DECISION
OF THE
INQUIRY COMMITTEE

UNDER SUBSECTIONS 63(2) AND 63(3) OF THE *JUDGES ACT* IN RELATION TO MR. JUSTICE F.L. GRATTON OF THE ONTARIO COURT OF JUSTICE (GENERAL DIVISION)

RE: CONSTITUTIONAL QUESTIONS WITH RESPECT TO THE JURISDICTION OF THE CANADIAN JUDICIAL COUNCIL AND THE INQUIRY COMMITTEE

OTTAWA, ONTARIO

RELEASED
FEBRUARY, 1994

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Chief Justice of Saskatchewan
(Chair)

The Honourable B. Hewak
Chief Justice of the Court
of Queen's Bench of Manitoba
(Member)

The Honourable L.A. Poitras
Chief Justice of the Superior
Court of Quebec
(Member)

F.P. Kiteley
Barrister, Toronto
(Member)

G.L. Guénette, Q.C.
Barrister, Ottawa
(Member)

COUNSEL FOR MR. JUSTICE GRATTON:

Ian G. Scott, Q.C.
Martin J. Doane

INDEPENDENT COUNSEL:

Harvey Yarosky, Q.C.
Natalie Fochs Isaacs

COUNSEL FOR THE ATTORNEY GENERAL OF CANADA:

Brian R. Evernden

OUTLINE

1. INTRODUCTION

Background:

This proceeding arises pursuant to section 63(2) of the *Judges Act*[1] which provides that the Canadian Judicial Council may investigate any complaint or allegation made in respect of a judge of a superior court. Section 63(3) provides that this task may be carried out by an Inquiry Committee. This Inquiry Committee consists of three members of the Council designated by the Council, and two members of the Ontario Bar designated by the Minister of Justice pursuant to section 63(3) of the *Act*.

This investigation was initiated by Chief Justice Callaghan of the Ontario Court of Justice (General Division). In a letter to the Council dated September 28, 1992, he alleged that there was reason to believe that Mr. Justice Gratton is "incapacitated or disabled from the due execution of the office of judge by reason of age or infirmity". Pursuant to the By-Laws of the Council, a Panel of the Judicial Conduct Committee was established to consider this allegation. The Panel reported that there were "sufficient grounds to warrant an investigation by the Council pursuant to section 63(2) of the *Judges Act*". After considering the report of the Panel and Mr. Justice Gratton's written submissions, the Council concluded that there should be an investigation pursuant to section 63(2) of the *Act* and the Inquiry Committee was established for that purpose.

Mr. Harvey Yarosky Q.C. was retained by the Canadian Judicial Council (not by this Committee) to act as an "independent counsel". It is his function to gather, marshall and present any evidence relevant to the allegation. This Committee maintains an "arm's length" relationship with Independent Counsel. Counsel to the Committee is Professor Ed Ratushny, Q.C. Counsel on behalf of Mr. Justice Gratton is Mr. Ian G. Scott, Q.C. and Mr. Brian R. Evernden represents the Attorney General of Canada.

Independent Counsel advised the Committee at the outset that he has abandoned the allegation in relation to "age". The sole allegation is that Mr. Justice Gratton may have become incapacitated or disabled from the due execution of the office of judge by reason of infirmity within the meaning of section 65(2)(a) of the *Judges Act*.

Section 63(4) of the *Act* gives the Inquiry Committee broad powers to summon witnesses, compel testimony under oath, and to require the production of documents. The Committee must determine whether Mr. Justice Gratton has become incapacitated or disabled from the due execution of the office of judge by reason of infirmity. The full Council must then consider the findings of the Inquiry Committee, and report its own conclusions and submit the record of the inquiry to the Minister of Justice. The Council may recommend that the judge be removed from office.

Counsel for Mr. Justice Gratton gave notice to the Inquiry Committee of his intention to question the constitutional validity of the sections of the *Judges Act* which give rise to this investigation, namely, sections 63(2), 63(3), 65(1) and 65(2)(a). A Notice of Constitutional Question also was served on the Attorney General of Canada, and the attorneys general of all of the provinces and the territories. Only the Attorney General of Canada chose to intervene.

Constitutional Issues:

A hearing was held in Ottawa on November 1st, 2nd and 3rd, solely to deal with the constitutional issues. No evidence was led in relation to Mr. Justice Gratton's physical condition or to his capacity duly to execute the office of judge. The constitutional challenges relate to specific provisions of the *Judges Act* and can be summarized as follows:

(1) **Role of the Canadian Judicial Council:** Section 99 of the *Constitution Act, 1867*[2] provides only one procedure for the removal of a superior court judge, namely, a joint address by the House of Commons and the Senate. Sections 63(2) and (3) of the *Judges Act* provide a role for the Canadian Judicial Council (and an Inquiry Committee) in the investigation of complaints or allegations which could lead to such removal. Section 65(1) provides for a report of such an investigation by the Council to the Minister of Justice, and section 65(2) provides that the Council may recommend that a judge be removed from office. Since the role of the Council in this process is completely independent of Parliament, these provisions of the *Judges Act* are *ultra vires*. Therefore, the Council and the Inquiry Committee have no jurisdiction to proceed with this investigation in relation to Mr. Justice Gratton.

(2) **Nature of the Inquiry Committee:** Section 99 of the *Constitution Act, 1867* provides that members of a superior court must hold office "during good behaviour" until the age of seventy-five years, subject only to removal on a joint address by the House of Commons and the Senate. However, two members of the Ontario Bar have been appointed to the Inquiry Committee pursuant to section 63(3) of the *Judges Act*. Their mandate will expire when the Inquiry Committee submits its report. As a result, the Inquiry Committee is acting as a superior court while two of its members do not meet the constitutional requirements for a superior court judge and, therefore, section 63(3) is *ultra vires*. It follows that the Inquiry Committee has no jurisdiction to proceed with this investigation in relation to Mr. Justice Gratton.

(3) **Incapacity by Reason of Infirmity:** Section 99 of the *Constitution Act, 1867* guarantees the tenure of a superior court judge until the age of seventy-five during "good behaviour". Section 65(2)(a) of the *Judges Act* provides for a recommendation for removal based on incapacity duly to execute the office of judge by reason of "infirmity". But incapacity based on infirmity does not constitute a breach of "good behaviour" under section 99 of the *Constitution Act, 1867*. Therefore, section 65(2)(a) of the *Judges Act*, together with the other provisions which authorize an investigation on this ground are *ultra vires* and there is no jurisdiction to proceed with this investigation in relation to Mr. Justice Gratton.

Judicial Independence and Security of Tenure:

The fundamental issue in these proceedings is the nature and scope of the principle of judicial independence as it is reflected in section 99(1) of the *Constitution Act, 1867*. It provides:

> *... the Judges of the Superior Courts shall hold office during good behaviour but shall be removable by the Governor General on Address of the Senate and House of Commons.*

Professor Hogg describes the underlying principle in the following terms:

> *The independence of the judiciary is a value which is now deeply rooted in Canada and elsewhere in the common law world. It is inherent in the concept of adjudication, at least as understood in the western world, that the judge must not be an ally or supporter of one of the contending parties. Indeed, John Locke claimed that the adjudication of disputes by neutral judges was the most important benefit of civilization. The independence of the judge from the other branches of government is especially significant, because it provides an assurance that the state will be subjected to the rule of law. If the state could count on the courts to ratify all legislative and executive actions, even if unauthorized by law, the individual would have no protection against tyranny.*[3]

Section 99 is not the only constitutional protection of the independence of the judiciary. In the words of Lord Acton:

> *While legislative power in relation to the constitution maintenance, and organization of Provincial Courts of Civil Jurisdiction, including procedure in civil matters is confided to the Province, the independence of the judges is protected by provisions that the judges of the Superior, District and County Courts shall be appointed by the Governor-General (s. 96 of the British North America Act, 1867), that the judges of the Superior Courts shall hold office during good behaviour (s. 99), and that the salaries of the judges of the Superior, District, and County Courts shall be fixed and provided by the Parliament of Canada (s. 100). These are three principal pillars in the temple of justice, and they are not to be undermined.*[4]

However, as the Supreme Court of Canada has observed in *Valente v. The Queen*:

> *Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence for purposes of s.11(d) of the Charter.*[5]

Section 11(d) of the *Charter* protects the fundamental right to a fair and public hearing by an independent and impartial tribunal in a criminal trial. The fundamental importance of section 99(1) of the *Constitution Act, 1867* in the maintenance of the principle of judicial independence is beyond any doubt.

Relevance of English Experience and Precedent:

The wording of section 99(1) was derived from the English *Act of Settlement* (1701) which provides that:

> *... judges commissions be made **quamdiu se bene gesserint...**; but upon the address of both houses of Parliament it may be lawful to remove them.*[6]

The Latin phrase in this provision simply means "during good behaviour" so that there is no significant difference between this wording in the English *Act of Settlement* and that contained in section 99(1) of our *Constitution Act, 1867.* Professor Lederman has pointed out that:

> *Section 99 is obviously a close reproduction of the famous provision for tenure during good behaviour and removal by joint parliamentary address of the **Act of Settlement.***[7]

Professor Lederman observed that the wording of this and other provisions of the *Constitution Act, 1867,* disclose an intention "to reproduce superior courts in the image of the English central royal courts". This view is reinforced by the Preamble to the *Constitution Act, 1867* which expresses the desire for Canada to have:

> *... a Constitution similar in Principle to that of the United Kingdom.*

Professor Lederman concluded that the tenure prescribed in section 99 has "the same meaning as in England".

Apart from the need for independent adjudication between the individual and the State, Chief Justice Dickson, in the *Beauregard* case,[8] has identified two other reasons for the importance of the principle of judicial independence in Canada. First, the courts in a federal state have the responsibility of resolving disputes between two levels of government. Secondly, our courts must defend basic rights and liberties through the interpretation and application of our entrenched *Canadian Charter of Rights and Freedoms*. Neither of these conditions exists in the United Kingdom. It was suggested to the Committee that the presence of these conditions in Canada warrants a greater degree of protection for the principle of judicial independence than exists in Great Britain. It was also suggested that the doctrine of parliamentary supremacy, in the absence of the entrenchment of judicial independence in a written constitution, meant that the British Parliament could pass any law, at any time, which intruded upon the independence of the judiciary.

However, even though that might be technically possible, it ignores the force of the "unwritten" English constitution. Professor Lederman pointed out that:

> *We have the recent testimony of Dr. A.L. Goodhart that the English are not as much without a constitution as they profess to be. He gives four principles which he maintains are equally basic as first or original principles of the English Constitution.*[9]

Included amongst these "equally basic" principles is that of judicial independence. Indeed, in the *Beauregard* case, Chief Justice Dickson also described the strength of the principle of judicial independence in Great Britain:

> *In the United Kingdom the cornerstone of the constitutional system has been for centuries, and still is today, the principle of parliamentary supremacy. But it is not the only principle. The rule of law is another. Judicial independence is a third. .... Judicial authority in the United Kingdom has matured into a strong and effective means of ensuring that governmental power is exercised in accordance with law. Judicial independence is the essential prerequisite for this judicial authority. In the recent words of Lord Lane: "Few constitutional precepts are more generally accepted there in England, the land which boasts no written constitution, than the necessity for the judiciary to be secure from undue influence and autonomous within its own field."*[10]

Moreover, even in Canada, the unwritten aspects of our constitution are also important. As Professor Russell has stated:

> *To begin with, it is important to bear in mind that the Canadian constitution does not consist solely of the Constitution Acts, 1867 to 1982. As with virtually all constitutional democracies, the corpus of constitutional rules in Canada includes, in addition to the formal "written" Constitution, organic statutes, judicial decisions, and constitutional conventions. In the Canadian system, constitutional conventions play a particularly important role in regulating the relationships among the different branches of government -- including the relationship of the judiciary to the legislature and the executive. In this respect the Canadian Constitution draws heavily from the British constitutional tradition. "In Britain," wrote S.A. de Smith, "the independence of the Judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion".*
>
> *To some extent, de Smith's words continue to apply to Canada. Although there are sections of the formal Constitution that deal with judicial independence ... it would be a serious mistake to regard these provisions as the sole or even primary constitutional basis for judicial independence in Canada.*[11]

In view of the constitutionally entrenched principle of judicial independence, how is section 99(1) of the *Constitution Act, 1867* to be interpreted?

In Canada, there are very few precedents which are of assistance in analyzing the meaning of section 99(1) of the *Constitution Act, 1867*. Professor Gall[12] has pointed out that since 1867, there have been only four attempts at removal of any superior court judge. (Three of these occurred prior to 1875). In one case, the judge died before any steps were taken. In another, the judge resigned following a judicial inquiry. In the other two cases, the proceedings were not pursued, so that a superior court judge has never been removed from office in Canada as the result of a joint address pursuant to section 99(1). No doubt the mere threat of the removal power being invoked has led to resignations in the past, but any such instance provides no guidance in the interpretation of this section.

The Preamble to the *Constitution Act, 1867*; the wording of section 99(1) and its similarity to the corresponding provision in the English *Act of Settlement*; the importance of the "unwritten" constitution; and the absence of Canadian precedent; all of these factors lead to the desirability and, indeed, the necessity of weighing the precedents and experience in Great Britain in order to interpret section 99(1).

In the entire history of Great Britain, however, only one judge has been actually removed by the joint address process. There have been many more attempts than in Canada but the available precedents consist mostly of speeches in Parliament, often long in the past. The views of academic writers are of assistance, but they are also inconclusive on some of the issues which we face. Finally, we are conscious of the need to interpret section 99(1) in a manner which is consistent not only with the precedents in Great Britain and Canada since 1701, but also in a manner which is consistent with the needs and values of contemporary Canadian society.

2. ROLE OF THE CANADIAN JUDICIAL COUNCIL:

Legislative Scheme Under *Judges Act* and By-Laws:

The first constitutional challenge to the *Judges Act*, made by Mr. Justice Gratton, relates to the role which it gives to the Canadian Judicial Council (and an Inquiry Committee) in removal proceedings.

He contends that section 99(1) of the *Constitution Act, 1867* provides the exclusive avenue which is available for the removal of a superior court judge. In other words, it can be done only by Parliament and only by joint address. There is no constitutional authority for Parliament to enact legislation to superimpose the involvement of the Canadian Judicial Council on the removal process established by section 99. Therefore, it is argued, subsections 63(2) and 63(3) of the *Judges Act* are *ultra vires* and the Inquiry Committee has no jurisdiction to proceed with this investigation.

Part II of the *Judges Act* establishes the Canadian Judicial Council which consists of: The Chief Justice of Canada, who acts as the Chairman of the Council; the chief justices and associate chief justices of all of the superior courts and the Tax Court of Canada; and the senior judges of the Yukon Territory or the Northwest Territories on an alternating basis. The objects and powers of the Council are as follows:

> ***60.*** *(1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior and county courts and in the Tax Court of Canada.*
>
> *(2) In furtherance of its objects, the Council may*
>
> *(a) establish conferences of chief justices, associate chief justices, chief judges and associate chief judges;*
> *(b) establish seminars for the continuing education of judges;*
> *(c) make the inquiries and the investigation of complaints or allegations described in section 63; and*
> *(d) make the inquiries described in section 69.*

Section 61 authorizes the Council to make By-Laws for a number of purposes including the establishment of committees of the Council and the delegation of duties to such committees and "respecting the conduct of inquiries and investigations described in section 63".

Sections 63, 64 and 65 of the *Judges Act*, together with the By-Laws of the Council, made pursuant to section 61, establish a process that may culminate in a recommendation from the Canadian Judicial Council to the Minister of Justice that a superior court judge be removed from office. Of course, the Minister of Justice does not have the power of removal. Nor does the Governor in Council. The only method of actual removal is that established by section 99(1) of the *Constitution Act, 1867* which provides for removal "... by the Governor General on Address of the Senate and House of Commons". Therefore, assuming that the Minister of Justice agreed with a recommendation from the Canadian Judicial Council for the removal of a judge, the Minister would have to introduce a motion in Parliament, in accordance with this constitutional requirement, in order to pursue that judge's removal.

It is clear that in establishing a role for the Canadian Judicial Council in the removal process, Parliament had no intention of eliminating its own role. Section 71 of the *Judges Act* provides that:

> ***71.*** *Nothing in, or done or omitted to be done under authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those sections.*

Thus the role of the Canadian Judicial Council in the removal process, which has been established by the *Judges Act* and the corresponding By-Laws of the Council, involves a preliminary stage that is additional to the Parliamentary removal process by address. Moreover, it would be open to Parliament simply to ignore this preliminary stage established by the *Judges Act* and proceed directly to removal in Parliament by joint address. Mr. Justice Gratton contends that there is no constitutional basis for Parliament to augment the process which has been established by section 99(1) of the *Constitution Act, 1867*, even if Parliament is free to ignore that process in any particular case.

There are two ways in which the inquiry process under the *Judges Act* may be initiated. The first is found in the following subsection:

> ***63.** (1) The Council shall, at the request of the Minister or the attorney general of a province commence an inquiry as to whether a judge of a superior or county court or of the Tax Court of Canada should be removed from office for any of the reasons set out in paragraph 65(2)(a) to (d).*

This avenue was invoked by the Attorney General of Nova Scotia in 1990 in relation to the judges of the Nova Scotia Court of Appeal who heard a Reference with respect to the conviction of Donald Marshall Jr. on an indictment for murder.

The second avenue is provided in the following subsection:

> *63(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior or county court or of the Tax Court of Canada.*

Whether an inquiry is generated by a request under section 63(1), or by a complaint or allegation under subsection (2), the conduct of the inquiry may be delegated under the subsection following:

> *63(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.*

The establishment of an inquiry occurs automatically where there is a request under subsection (1). However, where the inquiry arises out of a complaint pursuant to subsection (2), that complaint first must advance through the procedures established by the Council's By-Laws. This Inquiry Committee was created as a result of the complaint process pursuant to the second avenue, in section 63(2).

Article VIII of the By-Laws of the Canadian Judicial Council deals with judicial conduct. The following is a general description of the steps prescribed for dealing with complaints under this Article:

(1) Every complaint or allegation is received by the Executive Director and referred to the Chairman of the Judicial Conduct Committee. The Chairman may close the file, where the matter obviously is "trivial, vexatious or without substance". If these criteria are not met, the judge has an opportunity to comment on the complaint or allegation. The file may then be closed on the same grounds or if the matter is "clearly not serious enough to warrant removal".

(2) The Chairman may also cause "further inquiries" to be made. These are usually conducted by an independent counsel. If further inquiries are made, the judge who is the subject of the complaint must be provided with the gist of the allegations and evidence which arise out of those inquires and the opportunity to respond to them.

(3) If the Chairman does not close the file, it is referred to a Panel of the Judicial Conduct Committee. The Panel may decide that no investigation is warranted because the matter is "without substance" or "clearly not serious enough to warrant removal". Alternatively, the Panel may refer the matter to the Canadian Judicial Council with its report and conclusion that an investigation pursuant to section 63(2) of the *Judges Act* may be warranted.

(4) A copy of the Panel's report to the Council must be provided to the judge, who is entitled to make written and oral submissions to the Council. The Council then decides whether or not an investigation pursuant to section 63(2) of the *Judges Act* is warranted. If an investigation is found to be warranted, an Inquiry Committee is established pursuant to section 63(3).

All of these steps were taken in relation to the allegation regarding Mr. Justice Gratton with the exception of step two. The judges who formed the Panel of the Judicial Conduct Committee did not participate in the deliberations of the Council under step four. Nor did the members who were ultimately appointed to this Inquiry Committee.

The *Judges Act* establishes the powers of an Inquiry Committee as well as certain procedural requirements:

> *63.(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have*
>
> *(a) power to summon before it any person or witness and to require him to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and*

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

The requirement of procedural fairness is expressly provided:

64. *A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his own behalf.*

At the conclusion of its hearings, the Inquiry Committee must submit its report to the Canadian Judicial Council. The final responsibility of the Council during this preliminary stage is described in section 65:

65. *(1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.*

(2) Where in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

(a) age or infirmity,

(b) having been guilty of misconduct,

(c) having failed in the due execution of that office, or

(d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

[The ground of removal established by section 65(2)(a), "age or infirmity", is the target of Mr. Justice Gratton's third ground of constitutional challenge.]

The procedures established by the *Judges Act* and the Council's By-Laws provide a systematic process for dealing with complaints against federally appointed judges. Complaints or allegations which are serious, proceed through further stages and may result in a formal inquiry being conducted. The ***Annual Report 1991-1992*** of the Canadian Judicial Council devotes a chapter to "complaints". In the past five years the number of complaint files opened has risen steadily from 47 in 1987-1988 to 115 in 1991-1992. Most files are closed by the Chairman of the Judicial Conduct Committee at the first step. Often these complaints are with respect to the substance of a judge's decision and the Council does not purport to act as a "court of appeal". The Annual Report refers to other complaints alleging conflict of interest, unprofessional behaviour and racist and sexist comments.

In effect, Parliament has created a mechanism whereby any person in Canada may make a complaint about a federally-appointed judge to a judicial body. The informal investigation of such a complaint may lead to a formal inquiry under section 63 of the *Judges Act*. However, even during the preliminary steps leading to such an inquiry, the judge may have three opportunities to meet the allegation. This may be done in response to: the original complaint or allegation; the report of any further inquiries which might be made and; the report of the Panel of the Judicial Conduct Committee.

Constitutional Authority to Legislate Under s.99(1):

Mr. Justice Gratton contends that Parliament has no constitutional authority to establish such a process. It is alleged to be flawed because it permits any person to initiate the removal process and because it permits the Council to decide to investigate whether a judge should be removed from office without any direction from Parliament. It is argued that section 99(1) of the *Constitution Act, 1867* dictates that only Parliament may initiate the removal process and that any aspect of the removal process must be under the control of Parliament.

It was argued that section 99(1) of the *Constitution Act, 1867*, authorizes an "adjudicative" rather than a legislative function. In other words, it authorizes Parliament to remove a particular judge in a particular case. It does not authorize Parliament to pass legislation in relation to the removal of judges. This provision was contrasted with section 100 of the same *Act* which authorizes Parliament to legislate in relation to the salaries, allowances and pensions of judges.

No authority was cited which dealt with the specific question of whether section 99(1) provides authority for Parliament to legislate in relation to the removal of superior court judges. However, an analogy was drawn to section 96 which provides that the Governor in Council shall appoint the superior court judges.

An earlier version of the *Judges Act* contained a provision prohibiting federally-appointed judges from receiving remuneration from provincial governments for conducting commissions pursuant to provincial appointments. The constitutionality of this provision was considered by

the Ontario Court of Appeal in *Re Judges Act.*[13] Mr. Justice Gratton relies upon the following passage from the judgment of Chief Justice Meredith in support of his contention that section 96 provides no authority to legislate and, by analogy, neither does section 99(1):

> *It will be seen from these provisions that the appointment of the Judges mentioned in section 96 is to be made by the Governor-General, and that no authority is conferred upon the Parliament of Canada to legislate as to the appointment of Judges or their removal. Both of these matters rest with the Governor-General, but his power of removal can be exercised only on address of the Senate and House of Commons.*[14]

This passage is certainly *obiter* in relation to section 99. A further distinction also can be made since, unlike section 96, section 99 specifies a role for Parliament as well as for the Governor General.

Moreover, this passage is also *obiter* in relation to section 96. The basis for Chief Justice Meredith's judgment is not that Parliament may not legislate in relation to judicial appointments but that Parliament may not legislate in relation to a provincial field of jurisdiction. He specifically states that the disputed provision was "... within the exclusive legislative authority of the Provincial Legislature..." (p. 608) in relation to provincial superior court judges.

A provision such as section 3 of the current *Judges Act* falls into a different category. It provides that to be eligible for judicial appointment a person must be a lawyer "... of at least ten years standing at the bar of any province...". This provision falls directly and solely within the subject matter of section 96 i.e. appointment, and does not invade a provincial sphere of legislative authority.

Indeed, the other four judges did not even deal with the constitutional issue. They limited their judgments to a narrow issue of statutory interpretation. That issue involved whether the provision in question applied only to future provincial commissions or also to unexpired commissions which had been made prior to its enactment. None of these judgments makes any observations on the existence or scope of the legislative power under section 96.

A similar issue arose in the subsequent case of *Re Winnipeg & Cross et al.*[15] There the Manitoba Court of Appeal came to the same conclusion i.e. Parliament could not prevent federally-appointed judges from receiving provincial remuneration for performing provincially assigned duties. The basis for this result was not any inherent restriction on Parliament legislating in relation to judicial appointments. Rather, it was based on Parliament attempting to legislate in relation to an area of provincial jurisdiction.

Nevertheless, the judgments in this case also contain a number of *obiter* statements on the constitutional authority of Parliament to legislate in relation to judges. Mr. Justice Fullerton made reference to sections 96, 99 and 100 of what is now the *Constitution Act, 1867*, and stated:

> *There is nothing in these sections which enables Parliament to legislate in regard to superior court judges. Its power is limited to fixing and providing their salaries and recommending their removal.*[16]

In contrast, Mr. Justice Dennistoun stated:

> *If Parliament chooses to lay down in advance rules for the guidance of judges, to place limitations upon their lay activities, to declare that their time is to be devoted to the administration of justice, and not to the enhancement of their incomes by fees from other sources, it has, no doubt, power to do so.*
>
> *If a Judge chooses to disregard the warnings given, Parliament may then consider that steps should be taken to call attention to his lapse from "good behaviour" and act accordingly.*[17]

Of course, he did not say that such provisions should be permitted to extend to matters within provincial jurisdiction.

Mr. Justice Prendergast was of the view that section 99 (as well as the "peace, order and good government") power provided Parliament with legislative authority:

> *Parliament, I believe, derives those powers, as well from s. 91 of the* ***B.N.A. Act*** *entrusting it with the making of laws for the good government of Canada, as from s. 99 providing that: -- "The Judges of the Superior Courts shall hold office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons".*
>
> *How very broadly the terms "Peace, Order and good Government" in the main part of s. 91 should be interpreted, is shown by the fact that, as there declared, the matters of jurisdiction set forth in the twenty-nine subsections which it contains, are but an elaboration on those terms, and I should think that if the matters thereafter set forth under the title "Judicature" were not included expressly in s. 91, it was for the sole reason that the special and more elaborate treatment which they called for required that this be done in a separate division of the Act.*
>
> *With respect to s. 99, the Governor General who pronounces the removal of a Judge, and the Senate and Commons who recommend such removal, are the same powers which in concurrent action as the Parliament of Canada, have passed the* ***Judges Act****. In anticipation of their being required to exercise their separate and distinct functions under said s. 99, they have united in the passing of a statute setting forth beforehand their disapproval of certain things, expressed in the form of a prohibition.*[18]

Mr. Justice Trueman was of the same view and took direct issue with the view expressed by Chief Justice Meredith in *Re Judges Act*:

> *Meredith, C.J.O., considered that the validity of the section was involved, and held it to be ultra vires, on the ground that the only legislative authority conferred on the Parliament of Canada is to fix and provide for the salaries, allowances and pensions of the Judges mentioned in s. 100 of the B.N.A. Act. I am obliged to say, but with the greatest deference, that this opinion is unconvincing. It is preoccupied, it seems to me, with a single and narrow consideration which leaves unconsidered the limitation imposed by ss. 96, 99 & 100 to the Provincial power, and the scheme of judicature which they establish, or that what by reason thereof is not assigned to the Province belongs to the Dominion.*[19]

He concluded, in dissent, that the impugned section did not fall within the sphere of provincial constitutional jurisdiction and held that it was valid.

A more recent and direct *obiter* statement was made by Mr. Justice La Forest in the case of *MacKeigan v. Hickman* where he stated:

> *The judicature provisions in Part VII of the Constitution Act, 1867 provide the constitutional underpinnings for the independence of the judiciary; the classic discussion of these provisions is of course that of Professor W. R. Lederman.... These provisions comprise a virtual code governing the constitutional status of the superior courts, and it is significant that all the powers relating to them are at the federal level, whether it be appointment (s. 96), tenure during good behaviour until 75 with the power of removal provided at the highest level (s. 99), and the fixing of salaries, allowances and pensions by Parliament (s. 100). In my view, the status and independence, and judicial functions of these judges thereby fall outside provincial competence, though a province may, of course, legislate in respect of their purely administrative functions under its power to legislate respecting the administration of justice (s. 92(14), Constitution Act, 1867).*
>
> *In speaking of the judicature provisions of the Constitution Act, 1867 as a code, I do not mean to suggest that there is no constitutional room for mechanisms for dealing with inquiries or complaints relating to the performance of judicial functions that are either not sufficiently serious as to warrant proceedings for removal, or which may precede or assist the conduct but not constitute an impediment to the proper functioning of such proceedings, or effectively amount to a substitute for them... I agree with Cory J. that there is need for credible complaint procedures to ensure continued public confidence in the administration of justice. In my view, since this matter appears, as I noted, to fall outside provincial competence so far as it affects the status, independence and judicial functions of superior court judges, the Federal Parliament may, under its general power under s. 91 of the Constitution Act, 1867, legislate in this area;*[20]

This passage comes very close to a general approval of the purpose of the provisions of the *Judges Act* which are under consideration. It is interesting to note that Mr. Justice La Forest has identified Parliament's authority to legislate in this area as falling within its residual power under section 91 of the *Constitution Act, 1867* to legislate in any areas which do not fall within provincial jurisdiction.

The article by Professor Lederman which was cited by Mr. Justice La Forest has been cited frequently by the Supreme Court of Canada with great deference (see, for example, *Beauregard* and *Valente*). On the specific issue of whether section 99(1) grants legislative authority, Professor Lederman was unequivocal:

> *... the cumulative effect of sections 96 to 100 inclusive is to assign by necessary implication to the federal parliament legislative power over the appointment, tenure and removal of provincial superior court judges, subject to the limitations contained in these sections themselves.*[21]

In the absence of direct judicial precedent, this must be considered to be a strong authority. It is true that Mr. Finkelstein has asserted that section 96 "gives no legislative power to Parliament".[22] However, he relies entirely upon *Re Judges Act* in this regard and we do not agree that this case supports his assertion.

Must Parliament Initiate Removal?

The question of whether any removal process must be **initiated** by Parliament arose in the case of *Landreville v. The Queen* (No. 2).[23] The Governor in Council had passed an Order in Council establishing a Royal Commission of Inquiry in 1966 to look into the activities of Mr. Justice Landreville prior to his appointment to the bench.

Although that inquiry was established pursuant to the *Inquiries Act*,[24] a creature of Parliament, the decision to inquire into the conduct of this particular judge was made, not by Parliament, but by the Governor in Council. The argument of the plaintiff is summarized in the Landreville case as follows:

> *The plaintiff says any inquiry into the conduct of a judge must be initiated or made only by the Senate and the House of Commons. ... The effect of s. 99 ... is, it is said, to ensure the independence of the Judges; independence is more than mere tenure and salary; it is freedom from harassment or inquisition. On those premises, the plaintiff contends that any investigatory process into the conduct or fitness of a Superior Court Judge must be initiated by the Senate and House of Commons; those bodies alone must ascertain the facts on which an address might be based; any preliminary processes must be authorized or carried out by them.*[25]

Mr. Justice Collier of the Federal Court, Trial Division ruled as follows:

> *I have concluded, but with doubt, that the Governor in Council, as distinguished from the Governor General or Parliament, can authorize an inquiry into the conduct of a Superior Court Judge.*[26]

This conclusion was reinforced by his view that, even if the Commission's report had been favourable to Mr. Justice Landreville, nothing would preclude Parliament from ignoring that report and proceeding under section 99 in any event.

Counsel for Mr. Justice Gratton appeared to concede that if Parliament had initiated the removal process under section 99, there would be no objection to it appointing an independent Commission of Inquiry to assist. In 1882, the House of Commons considered whether a Commission should be appointed to conduct the investigation into the conduct of Mr. Justice Wood of Manitoba.[27] This proposal was not adopted but this seems to reflect merely that the House chose not to proceed in this manner in that case. There was no suggestion that the House lacked constitutional authority to do so.

Independent counsel contended that if the Governor in Council is authorized to initiate an inquiry, as the Landreville case held, then legislation passed by Parliament specifically to authorize an inquiry by the Canadian Judicial Council rests on an even sounder constitutional foundation. He also contended that if Parliament could establish an independent inquiry after it had initiated proceedings, there is no reason why it could not do so as a preliminary stage. Counsel for Mr. Justice Gratton contended that this issue simply was wrongly decided in the Landreville case.

On balance, the recognized constitutional authority for Parliament to appoint an independent Commission in carrying out its responsibilities under section 99(1) of the *Constitution Act, 1867*, provides some support for the constitutional validity of the disputed provisions of the *Judges Act*. The Landreville decision is that of a trial court and it is expressed with some hesitation. Nevertheless, it does stand for the proposition that the Governor in Council, independently of Parliament, may initiate an inquiry into the conduct of a superior court judge under the authority of a federal statute. This also lends support to the constitutional power of Parliament to authorize a similar procedure as a preliminary stage to the exercise of its authority under section 99(1). The *proviso* that Parliament may not in any way restrict that authority is met by section 71 of the *Judges Act* which provides that nothing in that *Act* affects Parliament's power of removal in any way.

Delegation of Adjudicative Function?

Counsel for Mr. Justice Gratton also attacked the *Judges Act* provisions on another front. The gist of this argument is that the removal process established by section 99(1) is an *adjudicative* function. Although Parliament is primarily a legislative body, when it exercises its

authority under section 99(1), it must weigh evidence, hear argument and render a specific decision in a particular case. Since this is in the nature of a "judicial" function, it cannot be delegated. The principle that "s/he who decides must hear" is operative. Since Parliament is required to decide, it is said, only Parliament may hear and weigh the evidence and arguments.

In response, it was argued that there is no delegation of this function. Parliament has established statutory machinery for the systematic processing of complaints. There is a "screening" function which eliminates allegations which are not serious. If removal might be warranted, section 99(1) becomes operative and Parliament acts without any restriction imposed upon it by the steps taken under the *Judges Act*. Moreover, it is said, Parliament may choose simply to ignore the complaints process established by the *Judges Act* at any time. Parliament may choose to move directly under section 99(1) no matter what may or may not have transpired pursuant to the *Judges Act*.

There can be little doubt that, in the *Judges Act*, Parliament has delegated to the Canadian Judicial Council a responsibility to participate in the removal process which flows from section 99(1). The key issue, however, is whether Parliament has delegated its *adjudicative* function under that section. We are of the view that it has not done so. Quite independently of the Council's fact-finding, conclusion or recommendation, Parliament must still exercise its adjudicative function under section 99(1).

We agree with Mr. Justice Gratton's contention that the Council's function of "recommending" rather than "deciding" is not determinative of the issue. If Parliament were to rely on the Council's fact-finding, analysis or conclusion without doing or reaching its own, that would be another story. However, the entire process established under the *Judges Act* has one potential consequence in relation to removal under section 99(1) and that is to recommend to the Minister of Justice that a judge be removed from office. In order to satisfy section 99(1), Parliament still must frame the allegation, weigh the evidence, hear argument and make its own decision in relation to removal, quite independently of what may have occurred before the Council. In this respect, the machinery in the *Judges Act* may be somewhat analogous to that of the preliminary inquiry in relation to a criminal trial. There is a preliminary assessment of the case but the trial still must proceed in its entirety and independently of what may have occurred at the earlier stage.

Moreover, counsel for Mr. Justice Gratton has conceded that Parliament could appoint an independent Commission, once it has initiated proceedings against a judge. In the context of this delegation argument, it is difficult to see any distinction between the role of an independent Commission and that of the Council under the *Act*.

Is Practical Effect Abdication by Parliament?

Counsel for Mr. Justice Gratton also argued that in assessing the constitutional validity of the *Judges Act*, this Inquiry Committee should have regard to its practical consequences in diminishing judicial independence. Section 99(1) of the *Constitution Act, 1867* makes it difficult

for a superior court judge to be removed from office. The responsibility which it imposes on parliamentarians is onerous. This may partly explain why there have been so few judges removed by this method over the centuries. However, it is contended, the *Judges Act* now provides an "out". The parliamentarians may simply point to the prestige and expertise of the Canadian Judicial Council and "rubber stamp" its recommendation. Parliament is relieved from exercising this responsibility.

Related to this is the suggestion that, even if Parliament wanted to act independently, it would find it difficult not to defer to the views of the Council. After all, judges have much greater expertise in adjudication than do politicians. If the Council has heard the evidence and submissions and made its recommendation, are parliamentarians likely to disagree? If this logic is accepted, it is contended, then the responsibility given to Parliament by section 99(1) will have been effectively transferred to the judiciary.

There are two assumptions contained in these submissions. The first is that the tenure of judges will be weakened by the introduction of a judicial element in the removal process. The second is that, because of the role granted by the *Judges Act* to the Canadian Judicial Council, Parliament will abdicate its independent responsibility under section 99(1). We do not agree with either of these assumptions. We view the process established by the *Judges Act* as an enhancement of the independence of the judiciary. Moreover we have heard no compelling argument as to why we should assume that the operation of the provisions of the *Judges Act* will cause Parliament to refuse to carry out its responsibility under section 99(1) of the *Constitution Act, 1867.*

It was also argued on behalf of Mr. Justice Gratton that to give constitutional validity to the current provisions of the *Judges Act* would be to embark upon a "slippery slope". It would then be open for Parliament to amend the *Act*, to permit lay persons rather than chief justices and lawyers to assess judicial conduct at this preliminary stage. It is contended that this would be a highly undesirable threat to judicial independence. But the exercise by Parliament of its investigatory responsibilities already involves the participation of many "lay" parliamentarians. Also, we observe that the participation of lay persons on provincial judicial councils is increasing but need not comment on either the desirability or the constitutionality of such participation at the federal level. Nor do we find much assistance in speculating as to what amendments Parliament might make to the *Judges Act* in future.

Support for Judicial Role in Removal Process:

In contrast to these arguments, there are a number of considerations in support of the kind of process which has been established in the *Judges Act*. Parliament is a large body which is often partisan. These features may restrict its effectiveness in exercising an adjudicative function. Therefore, the introduction of a preliminary "screening" and "processing" stage may be desirable and of assistance to Parliament in ensuring that only serious cases come before it.

The public is entitled to an orderly process for dealing with complaints against superior court judges. This was recognized by Mr. Justice La Forest in the *Hickman* case, where he said:

> *I agree with Cory J. that there is need for credible complaint procedures to ensure continued public confidence in the administration of justice.*[28]

The effect of the provisions of the *Judges Act* is to establish such procedures without detracting from Parliament's authority under section 99(1).

It is widely recognized that the introduction of a judicial role in the removal process enhances rather than detracts from judicial independence. Professor Russell has observed that:

> *The requirement of an inquiry by judges or a judicial council as a pre-condition of removal meets the basic institutional requirement for judicial independence.*[29]

This has been recognized in international documents such as **The Universal Declaration on the Independence of Justice (1983)**, which provides:

> *2.33 (a) The proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected by the judiciary.*
>
> *(b) However, the power of removal may be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of a court or board as referred to in 2.33(a).*[30]

The International Bar Association **Code of Minimum Standards of Judicial Independence (1982)** provides:

> *4. (c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.*[31]

Professor de Smith has recommended that a judicial role be introduced into the removal process in Great Britain:

> *But the strictly legal safeguards of security of tenure are weak. The dearth of parliamentary addresses is attributable to the self-restraint of politicians and the circumspection maintained by the Judiciary. It would be more satisfactory to introduce a new procedure whereby a judge would be removable either for mental or physical incapacity or misbehaviour in pursuance of the report of a judicial tribunal of inquiry, and on no other ground. Such a procedure has been incorporated in a number of Commonwealth constitutions since 1957.*[32]

Professor Lederman has given his express approval of the process established by the *Judges Act*:

> *Adequate due process leading to removal for cause may take several forms. In this respect, we should note the recent advent of the Canadian Judicial Council, under which the federally-appointed judges as a group themselves apply due process and self-discipline concerning any of their own members against whom complaints may have been entered. This is a progressive step in safeguarding the independence of the judiciary that is quite in harmony with the concept of independence.*[33]

Finally, in his criticism of the Landreville inquiry, Professor Russell observed:

> *The creation of the Canadian Judicial Council in 1971 and the statutory role it now has in the removal process is a distinct improvement over the one-judge ad hoc inquiry. The advantage of its collegial judgment has already been experienced.... Some may fear that the injection of this large council of senior judges into the removal process will provide too strong a shield against the removal of judges. But here it should be borne in mind that under our constitution the right of a member of Parliament, including a minister, to initiate proceedings in Parliament to remove a superior court judge continues and could be exercised regardless of whether a report recommending removal has been received from the Canadian Judicial Council.*[34]

Thus, in contrast to the concerns expressed on behalf of Mr. Justice Gratton, Professor Russell raises the potential criticism that the *Judges Act* creates too great a barrier to the removal of a superior court justice. His conclusion is that the continued presence of Parliament's removal power in section 99(1) is a response to such criticism.

Conclusions on First Constitutional Issue:

In summary, this Inquiry Committee concludes that:

(a) Parliament has the legislative authority to enact sections 63(2) and 63(3) of the *Judges Act*. This authority is implicit in section 99(1) of the *Constitution Act, 1867*. It is reinforced by Parliament's residual power to legislate under section 91.

(b) Section 99(1) does not dictate that Parliament, exclusively, must initiate or directly control every process which could culminate in the removal of a superior court judge from office.

(c) Sections 63(2) and 63(3) of the *Judges Act* are not a delegation of Parliament's adjudicative function under section 99(1) of the *Constitution Act, 1867*. On the contrary Parliament expressly retains its entire role under section 99(1) by virtue

of section 71 of the *Judges Act*. Sections 63(2) and 63(3) simply envision a preliminary stage prior to Parliament exercising its own authority under section 99(1). Parliament is also completely free to by-pass that preliminary stage at any time. Moreover, the Minister is free to disregard any recommendation of the Council.

(d) Sections 63(2) and 63(3) do not have the practical consequence of causing Parliament to abdicate its responsibility under section 99(1). There is no evidence to support such an inference and we assume that, if and when required to do so, Parliament will exercise its constitutional responsibility under section 99(1) of the *Constitution Act, 1867.*

(e) There is respected opinion and sound policy reason for the introduction of a judicial element into the removal process for superior court judges in the manner in which Parliament has done that by enacting the *Judges Act*. This element should enhance rather than detract from the strength of the principle of judicial independence.

3. STATUS OF THE INQUIRY COMMITTEE: SUPERIOR COURT?

Improperly Constituted Superior Court?

The second ground of constitutional challenge relates to the status and constitution of this Inquiry Committee. Section 63(4) of the *Judges Act* provides that:

> *The Council or an Inquiry Committee making an inquiry or investigation under this section shall be deemed to be a superior court ...*

Mr. Justice Gratton contends that the purpose of a "deeming" clause is to cause something to be different from that which it might have been in the absence of the clause. As a result, in enacting this provision, Parliament has purported to create a superior court.

However, in doing so, it is said, Parliament has not respected the constitutional requirements necessary for the appointment of a superior court judge. Section 99 of the *Constitution Act, 1867* requires that every superior court judge hold office "during good behaviour" until the age of seventy-five unless removed from office pursuant to section 99(1). An inquiry committee is appointed on an *ad hoc* basis to deal with a specific case. Moreover, two of the members of this Inquiry Committee are not judges but members of the Bar of Ontario as permitted by section 63(3). They do not have the tenure of office which the other three members of the Committee possess. As a result, Mr. Justice Gratton's conduct is being assessed by a superior court but two of the members of that "court" are *ad hoc* appointees of the Minister of Justice. They do not have security of tenure but must rely on the Minister of Justice for any future appointments.

Counsel for Mr. Justice Gratton suggested three possible reasons why Parliament has chosen to "deem" an inquiry committee to be a superior court. These are:

a) to insulate it from judicial review by superior courts;
b) to grant it any inherent powers possessed by a superior court that are not specified in the *Judges Act*;
c) to provide its members with judicial immunity in relation to any conduct by them as members of the Inquiry Committee.

Whatever the reason may be, it is said, Parliament has created a superior court but it has not constituted that court in accordance with the requirements of the *Constitution Act, 1867.*

Conclusions on Second Constitutional Issue:

We do not agree that section 63(4) of the *Judges Act* has the effect of making this Inquiry Committee a superior court. While it may be "deemed" to be a superior court for any or for all three of the purposes suggested, an inquiry committee does not have the essential characteristics of a superior court. Parliament did not say that an inquiry committee is a court. The language of "deeming" suggests that Parliament is using a legal "fiction" in order to provide the committee with certain powers or characteristics. But this does not transform an inquiry committee into a court.

If Parliament had intended to make an inquiry committee a superior court, it would not have listed the powers of an inquiry committee: to summon witnesses, to require testimony on oath or on solemn affirmation, to compel production of documents, to enforce the attendance of witnesses. A superior court has all of these powers.

An inquiry committee does not adjudicate disputes between parties. It does not render a legally enforceable decision. It merely carries out an investigation. Nor does it have the jurisdiction of a superior court. An inquiry committee is authorized to deal with only the specific matter which is referred to it. In all of these circumstances, this Inquiry Committee is not a superior court and this second ground of constitutional challenge also must fail.

4. GROUNDS FOR REMOVAL: INFIRMITY

Infirmity not a Ground for Removal?

Section 99(1) of the *Constitution Act, 1867* provides that:

> *... the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.*

Mr. Justice Gratton contends that this provision establishes the sole ground for removal of a superior court judge prior to retirement. Since the condition of holding office is "good behaviour", the sole ground for removal is "misbehaviour".

Section 65(2) of the *Judges Act* provides that:

> *(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of*
>
> *(a) age or infirmity, ...*
>
> *the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.*

In view of section 99(1), it is contended, Parliament has no authority to enact such a provision since incapacity due to "infirmity" does not constitute "misbehaviour".

The only issue before us, is whether Parliament has the constitutional authority to remove a superior court judge because of incapacity, due to "infirmity". The Committee wishes to emphasize that the discussion of this constitutional issue is totally unrelated to Mr. Justice Gratton's actual physical condition or capacity to execute the office of judge. We have heard no evidence on that matter. Our determination of this preliminary and fundamental constitutional issue is based on the hypothetical supposition that a superior court judge has, in fact, "become incapacitated or disabled from the due execution of the office of judge by reason of ... infirmity". We are speaking of a permanent and not a temporary disability. If such a factual situation were established, could the Governor General, on Address of the Senate and House of Commons, remove such a judge from office?

Although the English *Act of Settlement* has been in force since 1701, there has been no authoritative interpretation of its scope. In a leading Canadian constitutional law treatise, Professor Peter Hogg states:

> *Nevertheless, the meaning of s. 99 of the Constitution Act, 1867 (and the similar language of the Act of Settlement) is not wholly free from doubt. **The question is whether s. 99 provides for one mode of removal or two.** It could be read as meaning that a judge may be removed only by joint parliamentary address and then only for bad behaviour. **But the section could also be read as meaning that a judge may be removed for bad behaviour by the government without the need for a joint parliamentary address, and may in addition be removed for any reason whatsoever (not necessarily involving bad behaviour) by a joint parliamentary address.** On principle, the former interpretation is preferable, because it is more apt to secure the independence of the judiciary, which is the purpose of the provision. **In fact no Canadian government has ever attempted to by-pass the joint address procedure;** and even the joint address procedure has never been*

> *carried to a conclusion, though it has been started on several occasions.*[35] [Emphasis added]

In a footnote to the second last sentence of this passage, Professor Hogg adds:

> *There is however an historical case for the latter view; see Lederman, ... who concludes that the removal by joint address is "additional to, and thus not exclusive of, the older prerogative type of removal without reference to Parliament".*[36]

These passages raise two aspects of section 99(1), namely: (a) Is removal by the Governor General on Address of the Senate and House of Commons the **only** procedure available for the removal of a superior court judge; and (b) Is "bad behaviour" the only ground upon which that procedure may be invoked.

Professor Hogg's statement of the question, reference to Canadian government practice and footnote reference, all suggest that he is primarily addressing the procedural issue. Nevertheless, he does express the view that to restrict the grounds of removal to "bad behaviour" would be to strengthen the principle of judicial independence. The passage is typical of many which are found in general Canadian sources which assume that the implication flowing from tenure during good behaviour is that removal is restricted to "misbehaviour". (See, for example, Heard[37], Mallory[38] and Cheffins[39]). They typically echo the observations of Lord Denning (as author rather than as judge) that:

> *... a judge of the High Court cannot be removed except for misconduct and, even then, there must be a petition from both Houses of Parliament for his removal.*[40]

Unfortunately, none of these authors provides any authority or analysis to support this view. The issue of total inability to function due to physical incapacity simply is not addressed.

Historically and at Common Law:

Professor Lederman's "classic" article provides the most detailed analysis available by a Canadian author. He points out that, prior to the *Act of Settlement*, there was frequent pressure applied by kings to influence judges of the common-law courts in rendering decisions which might affect royalty. Prior to the seventeenth century, judges were appointed during the king's good pleasure (*durante bene placito*). Such appointments could be terminated at any time at the whim of the king. However, appointments to the Exchequer Court were an exception and were made during good behaviour (*quamdiu se bene gesserint*):

> *As we shall see, the grantee during good behaviour could be removed from office at the instance of the grantor (the king) for breach of the condition of the grant, that is, for failure to conduct himself well in the office.*[41]

According to Professor Lederman, the practice of kings and queens, in arbitrarily dismissing judges, varied during different periods of the seventeenth century. During one period, all appointments were made during good behaviour. However:

> *The position steadily worsened for the courts, and so far indeed did James II carry dismissals that virtually all judges of ability and integrity were driven from the bench. Their replacements in judicial office 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. William III quickly dismissed the judicial lackeys of James II and restored the Commonwealth practice of issuing all judicial commissions during good behaviour.*[42]

Finally, the *Act of Settlement* came into force in 1701.

This *Act* introduced, for the first time, the power of removal upon joint parliamentary address. Prior to that time, "at pleasure" judges simply could be removed by the king or queen. What action could be taken against judges appointed during "good behaviour" who did not live up to the condition of their appointment? An appointment during good behaviour was a grant of office for life during good behaviour.

The proprietary nature of the legal conception of such an office is obvious from the following passage in the case of *Harcourt v. Fox*:

> *When an office is granted **quamdiu se bene gesserint**, it is a freehold, and to last during the parties' life. It is so even in the case of the King, whose grant shall be taken most strictly against himself. If the king grant an office **quamdiu se bene gesserint**, it is a freehold for life.*[43]

In Professor Lederman's words:

> *Such grants of offices were conceived to be in much the same category legally as grants of estates in land. The relatively modern notion of contract simply did not exist in these earlier times and thus played no part in the legal conception that was developed of the nature of judicial office.*[44]

Professor Lederman points out the feudal property nature of this concept and that the grantee of such an office could not be dispossessed so long as the conditions of the grant were observed.

The common law writ of *scire facias* was available to repeal the patent by which the office had been conferred. Professor Lederman relies almost entirely upon Todd for an explanation of the nature and scope of this writ:

> *The legal effect of the grant of an office during good behaviour is the creation of an estate for life in the office. Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour. But like any other conditional estate, it may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity. Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and, thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. When the office is granted for life, by letters patent, the forfeiture must be enforced by a scire facias. These principles apply to all offices, judicial or ministerial, that are held during good behaviour.*[45]

This passage is difficult to comprehend if a breach of good behaviour is interpreted as being synonymous with "misbehaviour". However, the passage might also be interpreted as dealing with two separate situations: (a) the office is "terminable" when the grantee is incapacitated by mental or physical infirmity or when the grantee is otherwise incapable of fulfilling the office (breach of good behaviour); (b) the office may be "forfeited" for "misbehaviour": the examples provided all contain an element of deliberate wrongdoing.

Professor Lederman does not analyze this passage but does offer the following observation:

> *It is noteworthy that a grantee can fail in "good behaviour", that is to say, can fail to "well demean himself in his office", by "incapacity from mental or bodily infirmity" as well as by the wilful means mentioned.*[46]

The implication is that "good behaviour" is not met or is contravened by a failure to perform as well as by misconduct. Professor Shetreet points out that, when the power of removal for misbehaviour is exercised by *scire facias*:

> *... the tenure of office is not thereby abridged but is forfeited and declared vacant for non-performance of the condition on which it was originally conferred.*[47]

If there is a distinction between "termination" based on incapacity due to infirmity and "forfeiture" based on misbehaviour, the implication is that *scire facias* is only required for the latter.

These distinctions were not the clear focus of any of the arguments before us and we do not regard them as determinative of the issues before us. The concept of an office as property has little relevance to Canada today. Shetreet points out that the writ of *scire facias* has never been employed for removing a superior court judge, although it has resulted in the forfeiture of other offices held during good behaviour. All three counsel before this Inquiry Committee agree that this writ has fallen into disuse, as a method of removal, and is no longer available in Canada. The sole avenue of removal is section 99(1).

Nevertheless Todd's observations are of more than passing interest since, whatever the passage means, it clearly states that, at common law, incapacity due to infirmity could result in the termination of an office held during good behaviour. Moreover, it suggests that this ground is quite separate from that of "misbehaviour". In this context, comments to the effect that an office-holder during good behaviour "shall demean himself well in it" or shall "execute it diligently and faithfully"[48] may take on an additional dimension. The suggestion is that there is an inherent condition that an office-holder, in fact, fulfill the office. In other words the absence of "misbehaviour" may be an additional condition of office and not the only one. This approach is discussed further under the heading "Non-Behaviour".

Interpretation of Section 99(1):

Thus, the historical context of the judicial tenure provision in the *Act of Settlement* was that judicial office was held either "at pleasure" or "during good behaviour". The only way to maintain the integrity of the common law courts was to establish "good behaviour" tenure for all of these judges. Otherwise, "at pleasure" appointees could be controlled by the king through arbitrary dismissal. The *Act of Settlement* established "good behaviour" as the tenure of office for judges. At common law, this meant an office for the lifetime of the judge so long as he shall well demean himself in office.

The introduction of this guarantee of "good behaviour" tenure did not take away the powers of the Crown to remove a judge by writ of *scire facias*. Rather it established that, in every case, the Crown would have to seek removal in the courts on the basis of the grounds established at common law. What was abolished, was the arbitrary power of the Crown to dismiss judges because they merely held office at the "pleasure" of the king or queen, in the absence of express wording to the contrary.

This distinction between "at pleasure" and tenured appointments has been recognized in section 23 of the *Interpretation Act* which provides:

> *(1) Every public officer ... is deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment, commission or instrument of appointment.*[49]

Moreover, even if a statute attaches a term of years to an office, in the absence of specific wording to the contrary, the office still will be considered to be held at pleasure. In other words, the mere statement that an appointment is for a term of ten years does not preclude the government from dismissing the incumbent, at will, at any time during the term. Unless the words "during good behaviour" are present, the appointment is "at pleasure".[50]

What, then, is the proper interpretation of section 99(1) of the *Constitution Act, 1867*, or of the corresponding provision in the *Act of Settlement*? What is the nature of the tenure which these provisions establish? More specifically, do they authorize Parliament to remove a judge because of incapacity to judge due to mental or physical infirmity?

The most comprehensive and detailed analysis of the appointment and accountability of the English judiciary is found in *Judges on Trial* (1976) by Professor Shimon Shetreet. In the Preface, the Right Honourable Lord Justice Scarman states:

> *Dr. Shetreet's admirably thorough book gives us the facts with a detached impartiality, to which no English writer could aspire on this topic.*

In the Foreword by the Editor, Professor Gordon Borrie states:

> *An important academic contribution of this work is its thorough study of the actual operation of the* ***Act of Settlement 1700****, of the mechanisms available for the removal of judges and of the standards of conduct that have been established, perhaps as conventions, during the course of parliamentary proceedings for an address for the removal of a judge.*

Although there has been only one successful address for removal, there have been many attempts and, consequently, many debates in Parliament. The analysis of these debates:

> *... has enabled Dr. Shetreet to explain at length the procedural safeguards, the role of the Government in the proceedings and perhaps most important, the types of misconduct which these Parliamentary proceedings established as justifying removal.*

The frequent citation of this work by leading Canadian authors indicates that Shetreet is a leading modern authority on these issues.

Professor Shetreet summarizes two opposing views of the interpretation of the tenure provision of the *Act of Settlement*:

> *One view is that the* ***Act****, by establishing security of judicial tenure and a new mechanism of removal, excluded all other methods of removal existing prior to the* ***Act****, and that only Parliament can take the initiative by passing an address for removal for breach of good behaviour. The other view is that the* ***Act*** *only established an additional power of removal by address which 'may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held'. According to this view, 'the liability to this kind of removal is, in fact, a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof'.*[51]

Counsel for Mr. Justice Gratton argued in favour of the first interpretation i.e. that the first part of section 99(1) establishes the sole ground for removal (misbehaviour) and the second part establishes the sole procedure (joint address). Independent counsel argued in favour of the second view i.e. that the first part establishes tenure during good behaviour while the second,

quite independently, gives Parliament a power of removal which goes beyond the common law concept of good behaviour. Counsel for the Attorney General of Canada took a different position which is described below under the heading "Non-Behaviour".

Shetreet analyzes the first argument as resting upon the proposition that the *Act of Settlement* effectively transferred the removal power related to good behaviour from the judiciary (by *scire facias*) to Parliament (by joint address). He characterizes the central issue as being, essentially, whether *scire facias* proceedings were eliminated by the *Act of Settlement*. He concludes:

> *The generally accepted interpretation of the Act is that while judges should hold office during good behaviour and cannot be removed by the Crown except for breach of good behaviour, established in scire facias proceedings, Parliament itself enjoys an unqualified power of removal. The wording of the Act supports this interpretation. The first phrase of the relevant section provides for tenure during good behaviour (and establishes judicial salaries), then the second phase beginning with 'but' (and in subsequent statutes with 'subject to') establishes the power of removal by address. This wording points strongly against regarding the power of removal by address as incident to tenure during good behaviour established by the opening sentence.*
>
> *The rules of construction likewise support the view that scire facias was not excluded by the Act and that subsequently the Crown could institute legal proceedings in the form of scire facias against a judge holding office during good behaviour. As Professor R.M. Jackson wrote, 'it is a principle of construction that judicial process is not abolished except by clear words'. Thus, 'The word 'only' could have been inserted to Parliamentary address, but it was not; and the common law rule that holders of office during good behaviour may be removed by scire facias cannot be regarded as having been abrogated'.*[52]

He adds that:

> *The prevailing view among legal scholars is that the address was established as an addition to the methods of removal existing prior to the Act and that in exercising the power of removal by address, Parliament is not limited to considerations of 'good behaviour' in its technical sense.*[53]

An impressive array of British authorities is cited in support of this proposition, which are not reproduced here. Sir Kenneth Roberts-Wray emphasized that the word "but" operates as a *proviso* or qualification upon good behaviour tenure rather than as an incident to it.[54]

In Canada, Professor Lederman reached a similar conclusion in stating that:

> *In any event, it seems that the scope of the statutory power of removal by joint parliamentary address is wider than the older possibility of forfeiture in the Queen's Bench for misconduct.*[55]

After quoting the relevant passage from the *Act of Settlement*:

> *...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.*[56]

Professor Lederman asks his readers to "Note the punctuation and the disjunctive 'but' " in this provision.[57] Professor Russell has adopted the Shetreet-Lederman interpretation that the grounds of removal available to Parliament are wider than those related to good behaviour at common law.[58] This interpretation is reinforced by the fundamental consideration that the purpose of adopting the phrase "during good behaviour" was to replace appointments "at pleasure" by the Crown. There is ample historical evidence of this. There was nothing before us to support a purpose of restricting the grounds of removal available to Parliament.

It should be noted that although the writ of *scire facias* did survive the *Act of Settlement*, Professor Shetreet has concluded that it has fallen into disuse. As a result, the generally accepted view is that removal by joint address is exclusive in practice. All three parties before this Inquiry Committee agree that joint address is the sole avenue available for the removal of a superior court judge in Canada today.

Grounds not Specified but Parliament Restricted:

Counsel for Mr. Justice Gratton forcefully contended that the interpretation espoused by Shetreet and adopted by independent counsel would make a sham of the principle of judicial independence in Canada. The available grounds would be completely "open-ended". Parliament would be able to remove a judge because he was "blue-eyed" or because she was a member of a particular political party. Professor Russell addressed this concern in his discussion of the Landreville case. He referred to a letter from then Justice Minister Lucien Cardin to counsel for Landreville:

> *Cardin asserted that the power to remove on address 'extends to any ground and it is open to Parliament to make an address for the removal of a judge on any ground it sees fit, whether it constitutes misbehaviour or not'. In a strict legal sense this may be correct: Parliament is not restricted to the common law meaning of mis-behaviour and its actions in this area are not reviewable by the courts. But in terms of constitutional convention, there surely are limits. On numerous occasions leading British and Canadian statesmen have expressed views similar to those of Lord John Russell, who in 1843 said, 'Independence of judges*

> *is so sacred that nothing but the most imperious necessity should induce the House to adopt a course that might weaken their standing or endanger their authority'.*[59]

Shetreet provides extensive evidence from British Parliamentary proceedings to demonstrate the strength of the tradition of respect for judicial independence and the protection of judges from unjustifiable public indignity or charges.

An elaborate body of procedural safeguards has been firmly established. Parliamentary precedent has been frequently cited and followed. The self-imposed limitations upon Parliament in relation to judicial removal are often referred to in the debates as "constitutional" principles. Indeed, a motion for the removal of a superior court judge on some arbitrary ground likely would be ruled out of order by the Speaker of the House on the basis of such principles and precedents. The effectiveness of these protections has been amply demonstrated by the restrained and proper manner in which parliaments have dealt with the removal of judges over the centuries.

This Inquiry Committee has concluded that section 99(1) of the *Constitution Act, 1867*, establishes a tenure for superior court judges "during good behaviour". It also authorizes Parliament to conduct proceedings for the removal of superior court judges without specifying the possible grounds for removal. Constitutionally, those grounds must be determined with the guidance of common law, parliamentary practice and tradition, and whatever additional considerations may be relevant to maintain and enhance the principle of judicial independence in Canada today. It remains to determine whether removal on the ground of incapacity due to infirmity is constitutionally valid based on those considerations.*

We wish to emphasize that we are not adopting or supporting, in any way, the view that the grounds upon which Parliament may seek the removal of a superior court judge are "unrestricted". Practically speaking, it is difficult to conceive of any possible grounds upon which Parliament could remove a superior court judge other than misbehaviour or infirmity. However, the sole issue which we must decide is whether a superior court judge may be removed from office on the ground of incapacity due to physical or mental infirmity.

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* Chief Justice Poitras would replace this entire paragraph with the following:

> "This Inquiry Committee has concluded that section 99(1) of the *Constitution Act, 1867* establishes a tenure for superior court judges "duing good behaviour". It remains to determine whether incapacity due to infirmity constitutes a failure to comply with the requirement of holding office "during good behaviour". Constitutionally, such determination must be made with the guidance of common law, parliamentary practice and tradition, and whatever additional considerations may be relevant to maintain and enhance the principle of judicial independence in Canada today."

Infirmity a Ground of Removal: Common Law and Parliament:

Counsel for Mr. Justice Gratton argued that the common law meaning of "good behaviour" excludes only deliberate wrongdoing. In other words, removal could be based only on serious "misbehaviour". This would require some "voluntary immoral conduct". Thus incapacity by reason of infirmity could not constitute misbehaviour. Moreover, it was argued, none of the four attempts at removal in Canada or the seventeen attempts in Great Britain were based on incapacity due to infirmity. In the absence of any case-law authority and, in light of the conflicting views expressed by authors writing on this subject, this Inquiry Committee was invited to rely on the Canadian and British experience (or non-experience) as demonstrating that incapacity due to infirmity is not a ground for removal.

Professor Shetreet appears to support this view when he states:

> *It appears that at common law, mental infirmity does not constitute misbehaviour for which an office held during good behaviour may be terminated.*[60]

However, this passage merely states that mental infirmity does not constitute "misbehaviour" at common law. It does **not** say that mental infirmity cannot constitute a ground of removal. The distinction is expressed clearly by Professor Russell who states:

> *... this common law meaning does not embrace inability to perform the office because of age or mental or physical illness nor scandalous behaviour off of the bench short of conviction for a crime.*
>
> *However, the grounds for removing judges have been considerably widened to include circumstances well beyond the common law meaning of misbehaviour. The parliamentary concept of the behaviour which could justify the removal of a judge has traditionally been wider than the common law.*[61]
> [Emphasis added]

Thus, at common law, removal by writ of *scire facias* required misbehaviour. However, Parliament is not restricted to misbehaviour.

It is interesting to compare this distinction to the passage quoted earlier from Todd.[62] Todd also restricted forfeiture by writ of *scire facias* to misbehaviour. However, the proprietary interest in an office held during good behaviour could be lost by incapacity due to mental or bodily infirmity or by "breach of good behaviour" (which is different from bad behaviour).

This distinction between the termination of an "estate for life" in an office due to incapacity based on infirmity and the forfeiture of that office through *scire facias* based on misbehaviour was not fully developed or argued before us. The concept of a "proprietary

interest" in an office holds little meaning today. Nevertheless, it does suggest that, historically, a condition of holding office may have been the capacity to fulfil that office, quite apart from any actual misbehaviour.

Professor Shetreet found support for this distinction in the parliamentary debates and concluded:

> *... it clearly appears that breach of 'good behaviour' includes misconduct in private life and mental and physical disability.*[63]

Thus, mental and physical disability do not, constitute "misbehaviour", but if they lead to incapacity, they will constitute a "breach of good behaviour". He refers to passages from parliamentary speeches to support his conclusion. In Fox's case (1806), the Prime Minister said:

> *A judge may be in a situation of notorious incapacity from age, and yet it may happen that through the peevishness natural to age, or ill humour, or some other cause, he may wish to adhere to his situation after he has been rendered unfit for its duties. That this would be a painful necessity for the interference of Parliament no one would doubt.*[64]

In Grantham's case (1906), the Attorney General stated:

> *By 'incapacity' I think Lord Palmerston had in his mind physical [or mental] incapacity not mere aberration, not mere error in the exercise of the judicial function, but the incapacity of a judge who continues so long on the Bench that he is physically [or mentally] unable to discharge his duties.*[65]

Finally, in 1891, the Leader of the House responded to a question in relation to a mentally ill judge, by stating that it was open to the Minister asking the question to move an address for the removal of the judge.[66]

Non-Behaviour a Breach of Good Behaviour:

Mr. Justice Gratton contends that the proper interpretation of section 99(1) is that the first part is "substantive" i.e. "good behaviour" establishes the sole criterion or ground for removal. The second part is "procedural" i.e. joint parliamentary address establishes the sole method or process for removal. Counsel for the Attorney General of Canada took a similar approach but argued that there is a relationship between the two parts and that there is a substantive element in the second part in the sense that removability must be analyzed in the light of "good behaviour".

Thus, both approaches rely upon the phrase "good behaviour" to ascertain the grounds upon which a superior court judge may be removed from office. However, "good behaviour" is not expressed as a ground of removal but as a tenure of office. If this phrase establishes the

basis for possible removal, it does so only by implication. Assuming, for the moment, that this phrase does establish the sole basis for removal, what ground for removal is to be implied from the phrase "during good behaviour"?

Counsel on behalf of Mr. Justice Gratton argued that the sole ground for removal, dictated by these words, is "misbehaviour". Professor Hogg had used the words "bad behaviour". However, it does not follow that misbehaviour is the only basis on which there is a breach of good behaviour. The further category of "non-behaviour" also must be considered.

Counsel for the Attorney General of Canada took the position that the long term physical and mental capacity sufficient to perform the duties of the office of judge always was and still is a fundamental and continuing condition of retaining office. A judge who is unable or unwilling to perform the office is not complying with the requirement of holding office "during good behaviour" and may be removed.

This approach is consistent with some of the authorities cited above. It must be born in mind that the standard of "good behaviour" is directly related to the office in question. Reference was made earlier to the case of *Harcourt v. Fox* (1692) and the phrase "... shall well demean himself **in his said office**..." [Emphasis added]. These words import more than the negative condition not to misbehave. There is also a positive obligation to act "well" in that office.

We do not suggest that a superior court judge may be removed for a failure to meet some standard of competence in fulfilling judicial duties. Judges are answerable only to their own consciences and to higher appellate courts for the "correctness" of any decisions or reasons which they might render. However, it is a reasonable interpretation of the words, on their face, that to "hold office during good behaviour" requires that at least the basic duties of that office be fulfilled.

Public Confidence Requires Removal for Infirmity:

In the end, statutory interpretation, constitutional history, common law decisions, parliamentary debates and tradition and the views of legal writers all provide assistance. However, none of these provides a definitive answer to the question before us. In these circumstances, it is important to return to the underlying principle which is involved. The nature and importance of this principle was discussed in our introductory comments. In other words, what interpretation of section 99(1) best contributes to the maintenance and enhancement of the principle of judicial independence in Canada today?

The principle of judicial independence is not an end in itself. Rather, it has the underlying purpose of providing service to the public. The importance of public confidence has been emphasized in recent decisions of the Supreme Court of Canada. In *Valente v. The Queen*, Mr. Justice LeDain stated:

> *Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.*[67]

In *MacKeigan v. Hickman*, Mr. Justice Cory added:

> *The aim and goal of all aspects of judicial independence is to preserve and foster public confidence in the administration of justice. Without public confidence the courts cannot effectively fulfil their role in society.*[68]

These passages emphasize public confidence not only in relation to any particular case but also, more generally, in relation to the administration of justice.

The element of public confidence or public perception has been long accepted as an important aspect of the test for removal from office of a superior court judge for misconduct. Shetreet states:

> *By what yardstick is Parliament to measure whether a misconduct of a judge 'was of sufficient magnitude' and whether it 'brought sufficient scandal' on the courts? In the course of the debates on judicial conduct, Lords and Members of Parliament have frequently referred to the vital importance of public confidence in the administration of justice, and many of them employed public confidence as a yardstick for measuring the magnitude of the misconduct complained of.*[69]

Anson described the type of misbehaviour which would warrant removal by Parliament as being:

> *... any form of misconduct which would destroy public confidence in the holder of the office.*[70]

In the Rand Inquiry Report, the following test was adopted:

> *When the function of the judge is fully sensed, to hear, weigh, and, according to law, to decide justly, to do so in a manner which fair-minded persons acting normally, expressing in fact enlightened public opinion, would approve, determining unfitness in a judge, at least in the statement of principle, does not perhaps present as much difficulty as might be imagined. That principle would seem to be this: would the conduct, fairly determined in the light of all circumstances, lead such persons to attribute such a defect of moral character that the discharge of the duties of the office thereafter would be suspect? Has it destroyed unquestioning confidence of uprightness, of moral integrity, of honesty in decision, the elements of public honour?*[71]

The test adopted in the Report of the Inquiry Committee in relation to the Nova Scotia judges who heard the Donald Marshall Jr. Reference was as follows:

> *Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?*[72]

These references leave us with no doubt as to the importance of taking into account the matter of public confidence in the administration of justice when interpreting section 99(1) of the *Constitution Act, 1867.*

Counsel for Mr. Justice Gratton relied heavily upon the interpretation given to section 99(1) by Professor Hogg, who is certainly one of the leading constitutional scholars in Canada today. Professor Hogg acknowledged that the interpretation of this section was not free from doubt. It could mean that the only ground for removal was "bad behaviour" or it could mean that additional grounds were also available. He concluded that:

> *On principle, the former interpretation is preferable, because it is more apt to secure the independence of the judiciary, which is the purpose of the provision.*[73]

Professor Hogg seems to assume that if fewer grounds of removal are available, judicial independence will be better served.

It is true that this interpretation would lead to greater independence in the sense of reducing the scope for removal. However, his analysis does not take into account the central element of public confidence. This further element was captured by Professor Russell in the following passage:

> *In considering the ways in which judges leave the bench these two countervailing concerns come into play. Security of tenure is certainly an essential condition of judicial independence. The influence which leaders of the political branches may have on the judiciary in controlling the appointing process becomes more tolerable to the extent that judges, once appointed, cannot be removed when their decisions displease those who appointed them. But tenure can be so secure that judges are insulated from any kind of accountability to the public they serve and hold office regardless of their capacity to perform their function well.*[74]

In other words, the principle of judicial independence may be weakened, rather than strengthened, by limiting the grounds for removal in a manner which would undermine public confidence. The central concern, in this context, should be not simply to reduce the number of grounds of removal but to establish what grounds of removal are appropriate and necessary.

In Barrington's case (1830), Sir Robert Peel stated that the unjustified absence of a judge from office would warrant removal. This is not parallel to a situation of incapacity due to infirmity, since the situation discussed by Peel involves an element of misconduct. Nevertheless, his rationale for removal is of interest:

> *Was it to be endured that a judge, who performed no duty, should be allowed to draw his salary from the public funds? Would it become them, the guardians of the public purse, to suffer this?*[75]

Provincial superior court judges currently receive annual compensation in the sum of $155,800. Moreover, they receive a pension, upon retirement of two-thirds of that salary. In the event of death, the judge's spouse receives a pension. In these circumstances, it is difficult to appreciate how public confidence could be enhanced by permitting a judge to remain in office when that judge is permanently incapable of fulfilling the role of judge due to mental or physical infirmity. To accept such a situation would be to cast the shadow of a sinecure upon judicial office. Moreover, the administration of justice could be adversely affected in an area where one or more judicial positions are held by judges who are unable to perform as judges.

In the following passage, Shetreet relates public confidence to the capacity to judge:

> *As has been noted, the most important consideration in determining the remedy for an incident of misconduct is public confidence, or the sense of the community. Parliament has also used public confidence as the ultimate test for judicial conduct and for discipline of judges. Judges could not discharge their functions without complete public confidence. If a judge behaved in a way which seriously impaired public confidence in him, he would no longer be able to administer justice and therefore should leave the bench.*[76]

In other words, the relevance of misconduct is that it prevents a judge from judging. The misconduct is not being assessed for the purpose of punishment or compensation, for example, but to determine whether that judge is capable of continuing to judge. Should that not be the same ultimate criterion in relation to incapacity due to infirmity?

In our view, a purposive, modern interpretation of section 99(1) demands that incapacity due to mental or physical infirmity be confirmed as a ground for removal. This is not to suggest that constitutional interpretation should be influenced by current public trends or moods. However, as Mr. Justice LeDain pointed out in the *Valente* case:

> *Conceptions have changed over the years as to what ideally may be required in the way of substances and procedures for securing judicial independence in as ample a measure as possible.*[77]

We are of the view that it is important for continued public confidence in the administration of justice that a person who holds the office of judge not be permanently incapable of fulfilling the

office of judge.

Conclusions on Third Constitutional Issue:

This analysis has led us to the following conclusions:

(a) The purpose of section 99(1) of the *Constitution Act, 1867* and the corresponding provision in the *Act of Settlement, (1701)*, was to establish tenure during good behaviour for all superior court judges (as opposed to tenure at the pleasure of the Crown);

(b) Section 99(1) also establishes a power of removal on joint parliamentary address but does not specify the grounds of removal which must be gleaned from common law, parliamentary tradition and any other considerations which would maintain and enhance the principle of judicial independence;*

(c) At the time of the *Act of Settlement*, an office held during good behaviour: (i) constituted a proprietary interest or estate which could be terminated for incapacity due to infirmity or other breach of good behaviour; or (ii) could be forfeited by writ of *scire facias* for misconduct in relation to that office;

(d) The concepts of a public office as a proprietary interest and judicial removal by writ of *scire facias* have fallen into disuse and joint parliamentary address is the sole process for the removal of a superior court judge in Canada today;

(e) Removal by joint parliamentary address on the ground of incapacity due to physical or mental infirmity is supported by parliamentary debates and the weight of authority of legal authors;

(f) Even if it were accepted that the only ground for removal on joint parliamentary address were breach of good behaviour, this would extend beyond "misbehaviour" to include "non-behaviour" or the incapacity to perform the office;

(g) The removal of a superior court judge on the ground of incapacity due to mental or physical infirmity would not detract from the principle of judicial independence but would enhance public confidence and respect for the administration of justice.

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* Chief Justice Poitras would replace this entire paragraph with the following:

"Section 99(1) establishes a power of removal on joint parliamentary address. A judge who is unable or unwilling to perform the duties of the office of judge fails to comply with the requirement of holding office "during good behaviour" and may thus be removed;"

5. CONCLUSIONS

The constitutional arguments which were made on behalf of Mr. Justice Gratton may be summarized in the form of three constitutional questions, as follows:

1. Is section 63(2) of the *Judges Act*, *ultra vires* the Parliament of Canada in view of Parliament's role in the removal of superior court judges by virtue of section 99(1) of the *Constitution Act, 1867*?

2. Is section 63(3) of the *Judges Act*, *ultra vires* the Parliament of Canada in purporting to establish an improperly constituted superior court?

3. Are sections 63(2), 65(1) and 65(2)(a) of the *Judges Act*, *ultra vires* the Parliament of Canada by virtue of section 99(1) of the *Cosntitution Act, 1867*, in purporting to permit an investigation leading to the possible removal of a superior court judge on the ground of incapacity due to infirmity?

Our answers to these questions are as follows:

Question 1. : No.
Question 2. : No.
Question 3. : No.

As we have stated, this entire constitutional analysis has been undertaken in a manner completely divorced from the actual personal circumstances of Mr. Justice Gratton. No evidence has been presented in relation to his actual capacity to act as a judge. This issue will be addressed during the next phase of this investigation.

Dated January 26, 1994.

The Honourable E.D. Bayda

The Honourable B. Hewak

The Honourable L.A. Poitras

F.P. Kiteley

G.L. Guénette, Q.C.

ENDNOTES

1. R.S.C., 1985, c. J-1.

2. U.K., 30 & 31 Victoria, c.3.

3. Peter W. Hogg, Constitutional Law of Canada (3rd Ed.), at 7-7, 7-8.

4. *Toronto Corporation v. York Corporation*, [1938] A.C. 415, at 426, quoted with approval by Dickson C.J. in *The Queen v. Beauregard* [1986] 2 S.C.R. 56, at 73.

5. [1985] 2 S.C.R. 673, at 694, per Le Dain J., delivering the judgment of the Court.

6. 12 and 13 William III (1701), c.2, s.3(7).

7. "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 769 and 1139, at 1160-1.

8. Supra, note 4.

9. Supra, note 7, at 769.

10. Supra, note 4, at 71, citing "Judicial Indpendence and the Increasing Executive Role in Judicial Administration", in S. Shetreet and J. Deschênes (eds.) Judicial Independence: The Contemporary Debate (1985), at p. 525.

11. Peter H. Russell, The Judiciary in Canada, pp. 75-6.

12. Gerald Gall, The Canadian Legal System (3rd Ed.), at 231.

13. [1923] 2 D.L.R. 604.

14. Ibid, at 607.

15. [1927] 3 D.L.R. 1072.

16. Ibid, at 1078.

17. Ibid, at 1079-80.

18. Ibid, at 1081-2.

19. Ibid, at 1085.

20. [1989] 2 S.C.R. 796, at 811-2.

21. Supra, note 7, at 1160.

22. Neil Finkelstein, Laskin's Canadian Constitutional Law, (5th Ed.), at 114.

23. (1977) 75 D.L.R. (3d) 380 (Fed. Ct. Tr.).

24. Then R.S.C. 1952 c.154.

25. Supra, note 23, at 393.

26. Ibid, at 395.

27. Referred to in Robert MacGregor Dawson, The Principle of Official Independence, at 37.

28. Supra, note 20, at 811.

29. Supra, note 11, at 181.

30. Quoted in Shimon Shetreet and Jules Deschênes (eds), Judicial Independence: The Contemporary Debate, at 453.

31. Ibid, at 388.

32. S.A. de Smith, Constitutional and Administrative Law, (2nd Ed.), at 374.

33. Lederman, W.R., "The Independence of the Judiciary", in A. Linden (ed.), The Canadian Judiciary, at 6.

34. Supra, note 11, at 180.

35. Supra, note 3, at 7-9.

36. Ibid.

37. Andrew Heard, Canadian Constitutional Conventions, at 121.

38. J.R. Mallory, The Structure of Canadian Government (Rev. Ed.), at 318.

39. R.I. Cheffins and R.N. Tucker, The Constitutional Process in Canada, (2nd Ed), at 989.

40. Sir Alfred Denning, The Changing Law (1953), at 5.

41. Supra, note 7, at 779.

42. Ibid, at 781.

43. (1692-3) 89 E.R. 680, at 728.

44. Supra, note 7, at 779.

45. Alpheus Todd, Parliamentary Government in England, Vol. II, at 858-9.

46. Supra, note 7, at 787.

47. Shimon Shetreet, Judges On Trial, at 152, quoting an Opinion of the English Law Officers, quoted in Todd, supra, note 45.

48. W. Hawkins, Pleas of the Crown, (6th ed.) c.66, at 310.

49. R.S.C., 1985, c.I-21.

50. "Employment During Good Behaviour", Henry L. Molot (1989) 2 C.J.A.L.P. 238.

51. Supra, note 47, at 90.

52. Ibid, at 92.

53. Ibid, at 94.

54. Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law, at 487.

55. Supra, note 7, at 787.

56. Ibid, at 782.

57. Ibid, at 787, footnote 99.

58. Supra, note 11, at 176.

59. Ibid, at 177.

60. Supra, note 47, at 89.

61. Supra, note 11, at 176.

62. Supra, note 45.

63. Supra, note 47, at 288.

64. Quoted in Shetreet, supra, note 47, at 274.

65. Ibid.

66. Ibid, at 99.

67. Supra, note 5, at 689.

68. Supra, note 20, at 846.

69. Supra, note 47, at 276.

70. Quoted by Lederman, supra, note 7, at 787-8.

71. Report on Inquiry re The Honourable Mr. Justice Leo A. Landreville (1966) 97-8. See also *Landreville v. The Queen (No. 2)*, supra, note 23.

72. Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the *Judges Act* at the Request of the Attorney General of Nova

Scotia (1990), at 27.

73. Supra, note 3, at 7-9.

74. Supra, note 11, at 173.

75. Quoted in Shetreet, supra, note 47, at 273.

76. Supra, note 47, at 282.

77. Supra, note 5, at 692.