mechanism for the government to determine judicial remuneration, and also with a wide range of issues touching on judicial administrative independence.⁴⁸

In the past the Supreme Court has insulated from scrutiny decisions by judicial officials from review, where such matters fall squarely within judicial authority to administer the courts. However, there are some instances where the courts have breached these protections, where for example, a judicial administrator has used their scheduling and assignment authority for an improper purpose.⁴⁹ In another case, the court

⁴⁶ See, *eg*, this authority described in *MacKeigan v Hickman* [1989] 2 SCR 796, which also extends judicial immunity for testifying about such activities [*Mackeigan*].

⁴⁷ Though there are some apparent limits on this authority. In the case of *Gillespie v Manitoba* (2000) 2000 MBCA 1; 185 DLR (4th) 214; [2000] 6 WWR 605; 144 CCC (3d) 193; [2000] MJ No 218 (QL); 145 Man R (2d) 229; 218 WAC 229; 41 CPC (4th) 199 [*Gillespie*], a practice direction was held *ultra vires* when it was superseded by provincial legislation, though this was in the face of a strong dissent.

⁴⁸ This includes large concerns about the management of the judiciary as a body, but also in the interactions between judges.

⁴⁹ See *Wachowich v Reilly*, (2000) ABCA 241, 192 DLR (4th) 540.

distinguished one aspect of an Ontario judge's administrative authority to renew the tenure of Deputy Judges, as a decision that was properly subject to judicial review.⁵⁰

As noted in Chapter Five, there is a growing tension in the administration of justice that touches on the institutional aspects of administrative independence. As a matter of courts' governance, this tension has been reflected in recent years by concerns about models of court administration, in the face of government efforts to control judicial efficiency. Approaches that focus on financial efficiency may not adequately address other important values in the justice system like effectiveness, which includes access to justice. In such cases, the judiciary may retain some authority to ensure access, even at the expense of other democratic constitutional principles, like Parliamentary approval of the expenditure of public monies.⁵¹

Though notionally separate from other branches of government, the judiciary also appears to remain closely connected to political considerations. Examples include historical involvement in direct political governance.⁵² Throughout much of Canadian history this also included indirect involvement in public policy formulation and political controversy through the association of judges with judicial inquiries.⁵³ In a highly

⁵⁰ See *Rai v Metivier*, (2005) 79 OR (3d) 641.

⁵¹ See note 114 in Chapter 5, highlighting *R v Moodie* (2016) ONSC 3469, where the Court recently criticized the low income cutoff limit for a provincial Legal Aid program and stayed criminal charges until Legal Aid covered the costs of a lawyer, even though the defendant did not qualify in terms of income limits for the program. See also notes 129 – 135 and discussion at Chapter 5 that describes the capacity of the courts to direct government funds to support the administration of justice.

⁵² Through participation on governing councils in colonial times, but also through the role of chief judges to act in place of the Queen's representative at the federal and provincial levels, *supra* Chapter 4.

⁵³ *Supra* Chapter 4. One additional association between the judiciary and political references has been the use of references to decide legal questions that may also touch on political sensitivities. In Canada, courts

decentralized federal political and legal system such as exists in Canada, it is more likely that courts and judges would also play a mediating role between the regional and fragmented political interests. However, as noted in Chapter Three in respect of the legal profession, this political role may not be structurally inevitable, and appears to occur in part as a consequence of the distinct social-political and legal culture that has developed in Canada.

At the institutional level, the analysis presented in this work suggests that the Canadian judiciary is also administratively ‘independent.’ However like other aspects of law and legal process,⁵⁴ administrative judicial independence is conditional and qualified. From this perspective, the principle of independence is highly dependent on context and continues to change in response to the distinctly Canadian political and legal environment.

7.2.2 Independence of the Bar

There is no one literature concerning the independence of the Bar.⁵⁵ Moreover, the principle of lawyer independence remains largely understudied. While there are variable perspectives on the importance of the independence of the Bar, Chapter Six of this work described an emerging ‘professionalism’ perspective, which has proven influential in Canada in recent years. Like the principle of judicial independence,

have been fairly effective in addressing such legal issues, while at the same time avoiding at least the appearance of partisanship, see discussion of this in the context of the *Secession Reference*, *supra* note 90 in Chapter 2 and at pp 53 – 56 and associated footnotes.

⁵⁴ From a dynamic realist perspective, it represents a coherent underlying principle that is largely aspirational.

⁵⁵ *Supra* notes 3 – 5 and text in Chapter 1.

‘professional’ examinations of the independence of the Bar usually do not precisely answer the question of ‘what’ it is. In this respect, many modern concepts about Bar independence reflect the tensions and concerns that underlie the dynamic realist perspective.

For example, like the discussion about the constitutive tension between concepts and the rule of law, each general category of lawyer independence literature addresses basic conceptual issues related to the concept or theory, often in a way that elides into considerations about the principle in practical contexts.⁵⁶ The next subsections illustrate this point in the context of the ‘conditions’ of Bar independence.

7.2.2.1 ‘Conditions’ of Bar Independence

At the heart of most approaches to the independence of the Bar are attempts to describe its dimensions in terms of how they manifest within the justice system. In this sense, like judicial independence, a dominant approach focuses on the ‘conditions’ of lawyer independence. For example, American legal scholar Robert Gordon’s work, highlighted initially in Chapter Two,⁵⁷ considers the theoretical conditions of Bar independence. Gordon’s framework outlines four distinct conditions for lawyer independence. These are independence:

1. From outside regulation – the legal profession should have autonomy in the regulation of its own practices;
2. From client control – lawyers should have autonomy to decide which clients and causes to represent and how to conduct that representation;

⁵⁶ *Supra* notes 130 – 137 and associated text in Chapter 1.

⁵⁷ At note 186 in Chapter 2.

3. From political control – lawyers should be able to assert and pursue client interests free of external controls, especially influence and pressure from the government; and,
4. To pursue public purposes – lawyers may provide services and technical skills for hire but their personal and political convictions cannot be purchased or coerced – a part of the lawyer’s professional persona must be set aside for dedication to public purposes.⁵⁸

As previously noted, a closer practical consideration of Gordon’s categories demonstrates the difficulty of developing definitive characterizations of the conditions for the principle of Bar independence. As a broad principle, lawyers’ independence shares the conditionality that exists with respect to all principled approaches to law, which are balanced against practical considerations and context. In this respect, an examination of the literature in the context of Gordon’s categories shows that the meaning of the phrase within Canada has also been continuously changing.⁵⁹

To re-iterate, it is historically accurate to point out the distinctions between different kinds of legal professionals within the practice of law, even though the separate functions of Barrister and Solicitor have usually been treated as a unitary profession in Canada.⁶⁰ Such singular characterizations of legal professionals are becoming even more problematic with the development of new groups of non-lawyer legal advocates. Such groups include paralegals in Ontario, as highlighted in Chapter Five, who are now licensed and regulated by Ontario’s statutory lawyer regulator, the Law Society of Upper Canada.

⁵⁸ Robert Gordon, “The Independence of Lawyers” (1988) 68 Boston U L Rev 1 at 6 – 10 [Gordon, “Independence”].

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

In addition, as noted in Chapter Six, institutional independence of the Bar through regulation by self-governing bodies is qualified by the fact it is subject to several additional sources of authority.⁶¹ While ‘independence’ in Gordon’s first sense suggests a degree of professional self-regulation, some suggest that statutory self-regulation by a professional body is not a necessary part of the principle of Bar independence.⁶² Other commentators include ‘independence,’ not just from the state or clientele as in Gordon’s second and third senses, but from all non-lawyers and even, to some extent, from other lawyers.⁶³

The condition of independence from client control also addresses some of the risks presented by ‘client capture.’ Such concerns have been particularly articulated in contemporary times, in the context of tensions between public and private characterizations of the provision of legal services.⁶⁴ However, as illustrated throughout Chapter Three, concerns about lawyers’ identification with specific client values, but also with state and elite interests, has presented an historical challenge in the Canadian context that continues into modern times.

⁶¹ *Supra* note 58, Gordon, “Independence” and note 77 and associated text in Chapter 6.

⁶² For example, Alice Woolley, “Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation”, (2012) 45 UBC L Rev 145 [Woolley, “Rhetoric”].

⁶³ Noel Semple, “Core Values: Professionalism and Independence Theories in Lawyer Regulation”, May 8, 2013, available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262518, [Semple, “Professionalism”] at 4. As noted in Chapter 6, in this sense Bar ‘independence’ is not absolute and is subject to a number of limitations which includes, as noted *supra* note 77 in Chapter 6, the possibility of judicial review of the institutional decisions of Law Societies.

⁶⁴ Built on Stigler’s economic notions of regulatory capture, see “The Theory of Economic Regulation” 2 *Bell Journal of Economic Science*, no 3, 3 – 18, which suggests that regulation is acquired by the regulated group for its own benefit. See discussion of the capture critique in the context of modern lawyer regulation in Noel Semple *Legal Services Regulation at the Crossroads*, (Northampton: Edward Elgar, 2015), 116 – 132.

As one condition of independence of the Bar, independence from the client also has an internal and external dimension. On the one hand, independence from the client highlights the additional, potentially conflicting public responsibilities that lawyers have. On an external basis in the administration of justice, these duties may override the primary duty of loyalty to clients.⁶⁵ On an internal basis, it requires lawyers to treat personal views as neutral, in order to be available to best represent the interests of clients. In some cases, this aspect of independence from clients encourages lawyers to take on unpopular causes, such as those highlighted in Chapter Three, to perform their representational role under a democratic rule of law.⁶⁶

Last, the putative goal of pursuing public purposes, as noted in Gordon's fourth criterion,⁶⁷ has become an increasingly important aspect of both 'professionalism' and independence of the Bar in Canada. For the Bar, the pursuit of public purposes can be conceived and characterized on either individual or a group basis. At the individual level, pursuit of public purposes is captured in the idea that all lawyers are also public officials as 'officers of the court'. At the group level, the democratic representational function of the Bar can be described as a kind of "5th Estate."⁶⁸ Singly or in groups, lawyers are in

⁶⁵ As 'officers of the court' for example, *infra* note 67.

⁶⁶ For the narrower version of the claim, linking lawyer representational roles to developing constitutionalism *supra* W Wesley Pue, "Death Squads and 'Directions over Lunch'" [Pue, "Death Squads"] at 88, in *In the Public Interest*, "The Report and Research Papers of the Law Society of Upper Canada's Task Force on Rule of Law and Independence of the Bar", (Toronto: Irwin Law Inc, 2007) [LSUC, *Public Interest*].

⁶⁷ In Ontario, lawyers are 'officers of the court' under *supra* note 35 *CJA*. The characterization of the legal profession as a '5th estate' is from Peter Russell, *Judiciary*, *supra* note 207 in Chapter 2.

⁶⁸ *Ibid.*

some sense officials intended to serve the public interest. One of the most important ways that lawyers serve the public interest is by providing access to legal services and facilitating access to a publicly available court system.

However, as noted in Chapters Three and Six, as individuals or as a group lawyers have also always been subject to and demonstrated a wide range of less public values. In this respect, like many other aspects of law, there is an inherent indeterminacy in lawyer independence that requires contextualization to understand better how the balance between these competing values manifests in the legal system.

Despite constitutive tensions, gaps between principle and practicality, as well as a degree of definitional indeterminacy, the independence of the Bar is an important wellspring of lawyer professionalism. Historically, the obligations of lawyers to work independently on behalf of clients was captured in a ‘standard conception’ of the lawyer that was based on historical exemplars such as Henry Erskine or Lord Brougham.⁶⁹ Brougham’s famous dictum to act as a ‘zealous advocate’ is one whose meaning is still debated.⁷⁰ However, like some descriptions of judicial independence, accounts of lawyer independence often rely on these traditional narratives. While traditional explanations may be flawed by inaccuracies and a degree of mythological romanticism, they

⁶⁹ *Supra* notes 41 – 44 and 110, and associated text of Chapter 3.

⁷⁰ For example, under Ontario’s *Rules of Professional Conduct*, lawyers are described as ‘resolute’ rather than ‘zealous’ advocates, Law Society of Upper Canada, [*Rules*], available online: <<http://www.lsuc.on.ca/lawyer-conduct-rules/>>, at Chapter 5.1-1. For discussion of the distinction in the terms see Alice Woolley, “In Defence of Zealous Advocacy” in *Understanding Lawyers’ Ethics* (Markham: LexisNexis Canada, 2011) [Woolley, *Understanding Lawyer’s Ethics*] 33- 43.

nonetheless appear to continue to influence more modern professionalism approaches to independence of the Bar.⁷¹

As considered in Chapter Six, professionalism perspectives on lawyers include functional perspectives that highlight the historical role of individual lawyers and lawyers' professional bodies from alternate viewpoints of the public and private interest. Some theorists also adopt a sociological framework to consider professionalism, and independence of the Bar, as a matter of jurisdictional control in the defence of knowledge. At an institutional level, jurisdictional control approaches have been influential in understanding the changing role of the modern legal marketplace and its interactions with the institutions of an independent Bar.⁷² At an individual level, the principal thesis underlying jurisdictional control concepts, the defence of a domain of knowledge, has also been influential in developing new ideas about legal education, training and continuing professional development.⁷³

Like studies of judicial independence, modern lawyer professionalism literature about independence of the Bar are heavily influenced by Formal considerations in public law, the constitution, statute and jurisprudence. By contrast to jurisprudential considerations of judicial independence, Formal considerations of independence of the

⁷¹ *Supra* discussion in Chapter 3. In addition, a case in point is a recently released disciplinary decision in which both the majority and the dissent endorse a characterization of the lawyer as a 'zealous advocate', despite the fact the term 'civility' does not appear within Ontario's professional rules, *Groia v The Law Society of Upper Canada*, (2016) ONCA 47 [*Groia*] and *ibid*.

⁷² See, eg Noel Semple, *Legal Services Regulation at the Crossroads* (Northampton: Edward Elgar, 2015), particularly at Chapters 8, 9 and 10.

⁷³ *Supra* Chapter 6, at notes 49 - 51 and associated text.

Bar are less well developed.⁷⁴ Case law continues to adapt and refine the principle and practice of lawyer independence. This includes the recent recognition of one part of Bar independence, the duty of commitment to a client's cause, as a new principle of fundamental justice in Canada.⁷⁵

In the end, the principle of independence of the Bar has developed largely along a parallel track with the concept of judicial independence. Both aspects of the principle of independence have been mediated by historical, social and political context. While the principle of lawyer independence may be less jurisprudentially developed as compared to judicial independence, the emerging picture of the Bar, from the various perspectives highlighted above, shares many broad characteristics with the principle and practice of judicial independence. These characteristics are compared in more detail in the next section.

7.2.3 Comparison of Lawyer and Judge Independence

There are a number of similarities in the 'conditions' of independence for judges and lawyers. For example, as set out in **Part II** of this work, both aspects of the principle emerged recursively over a long period of time. Independence of the Judiciary and the Bar also appear to be based in multiple sources. Judge and lawyer independence are also influenced by things outside of the traditional accounts, which root both aspects of the principle in early British history. Independence in both contexts has an individual

⁷⁴ In the sense that while judicial independence has constitutional recognition, similar acknowledgement applies only to parts of the principle of an independent Bar.

⁷⁵ [2015] 1 SCR 401, 2015 SCC 7 (CanLII) [*Canada v FLSC*].

dimension, but also a similar organizational or institutional character. While self-regulation of the legal profession has long been a feature of independence of the Bar, the judiciary has also moved towards a similar sort of organizational model, that emphasizes similar aspects of self-regulation and ‘professionalism’.⁷⁶

For example, both the Bar and the bench in Canada rely on similar governance bodies, which though statutorily authorized administrative tribunals, still maintain a degree of independence from government. These tribunals, the Law Societies and Judicial Councils, both enforce professional and ethical obligations. Both judges and lawyers also share a kind of tenure that is managed through different, but similar forms of self-regulation through these tribunals. For judges, tenure can only be removed after investigations by a Judicial Council.⁷⁷ For lawyers, a ‘call’ to the Bar means that professional status can only be removed by a Law Society through disbarment, as part of its professional self-governance disciplinary function.

In addition to developing on parallel tracks in terms of function, independence for judges and lawyers has been both mutually informing and interdependent. The separate, but closely related role of independent judges and lawyers is a vital component in the establishment and maintenance of the independent adjudicative environment.⁷⁸ Last, both aspects of the principle of independence appear practically limited in context and

⁷⁶ *Supra* notes 97 and 82 and notes in Chapter 5 and associated text.

⁷⁷ More specifically, following an inquiry recommending removal, followed by a joint address in Parliament.

⁷⁸ Though the perspective of ‘independence’ as rooted in adversarial presentation may need to be modified to account for less dichotomous conflict resolution methods in the modern court system, like ADR.

they continue to be refined in response to the distinct Canadian legal and political environment.

For example, one distinct factor has been a new concern about the ethical ‘professionalism’ of individual lawyers and the role of the legal regulator in managing the profession.⁷⁹ Similarly there has also been increasing concern about the ethical behaviour of judges and the role of Judicial Councils in reviewing judicial conduct.⁸⁰ Like prospective lawyers, who must be of ‘good character,’ judges must remain of ‘good behaviour’ to maintain their tenure of office.

The specific conditions or dimensions, set out above, are moderately useful in describing independence. However the conditions of independence are also limited by their contextual dynamism. In this respect, the nature of independence for the Judiciary and the Bar reflects the primary constitutive tension of indeterminacy in law. For judges this indeterminacy helps to explain the variability of context as between different kinds of judicial officials, along with its continuing refinement in the Canadian context.

For the Bar, the apparent ‘fragmentation’ within the legal profession, including increased diversity and differentiated functions of different kinds of lawyers also present similar variability challenges in the context of the legal profession.⁸¹ Given this

⁷⁹ See discussion starting at section 6.5 in Chapter 6.

⁸⁰ Both judges and lawyers are potentially subject to both professional and extra-professional scrutiny of their behaviour.

⁸¹ *Supra* notes 64 – 66 and text in Chapter 3.

indeterminacy, current approaches are insufficient to capture the complexity and variability of the principle. Consequently, the next section, describes an alternative, proposed framework, for understanding ‘what is independence’ in the justice system.

7.2.4 Proposed Underlying Framework of Independence

Descriptions of the conditions of independence do not adequately describe what it is, or how or why it functions. However, in terms of ‘what’ it is, at the heart of modern independence scholarship is an acknowledgment that independence in all forms starts with the capacity for individual decision-making. Descriptions of ‘what’ independent decision-making is, based on conditional descriptions in the context of either lawyers or judges, suggests it is two separate, though related, principles. In my view, a better approach to understanding the principle of independence in the justice system, consistent with the approach presented in this work, is to use the described conditions of independence, for either judges or lawyers, as a further emergent analytic.

Conditional and other approaches to the principle of independence⁸² all touch on the practical context of independence.⁸³ Because of the differences in context, or in the practical applications of the overall principle of independence, the operation of independence for judges and lawyers is distinguishable and can be considered separately.

⁸² For example, interactional, institutional or sociological approaches, *supra* note 8, Rankin, “Access to Justice” at 9.

⁸³ There are some exceptions. For example, the principle of ‘impartiality’ may be regarded as primary constitutional value for judges, *supra* note 222 in Chapter 2. In the lawyer context, there is, as noted through Chapter 3, also some focus on the importance of the Bar’s representational function. As discussed, *infra*, in my opinion these aspects of independence are part of a broader principle of independence that underlies these contextual manifestations.

However, it can also be thought of as a single principle, comprising common parts, which together form an underlying framework for independence as it has developed in Canada. In this way, current conditional descriptions of the independence of the bench and Bar can further detail a more interrelated and unitary principle of independence.

This unified concept of independence comprises the three interrelated features of impartiality, neutrality and autonomy. The concept of independence emerges differently in context, but relies on all three of these distinguishable aspects, albeit in the different legal, social and political environments. Though these aspects of the principle have grown and developed in different environments, they are united by the interdependent relationship between judges and lawyers in the legal system. A brief consideration of these three component parts of the underlying framework of independence is set out below.

7.2.4.1 Impartiality

For both judges and lawyers impartiality is an essential external aspect of the principle of independence. Few would argue that it is not amongst the most important attributes for a judicial decision-maker.⁸⁴ Based on their traditional role, judges must hold legal arguments and evidence presented in court in suspension through the course of legal proceedings.⁸⁵ To do otherwise, judges risk being, or even just appearing to be, biased towards a particular viewpoint. A judge must be so careful to remain unbiased that

⁸⁴ Though some disagree, *supra* discussion in note 225 in Chapter 2.

⁸⁵ As in the British common law tradition.

they must also be prepared to judge what might to them be an unknown, or unconscious, bias as against the standard of what a reasonable person might perceive.⁸⁶ In such matters the value of impartiality is a vital component of the reality and perception of judicial independence.⁸⁷

Independence of the Bar is not usually characterized by its impartiality.⁸⁸ More usually, lawyers are generally expected to act in highly partial ways, ‘zealously’ or ‘resolutely’ in favour of their clients’ interests.⁸⁹ However, towards the law, and the legal merits of any particular interpretation of any legal argument, the mindset of impartiality is also an important external aspect of independence of the Bar. Broadly speaking, there are a number of ways in which lawyers must adopt an impartial mindset.

For example, from a professionalism perspective, the impartiality of individual lawyers means they must assess legal merits and advise clients, but also candidly provide confidential and un-conflicted advice as to the legal risk of particular legal interpretations or proposed courses of litigation.⁹⁰ Lawyers must have a similar capacity as judges to hold in suspension alternative legal viewpoints, while gathering facts and evidence and

⁸⁶ The test for bias is set out in common law jurisdictions in a line of Canadian case law starting with *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 364 at 395; *infra* note 96. In Quebec, there may be some differences in the test, since it is also codified in the province’s *Civil Code*, see discussion in Jula Hughes & Philip Bryden “From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification” (2016) Osgoode Hall LJ 53 (3) *forthcoming*, available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791528.

⁸⁷ *Ibid*, reasonable apprehension of conscious or unconscious bias, rather than actual bias is the test.

⁸⁸ *Supra*, note 70.

⁸⁹ In its modern formulation through the duty of commitment to a client’s cause, *supra* note 69.

⁹⁰ Alice Woolley, “Lawyers and the Rule of Law: Independence of the Bar, the Canadian Constitution and the Law Governing Lawyers, (2014) 24 Nat Jour of Const L 24.

determining applicable legal precedents. In this way lawyers are important sources of authority for law, to act not just as ‘hired guns’ but also as ‘trusted intermediaries’ to serve the potentially wide-ranging needs of clients.⁹¹

Lawyers who work in organizational settings provide further examples of how impartiality informs the operation of independence of the Bar. For example, government prosecutors must exercise their authority on behalf of the Crown, but in the public interest.⁹² In this respect, these lawyers play roles as “mini” ministers of justice, to act fairly in both civil and criminal matters.⁹³ Though the question of ‘who is the client’ for lawyers in organizational settings is disputed, all government lawyers must have some awareness of the larger obligation to act in the public interest.⁹⁴ Similarly, counsel in corporate organizations must also be cognizant of their obligations as independent

⁹¹ *Ibid*, see also Michele Leering, “Conceptualizing Reflective Practice for Legal Professionals” (2014), *Journal of Law and Social Policy*, 23 83-106, available online: <http://digitalcommons.osgoode.yorku.ca/jlsp/vol23/iss1/5>.

⁹¹ *Ibid*, at 87 – 90. Lawyers must act loyally and ‘resolutely’ for their clients, but also to provide ‘reasonable’ advice and to resist ‘unreasonable’ instructions from clients or otherwise face sanctions from the court, see, for example, *Best v Ranking* (2016) ONCA 492, *QL* [2016] OJ No 3284.

⁹² Allan C Hutchinson, “In the Public Interest: The Responsibilities and Rights of Government Lawyers” (2008) 46 *Osgoode Hall LJ* 105 at 106.

⁹³ The recent case from Ontario of *R v Hillis* (2016) ONSC 451, suggests for example, that while Crowns are entitled to act adversarially in Court proceedings, some aspects of their role, like the choice to call or not call witnesses, are subject to scrutiny by the Court on a fairness standard. Though most familiar in the criminal context, government lawyers must play this role in the context of civil proceedings as well. In my view this authority is consistent with, and derives from, the overall obligation of the Attorney General to act as Chief Law Officer of the Crown, a separately recognized constitutional role, see Kent Roach “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law” (2005) 31 *Queen’s LJ* 598.

⁹⁴ See, *eg* “William H Simon, “Whom (or What) Does the Organization’s Lawyer Represent? An Anatomy of Intra-client Conflict” (2003) 91 *Cal Law Rev* 57; Adam Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33 *Dal L J* 1.

lawyers to act and provide impartial advice in the best interests of their client corporation.⁹⁵

Ultimately, impartiality is an important external characteristic of independence for both judges and lawyers. However, impartiality interacts with other features of the principle. The second feature of the underlying framework of independence, neutrality is a characteristic that is primarily internal to judicial and lawyer decision-making and is examined in the next section.

7.2.4.2 Neutrality

A second requirement of independent decision-making is neutrality. While impartiality, described above, can be described as external to legal decision-makers, neutrality is best thought of as an internal feature of independence. Impartiality requires that decision-makers maintain an open mind to suspend their conclusions about the application of the law to certain external circumstances. By contrast, neutrality requires that the individual decision-maker only permit their own knowledge, experience, or values to affect a legal decision in a limited set of qualified ways.⁹⁶

⁹⁵ In such instances, the interests of shareholders or a Board of Directors may diverge from the organization. Concerns about ‘client capture’ for in-house counsel has been a recursive concern in the Canadian legal profession since at least the late 1800’s, *supra* note 159 in Chapter 3 and note 64.

⁹⁶ Though the language of ‘judicial bias’ is often employed generally as an antonym for judicial impartiality, I utilize the term in this technical narrower and internal sense to distinguish it conceptually and practically.

The principle of neutrality is also a central aspect in the doctrine of judicial notice.⁹⁷ The concept of judicial notice means judges must only consider evidence, facts and law presented within a proceeding in making determinations.⁹⁸ For judges this neutrality aspect of independence is perhaps best exemplified by its connection to the law and conventions to determine potential judicial biases. Where a judicial decision-maker uses outside facts or law to influence their determination in a matter over which they are presiding judicially, it can lead to a real or perceived bias that may disqualify a judge from hearing and deciding a matter.⁹⁹ This limitation reinforces their neutral stance and bolsters the likelihood of external impartiality by ensuring that specific personal views, internal to the decision-maker, do not affect receipt of evidence, argument or ultimately, the facility for legal reasoning.

The underlying characteristic of neutrality also plays a seminal role in the judicial institutional function. Conventionally, judges refrain from publicly commenting on public affairs.¹⁰⁰ This refrain is particularly important to support the appearance of judicial neutrality *vis-a-vis* the state.¹⁰¹ The analysis presented in this work supports the

⁹⁷ The classic statement is that “the judge is not to use from the bench, under the guise of judicial knowledge, that which he knows only as an individual observer outside of court” in *Wigmore on Evidence*, 3rd ed (Boston: Little, Brown & Co, 1981), vol IX, para 2569.

⁹⁸ Though venerable, the principle itself is not absolute and like other aspects of law from a dynamic realist perspective has had to be refined in response to modern concerns in the justice system, see *eg* Jeffrey Bellin & Andrew Guthrie Ferguson, “Trial By Google: Judicial Notice in the Information Age” (2014) 108 *Northwestern Law Rev* 1137. More generally, technology has had a significant impact on other aspects of the judicial function as well, see, *eg* Karen Eltis “The Impact of Technology on Courts and Judicial Ethics: An Overview” in *infra* note 102, Dodek & Sossin, *Judicial Independence*, at 337 – 377.

⁹⁹ The test for judicial bias rests on a line of Canadian cases, one of the most important of which is *Waywaku Indian Band v Canada* [2003] 2003 SCJ No 50, 2003 SCC 45; *supra* note 94.

¹⁰⁰ Though arguably an accepted convention as an aspect of the separation of the judiciary from the executive and legislative branches, in the Canadian context it is subject to exceptions or qualifications, as discussed throughout Chapter 4.

¹⁰¹ This enhances the reality and perception of independence as separate branch of government.

view that “judges exercise authority and power in a broader political context.”¹⁰²

Consequently, the ideal of neutral independence is that individual decision-makers and the judiciary as a whole are above direct partisanship as a separate branch of government.¹⁰³ But it also plays a more general role in the internal discouragement of judicial comment in other settings, outside the context of either regular court proceedings or publicly partisan political settings. This internal neutrality by the bench as a group serves a broader systemic function, which bolsters public confidence in an independent justice system. It also ensures that the integrity and power of judicial decision-making is seen to be reserved for their central role as adjudicative decision-makers in the formal legal system.

The counterpart to judicial bias for lawyers is their duty to avoid conflicting interests.¹⁰⁴ Conflicting interests are generally thought of as adverse legal associations with a current client. The current client’s legal interest is the focus in the developing body of Canadian lawyers’ conflicts of interest law.¹⁰⁵ However, the broader obligation also includes consideration of a wider range of interests internal to the lawyer, some of which are not legal. This includes a lawyer’s individual non-legal interests like financial, reputational, or personal concerns.¹⁰⁶ In such circumstances, where a real or potential

¹⁰² Janice Gross Stein, “Going Too Far, Too Fast: Judicial Independence and Political Judgment” in A Dodek and L Sossin eds, *Judicial Independence in Context*, (Irwin Law: Toronto, 2010), [Dodek & Sossin, “*Judicial Independence*”] at 582.

¹⁰³ *Ibid.*

¹⁰⁴ While there is also ‘conflicts’ for adjudicative officials, its primary importance in the context of this discussion is an aspect of judicial bias, in my opinion.

¹⁰⁵ Most recently in the Supreme Court decision in *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39.

¹⁰⁶ *Supra*, note 70, *Rules*.

conflict exists, a lawyer must take steps to ensure that they remain as neutral as possible in relation to their current client. However, they also must remain neutral to protect a larger set of individuals that includes past clients, prospective clients and even third parties.¹⁰⁷

For lawyers, the independence requirement of neutrality is also captured in the admonition that members of the Canadian Bar should not let their personal views and judgment about a client, or the subject matter of litigation, affect their representation. As described in Chapter Three, the individual lawyer's discretion to make a 'choice of client' is a longstanding feature in Canadian legal culture. As the dilemma of the 'last lawyer in town' suggests, however,¹⁰⁸ the Bar is expected to exercise this internal professional discretion in a neutral manner, in keeping with the public interest, so that clients may enjoy the right to counsel of their choice. This is one example, despite private characterizations of lawyers' behaviour, of the way the legal profession is expected to play a broad public role in a system operating under the democratic rule of law.¹⁰⁹

7.2.4.3 Autonomy

The last aspect of the underlying principle of independence is the separate concept of autonomy. Unlike external impartiality or internal neutrality, autonomy has both internal and external features.¹¹⁰ At the individual lawyer level, autonomous decision-

¹⁰⁷ *Ibid.*, at Rule 3.

¹⁰⁸ *Supra* section 3.3.2 and note 104 in Chapter 3.

¹⁰⁹ Typified by their designation in Canada as 'officers of the court' who have a set of obligations external to the lawyer-client relationship, *supra* note 67.

¹¹⁰ The question of 'autonomy' for judges is consequently best regarded as a related, but separate principle from independence in the judicial context.

making means that they can, within limits, autonomously do things in their professional role like determine the course of litigation. This includes common tasks such as implying consent to reveal confidential information to complete court filings, or to engage in undertakings on behalf of a client in legal proceedings.¹¹¹

At the individual lawyer level, autonomous decision-making touches on lawyer neutrality and is related to the question of autonomous ‘choice of client’. While as a matter of lawyer neutrality no member of the Bar should preclude someone from having counsel of their choice,¹¹² lawyers in Canada have a reserve right to refuse service.¹¹³ Like many such obligations and duties in law, the right is limited in that refusal may only appropriately occur when consistent with broader public responsibilities. In this case, a decision to refuse service should be based on legitimate internal assessments of things like individual capacity and competence to handle particular legal matters.¹¹⁴

Moreover, lawyers are responsible for internally balancing client interests against their broader and external obligations to the court and the administration of justice. In this instance, for example, lawyers may autonomously decide when their professional obligations not just permit, but actively require that they terminate the lawyer-client relationship.¹¹⁵ A further example of autonomy for lawyers in organizational settings, underlies the duty of candour and sometimes means that individual lawyers must step

¹¹¹ *Supra* note 70 *Rules* as discussed throughout Chapters 3 and 5 respectively.

¹¹² *Supra* note 226 in Chapter 2 and discussion at section 3.3.2 in Chapter 3.

¹¹³ There is no equivalent of the British ‘cab rank’ rule in Canada, *supra* p 80 in Chapter 3.

¹¹⁴ *Supra* note 70 *Rules*.

¹¹⁵ *Ibid*, at Chapter 3.7.

outside the usual constraints of the lawyer-client relationship.¹¹⁶ In such an instance, the public duty of lawyers is to ensure that their professional opinions are heard, and that client interests are protected, though such a direct obligation may be in conflict with usual understandings about commitment to the client, and the duties of confidentiality and privilege.¹¹⁷

At the institutional level for lawyers, the underlying idea of autonomy means that, despite their statutory licensing and organization under a governmentally recognized institution, the Bar also has external duties to the rule of law and the administration of justice. One of these obligations, that closely associates the autonomous function of the Bar and the bench, is to prudently avoid unmerited criticism of the court system and its judges.¹¹⁸ Since for their part the neutrality obligations of judges require them to refrain from commenting on public matters,¹¹⁹ it is a widely regarded responsibility of an autonomous and independent Bar to take up this task and to speak out in defence of the judiciary when necessary.¹²⁰ In recent years, the external scope of this autonomous obligation for the Bar in Canada has expanded to include institutional comments by Law Societies to defend the judiciary, both at home and abroad.¹²¹

¹¹⁶ For example, the *Smith v Jones* or ‘future harm’ exception to privilege permits lawyers to breach confidentiality and privilege where there is a risk to public safety, [1999] SCJ No 15.

¹¹⁷ *Ibid.* There are a set of similar obligations for lawyers in organizational settings, *supra* note 70, *Rules*, where *eg*, Chapter 3.2-8 that requires a lawyer to report ‘up the ladder’ where there may be fraud or dishonesty in a client organization.

¹¹⁸ *Supra* note 70, *Rules* for example, where Chapter 5.6 requires lawyers to ‘encourage respect for the administration of justice’.

¹¹⁹ *Supra* notes 100 – 103 and associated text.

¹²⁰ Which further reinforces the professional links between groups of judges and lawyers.

¹²¹ *Supra* note 58, Chapter 6 and discussion of international recognition of independence of the Bar.

In several ways the autonomous decision-making discretion of individual lawyers parallels the similar inherent discretion of autonomous judges within their court proceedings, highlighted earlier.¹²² At the individual judge level, this means that judges have broad authority to exceed what would otherwise be limiting legal concepts.¹²³ It permits them a wide authority to act “justly” in the circumstances,¹²⁴ and contrary to what would otherwise be established law. The autonomous decision-making authority of judges is also bolstered at the individual level by protecting judges from the errors they may make as part of their judicial function through the conventions of judicial immunity.¹²⁵

For their part, lawyers maintain a similar individual decision-making authority within the course of legal representation of clients. Though most lawyers do not enjoy a fully formed ‘judicial’ immunity, a similar concept insulates some lawyers, Crown Counsel, from disciplinary scrutiny for decisions related to their prosecutorial function.¹²⁶ Further a more general immunity is accorded to their professional status, which like

¹²² *Supra* notes 46 – 47 and in Chapter 6 at notes 80 – 81.

¹²³ For example, solicitor-client privilege may be the subject of scrutiny by the court.

¹²⁴ For example, under Rule 2 of Ontario *Rules of Civil Procedure* RRO 1990, Regulation 194 under *supra* note 35 *CJA*.

¹²⁵ *Supra* note 35.

¹²⁶ *Krieger v Law Society of Alberta* [2002] SCJ No 45, but only in relation to prosecutorial decisions made in bad faith or for an improper purpose. Under the *Law Society Act*, RSO c L 8, s 13 (3), the Ontario’s Attorney General is afforded immunity from Law Society discipline while exercising the functions of that office. Enacted in 1970, by the same Ontario AG in office at the time of the Landreville affair, *supra* discussion in Chapter 5, this explicit immunity provision for an AG is unique in Canada, and perhaps the Commonwealth, see John Edwards, “The Office of the Attorney General: New Levels of Public Expectations and Accountability” in Phillip C Stenning ed *Accountability for Criminal Justice: Selected Essays* (Toronto: U of T Press, 1995) 294 at 303. Though note the Yukon *Legal Profession Act*, RSY 2002, c 134, s 106 contains similar, though not equivalent language. The Law Society and its benchers in Ontario enjoys a similar immunity under s. 9 of the same legislation.

judges, can only be modified or removed after disciplinary proceedings before a statutorily authorized body.¹²⁷

At the institutional level, the autonomous decision-making authority of the courts allows them, within some limits in Canada, to determine the scope of their own jurisdiction and authority.¹²⁸ Also at the institutional level, the autonomous authority of administrative judges, like Chief Judges, is preserved over a recognized area of jurisdiction within the exclusive legal authority of the judicial branch of government.¹²⁹ It also serves as a legal justification for judicial Practice Directions, which form a kind of ‘soft law’ affecting practice and proceedings before the Court.¹³⁰

For lawyers at the institutional level, the autonomous decision-making authority of Law Societies means that they are accorded a wide discretion and deference in their management of the legal profession. This includes the authority for the Law Society to pursue sanctions against lawyers, for matters that may not be the substance of official

¹²⁷ Individual lawyers may fall below the standard of competence, but the test in the context of either tortious liability or professional misconduct may yield different results. Generally, disbarment, an authority exercised exclusively by the legal regulator, is intended to be permanent.

¹²⁸ This principle operates in Canada in tension with that of Parliamentary sovereignty in a manner described by some commentators as a ‘dialogue’, see Peter Hogg & Allison Bushnell, “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) Osgoode Hall LJ 35:1, 75.

¹²⁹ Principally over things like assignment and scheduling of judges, *supra MacKeigan* at note 44. However, in recent years the scope of this authority appears to have expanded to include protection of things like judicial library resources, judicial security, IT security *et al.* At Ontario’s Superior Court, the respective authority over the judicial and executive responsibilities in the administration of justice is set out in a *Memorandum of Understanding*, available online: < <http://www.ontariocourts.ca/scj/news/mou/>>.

¹³⁰ Though there remains some tension as to the appropriate scope of this authority, *supra Gillespie* at note 45. See also: Lorne Sossin, “Discretion Unbound: Reconciling the *Charter* and Soft Law” (2002) *Canadian Public Administration* vol 45 465 – 489; Lorne Sossin, “Constitutional Accommodation and the Rule(s) of the Courts” 42 *Alta LR* 607.

rules,¹³¹ but also for a wide range of extra-professional conduct.¹³² While Law Societies are regarded as the primary professional regulator in Canada, the connection between the principle of judicial and lawyer independence is further strengthened by the additional and complementary role that judiciary plays in the lawyer regulatory function.¹³³

In conclusion, for both lawyers and judges the answer to the question of ‘what is independence’ has been recursive and mediated by various factors in the context of the legal system, including simultaneity with political developments. Independence has been subject to various constitutive tensions, including indeterminacy, but also to a wide range of competing values. Based on a consideration of its ongoing development, and on the contextual ‘dimensions’ of either judicial or lawyer independence, the underlying framework is best thought of as incorporating the conditional elements of autonomy, neutrality and impartiality in decision-making as set out above.

As will be set out in the next section, the nature of legal decision-making in the context of the independence analysis in this work requires some further delineation. The next section problematizes the question of independence from the perspective of the additional but related inquiries of to whom, when and where it applies.

7.3 When, Where and to Whom Does Independence Apply?

¹³¹ *Law Society of British Columbia v Jabour*, [1982] 2 SCR 307.

¹³² Including, *inter alia*, things like public nudity and the mistreatment of animals, *supra* note 122 in Chapter 6. A recent Ontario Court of Appeal judgment described this disciplinary discretion of the Law Society as “unqualified” in law, *supra Groia*, at note 71 at para 102.

¹³³ And as the example of Judge Landreville suggests, discussed in Chapter 5, perhaps *vice versa*.

As set out in the previous section, the principle of independence is supported by separate, but interrelated ideas, about autonomy, neutrality and impartiality. While better defining ‘what’ independence is, the ‘what’ question is only imbued with contextual significance when overlaid with answers to several additional inquiries. While the three middle questions of ‘when,’ ‘where’ and ‘to whom’ independence applies would seem to be the most straightforward in Canada, the analysis in earlier Chapters suggests the answer is more complex than the simplicity of the questions might suggest. A summary and analysis of when, where and to whom the principle of independence applies is the focus of the next subsections.

7.3.1 When & Where?

Though traditional accounts support an argument that the roots of independence for both the Bar and the Bench extend back centuries, this work suggests instead that the principle has developed and continues to change over time. The origins of the idea of ‘independent’ actors may well have roots in basic human interactions from a sociological viewpoint.¹³⁴ They are also informed by other, older sources such as customary law and classical traditions.¹³⁵

¹³⁴ *Supra* Shapiro, *Courts*, note 155 Chapter 1.

¹³⁵ *Supra* notes 30 – 3 and discussion in Chapter 4.

However, from the perspective of the dominant common law tradition of independence,¹³⁶ the roots of the principle for lawyers and judges in independent courts lie largely in early British history. While the *Act of Settlement* was an important milestone for the emerging concept and practice of independence, many substantial elements of the principle arose before the passage of that legislation in 1701.¹³⁷ In this respect, the *Act of Settlement* was neither the beginning nor the end of the story in that many features of independence continued to develop for centuries afterwards.

The ‘when’ and ‘where’ questions also include an examination of the emergence of independence in the British colonial context. Even within the focus on the common law tradition, independence had multiple sources and influences,¹³⁸ some of which appear to have developed distinctly within the early Canadian social and political historical context. While some assert a close association between the advancement of progressive liberal values and independence, the recursive and simultaneous examples highlighted in this work suggests the connection is less reliable. While there is an ongoing influence and interaction with political factors, at various times in English and Canadian history, both lawyers and judges have frequently acted inconsistently with a view that suggests a highly consistent correlation with the advancement of liberal or more public values.

¹³⁶ This precludes specific examination of the potential differences in the principle from the perspective of civil law systems, particularly as it may affect the role of lawyers and judges in the province of Quebec’s civil legal regime.

¹³⁷ *Supra* note 23.

¹³⁸ One further source is Canada’s civil law tradition, which was discussed briefly in Chapters 3 & 4, though largely outside the common law tradition of independence, which is the focus of this work.

Many of the features underlying the principle of independence continued to develop into more modern Canadian history. This includes a significant re-focus after World War II on the role of the legal system to advance and defend individual rights. As the post-War focus on rights led to increased concerns about access to justice, this shift also centred attention on the role of the formal justice system, as well as the function of its independent officials. All of these factors significantly mediated new discourses about the role of independent judges, independent lawyers and their contribution to the creation and enhancement of an independent adjudicative environment. Most recently in terms of highlighting the separate but related development of the idea of independence of the Bar, this has included a new scholarly approach that has further articulated the public role of lawyers as ‘professionals.’¹³⁹

7.3.2 To Whom?

The straightforward answer to the basic question of ‘to whom,’ is that the principle of independence applies to judges and lawyers. However, my analysis suggests the answer to the question is more complex, and less determinate than the basic question would suggest. For example, independence of the Bar applies to members of what is colloquially known as the ‘Bar.’ While as an historical matter there have been distinctions between branches of the profession that remain relevant in non-Canadian jurisdictions, a formal separation between different kinds of lawyers does not exist in Canada.

¹³⁹ *Supra* Chapter 6.

However, there are very real practical differences between kinds of lawyers who comprise the Bar. Moreover, the expansion of non-lawyer legal professionals, like paralegals, presents a new challenge that has yet to be fully addressed.¹⁴⁰ Though recognized by the government, and regulated by provincial Law Societies, it remains to be seen to what extent the rights, privileges and obligations of the traditional Bar might be extended to new classes of emerging legal professionals, like paralegals in Ontario.¹⁴¹

While historically and traditionally considered in their individual capacity, recent changes in lawyer professionalism and regulation have also led to the start of a reconsideration of the focus on the individual in lawyer regulation. In this case, there have been some recent efforts in Canada to address lawyer organizations as the appropriate subject of lawyer regulation.¹⁴² Moreover, other changes in the profession that may affect the question of to whom independence of the Bar applies include proposals to develop a system of Alternative Business Services. While lawyers enjoy a near monopoly on the ownership of bodies that provide legal services, increasingly that older and traditional model of business organization is being challenged.¹⁴³

¹⁴⁰ For example, should paralegals and notaries, governed by the Law Societies in several provinces, now be included as members of the Bar? As a democratic matter of access to justice should additional classes of legal professionals like mediators, assessment officers, or dispute resolution officers also be accorded some form of professional legal recognition? These remain largely unresolved questions in Canadian law.

¹⁴¹ As they have been in other jurisdictions like British Columbia and Quebec, *supra* notes 64 - 66 in Chapter 3.

¹⁴² See, from Ontario, LSUC “Compliance-Based Entity Regulation Task Force” Report to Convocation May 26, 2016, available online: <http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2016/convocation_may_2016_cber.pdf> There have been similar initiatives in other Canadian jurisdictions, such as British Columbia.

¹⁴³ *Ibid.*

As noted in Chapter Three, the influence of the ‘law firm,’ owned and controlled by individual members of the Bar, has been a significant organizational characteristic of Canadian legal culture since the late 1800s. However, in more recent times, some have suggested that legal services should adopt a more market-oriented approach, which would permit non-lawyer ownership of legal entities that provide advice and information, in order to make legal services better available and accessible by the public.¹⁴⁴ Such suggestions appear to be consistent with the ongoing constitutive tension in law, and in the principle of independence, which has cycled between private and public considerations. On one hand, challenges to traditional lawyer monopolies on legal services may provide better access to legal services. On the other hand, such potential benefits are balanced against a range of concerns, including that the public character of legal services will diminish in the face of private interests, including competing commercial priorities.¹⁴⁵

There are also ambiguities in the question of ‘to whom’ as it applies to the principle of judicial independence. In the past, the principle of judicial independence was limited. In its earliest days, before the *Act of Settlement*, only certain aspects of the modern form of independence existed and these applied only to a few judicial officials. However, as the principle was established in the 1700s and was subjected to a variety of factors, including political developments, the principle became more fully formed and largely entrenched.

¹⁴⁴ *Ibid.*

¹⁴⁵ See, for example, the discussion of ‘balanced commercialism’ at note 38 in Chapter 6.

In Canada, for example, aspects of the original British legislation were included as provisions of its written constitution at Confederation in 1867.¹⁴⁶ Since that time, the practice and the principle has continued to develop and now includes a wide body of adjudicative officials.¹⁴⁷ In this respect, the principle of judicial independence remains conditional, but also has additional variability in its practical applications, depending on the kind of judicial official to which it applies.¹⁴⁸

Subject to the qualifications set out above, independence for judges and lawyers operates in context on the basis of the underlying elements of impartiality, neutrality and autonomy. This summary of ‘when,’ ‘where’ and ‘to whom’ the principle of independence applies begs a further question that requires a little examination. In this respect, how does independence function as an underlying unitary principle for judges and lawyers within the legal system? In the next subsection, I answer this question by proposing that both lawyers and judges play a similar role to apply, protect and improve the law.

7.4 How Does Independence Function for Judges and Lawyers?

¹⁴⁶ 30 & 31 Victoria, c 3 (UK), as amended by *Constitution Act, 1982*, ss 96 – 101.

¹⁴⁷ *Supra*, note 40, *Remuneration Reference*.

¹⁴⁸ *Supra* note 28. An additional complexity is the potential application of judicial independence within Canada’s administrative law regime. While the autonomy of administrative tribunals is largely external to current understandings of ‘judicial’ independence, at least one court has noted that the constitutional protections for judicial independence should apply to an administrative tribunal, though in an appropriately modified way: *McKenzie v British Columbia (Minister of Public Safety and Solicitor General)*, [2006] BCJ No 2061 (BCSC), appeal to BCCA dismissed (as moot); appeal to SCC dismissed.

The principle of independence is practically operationalized under the rule of law through the justice system.¹⁴⁹ Earlier in this work, I presented practical examples of how the role and function of independent actors in the independent court system has been mediated within the Canadian administration of justice.¹⁵⁰ However, how these aspects manifest the underlying framework of independence require some further examination. That is, how does independence, and its component parts of impartiality, neutrality and autonomy, actually function?

There is potentially a full range of wide and narrow understandings of how independence works for lawyers and judges in the justice system. As discussed in Chapter Two, in the judicial context a narrow view is supported by the original formalist approaches and neo-formalist perspectives. This view suggests, for example, that it is the substantial role of judges to apply the law. This view has been challenged by legal realists old and new,¹⁵¹ who recognize additional factors, some external to law and the legal process, as important variables in the process of law and legal reasoning.¹⁵² This broader view includes a consideration of historical factors that continue to resound into modern times, the simultaneity of law and socio-political developments and events, and the mediation of the principle in the context of judges and lawyers in the modern justice system.

¹⁴⁹ Though there are numerous examples of independence outside the traditional legal system, courts remain a dominant focus, which in my opinion remains the touchstone for understanding how the broader justice system operates.

¹⁵⁰ *Supra* Chapter 5.

¹⁵¹ It may also be challenged by from the perspective of critical legal studies.

¹⁵² Though, at its most extreme, this viewpoint has the potential to de-value law and the legal process.

Between the narrow and wide possible approaches highlighted above are viewpoints that seek to balance the many possible factors that might be considered. Among the most important, reflected in the title of this work, are views that seek balance between the aspirational ideals or principles of law and the gritty specificity of its practical applications. One consideration within the judicial context that fits within this constitutive tension¹⁵³ between principle and practicality suggests that, while it is the ‘special obligation’ of the role of judges to apply the law, they are also functionally obligated to protect and improve it.¹⁵⁴ This description of how independence functions is consistent with the wider social and political role, for both judges and lawyers, sketched out throughout this analysis.

For judges, a very narrow understanding of the first functional obligation might suggest that how judges act independently is only through the application of law.¹⁵⁵ Even on its face though, this obligation would appear to include several collateral obligations.¹⁵⁶ For example, within the rule of law, the application of the law by an independent decision-maker requires them to assess that any particular law is valid, that

¹⁵³ These views are a summary and adaption of Leslie Green’s “Law and the Role of the Judge” *supra* note 7. Though this approach arguably fits within the dynamic realist framework, Professor Green is more usually associated in legal theory with a strain of positivist theorists.

¹⁵⁴ *Ibid*, such obligations are not principles of law, and do not arise from those principles, but are rooted in broader notions of the rule of law, at 10, while ‘special obligations’ are described at 10 – 14.

¹⁵⁵ *Ibid*, at 16. Green’s work in this article is an extended analysis of this position, presented by Michael S Moore, “Four Reflections on Law and Morality” (2007) 46 William & Mary L R 1523, at 1537 – 1538.

¹⁵⁶ *Ibid*, Green describes these as “families” of obligations.

their determination of facts to which the law is applied is accurate,¹⁵⁷ or that a legal determination or ruling is reasonably understandable.

Lawyers have a similar set of law-applying obligations. Before they are even lawyers by being ‘called to the Bar’ they must apply the law to themselves to determine their own moral character and fitness to practice.¹⁵⁸ On an ongoing basis, they must display the competence to assess their relative capacity to handle legal matters. As a principled matter, in terms of their function to represent clients, they must abide by their duty of candour, to give a forthright and realistic assessment of legal merits of any particular situation.¹⁵⁹ A good lawyer cannot only assess the relative theoretical merits of a case, but has the capacity to anticipate, produce and execute a successful advocacy strategy that might include a wide range of important factors outside of law.¹⁶⁰ Where necessary a lawyer also may have to apply the law to determine if and when their duties to clients may be superseded by their broader public obligations.¹⁶¹

¹⁵⁷ I say “accurate” rather than Green’s assertion of “correct”, *ibid*, since as I have earlier argued, *supra* note 35, judicial immunity anticipates that judges will make good faith mistakes, and therefore the obligation appears somewhat less than “correct”.

¹⁵⁸ *Supra* note 122 in chapter 6.

¹⁵⁹ In this way, they serve as a major source of legal authority for clients, who would potentially heed their advice and address the matter through an alternative to the judicial decision-making process, *supra* notes 227 in Chapter 2 and note 90 in Chapter 6. There are still only a few jurisprudential considerations of the scope of the duty of candour. One recent Ontario case, *Law Society of Upper Canada v Nguyen* 2015 ONSC (Div Ct) 7192, suggests the lawyer must disclose all material facts to a client and cannot presume a reasonable belief that the client knew such information beforehand.

¹⁶⁰ For example, Ontario’s professional *Rules*, *supra* note 70, include reference to legal matters that touch on a wide range of policy, financial, economic, social and other factors that may form part of a lawyers’ role.

¹⁶¹ For example, as officers of the court, *supra* note 67.

In terms of the second obligation, how judges perform their roles also includes a set of additional collateral duties to improve the law. As noted in Chapter Two, there are variety ways in which to assess, through coherence and correspondence with legal principles, how the rule of law practically emerges. One balanced, though potentially imprecise viewpoint,¹⁶² is that the term ‘rule of law’ describes justice systems that are in legally ‘good shape.’¹⁶³ In this case, judicial officials have an important role to maintain *en plein forme*, the ‘good shape’ of the law, through clarification and correction where necessary.

Similarly, the Bar is also required to ensure the overall integrity of the law,¹⁶⁴ through a broad series of functional mechanisms. These include improving the law and protecting the legal interests of clients by advancing ‘every argument,’ raising ‘fearlessly every issue’ to “obtain for the client the benefit of every remedy and defence authorized by law.”¹⁶⁵ As further examples, it also includes pointing out legal ambiguities and seeking favourable interpretations of the common law, statute and in constitutional litigation. At the institutional level, it includes participation in public interest litigation,¹⁶⁶

¹⁶² Reflecting the primary constitutive tension of indeterminacy in law, *supra* discussion in Chapter 2 starting at section 2.3.3.

¹⁶³ *Supra* note 140, Finnis *Natural Law*. Green, “Role of a Judge” *supra* note 7, relies on this description at 19.

¹⁶⁴ The importance of the principle of integrity as the interpretive principle for law and lawyers is reflected in the fact that recent amendments to Ontario’s professional *Rules*, *ibid*, have crafted ‘Integrity’ as a stand-alone rule (Chapter 2 of the *Rules*) that infuses all other professional obligations, *supra* note 66, ‘Professional Rules’.

¹⁶⁵ As cited in commentary to chapter 5.1-1 of Ontario’s *Rules*, *ibid*, which is an adoption of the modern jurisprudential description of a lawyer’s obligation from *Rondel v Worsely*, *supra* note 57 in Chapter 6.

¹⁶⁶ *Ibid*, particularly at chapter 5.6-1 and 5.6-2, and commentary of Ontario’s *Rules*.

as well as obligations to act in the best traditions of the profession, to defend rule of law, the justice system, and its judges.¹⁶⁷

The last functional obligation of independent judges is to seek to improve the law. For example, at the appellate level, judges seek to correct errors or engage in establishing new precedents under the system of *stare decisis*.¹⁶⁸ At the interpretational level, the obligation to improve the law is consistent with the dominant metaphor in Canadian law of the ‘living tree.’¹⁶⁹ Despite the traditional emphasis on separation of law, and lawyers and judges, from politics, at the institutional level the obligation to improve that law also captures the significant past and ongoing involvement of judges and lawyers in public policy in Canada. In particular, as a practical matter, a distinguishing feature of independence of the Bar in Canada has been the ongoing participation of lawyers in public matters and in politics.¹⁷⁰ The fact that Canadian lawyers have internalized their participations in the public sphere and in politics more generally is a distinguishing feature of independence of the Bar in this country.¹⁷¹

At the institutional level, the judiciary, Bar and the courts have also played a substantial role to improve the law. Perhaps the most notable of these improvements have occurred in respect of the federal nature of Canada. As noted in **Part II**, in several

¹⁶⁷ *Ibid.*

¹⁶⁸ See discussion of role of precedent in Chapter 2.

¹⁶⁹ *Supra* notes 225 and 25 in Chapters 3 and 4 respectively.

¹⁷⁰ *Supra* notes 97 – 99 in Chapter 3.

¹⁷¹ So much so that, notwithstanding its extra-professional character, the Law Society in Ontario has set out specific rules to govern the conduct of lawyers who hold public office, *supra* note 70, at chapter 7.4 of the Ontario’s *Rules*.

respects over a long period of time, independent judges and lawyers acting in independent courts have long been principal actors in mediating tensions between jurisdictions.¹⁷² This historical mediation has taken a modern form, through the substantial involvement of lawyers, courts and judges under the *Charter*,¹⁷³ in jurisdictional matters, but also to advance and defend individual rights. The result, from a dynamic realist perspective, is that judges, lawyers and the court system have all contributed significantly to the fabric of legal culture and politics throughout Canadian history.¹⁷⁴

In short, lawyers and judges operate independently in the Canadian justice system. Their independent roles require them to make impartial, neutral and autonomous legal decisions. In this respect, they work both as individuals and as organizational bodies within a formal legal system of courts, to apply, protect and improve the law. However, this description does not wholly account for the underlying purpose of the principle or the practice of independence. To examine the purpose of independence requires a consideration of why it exists, which is the focus of the last and final substantive section of this Chapter.

¹⁷² *Supra* Chapter 2.

¹⁷³ *Supra* note 8.

¹⁷⁴ As identified and described throughout Part II.

7.5 Why Independence?

The question of ‘why’ independence is often displaced in priority by the other questions, such as what and how.¹⁷⁵ Alternatively, the value of why, even if unarticulated may be presumed within the question of ‘what’ something is.¹⁷⁶ So, for example, **Part I** of this work described the dynamic realist perspective on what law is, or its concepts, and how concepts and practices interrelate, especially in the context of ideas whose importance to law are widely accepted, such as democratic rule of law and independence.¹⁷⁷ The analysis of these terms suggests they are freighted with constitutive tensions, and are best thought of as ideal aspirations in the nature of ‘principles.’¹⁷⁸ By contrast, the real applications of these principles, the focus of **Part II** of this work, provides emergent analytics to determine, or at least better describe, ‘what’ they are in practice.

To the extent that the ‘what’ question leads to a response that describes the principle of ‘independence,’ in Canada it appears to be highly qualified and reliant on a wide range of variables and conditions. As suggested earlier in this Chapter, the identification of emergent analytics serves as a basis to develop more holistic understandings of independence and its related concepts. Towards this end, this work has considered historical and historiographical factors, the interrelationship with political influences, including the role of institutions and public policy, as well as empirical

¹⁷⁵ *Supra* note 1, Webber, ‘Asking Why’, at 1.

¹⁷⁶ *Ibid.* See also Michael Oakeshott “What is Political Theory?”, in *What is History? And Other Essays*, ed Luke O’Sullivan (Charlottesville, VA: Imprint Academic, 2004), 391 – 402.

¹⁷⁷ *Supra* discussion of the constitutive tensions and indeterminacy of these terms in Chapter 2.

¹⁷⁸ *Supra* notes 108 – 109 in Chapter 2.

considerations. It also employs some of the more common tools of legal analysis, jurisprudential examinations, as well as considerations of statute and constitutional law, to develop analytics about what underlies the real manifestations of independence. Such holistic approaches take a broad view. This view balances wide and narrow approaches to important legal and non-legal variables in considering the nature of ‘independence’.

Inquiries about ‘what,’ ‘who,’ ‘where’ and ‘when’ to describe ‘independence’ are principally concerned with lawyers and judges. These judges and lawyers act impartially, with neutrality and autonomy to make decisions within the context of formal legal proceedings before the court system.¹⁷⁹ As argued in **Part II**, independence in the Canadian legal system has arisen from multiple sources and has been influenced by a range of factors and values. In this sense, the broad principle of independence presents a complex bundle of rights and obligations,¹⁸⁰ many of which overlap and interrelate to support a shifting set of values across the justice system.¹⁸¹ As examined more closely in Chapter Five, in modern times a primary normative value and answer to the question of ‘why’ independence has become access to justice. In this respect, while it may be necessary to start with other questions to understand the scope of the principle of

¹⁷⁹ Of course, this examination has deliberately limited the scope to focus on the court system, but such an analysis could also be applied to the broader legal system, including the substantial administrative law regime that exists in Canada.

¹⁸⁰ This description of judicial independence adopted from *supra* note 8, Rankin “Access to Justice”.

¹⁸¹ For example, ‘equality’ has become a concept that has also become more prominent, that is in part tied to the modern and perhaps aspirational notion that people stand before a justice system that is ‘blind’ to individual differences, *supra* Resnik J & Curtis D, *Representing Justice* (New Haven: Yale University Press, 2011) at 301 – 304.

independence, the contextually different aspects of the principle are united by a common purpose.

Why access as a ‘primary’ value underlying independence? In my view access to justice plays this role, instead of other, complementary or competing values for a few reasons. As noted in Chapter 2, there is some indeterminacy and interrelationship between the various terms used to describe important parts of law and the legal system. So for example, while there is conceptual uncertainty about what constitutes ‘rule of law’ a practical starting point, that has the flexible potential to cohere and correspond to different contexts, is that ‘rule of law’ exists where a legal system can be said to be in ‘good shape’. The Supreme Court has further identified ‘rule of law’ as one of the organizing principles of Canadian democracy.¹⁸² In this sense, the best understanding of ‘rule of law’ is as a broad principle, that overarchs other important concepts and practices, including independence.

Within the scope of my examination of independence in the justice system, access to justice generally precedes other possible values that might also be said to inform independence. Without the availability of the mechanism of the court system to address legal issues other important values, such as equality, dignity, individual autonomy, become secondary and more unavailable. If people do not have an available means to

¹⁸² More specifically, ‘constitutionalism and the rule of law’, *supra* note 90 at in Chapter 2, at paras 48, 70 – 78.

access an independent adjudicative forum in which to enforce and defend their rights, then these values become harder, perhaps in some cases impossible to achieve.

In this sense, in terms of access, the formal justice system of courts and judges and lawyers remains the most important touchstone for understanding the broader system of justice. In this respect, it is important that all inquiries about these terms do not lose sight of how they contribute to the machinery of an effective legal system. Ultimately, thorough analyses of principles like independence, and its relation to rule of law and access must consider how the various understandings of these principles actually operate in practice.

My presentation also suggests that some of the practical variables affecting independence have long historical roots and appear deeply embedded within Canadian legal and political culture. Moreover, some of the effects of these variables may not always be consistent with some of the public values underlying the justice system. At least some of these competing values may help explain why, in this examination of lawyer, judge and court independence, that parts of the modern legal system may be faltering in its primary purpose to provide access to justice.¹⁸³

Given my assertion that a primary justification for independence is access to justice, then the declining utilization of a publicly available legal system warrants substantial concern. At a minimum, the principle of independence is, in fact, inter-

¹⁸³ See Small Claims Court case study in Chapter 5.

dependent in that judges and lawyers must work together to realize the benefits of the principle within the court system. While there has been considerable study of judges, the role and function of the Bar is also vital to a more complete understanding of how independence operates. In this respect, lawyer independence continues to develop and is the source of emerging understandings about legal professionalism in Canada.¹⁸⁴

If, as earlier suggested, it is the main function of independent judges and lawyers to facilitate access by applying, protecting and improving the law through the court system, then more holistic effort must be employed to understand both ‘why independence,’ but also ‘why’ access to the court system may be declining. There have been many changes and adaptations of the principle and practice of independence in Canada in modern times. The principle of Bar independence, subject to further recent constitutional recognition, will also likely be further modified in the coming years.¹⁸⁵ However, despite its long history and conceptual development - legal refinements through jurisprudence, statutory, and procedural modifications - the worth of independence has to be measured by what it accomplishes in practice. While it is important to seek to better define legal concepts, like independence and its relation to both rule of law and access to justice, ultimately the purpose of such principles and practices, the answer to the question of ‘why’, must be a primary concern in their further development and application.

¹⁸⁴ *Supra* note 73.

¹⁸⁵ In particular, there are several appeals in a case dealing with individual rights and the public role of lawyers, the role of University legal education and the scope of authority for Law Societies to preclude admission to the practice of law, see, for example, *Trinity Western University v The Law Society of British Columbia* (2015) BSCS 2320. Given that it involves a significant issue of *Charter* rights and is the subject of litigation in several jurisdictions, the case appears likely headed to the Supreme Court of Canada.

7.6 Conclusion

This Chapter concludes the analysis of the principle and practice of independence in the Canadian justice system. This work has utilized a dynamic realist viewpoint and framework, which takes into account a wide range of factors including history, politics, public administration, empirical data and more common forms of legal analysis, through its consideration of jurisprudence and legislation. This wide range of methodological analytics provides a basis to flesh out this perspective, to provide a more holistic account of the development of the principle of independence, and its mediation within Canadian legal culture.

My analysis suggests that while ‘independence’ is an important term, it can best be understood by its interaction with related concepts about the rule of law and access to justice. This examination also suggests that law, legal concepts, the legal system, and the words and phrases used to describe these ideas are all subject to significant constitutive tensions. The most important of these tensions suggests a substantial degree of indeterminacy in legal principles and practices. In terms of the indeterminacy of ‘independence,’ the principle and practice developed from a wide range of sources, has been variable, and remains highly changeable as it has been mediated in the Canadian context.

The principle of independence of the Bar is one that has been subject to some scholarly consideration, but remains largely understudied. In the Canadian context, many accounts of Bar independence rely on traditional narratives about the development and operation of the principle that appear inaccurate, and often either exclude political considerations, or suggest a close association between law and the widespread promulgation of liberal democratic values. The dynamic realist perspective presented throughout this work suggests instead that independence is infused with a simultaneous political component, which has significantly affected the practice of independence for judges and lawyers and in the court system. Moreover, while access to justice has become a primary normative value underlying independence, the principle appears to continue to be affected by a range of less public values, including the promotion of private, state and elite interests.

While all these variables are important to understanding the principle, independence must also be understood in practice. If access to justice is a primary value underlying independence, then its function to facilitate access to the justice system must be objectively considered and assessed. In the case of the quantitative metrics and analysis presented in Chapter Five of this work, it appears that, despite ongoing refinement and development of the principle, its actual purpose is not being well realized within parts of the justice system.¹⁸⁶ That is, despite recognition and efforts to enhance to

¹⁸⁶ Similar sorts of observations seem to be emerging isomorphically in Canada. For example, concern about the actual performance of the justice system and the ambiguities inherent in its traditional terms of analysis have led to recent public calls for a ‘justice system report card’ that contains generally agreed upon metrics, see Perrin B, *et al* “Bridging Canada’s Justice Deficit Gap” (May 16, 2016) Macdonald-Laurier Institute, available online: <http://www.macdonaldlaurier.ca/bridging-canadas-justice-deficit-gap-mli-paper->

the role and function of judges and lawyers in independent courts, access to the justice system is declining.

In the last decade or so, there has been a renewed focus on the role of an independent Bar to act professionally. Professional examinations suggest that professional privileges, such as self-regulation, can be best justified through an ethical framework that preferences public values like access to justice under the democratic rule of law. Though there has been less consideration of the judiciary from this ‘professionalism’ perspective, many similar concerns raised by this literature also apply to the bench. To the extent that independence for the bench and the Bar is an inter-dependent and unitary principle, as this work concludes, changes to the independent function of lawyers and judges in independent courts must consider the interrelation between the contextual threads of independence. Ultimately, future changes should be fashioned with a view to better reinforcing not only independence, but also rule of law and access to justice.

[by-benjamin-perrin-richard-audas-and-sarah-peloquin-ladany/](#), which was also noted in the preface to Chapter 2 of this work.

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