McGill Law Journal
Revue de droit de McGill

The Structural and Administrative Demands of Unwritten Constitutional Principles

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Volume 65, Number 2, December 2019

Unwritten Constitutional Norms and Principles: Contemporary Perspectives

URI: https://id.erudit.org/iderudit/1075518ar
DOI: https://doi.org/10.7202/1075518ar

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Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)
1920-6356 (digital)

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Cite this article

Berger, K. G. (2019). The Structural and Administrative Demands of Unwritten Constitutional Principles. *McGill Law Journal / Revue de droit de McGill*, *65*(2), 305–340. https://doi.org/10.7202/1075518ar

Article abstract

This article challenges the traditional view in administrative law scholarship that the mandate and design of administrative decision-makers are principally products of executive policy choice and legislative delegation. Drawing on public law theories of structural interpretation and positioned within the growing field of administrative constitutionalism, this article argues that unwritten features of the Constitution can make concrete demands on institutional structure and tribunal design such that certain functions and features of the administrative state are constitutionally required. The argument emerges from a careful analysis of a single case study, that of the discipline, and in particular the removal, of superior court judges in Canada. The analysis reveals that section 99(1) of the *Constitution Act, 1867* provides an incomplete account of the procedures that must be followed in order to remove a federally appointed judge from the bench. More specifically, the case study establishes that the principle of judicial independence requires that judges be eligible for removal under section 99(1) only after an administrative process is held, one that investigates the alleged misconduct and assesses the facts against the constitutional standard of good judicial behaviour. Judicial independence further demands that this process embody certain essential features—features that are familiar to administrative law: the inquiry must be carried out by a body that is independent from the political branches of government; the body must conduct itself in accordance with a commitment to the independence of the judiciary; the inquiry must be carried out in accordance with the duty of fairness; and both the process and substantive determinations of the inquiry process must be subject to review by the courts. While current theories of administrative constitutionalism have often been focused on the role of administrative decision-makers in interpreting and implementing constitutional rights, this article builds on the work of Mashaw, Lee, Bremer, and Metzger and Stack to open and contribute to important structural conversations in the field.

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The Structural and Administrative Demands of Unwritten Constitutional Principles

*Kate Glover Berger**

This article challenges the traditional view in administrative law scholarship that the mandate and design of administrative decision-makers are principally products of executive policy choice and legislative delegation. Drawing on public law theories of structural interpretation and positioned within the growing field of administrative constitutionalism, this article argues that unwritten features of the Constitution can make concrete demands on institutional structure and tribunal design such that certain functions and features of the administrative state are constitutionally required. The argument emerges from a careful analysis of a single case study, that of the discipline, and in particular the removal, of superior court judges in Canada. The analysis reveals that section 99(1) of the *Constitution Act, 1867* provides an incomplete account of the procedures that must be followed in order to remove a federally appointed judge from the bench. More specifically, the case study establishes that the principle of judicial independence requires that judges be eligible for removal under section 99(1) only after an administrative process is held, one that investigates the alleged misconduct and assesses the facts against the constitutional standard of good judicial behaviour. Judicial independence further demands that this process embody certain essential features—features that are familiar to administrative law: the inquiry must be carried out by a body that is independent from the political branches of government; the body must conduct itself in accordance with a commitment to the independence of the judiciary; the inquiry must be carried out in accordance with the duty of fairness; and both the process and substantive determinations of the inquiry process must be subject to review by the courts. While current theories of administrative constitutionalism have often been focused on the role of administrative decision-makers in interpreting and implementing constitutional rights, this article builds on the work of Mashaw, Lee, Bremer, and Metzger and Stack to open and contribute to important structural conversations in the field.

Cet article défie l'opinion traditionnelle dans la doctrine de droit administratif voulant que le mandat et la conception des décideurs administratifs soient principalement le produit de choix de politiques faits par l'exécutif et de délégation législative. Se basant sur des théories de droit public d'interprétation structurelle et se positionnant au sein du champ en croissance qu'est le constitutionnalisme administratif, cet article avance que les éléments non écrits de la constitution peuvent effectuer des demandes concrètes au niveau de la structure institutionnelle et de la conception des tribunaux, de sorte que certains aspects et fonctions de l'état administratif sont constitutionnellement requis. L'argument émerge d'une analyse attentive d'une seule étude de cas, soit celle de la discipline, et particulièrement celle de la révocation, des juges des cours supérieures du Canada. L'analyse révèle que l'article 99(1) de la *Loi constitutionnelle de 1867* fournit un compte-rendu incomplet des procédures qui doivent être suivies afin de révoquer un juge de nomination fédérale du banc. Plus spécifiquement, l'étude de cas établit que le principe d'indépendance judiciaire exige que les juges ne soient éligibles à la révocation sous l'article 99(1) qu'après qu'un processus administratif ait été tenu. Ce processus examine l'inconduite allégée et évalue les faits en fonction du standard constitutionnel de bon comportement judiciaire. L'indépendance judiciaire demande en outre que ce processus incarne quelques éléments essentiels – éléments qui sont familiers au droit administratif : l'enquête doit être effectuée par une organisation indépendante des branches politiques du gouvernement; l'organisation doit se conduire de façon à respecter un engagement à l'indépendance judiciaire; l'enquête doit être effectuée en respectant le devoir d'équité; et tant le processus que les déterminations substantives de l'enquête doivent être sujets à révision par les tribunaux. Alors que les théories actuelles du constitutionnalisme administratif ont souvent été concentrées sur le rôle des décideurs administratifs dans l'interprétation et l'implémentation des droits constitutionnels, cet article bâtit sur le travail de Mashaw, Lee, Bremer, et Metzger et Stack pour ouvrir et contribuer à d'importantes conversations structurelles dans ce champ.

* Assistant Professor, Osgoode Hall Law School, York University, B.A., LL.B., LL.M., D.C.L. Early versions of this article were presented at the Symposium on Unwritten Constitutionalism at the Faculty of Law, University of Ottawa in March 2019 and the Annual Meeting of the Canadian Law and Society Association at the Allard School of Law, University of British Columbia in June 2019. A summary of some of the main claims was published on the Blog of the International Association of Constitutional Law on May 29, 2019, online: <blog-iacl-aidc.org> [perma.cc/BDX9-U3YB]. Sincere thanks to Benjamin Berger, Vanessa MacDonnell, Seshauna Wheatle, the editors of the McGill Law Journal and the IACL Blog, the two anonymous reviewers for the McGill Law Journal, and the conference participants in both Ottawa and Vancouver for their engagement with the ideas in this article and helpful questions and comments. Thank you also to Christina Skinner, J.D. 2020 and Leaelle Derynck, J.D. 2019 for their excellent research and editorial assistance. This article was written with the assistance of a grant awarded by Western University's Social Sciences and Humanities Research Board and Research Development & Services Office; I am grateful for this generous institutional support.

Citation: (2019) 65:2 McGill LJ 305 — Référence : (2019) 65:2 RD McGill 305

Introduction

This article asks: What are the implications of unwritten constitutional principles for concrete issues of institutional design in the public law order? To explore this question, this article focuses on a particularly relevant case study—namely, the oversight of judges. It considers what the Constitution requires of the discipline, and in particular the removal, of federally appointed judges in Canada. Section 99(1) of the *Constitution Act, 1867*, the sole provision to expressly address removal in the written constitution, shapes this case study. Section 99(1) provides that a federally appointed judge is removable by the Governor General upon address of the Senate and the House of Commons. On the face of the text, no other procedural steps are required to remove a judge from the bench. But the removal of a judge from office is a striking constitutional moment, one that can both jeopardize and advance judicial independence and the rule of law. By involving both the executive and legislative branches and by empowering both the upper and lower chambers, the decision-making process entrenched in section 99(1) reflects ideals of transparency, public accountability, and democracy in response to the fundamentally political character of removing a judge. In this way, section 99(1) highlights that the process to be followed to remove a federally appointed judge necessarily implicates dramatic and delicate issues of inter-branch relations and constitutional design. This article speaks to those relations and design, exploring how they are shaped by constitutional principles and aspiration.

The design of the judicial removal process in Canada has been under scrutiny in a number of recent cases before the Federal Courts, principally because of claims raised by the Canadian Judicial Council (CJC or Council). Established under the *Judges Act*, the Council is responsible for inquiring into allegations of misconduct against superior court judges and, when warranted, recommending removal to the minister of justice.[1] In response to challenges by judges whose conduct has been under investigation in recent years the CJC has argued that its decision-making processes and reports are immune from judicial review. While the Federal Courts have quite rightly rejected these claims,[2] neither the submissions of the CJC nor the courts' reasoning tells the full story about the nature of the Council's role or the Constitution's procedural and institutional demands for removing judges. This article aims to tell more of this story.

It is in service of this aim that this article considers whether the text of section 99(1) is a complete account of the constitutional demands for removing a superior court judge from the bench. It explores how unwritten

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1 See *Judges Act*, RSC 1985, c J-1, ss 63(1)–65(2).

2 See e.g. *Canadian Judicial Council v Girouard*, 2019 FCA 148, leave to appeal to SCC refused, 38765 (12 December 2019) [*Girouard Appeal*]; *Girouard v Canada (AG)*, 2018 FC 865 [*Girouard Application*]; *Douglas v Canada (AG)*, 2014 FC 299 [*Douglas*].

constitutionalism, and in particular the unwritten principle of judicial independence, should inform how we read section 99(1). In short, this article argues that judicial independence requires certain forms and structures of decision-making be in place, in addition to the processes of deliberation guaranteed by the text of section 99(1), when considering and effecting the removal of a superior court judge. The article ultimately concludes that judicial independence demands that superior court judges be eligible for removal under section 99(1) only after an inquiry is held, one with certain defined features, and one that investigates the alleged misconduct and assesses the facts against the constitutional standard of good behaviour. The necessary features of this inquiry are paradigmatic in administrative law: the inquiry process must be carried out by a body that is independent from the political branches of government; the body must conduct itself in accordance with a strict commitment to the independence of the judiciary; the inquiry must be carried out in accordance with the duty of fairness; and both the process and substantive determinations of the inquiry must be subject to review by the courts.

With its focus on the CJC, this article goes beyond reorienting the unwritten constitutionalism literature to questions of institutional and structural design and, further still, goes beyond addressing the implications of unwritten principles for processes of judicial discipline. It also contributes to concrete conversations about legislative and operational reform of the CJC and existing regulatory arrangements. While this article does not offer a complete blueprint for renovating the existing decision-making framework, it does assess the institutional design and workings of the Council against the backdrop of judicial independence, which is instructive for conversations about reform of the existing regulatory arrangements.

At the same time, this article confronts the issue of how the Constitution might contemplate certain administrative minimums. That is, the Constitution might require certain administrative institutions or processes and it might specify some of the features of those institutions and processes, as well as features of their relationship to other institutions and processes. This more general issue inevitably raises the idea of a constitutionalized administrative state, which is a larger architectural implication of the arguments of this article.[3] By exploring potentially necessary connections between the Constitution and structures of the administrative state, the study of the CJC within Canada's public order offers insight into these broader inquiries as well. Indeed, while the emerging field of "administrative constitutionalism" has tended to focus on understanding the role

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[3] I have addressed this issue in Kate Glover Berger, "The Constitutional Status of the Administrative State" (2019), online (pdf): *Social Science Research Network* <papers.ssrn.com> [perma.cc/JW57-2ASU].

of administrative actors in interpreting, implementing, upholding, and undermining constitutional rights,[4] this article highlights and contributes to a second structural branch of administrative constitutionalist inquiry.[5]

Like all questions that marry law with institutional design, the questions underlying this article ask us to care deeply about the substantive character of structure, form, and process and about the resulting practical demands for transforming this substance into reality. But the questions of this article become more complex because they ask us to work through these issues of design in a context shaped by multiple ongoing debates about the nature and effects of unwritten constitutional principles. For example, this article takes seriously the legitimacy of unwritten constitutional law and is thus confronted with the naturalist and structuralist critiques of unwritten constitutionalism more generally.[6] Further, this article accepts that unwritten constitutional principles have enforceable legal effects and it is therefore in conversation with claims that unwritten principles are both too abstract and too disconnected from the constitutional text to ground enforceable legal obligations for constitutional actors.[7] And further still, this article suggests that certain provisions of the *Judges Act*[8] may be unconstitutional on account of their inconsistency with judicial in-

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4 See e.g. David E Bernstein, "Antidiscrimination Laws and the Administrative State: A Skeptic's Look at Administrative Constitutionalism" (2019) 94 Notre Dame L Rev 1382; Matthew Lewans, "Administrative Constitutionalism and the Unity of Public Law" (2018) 55 Osgoode Hall LJ 515; Bertrall L Ross II, "Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism" [2014] 1 U Chicago Legal F 223; Gillian E Metzger, "Administrative Constitutionalism" (2013) 91 Texas L Rev 1897.

5 See e.g. Jerry L Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012); Sophia Z Lee, "From the History to the Theory of Administrative Constitutionalism" in Nicholas R Parrillo, ed, *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L Mashaw* (Cambridge, UK: Cambridge University Press, 2017) 44; Sophia Z Lee, "Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present" (2019) 167:7 U Pa L Rev 1699.

6 For a discussion of these critiques and a response to them, see Mark D Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 245.

7 See e.g. Jeffrey Goldsworthy, "Unwritten Constitutional Principles" in Huscroft, *ibid*, 277; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389; *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at paras 296–375, 150 DLR (4th) 577, La Forest J, dissenting in part [*Remuneration Reference*].

8 See *Judges Act*, *supra* note 1.

dependence, an unwritten principle of the Canadian Constitution, thus engaging the active debate on whether unwritten principles can and should limit legislative power.[9]

But this article does not only contribute to conversations as they are currently framed. Its primary aim, rather, is to direct much needed attention to gaps in the law's understanding of the impact of unwritten principles on the structure of the public order and the design and operation of public institutions. In this sense, it not only resists the preoccupying force of questions about unwritten principles and legislative invalidity, but also advances thinking on unwritten principles and institutional design beyond the defining impact of the *Remuneration Reference*.[10]

This article proceeds in three parts. Part I explores the relationship between the Constitution and institutional design. Given that this article suggests that unwritten constitutional principles can require the existence of particular institutional decision-making frameworks, Part I provides a high-level account of the role of written and unwritten constitutional sources in the design, operation, and interactions of public institutions. This account shows the inevitable role of unwritten sources in understanding the institutions and structures of Canada's constitutional order. It then focuses on the specific roles of unwritten principles, detailing the ways in which these principles have been used to first, set concrete minimums and aspirations for public actors[11] and second, entrench the need for certain decision-making structures to exist within the framework of government. With this background in place, Part II then turns to the existing process for removing judges in Canada. It sets out this process, as governed by section 99 of the *Constitution Act, 1867*, and explores the CJC's investigation and inquiry regime. In describing the CJC's role, Part II provides greater detail on the claims of the CJC regarding its constitutional status and immunity from judicial review.

This discussion leads into Part III, the heart of the article. Part III explores the structural implications of judicial independence in the context of removing judges from the bench. Drawing on theories of constitutional structuralism and judicial independence, this Part argues that an inquiry process designed and carried out within constitutional parameters must precede legislative and executive action under section 99(1). Within these parameters, Parliament has much freedom in designing the inquiry process and the body or bodies responsible for conducting this process, but at

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9 *Cf* Leclair, *supra* note 7; *British Columbia v Imperial Tobacco Canada*, 2005 SCC 49 at paras 60–78; *Campisi v* Ontario, 2017 ONSC 2884 at para 55; *Remuneration Reference*, *supra* note 7, Lamer CJ; *Ell v Alberta*, 2003 SCC 35 at paras 19–26 [*Ell*].

10 See *supra* note 7.

11 On constitutional ideals and constitutional minimums, see Eric Colvin, "The Executive and the Independence of the Judiciary" (1986) 51:2 Sask L Rev 229.

a minimum and in the normal course, this inquiry process is one for an administrative actor, created by statute and exercising its delegated power in accordance with governing public law. Part III also identifies the required features of the inquiry process and canvasses the implications of judicial independence for the design and operation of the CJC. This article concludes by looking to the bigger picture, noting how this study of judicial independence helps to illuminate—and complicate—traditional understandings of the relationship between the Constitution and the administrative state.

I. The Sources of Constitutional Structure

The question underlying this article is concerned with the impact of unwritten constitutional principles on the structure and design of the public order. But to understand this impact, we must first consider the relationship between the Constitution and institutional design more broadly. Our first question is, therefore, which parts of a constitution speak to the design of the public order, to its institutional arrangements and operations—that is, to the constitution's structural features?

An immediate answer to any question about constitutional institutions could naturally focus on the text of the constitution and the grand institutions of governance. Indeed, the text of the Constitution of Canada speaks directly to the major institutions of national government—to the executive, legislative, and judicial branches—and to the nature of the relationship between them.[12] The text, for example, guarantees the existence of "[o]ne Parliament for Canada" that consists of the Queen, the Senate, and the House of Commons.[13] The *Constitution Act, 1867* then goes on to specify some features and powers of each of these parliamentary institutions.[14] In doing so, it not only engages in the design of individual institutions, but also has a hand in defining the relationships of power and legitimacy between them. For example, the *Constitution Act, 1867* provides that in contrast to the elected House of Commons that has plenary legislative powers within areas of federal jurisdiction,[15] the Senate comprises 105 appointed senators, who hold veto power over all legislation and are empowered to introduce any bill for debate with the exception of money bills, which must originate

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12 Section 52(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 sets out an (incomplete) list of the texts that fall under the general label of "Constitution of Canada".

13 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 17, reprinted in RSC 1985, Appendix II, No 5.

14 See e.g. *ibid*, Parts III (Executive Power) and IV (Legislative Power).

15 See *ibid*, ss 37, 53, 91.

in the House.[16] In operation, these seemingly unremarkable design features of the Senate and House signal the hierarchical relationship that is to exist between these institutions. That is, by not granting the Senate a popular mandate and by excluding money bills from its jurisdiction, the *Constitution Act, 1867* signals that the Senate is not to block House action on partisan grounds. The Senate is not to serve as a second democratic chamber. Rather, it is to exercise its role of sober second thought apart from the political fray.[17] In this way, the institutional design assembled from the text of the Constitution not only provides the building blocks of these institutions of government, but also structures how they should relate to one another.

This naming, designing, and positioning of institutions within the text of the Constitution adds important detail to the blueprint of Canada's governmental structure, detail subject to formal textual change only by virtue of the constitutional amending process. But despite the entrenchment of a skeletal blueprint across Canada's constitutional documents, the Canadian project of text design is ultimately both grand and modest. It is grand in its aim to entrench and empower the branches of Canadian government, their relationships, their jurisdiction, and the division of their labour. It is grand, in other words, in its attempt to imagine and preserve the purported seat of public power for the nation. At the same time, it is modest because of the limits of a written constitution in the realm of institutional design. The limits of language and human foresight render impossible attempts at full written constitutional capture in any context.[18] In the specific context of institutional design and operations, the text alone cannot contemplate or capture the lived life of an institution, the practices and effects of the people who act within it, the formal and informal norms governing the institution's work, and the organic ways in which the institution's biographical features will change over time.[19]

The exercise of committing essential features and relationships of the core branches of government to writing can represent a significant expression of statecraft and shared political commitment and aspiration. But focusing on the institutional configuration of a constitutional order and the ways in which public institutions live, move, and change is a reminder that codifying institutional features in a constitutional text will always be aspirational, skeletal, and incomplete. This does not diminish the importance

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16 See *ibid*, ss 24, 53, 55.

17 See *Reference Re Senate Reform*, 2014 SCC 32 at paras 57–59 [*Senate Reform Reference*].

18 See Benjamin L Berger, "White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text" (2008) 3:1 J Comparative L 249 at 284 [Berger, "White Fire"].

19 See e.g. Roderick A Macdonald & Robert Wolfe, "Canada's Third National Policy: The Epiphenomenal or the Real Constitution?" (2009) 59:4 UTLJ 469 at 470–73. See also KN Llewellyn, "The Constitution as an Institution" (1934) 34:1 Colum L Rev 1.

of the exercise of constitution-writing or of the constitutional text. But it does highlight what is already well established in Canadian public law: first, focusing on the major institutions of the traditional branches of government—the legislature, the executive, and the judiciary—generates a myopic and sorely thin account of governance and public life; and second, a focus on constitutional text alone effaces the rich, lively, and inherent tradition of unwritten constitutionalism in Canada, and indeed, inherent in the notion of constitutionalism.[20] Let's consider a few comments on these two points.

First, when we fasten our gaze on the grand institutions of governance addressed in the text of the Constitution—the Crown and its representatives, the House of Commons, the Senate, and the superior courts—we authorize ourselves to ignore the more specialized and quotidian actors that are also expressly contemplated in the constitutional text and are imagined as part of a successful, operating constitutional order in Canada. These are actors named in the text or contemplated by it; actors that must exist in order to realize textually guaranteed rights or to effectively manage a vast and diverse country; actors that carry out the Constitution on the ground. For example, in the Canadian constitutional order, the everyday actors of management, rights-realization, and government-implementation that are imagined in the text of the Constitution include the commissioner of agriculture in Ontario and Quebec,[21] school boards and trustees,[22] minority language school facilities,[23] municipal institutions,[24] licensing institutions,[25] and institutions to manage hospitals, asylums, charities,[26] prisons,[27] and resource conservation.[28] These actors also include public officials who determine citizenship status,[29] the postal service,[30] and the "head or central office" of federal government institutions.[31] These lists point to a set of specialized offices that are imagined within the constitutional text and are of

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20 See e.g. *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 32, 161 DLR (4th) 385 [*Secession Reference*]; Walters, *supra* note 6 at 256; Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015) at 259–60.

21 See *Constitution Act, 1867*, *supra* note 13, ss 134, 135.

22 See *ibid*, s 93.

23 See *Canadian Charter of Rights and Freedoms*, s 23, Part I of the *Constitution Act, 1982*, *supra* note 12 [*Charter*].

24 See *Constitution Act, 1867*, *supra* note 13, s 92(8).

25 See *ibid*, s 92(9).

26 See *ibid*, s 92(7).

27 See *ibid*, ss 91(28), 92(6).

28 See *ibid*, s 92A.

29 See e.g. *Charter*, *supra* note 23, s 6(2).

30 See *Constitution Act, 1867*, *supra* note 13, s 91(5).

31 See *Charter*, *supra* note 23, s 20(1).

a more administrative than grand nature. That is, they represent a set of public actors with bureaucratic, operational, managerial, or regulatory functions, many of which would likely now be understood to fall within the administrative state and which are referenced in or required by the text of the Constitution of Canada.

Returning to the issue of judicial discipline, it is worth noting that the set of institutions referenced in Canada's constitutional text does not include a body like the CJC. Beyond the executive and legislative action prescribed by section 99(1) for the removal of judges, the text of the Constitution does not elaborate on how to remove a judge. It does not describe the decision-making process or processes that must precede or underlie the Governor General's action to remove a judge following a double address of the Houses of Parliament. Nor does the text seem to contemplate or even gesture towards any additional legislative or extra-legislative infrastructure for removing a judge. And so, if the constitutional text exhausts the possibilities of constitutional design, then the legislature and executive might be autonomous in their ultimate legal authority to remove judges of the superior courts when the "good behaviour" threshold is breached. And yet, the constitutional text is never so thin or superficial in its meaning. Even when interpreted in a way that accounts for context, purpose, and underlying commitments, a constitution is never confined to its text.

This brings us to the second way in which cleaving too closely to the grand schematic design set out in the text of the Constitution can undermine an attempt to truly appreciate constitutional structure or the Constitution's institutional and procedural demands. This second way is the effacing effects of textual myopia, and more specifically, the effacement of the deep and undeniable unwritten dimensions of Canada's Constitution (which range from practice to principle to popular action) and the relationship of those unwritten dimensions to the Constitution's institutional order.

The true constitutional character of a public order can never be fully appreciated without accounting for the lived realities of its institutions, its actors, its communities, and its people. The long arc of Canadian constitutional history confirms that the structures of governance and government decision-making are not limited in their design, operation, or normative force to a reading of the written constitution. Rather, Canada's public institutions are necessarily sustained and brought to life by the Constitution's unwritten dimensions. Broadly speaking, the term "unwritten constitutionalism" captures constitutional features like conventions and unwritten principles that can be articulated with some precision and could be described as the most "formal" forms of unwritten constitutionalism. "Unwritten constitutionalism" also embraces the norms, practices, and informal mechanics of government machination, features of the public order that are often more implicitly defined and communicated, and that are

more fluid in meaning. All of these unwritten features are normative in their own way, all with their own force of compulsion and explanation for constitutional action on the ground. But they differ in how they are enforced. A breach of convention is principally the provenance of the political sphere. Informal norms, practices, and operational matters are enforced in some ways through administrative law, whether external or internal,[32] and institutional and personal dispute resolution mechanisms outside the formal legal sphere.[33] The interpretation and enforcement of unwritten principles are within the jurisdiction of the courts.

This conception of the Constitution appreciates the natural inevitable gaps in constitutional text. These are gaps of various forms—silences, thin spots, ambiguities, interpretive options, unstated social and philosophical contexts, and so on. As noted above, gaps are a function of the limits of human imaginative capacity and expression. We cannot foresee or contemplate all of the possibilities of a modern society. Further, the presence of gaps can be a matter of good technique. Life will always "overflow" the categories and constraints of the law's ideas and rules.[34] And so the attempt at full constitutional capture through text will always be unsuccessful. Moreover, the attempt could produce a harm of sorts. Textual gaps reflect the potentially paralyzing and stultifying effects of committing the conditions for human, community, and state interaction to writing, writing that is difficult to formally change. Textual gaps are thus inevitable and indeed appealing features of a constitution.

In expanding our gaze outwards, we come to see that the text must always be filled, both in practice and principle, by unwritten constitutionalism, that is, by reasoning and interpretation that accounts for informal norms, popular movements, political conventions, underlying assumptions, actions of resistance, expressions of assent and dissent, foundational ideas, and so on.[35] In this sense, there are no gaps in the Constitution. This is not to say that the unwritten constitution holds within it a coherent, complete vision of the constitutional order or a pool of "answers" to the problems that arise in public life. A constitution is never so tidy, stable, or predictable. A constitution is not a crystal ball or a product of omniscience, beneficence, or coherence. Rather, the notion of a gapless constitution signals that we

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[32] See Gillian E Metzger & Kevin M Stack, "Internal Administrative Law" (2017) 115:8 Mich L Rev 1239.

[33] See e.g. Roderick Alexander Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press for the Law Commission of Canada and the School of Policy Studies, Queen's University, 2002).

[34] On the overflow of law's categories, see Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 190–99.

[35] See generally Walters, *supra* note 6 at 254.

are never constitutionally unmoored even in moments of uncertainty, tension, and dispute. Rather, the unwritten constitution offers access to an expansive and dynamic set of rules, principles, institutions, frameworks, and practices that can be looked to, whether in moments of uncertainty, dispute or shared pursuit, for guidance, insight, or possible routes forward. The unwritten constitution is, in this sense, the unending white space on which the black ink of the text is written.[36]

In addition to the conventions, principles, norms, and practices noted above, "unwritten constitutionalism" also includes the constitution's "internal architecture" or "basic constitutional structure."[37] These terms signal that the Constitution should be conceived of as a unified—though not necessarily coherent or theoretically harmonious[38]—whole that seeks to implement a particular "structure of government."[39] But this article focuses on the institutional implications of judicial independence and so, the relationship of particular interest here is that between the unwritten principles of Canada's Constitution and these notions of constitutional structure and design. For this article, four points are particularly relevant to thinking through the ways in which the unwritten principles of the Constitution inform the design and operation of Canada's public institutions, that is, state institutions of legislative, executive, and administrative character.

First, the grand institutional structures set out in the constitutional text are necessarily expressions of unwritten principles. The principles are the building blocks of the constitutional order and it would be, the Court explained in the *Secession Reference*, "impossible to conceive of our constitutional structure without them."[40] In this way, the unwritten constitutional principles form a foundation for, and scaffolding on and around which, public institutions are constructed. The principles are also in the clay that makes up the metaphorical bricks from which these institutions are built and are mixed into the mortar that holds the bricks together. The institutions of Canada's constitutional architecture are, in other words,

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36 For different metaphors and elaboration of the relationship between written and unwritten constitutionalism, see Berger, "White Fire", *supra* note 18 at 255–63; Walters, *supra* note 6 at 264–65.

37 *Secession Reference*, *supra* note 20 at para 50; *OPSEU v Ontario (AG)*, [1987] 2 SCR 2 at 57, 41 DLR (4th) 1 [*OPSEU*]; *Reference Re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at para 82 [*Supreme Court Act Reference*]; *Senate Reform Reference*, *supra* note 17 at para 26.

38 See Webber, *supra* note 20. See also Eisgruber's discussion of the "aesthetic fallacy" in constitutional theory (Christopher L Eisgruber, "The Living Hand of the Past: History and Constitutional Justice" (1997) 65:4 Fordham L Rev 1611 at 1617–21).

39 *Senate Reform Reference*, *supra* note 17 at para 26. See e.g. *Secession Reference*, *supra* note 20 at para 50; *OPSEU*, *supra* note 37; *Supreme Court Act Reference*, *supra* note 37 at para 82.

40 *Supra* note 20 at para 51.

manifestations of the unwritten principles, built on, around, and from them. It is these notions of fusion and infusion, foundation and scaffolding that characterize the relationship between the institutions identified and contemplated in the text of the Constitution and the Constitution's unwritten principles. This is what the Supreme Court meant in the *Secession Reference* in holding that the unwritten principles "dictate" the major institutions of the constitutional architecture and are their "lifeblood."[41] And again what it meant in the *Senate Reform Reference* when it held that the text of the Constitution must be interpreted "with a view to discerning the structure of government that it seeks to implement."[42] The point is that the structure of the Constitution and the character of its institutions cannot be meaningfully understood without these principles; the effort to do so is definitionally futile.[43]

Second, unwritten principles have concrete implications for the powers of public actors. A number of cases illustrate this effect, but here, consider just two.[44] The *Secession Reference* offers one example of how unwritten principles can give rise to legal obligations for public actors in the exercise of their constitutional powers. In this reference, the Supreme Court recognized a legally enforceable obligation for representatives of the provincial and the federal governments to negotiate a province's secession from the Canadian federation in certain prescribed circumstances.[45] According to the Court, the "clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations."[46] The legal obligation was grounded in a set of unwritten principles—democracy, federalism, rule of law, constitutionalism, and re-

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41 *Ibid*.

42 *Supra* note 17 at para 26. On this structural reasoning, see e.g. Charles L Black Jr, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969).

43 See *Secession Reference*, *supra* note 20 at para 51.

44 For additional examples, see *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1; *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1; *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689; *Remuneration Reference*, *supra* note 7.

45 See *Secession Reference*, *supra* note 20 at paras 83–105.

46 *Ibid* at para 88.

spect for minorities—that, "function[ing] in symbiosis," gave rise to "substantive legal obligations ... and limitations on government action."[47] Another example is seen in *New Brunswick Broadcasting*.[48] Here, the unwritten principle at play—parliamentary privilege—sustained a constitutional power for the public actor involved: the Nova Scotia House of Assembly. In short, by rejecting New Brunswick Broadcasting's application for an order allowing it to film the House's proceedings, the majority of the Court held that inherent legislative privileges were constitutionally guaranteed. They authorized and empowered the House to exclude strangers and ban independent cameras from the chamber.

In both the *Secession Reference* and *New Brunswick Broadcasting*, underlying constitutional principles give rise to concrete powers and limits that bind public actors. This brings us to the third way in which unwritten principles are relevant to constitutional structure, this one also speaking to how public institutions operate. But while the examples of the *Secession Reference* and *New Brunswick Broadcasting* deal with formal rules that guide public action, this next point is concerned with ethical or orienting guides for action. The point is that unwritten principles serve not only as constraints on public action but also as ethical ideals that animate public actors and define the posture they should assume in the exercise of their public power. We see the principles serving this posture-defining function in the *Secession Reference*. In that case, the Constitution's unwritten principles not only ground a legal obligation for government officials to negotiate a province's place within the Canadian constitutional framework when certain conditions are met, but they also provide the aspirational ethic animating the negotiating parties. These actors are to embody the same constitutional principles that give rise to the duty to negotiate—federalism, democracy, constitutionalism, the rule of law, and respect for minorities. And thus, a common set of orienting principles would shape the approach and attitude of the negotiating parties.[49] In the Court's words, the principles "must inform the actions of *all* the participants in the negotiation process."[50] To abandon these ideals would, in the Court's view, jeopardize constitutional legitimacy.[51]

The role of unwritten principles as guides for action and procedural scaffolding is seen also in the ethical commitments flowing from judicial independence. As is discussed in greater detail below, judicial independence gives rise to concrete legal obligations in relation to the appointment,

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47 *Ibid* at paras 49, 54.

48 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 100 DLR (4th) 212.

49 See *Secession Reference*, *supra* note 20 at para 88.

50 *Ibid* at para 94 [emphasis in original].

51 See *ibid* at para 95.

compensation, and removal of judges. But in its aspiration-setting function, judicial independence informs the role morality of the public actors responsible for the administration of justice and the judiciary. In this sense, the principle helps to guide action and illuminate pathways for action. Kong and Macdonald argue that the formal, legal obligations of judicial independence will never be sufficient to truly realize a "virtuous judiciary."[52] The commitment to independence must be deeper such that structures, processes, and decision-making in relation to the judiciary are also imbued with the spirit of judicial independence. This means that not only must judges be chosen wisely, but structures must be in place to celebrate the selection, train judges well, provide judges with meaningful feedback on their work, publicly value the job judges are doing, provide judges with ongoing learning opportunities, defend the judiciary when necessary, and so on.[53] In these ways, the unwritten principles serve as constitutional ideals, contributing to the culture within which public actors operate and the institutional morality that guides their action.

The fourth and final way in which unwritten principles bear on the structures of Canada's public order is by requiring, or contributing to demands for, particular procedural and institutional frameworks. In some respects, we have already seen this in the negotiation process described in the *Secession Reference*, but the clearest example is found in the *Remuneration Reference*.[54] In this case, a majority of the Court held that judicial independence was an unwritten organizing principle of the Constitution that is brought to life, but not exhausted by, certain express provisions of the Constitution. The Court sustained the need for a "special process" for determining judicial remuneration.[55] In service of judicial independence, and the accompanying need to depoliticize the relationship between the judiciary and other branches of government and avoid any real or apprehended economic manipulation of the judiciary, the majority held that the process had to satisfy certain criteria of independence, effectiveness, and objectivity.[56]

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[52] See Roderick A Macdonald & Hoi Kong, "Judicial Independence as a Constitutional Virtue" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 831 at 857.

[53] See *ibid*. See also Roderick A Macdonald, "La faculté de discernement / Exercising Judgement" in *Which Judge for Which Society?: Proceedings of the 2008 Judges' Conference* (Quebec: Conseil de la Magistrature du Québec, 2008) 51 at 64–68.

[54] The relationship between text, the unwritten constitution, and demands on the institutional order in the majority's reasoning in the *Supreme Court Act Reference*, *supra* note 37 is a second example. On the negotiation process discussed in the *Secession Reference*, see *supra* note 20 at paras 94–103, 152.

[55] *Remuneration Reference*, *supra* note 7 at para 133.

[56] See *ibid* at paras 133–47.

The majority's reasoning in the *Remuneration Reference* has been read to oblige legislatures across the country to establish judicial compensation commissions to fulfill this "special process" and has been heavily critiqued on the grounds it extends well beyond the Court's proper constitutional role.[57] And indeed, the *Reference*, along with a subsequent companion case,[58] provides a very detailed account of the commissions, their mandates, their design, their operations, and the deference owed to them, despite the express repudiation of an intention to "lay down a particular institutional framework in constitutional stone."[59] But ultimately the core of the holding in the *Remuneration Reference* is that the principle of judicial independence requires a particular procedural or structural framework, one that lives up to the minimums of effectiveness, objectivity, and independence set out by the Court. This framework and these minimums can take on many forms, with the freedom of design, constrained only by the broad constitutional parameters, lying with legislative and executive actors. As the Ontario Court of Appeal explains, "there is no single template for the title, composition, structure, powers and procedures" of the body or bodies carrying out the special process.[60] The principle demands that a process with certain features be found within the public order; policy choice will govern the rest.[61]

The above discussion shows that if we are interested in the way in which we live our constitutional lives within a rich understanding of the public order, then we must be interested in three interlocking dimensions—the text of the Constitution of Canada, the unwritten features of Canadian constitutionalism, and the institutions and processes necessary to realize constitutional minimums, aspirations, or guarantees.[62] This article deals with a question that lies at the intersection of these three elements. The question is this: Do the terms of section 99(1), which authorize the Governor General to remove a superior court judge following a double address of the Senate and House of Commons, exhaust the institutional and procedural requirements for removing judges? This brings us back to

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57 See e.g. Peter W Hogg, "The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) [Dodek & Sossin, *Judicial Independence*] 25 at 26; Leclair, *supra* note 7 at 422–24.

58 See *Provincial Court Judges' Association of New Brunswick v New Brunswick (Minister of Justice)*, 2005 SCC 44 [*Provincial Court Judges' Assn of NB*].

59 *Remuneration Reference*, *supra* note 7 at para 185.

60 *Masters' Association of Ontario v Ontario*, 2011 ONCA 243 at para 39.

61 See *ibid*. On the impact of constitutional jurisprudence on institutional design and policy choices, see Kate Glover Berger, "The Impact of Constitutional References on Institutional Reform" in Emmett Macfarlane, ed, *Policy Change, Courts, and the Canadian Constitution* (Toronto: University of Toronto Press, 2018) 125.

62 On the difference between minimums and guarantees in the context of judicial independence, see Colvin, *supra* note 11.

our original query: What does judicial independence require of the process for removing a judge?

II. The Canadian Judicial Council and the Process of Removing Judges

The written constitution tells us how to remove a superior court judge from the bench. Tucked within a short section of the *Act* entitled "Judicature", section 99(1) of the *Constitution Act, 1867* guarantees the tenure of a superior court judge "during good behaviour." Beyond this standard, the limits of judicial tenure are, according to the constitutional text, principally procedural. That is, a superior court judge's tenure must end when the judge reaches the age of seventy-five[63] or upon agreement of both houses of Parliament and the executive. Section 99(1) addresses the latter by providing that judges of the provincial superior courts are "removable by the Governor General on address of the Senate and House of Commons."[64]

No superior court judge has been removed from the bench by way of the section 99(1) process, but it is not for lack of trying. Recommendations for removal have been made by the Council (and, before 1971, by judges acting under the *Inquiries Act*).[65] Further, the minister of justice introduced removal at least once in the modern era, but the judge resigned before a vote.[66] Even before the section 99(1) process has begun, the prospect or reality of a recommendation for removal from the Council or the investigation itself can be sufficiently painful to provoke a judge's resignation from the bench.[67] As the Federal Courts and the CJC have both agreed, a CJC inquiry report "amounts to 'capital punishment'" for the career of the judge under investigation.[68]

In practice, the minister of justice and cabinet decide whether to bring a recommendation for removal to the houses of Parliament for action under section 99(1). By virtue of the *Judges Act*, the CJC's involvement, if any,

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63 See *Constitution Act, 1867*, *supra* note 13, s 99(2)

64 *Ibid*, s 99(1).

65 See e.g. Canadian Judicial Council, "Report of the Canadian Judicial Council to the Minister of Justice" (30 March 2009), online (pdf): <cjc-ccm.ca> [perma.cc/L9K7-SJ8P]; Canadian Judicial Council, "Report of the Canadian Judicial Council to the Minister of Justice" (8 March 2017), online (pdf): <cjc-ccm.ca> [perma.cc/HTK4-ZP4P]; IC Rand, "Inquiry re: the Honourable L.A. Landreville" (1966), online (pdf): *Library and Archives Canada* <epe.lac-bac.gc.ca> [perma.cc/QKB4-Z9LK].

66 See e.g. Alison Crawford, "Justice Robin Camp Resigns After Judicial Council Recommends Removal", *CBC News* (9 March 2017), online: <www.cbc.ca> [perma.cc/ALZ4-LMGT].

67 See e.g. The Canadian Press, "Ontario Judge Resigns Over Misconduct", *CBC News* (3 April 2009), online: <www.cbc.ca> [perma.cc/EF3B-U4MD].

68 *Girouard Application*, *supra* note 2 at paras 166, 168, 171; *Girouard Appeal*, *supra* note 2 at para 105; *Review of the Judicial Conduct Process of the Canadian Judicial Council: Background Paper* (Ottawa: Canadian Judicial Council, 2014) at 47.

precedes this step. I say "if any" because neither the constitutional text nor the *Judges Act* requires the Council's involvement before a judge is removed. Indeed, the *Judges Act* expressly provides that the Council's investigatory jurisdiction does not affect the authority of the House of Commons, the Senate, or the Governor-in-Council to remove a judge.[69]

What role then can the CJC play in the removal of a superior court judge? The Council was established by statute in 1971, as part of a package of legislative reforms aimed at professionalizing and enhancing the administration of justice in the country's superior courts.[70] As the *Judges Act* provides, the Council's objects are to "promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts."[71] To achieve this aim, the Council is made up of the Chief Justice of Canada; the chief justice and any senior associate chief justice and the associate chief justice of each superior court or branch or division thereof; and the Chief Justice of the Court Martial Appeal Court of Canada.[72] "[I]n furtherance of its objects," the Council is empowered to establish conferences of chief justices and associate chief justices, establish seminars for the continuing education of judges, make inquiries and investigate complaints and allegations against judges, and make inquiries into the removal of some other federally appointed officers.[73] Individually and collectively, these powers give the Council significant power to impact the independence of the judiciary—whether to preserve, enhance, complicate, or undermine it. While acknowledging this impact, for the reasons noted earlier, this article will focus on the Council's power to inquire into complaints and the ways in which this power fits into the removal of judges. What then are these powers to investigate and inquire into complaints against judges?

The *Judges Act* details and formalizes the steps of the inquiry and investigation process alongside by-laws, a procedural code, and a handbook of practice and procedure issued by the Council.[74] The most relevant steps

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69 See *Judges Act*, *supra* note 1, s 71.

70 See discussion in *Girouard Application*, *supra* note 2 at paras 130–44.

71 *Judges Act*, *supra* note 1, s 60(1).

72 See *ibid*, s 59(1).

73 *Ibid*, s 60(2). The inquiries and investigations into judges are governed by section 63. Inquiries into other federal officers are governed by section 69.

74 *Ibid*, s 61(3) empowers the Council to enact by-laws dealing with the calling of Council meetings, conducting business at Council meetings, and the conduct of inquiries and investigations of judges. The Council has enacted by-laws dealing with the conduct of inquiries and investigations: *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203 ["By-laws"]. In addition, the Council has issued a procedural code for its inquiries ("Canadian Judicial Council Procedures for the Review of Complaints or Allegations about Federally Appointed Judges" (2015), online (pdf): <cjc-ccm.gc.ca> [perma.cc/8LN3-A6K2] ["Review Procedures"]) and a handbook ("Handbook

of the process are set out below, divided into three stages: Initiating the CJC's Inquiry and Investigation Process, The Conduct of Proceedings by an Inquiry Committee, and After an Inquiry. The aim in setting out these details is to provide the foundation needed to both understand the Council's approach to removal and reflect upon its procedural commitments in light of the demands of judicial independence.

A. Initiating the CJC's Inquiry and Investigation Process

The Council's complaint process can be triggered in one of two ways. The first is upon request of the minister of justice or the Attorney General of a province. With such a request, the Council must start an inquiry into the grounds for removing a particular judge.[75] In these circumstances, the Council automatically strikes an inquiry committee with the mandate of determining whether the judge "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 or her conduct or otherwise, in a position incompatible with the due execution of that office."[76] These are thresholds for removal. The inquiry committee is made up of judges and lawyers. It is composed of an uneven number of Council members, chosen by the senior member of the Judicial Conduct Committee (JCC), and one or more lawyers with at least ten years standing chosen by the minister of justice.[77] The majority of the inquiry committee are to be members of the Council.[78]

The second way to initiate the Council's investigation powers is by complaint from a member of the public or a member of the Council,[79] or by material that comes to the attention of the executive director of the Council.[80] Such a complaint or material sets in motion a set of screening mechanisms, all aimed at determining whether the complaint discloses conduct that is sufficiently serious to warrant removal of the judge from the bench. If the decision-makers at the screening stages determine that the threshold is met, an inquiry committee will be struck.

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of Practice and Procedure of CJC Inquiry Committees" (2015), online (pdf): <cjc-ccm.gc.ca> [perma.cc/FQB2-5PBZ] ["Handbook"]).

75 See *Judges Act*, *supra* note 1, s 63(1).

76 *Ibid*, s 65(2).

77 See *ibid*, s 63(3); "By-laws", *supra* note 74, s 3(1).

78 See "By-laws", *supra* note 74, s 3(1).

79 See *Judges Act*, *supra* note 1, s 63(2).

80 See "Review Procedures", *supra* note 74, s 4.2.

There are three levels of screening. The executive director carries out the first level. The executive director is responsible for examining all incoming complaints and other material relevant to judicial conduct and determining whether it warrants consideration. If it does, the executive director must refer the matter to the chair of the JCC.[81] At this early stage, certain matters will not warrant consideration, including complaints that are trivial, vexatious, made for an improper purpose, manifestly without substance, or those that constitute an abuse of the complaint process.[82] Additionally, complaints that do not involve conduct, and any other complaints that are not in the public interest and the due administration of justice to consider, will not warrant consideration.[83]

If the executive director determines the matter warrants consideration, the complaint proceeds to a second level of screening undertaken by the chair of the JCC. The chair must review matters received from the executive director and can proceed in one of three ways: seek additional information from the complainant, seek the judge's comments and those of their chief justice, or dismiss the matter if the chair considers that it does not warrant consideration.[84] If more information is sought, the chair must then review it and again choose how to proceed: dismiss the matter if no further measures need be taken; hold the matter in abeyance pending the pursuit of remedial measures; ask for an independent investigator to collect further information in order to assist in considering the matter; or refer the matter to a judicial conduct review panel if the chair determines that the matter, on its face, might be serious enough to warrant the removal of the judge.[85] If the matter is referred to a review panel, the chair must provide written reasons for the referral. These reasons are provided to the judge under

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81 See *ibid*, s 4.3.

82 See *ibid*, s 5.

83 See *ibid*.

84 See *ibid*, s 6.

85 See *ibid*, s 8.2; "By-laws", *supra* note 74, s 2(1). If the matter is dismissed, the chairperson is authorized to provide the judge with an assessment of their conduct and express any concerns the chairperson might have ("Review Procedures", *supra* note 74, s 8.3). If the matter is held in abeyance, the chairperson can recommend that any problems identified by way of the complaint be addressed through counselling or other remedial measures and then consider the matter if satisfied that it has been appropriately addressed ("Review Procedures", *supra* note 74, s 8.4). If an independent investigator is retained, the investigator is to pursue relevant information only and must provide the judge under scrutiny the opportunity to comment on the information gathered. Those comments must be included in the investigator's report ("Review Procedures", *supra* note 74, ss 9.1–9.5). When a matter is dismissed or concluded by the chair of the JCC, the executive director must inform the complainant ("Review Procedures", *supra* note 74, s 12.1).

scrutiny and their chief justice, and the judge has thirty days to comment, including comments on whether an inquiry committee should be struck.[86]

A review panel is the final layer of screening before a matter reaches the inquiry committee. By the time a matter reaches the review panel, the executive director will have determined it warrants consideration and the chair of the JCC will have concluded that the matter may be serious enough to warrant the removal of the judge. The task of the review panel is to determine whether an inquiry committee should be struck. The senior member of the JCC selects the members of the review panel,[87] a five-person panel composed of three members of the Council, one puisne judge, and one person who is neither a lawyer nor a judge.[88] An inquiry committee is to be constituted "only if [the review panel] determines that the matter might be serious enough to warrant the removal of a judge."[89] If this threshold is not met, the review panel must send the matter back to the chair of the JCC to decide how to proceed.[90] If the threshold is met, the complainant is informed and an inquiry committee is struck.[91] The review panel must provide written reasons and a statement of issues that the inquiry committee is to consider. These reasons and the statement of issues are then sent to the judge under review, that judge's chief justice, the minister of justice, and the inquiry committee.[92] It is at this time that the executive director must also send a notice to the minister of justice inviting the minister to designate members of the inquiry committee.

B. The Conduct of Proceedings by an Inquiry Committee

An inquiry committee is tasked with determining whether a judge's conduct has met the statutory threshold for removal from the bench. The proceedings are formal and prescribed, governed by the *Judges Act* and the *Canadian Judicial Council's Inquiries and Investigations By-laws, 2015*. The Council is authorized to enact the by-laws.[93] These instruments address a number of procedural issues, ranging from case management conferences to subpoenas to privilege. For our purposes, the following points drawn from both instruments give a good sense of how the proceedings of the inquiry committee unfold:

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86 See "Review Procedures", *supra* note 74, s 8.5.

87 See "By-laws", *supra* note 74, s 2(2).

88 See *ibid*, s 2(3).

89 *Ibid*, s 2(4).

90 See *ibid*, s 2(5).

91 See *ibid*, s 2(6).

92 See *ibid*, s 2(7).

93 See *Judges Act*, *supra* note 1, s 61(3)(a).

- A judge who is the subject of proceedings must be given reasonable notice of the subject matter of the inquiry or investigation, and of the time and place of any hearing. The judge must be given the opportunity, in person or by counsel, to be heard at the hearing, to cross-examine witnesses and to adduce evidence on his or her behalf.[94] Beyond these statutory guarantees of participation, the inquiry committee is expressly bound to conduct its proceedings in accordance with the principle of fairness.[95]
- The minister of justice can require that the proceedings of the inquiry committee be held in public.[96] Apart from a ministerial demand, the committee's hearings are expected to be held in public unless the public interest and due administration of justice require otherwise.[97]
- When operating under section 63, the Council or an inquiry committee is "deemed to be a superior court and shall have (a) power to summon before it any person or witness and to require him or her to give evidence on oath ... 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".[98]
- The inquiry committee is authorized to engage legal counsel and others to provide advice and to assist in the conduct of the inquiry.[99]
- Witnesses should testify before the inquiry committee under oath or upon affirmation.[100] The committee and the judge under scrutiny must advise as to the witnesses who will appear and provide summaries of their expected testimony.[101] The inquiry committee will decide on the order in which witnesses will be examined and the rights of cross-examination and re-examination.[102] At the end of the

94 See *ibid*, s 64.

95 See "By-laws", *supra* note 74, s 7.

96 See *Judges Act*, *supra* note 1, s 63(6).

97 See "By-laws", *supra* note 74, s 6(1).

98 *Judges Act*, *supra* note 1, s 63(4).

99 See "By-laws", *supra* note 74, s 4.

100 See "Handbook", *supra* note 74, s 4.5.

101 See *ibid*, s 4.6.

102 See *ibid*, s 4.7.

proceedings, parties with standing have the opportunity to present final submissions to the committee.[103]

C. After Proceedings of an Inquiry Committee

The inquiry committee is not tasked with reporting or making a recommendation to the minister; that is a task for the Council as a whole. And so once the committee completes its proceedings and deliberations, it submits a report to the Council, setting out its findings and conclusions regarding a recommendation for the removal of the judge under scrutiny.[104] The report is also sent to the judge, any other parties with standing, and the complainant, if any.[105] If the hearing was conducted in public, the report too must be made publicly available.[106]

The judge under scrutiny is entitled to respond to the committee's report within thirty days.[107] The Council then deliberates. It has a statutory obligation to consider the committee's report and the judge's submission.[108] It then issues a report. When the Council is "of the opinion" that the judge under scrutiny "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 or her conduct or otherwise, in a position incompatible with the due execution of that office," the Council's report "may recommend that the judge be removed from office."[109] It is this report of Council that is transmitted to the minister of justice, along with the record of the investigation or inquiry.[110] The responsibility for what happens next then lies with the minister who, in consultation with cabinet, decides how to proceed and whether to initiate the removal process under section 99(1). Of course, as noted earlier, the *Judges Act* provides that the Council's report does not affect the power of the executive and legislative actors involved in the section 99(1) process. While it may be "improbable" that cabinet would act without such a report,[111] there has been no express

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[103] See *ibid*, s 5.1.

[104] See "By-laws", *supra* note 74, s 8(1).

[105] See *ibid*, s 8(2)–(3).

[106] See *ibid*, s 8(3).

[107] See *ibid*, s 9(1). An extension of time is to be granted if requested and if the Council considers it to be in the public interest (*ibid*, s 9(2)).

[108] See *ibid*, s 11(1). When the Council meets to deliberate the removal of a judge, the quorum is seventeen members (*ibid*, s 10(2)).

[109] *Judges Act*, *supra* note 1, s 65(2).

[110] See *ibid*, s 65(1). The executive director also sends the report to the judge under scrutiny ("By-laws", *supra* note 74, s 13).

[111] See *Cosgrove v Canadian Judicial Council*, 2007 FCA 103 at para 49, leave to appeal to SCC refused, 32032 (29 November 2007) [*Cosgrove*].

finding that the section 99(1) process is legally bound by, or cannot be initiated until receipt of, a report from the Council.

The *Judges Act* does not set out a formal legal route by which a judge or other interested party can challenge the decisions of the Council or an inquiry committee.[112] There is no statutory appeal and judicial review is not addressed. The issue of whether judicial review is available arose most recently in *Girouard v. Canada (AG)*. In that case, in response to an application for judicial review to the Federal Court of a report from the Council, the Council argued that the decisions of the Council and its inquiry committees are not subject to judicial review. The Council submitted that neither the Council nor an inquiry committee is a "federal board, commission or other tribunal" under section 2 of the *Federal Courts Act* and their decisions are not subject to the judicial review jurisdiction of the Federal Court.[113] In part, this claim is rooted in specific language of the *Judges Act*, which provides that "the Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court".[114] Both the Federal Court and Federal Court of Appeal have rejected the Council's interpretation of this language.[115]

But beyond these specific matters of statutory interpretation and of interest for this article, both the Council and the Federal Courts have confronted questions about the constitutional character and status of the Council and its inquiry committees. In the Council's view, its jurisdiction over judicial discipline originates in the Constitution, as its membership comprises "senior judges with administrative duties" who enjoy inherent constitutional jurisdiction over judicial ethics.[116] The Council has also claimed that even if its power and that of its inquiry committee originates in statute, when these actors inquire into the character and implications of judicial conduct, they act in their constitutionally protected capacity as judges (and guardians of the Constitution), rather than in an administrative role.[117] It follows, the Council argues, that judicial review is not available.

Both the Federal Court and Federal Court of Appeal have unanimously (and rightly, in my view) rejected each of these constitutional claims. But

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[112] For a general discussion of routes for challenging the action of statutory delegates, see Cristie Ford, "Remedies in Administrative Law: A Roadmap to a Parallel Legal Universe" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond, 2018) 43 (see especially *ibid* at 59–79).

[113] See *Federal Courts Act*, RSC 1985, c F-7, s 18(1).

[114] *Judges Act*, *supra* note 1, s 63(4).

[115] See *Girouard Appeal*, *supra* note 2 at paras 81–96.

[116] *Canadian Judicial Council v Girouard*, 2019 FCA 148 (Appellant's Memorandum of Fact and Law at para 2).

[117] See *ibid* at paras 45, 55.

underlying both the courts' reasoning and the CJC's self-understanding are questions about the nature of the Council's constitutional role in the process of removing superior court judges from the bench and the way in which the Council must carry out that role. These questions are addressed in the next section, which explores what the principle of judicial independence requires of a removal process. This exploration shows that the Council's identity as a constitutional actor is accurate in part, but that immunity from judicial review would be unconstitutional. As is elaborated below, the Council is an administrative body carrying out a constitutionally required function. Because of this function, the Council's processes of decision-making and its place within the public order must satisfy certain criteria, including the availability of some form of judicial review.

However, these constitutional dimensions of the Council's work and operations do not render the Council itself or most of its design features to be constitutionally required or guaranteed. Rather, statute establishes, designs, and delegates authority to the Council and its powers, design, and indeed, its existence, are subject to reform or dismantling through the ordinary legislative process at any time. By first principles of public law, both the Council's enabling statute and the exercise of power under that statute must be consistent with the Constitution. And further, as we will see, the Constitution not only requires that the decisions of the Council and the inquiry committee be subject to judicial review, but it also suggests that the members of the Council operate in a way that welcomes rather than resists such review.

III. Judicial Independence and the Removal of Judges

Judicial independence is a political aspiration and a constitutional principle that operates in service of the rule of law. It is concerned with relationships and their effects on the integrity of the judicial mind, striving to shield the "capacit[ies] or inclination[s] of judges" from improper influence and interference.[118] In this sense, *judicial independence* is a "relational term," Peter Russell writes, "that refers to the important features of the relationship that the judiciary as an institution ought to have with other parts of the political system, and also of the relationships that members of the judiciary ought to have with one another."[119] In Canadian constitutional law, judicial independence is concerned with both institutional relationships of courts and individual relationships of judges, and the law seeks to discipline and structure these relationships by guaranteeing security of tenure, financial security, and administrative independence.[120] At its core,

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[118] Peter H Russell, "A General Theory of Judicial Independence Revisited" in Dodek & Sossin, *Judicial Independence*, *supra* note 57, 599 at 600.

[119] *Ibid*.

[120] See *Valente v R*, [1985] 2 SCR 673 at 687, 694, 704, 708, 24 DLR (4th) 161 [*Valente*].

judicial independence is ultimately concerned with the capacity of the courts and individual judges to "perform their constitutional function free from actual or apparent interference."[121] The three objective guarantees are intended to help realize this goal.

Judicial independence is not absolute and is always contextual.[122] Its demands change over time and are not exhaustively codified by the three objective guarantees.[123] Given the dynamic understanding of constitutionalism in Canadian public law, Dodek and Sossin argue that it "would be a mistake to assume that we have reached the end of the process of defining the constitutional requirements of judicial independence."[124] That process is "essential to understanding the dynamic normative context in which models of court administration must be analyzed" and as governments change in modern times, "we must now consider the contemporary transformations in the principle of judicial independence."[125] Part of those "contemporary transformations" includes ongoing efforts to depoliticize the relationship between the judiciary, on the one hand, and the legislative and executive branches, on the other.[126] In this context, the notion of depoliticization accepts the inevitably political nature of the judicial function and the nature of adjudication, while aiming to ensure that the legislature and executive do not, and do not appear to, exert political pressure on the judiciary.[127]

Structural questions about judicial independence in Canada have most often arisen in relation to provincial courts,[128] the role of justices of the peace,[129] and the design of administrative decision-makers,[130] rather than in relation to superior courts. As a result, much of the jurisprudential understanding of judicial independence in Canada has developed through reflection on the place of adjudicative decision-makers other than superior

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121 *Ibid* at 687.

122 See e.g. Russell, *supra* note 118 at 601.

123 See *Mackeigan v Hickman*, [1989] 2 SCR 796 at 826, 61 DLR (4th) 688.

124 Adam Dodek & Lorne Sossin, "Introduction: Judicial Independence in Context" in Dodek & Sossin, *Judicial Independence*, *supra* note 57, 1 at 12 [Dodek & Sossin, "Introduction"].

125 *Ibid*.

126 See *Remuneration Reference*, *supra* note 7 at para 140; Dodek & Sossin, "Introduction", *supra* note 124 at 11–14.

127 See Dodek & Sossin, "Introduction", *supra* note 124 at 12–13.

128 See e.g. *Remuneration Reference*, *supra* note 7; *Valente*, *supra* note 120; *Beauregard v Canada*, [1986] 2 SCR 56, 30 DLR (4th) 481; *Re Therrien*, 2001 SCC 35 [*Therrien*].

129 See *Ell*, *supra* note 9; *Provincial Court Judges' Assn of NB v New Brunswick*, *supra* note 58 (the Alberta legislation at issue in this multi-party case dealt with justices of the peace).

130 See e.g. *Ocean Port Hotel v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 [*Ocean Port Hotel*].

court judges within the public order. This history may have helped Canadian constitutional law come to appreciate the contextual character of judicial independence.[131] While the core of judicial independence and the essence of its objective guarantees of security of tenure, financial security and administrative independence remain constant across decision-making contexts, the institutional and procedural frameworks that independence requires will vary over time and by type of decision-maker.[132] In each of these contexts, however, the test for lack of independence remains the same. The question is whether "the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence."[133] "The perception of independence will be upheld if the essence of each condition of independence is met" and the "essence of security of tenure is that members of a tribunal be free from arbitrary or discretionary removal from office."[134]

Any procedural framework for removing judges is both necessary for the realization of judicial independence and a risk to it. It is necessary because the rule of law is jeopardized when judges who no longer embody—or who are no longer seen to embody—the standard of judicial conduct remain on the bench. "Tenure which is too strongly shielded can be a licence for incompetence or impropriety."[135] But a removal process puts judicial independence at risk if it is invoked easily or arbitrarily, that is, if the posture of the actors carrying out the process is not properly calibrated to the demands of judicial independence. Along with any other administrative bodies, when the legislature and executive approach removal liberally, casually, or politically, the conditions for an open, unencumbered judicial mind and a virtuous judiciary are undermined. When operating with a steady and deep commitment to judicial independence, in both its formal and ethical forms, the institutions involved in removal uphold and reinforce the aspirational and practical dimensions of judicial independence. But when that commitment to judicial independence is questionable or destabilized through the actions, policies, decisions, or actors of the institutions in-

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131 See e.g. *Valente*, *supra* note 120*; Ell*, *supra* note 9 at paras 28–41; Dodek & Sossin, "Introduction", *supra* note 124.

132 This variation is particularly acute in the context of administrative decision-makers, to which judicial independence does not attach, at least not as a uniformly applicable constitutional guarantee: see *Ocean Port Hotel*, *supra* note 130 at para 30.

133 *R v Généreux*, [1992] 1 SCR 259 at 287, 88 DLR (4th) 110. See also *Cosgrove*, *supra* note 111 at para 41.

134 *Ell*, *supra* note 9 at para 32.

135 Colvin, *supra* note 11 at 237.

volved, judicial independence will suffer, practically, culturally, and normatively. The rule of law would necessarily suffer next.[136] At its core, judicial independence is not a protection in the service of judges, but rather in service of the public and its confidence in the administration of justice.[137]

With these first principles of judicial independence in mind, an aspiration of depoliticization focuses our attention on the character of the judiciary's relationships with the legislature and the executive, the branches of government legitimately shaped by partisan politics. The aim is to realize independence with a deep appreciation of the interdependence of judicial, executive, and legislative actors in governance.[138] Thus, the Constitution calls for a kind of deepening of the separation of powers between the branches, a deepening premised on robust understandings of the need for "institutional and functional differentiation"[139] in certain circumstances and fluidity between institutional roles in others. Sometimes, depoliticization will require formalizing the judiciary's relationship with the executive and legislature through structural separation and other design measures. As discussed above, such was the case in the *Remuneration Reference*. The special process for assessing judicial compensation, with its features of independence, effectiveness, and objectivity, established a formal, structural framework for mediating the relationship between the judiciary and the legislative and executive.

This article argues that the removal of judges is another such case. In the context of financial security and remuneration, an independent administrative process was found to be constitutionally necessary to create structural distance between the judiciary and the legislature and executive. The aim was to shield judicial office from the complexities of partisan politics. The thrust and parry of salary negotiations necessarily involves the dirty work of the political. The allocation and distribution of public funds is political by definition.[140] And so, judicial independence is jeopardized when judges and government representatives engage directly in the process of salary negotiation. To absorb the political overflow, the Constitution demands the creation of a special process, that is, an independent, effective and objective decision-making forum for discussion and negotiation interposed between the judiciary and the other branches of government. To fulfill this constitutional demand, Parliament and provincial legislatures

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136 See *Slansky v Canada (AG)*, 2013 FCA 199 at paras 329–30 [*Slansky*].

137 See *Cosgrove*, *supra* note 111 at paras 30–31.

138 On independence and interdependence, see Macdonald & Kong, *supra* note 52 at 856.

139 Dodek & Sossin, "Introduction", *supra* note 124 at 11.

140 See *Remuneration Reference*, *supra* note 7 at paras 133–47.

have established judicial compensation commissions—administrative actors—to review judicial compensation.[141]

This article argues that the same logic applies in the context of security of tenure. Under section 99(1), the executive and legislature hold the reins of judicial removal, an issue at the extreme end of the security of tenure spectrum. While this removal power is constrained by a good behaviour requirement, there is no way for either the executive or legislature to inquire into judicial behaviour in a way that is truly depoliticized. The character of judicial discipline is already fraught by public expectations, the pressures of contested moralities, and the exigencies of litigation. The complexities of judicial discipline and tenure must not be further formatted by the complexities of the political process. The judicial role cannot be realized if exercised with fear of arbitrary removal. This suggests that in the context of judicial tenure, as in the context of remuneration, a structural separation between the judiciary and the other branches of government is needed. In the removal context, the demand is not for a decision-making framework that shifts the site of negotiation. Rather, judicial independence calls for a structurally separate framework for inquiring into the conduct of a judge and assessing that conduct in light of the constitutional threshold for removal.

The claim here is that judicial independence demands that a particular process be carried out before a superior court judge is removed from the bench. In other words, the inquiry process and the function it serves are constitutionalized, but the form that this process takes is not. In the context of the basic questions of structural design, judicial independence sets a minimum that must be satisfied. The particulars are, subject to the limits elaborated below, matters of policy preference and choice. Barring any future constitutional amendment, the constitutional minimum will be satisfied through legislative action, through the creation of a permanent or ad hoc procedural framework. The minimum is, in effect, a constitutionalized administrative process. The demands for independence, also elaborated below, place this process outside the partisan branches and while Parliament could choose to locate this process within the courts, there is no constitutional reason to do so. Such would amount to the judicialization of an administrative process, not the other way around.

Thinking through the constitutional need for a specialized process to deal with the removal of judges from the perspective of administrative law offers a helpful reminder of the diverse ways in which this inquiry process

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[141] See e.g. *Judges Act*, *supra* note 1, s 26(1).

can be designed and carried out.[142] Within the bounds set by the Constitution, the legislature is empowered to establish the institutional and procedural structures that it sees fit, legislating the specifics of mandate, design, and jurisdiction. This freedom guarantees that the design of statutory decision-makers and processes can be tailored to the function that the decision-maker and process are intended to serve, whether that might be the constitutional function of inquiring into complaints of judicial misconduct or the policy goal of regulating certain products or industries.

While the legislature enjoys much freedom and flexibility in designing an inquiry process that would meet the demands of judicial independence, we must consider whether judicial independence imposes any constraints on these design choices. In light of the contextual understanding of judicial independence in Canadian constitutional law and the central role of superior courts in the judicial system,[143] the security of tenure of superior court judges cannot be less than that guaranteed for provincial court judges, but it need not be identical. A provincial judge cannot be removed from the bench without a judicial inquiry. The courts affirmed this procedural requirement in both *Valente* and *Therrien*.[144] While sometimes taken for granted as applying in the context of superior court judges,[145] the need for a judicial inquiry when removing a provincial court judge is premised on one of the structural differences in the design of the provincial and federal judicial orders, namely the constitutional guarantee of a double address of the legislature at the federal level.[146] The absence of such a double address in the provincial context has been held to be constitutional so long as the provincial court judge is removable only for cause, and that cause is "subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard."[147] In the presence of a double address, as in the federal context, the courts have not considered whether such an inquiry is constitutionally required.[148] This article

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142 On the diversity of design options in the administrative sphere, see e.g. Kate Glover, "The Principles and Practices of Procedural Fairness" in Flood & Sossin, *supra* note 112, 183.

143 While perhaps exaggerated somewhat in light of access to justice concerns and the expansion of the administrative state, the Supreme Court has held that superior courts are at the centre of the Canadian legal system. See *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, 130 DLR (4th) 385.

144 See *Valente*, *supra* note 120 at 697–98; *Therrien*, *supra* note 128 at para 76.

145 See *Girouard Application*, *supra* note 2 at para 160; *Douglas*, *supra* note 2 at para 121.

146 See *Valente*, *supra* note 120 at 697. See also *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 at paras 42–43; *Girouard Appeal*, *supra* note 2 at para 62.

147 *Valente*, *supra* note 120 at 698.

148 See *Girouard Appeal*, *supra* note 2 at para 63 (the Federal Court of Appeal concluded without additional reasoning that the need for a judicial inquiry should not be read into section 99(1)).

argues that an inquiry is constitutionally required before the section 99(1) process unfolds, but that the limits of what the Constitution demands must be carefully identified.

What then does the principle of judicial independence demand of such a process of inquiry? Four related features follow from the discussion above.

First, and most obviously, the inquiry must be independent of the legislative and executive branches of government. This follows directly from the need for depoliticization. The aim is to establish an institutional structure that ensures the independence of the judiciary by shielding judges from political interference and influence, while also providing the executive and legislature with the information needed to exercise the removal power when the circumstances so warrant. This institutional structure cannot be created under the oversight or with the participation of executive or legislative actors. As those branches of government already have the final word on removal under section 99(1), the public's confidence in the independence of the judiciary would be reasonably undermined if the political branches could also play a role in the initial stages of investigation and inquiry into whether the "good behaviour" standard has been breached. The need then, is for a decision-making process that fulfills the constitutional function but does so independently of the executive and legislature. This is precisely the kind of need that processes and actors within the administrative state—with the associated flexibility of mandate and design—can be tailored to meet.

The need to maintain a strict separation between the judiciary, on the one hand, and the executive and legislature, on the other, in the context of this inquiry process raises a concern about the current configuration of the process under the *Judges Act*. As noted above, the minister of justice is empowered to ask the Council to consider whether a particular judge should be removed. With this request, the Council automatically strikes an inquiry committee to consider the complaint. The additional screening mechanisms are not triggered. The minister is then entitled to choose members of the inquiry committee that will consider the complaint. The minister thus determines that an inquiry is warranted, chooses some of the decision-makers, and then decides how to proceed on the decision-makers' recommendation. Even on a more flexible and contextual understanding of independence in the administrative realm, this institutional configuration would breach the expectations of the reasonable person.[149] The direct involvement of the same person—a person who is the embodiment of political power and professional jeopardy—at the initiation, recommendation, and final decision-making stage offends the most basic notions of independence. In this context, while the minister's power to initiate a complaint is not

[149] See e.g. *2747-3174 Québec Inc v Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919, 140 DLR (4th) 577.

unconstitutional on its own, the provisions of the *Judges Act* that authorize the minister's continued participation at key parts of the process raise serious constitutional concerns about the current administrative scheme.

Second, the actor carrying out this inquiry must be animated and bound by an internal law that is strictly committed to judicial independence. In *Slansky v. Canada*, Justice Mainville held that when conducting inquiries into complaints of judicial misconduct, the CJC must operate in accordance with judicial independence:

> When undertaking an examination of the conduct of a judge, the Canadian Judicial Council must ensure that the examination respects the underlying purpose of the constitutional principle of judicial independence. Throughout its investigation, it must act in a manner that does not materially impair the independence and impartiality of the judiciary more than is necessarily inherent in the discharge of its statutory responsibility of preserving the integrity of the judiciary: As noted by La Forest J. in *Mackeigan* at p. 813:
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> > To conclude, bodies which are set up or which in the course of their duties are required to undertake an examination of the conduct of a superior court judge in the exercise of judicial functions must be so constructed as to respect the letter and the underlying purpose of the judicature provisions of the Constitution. Nor can investigatory bodies act in a manner that might materially impair the protection accorded by s. 99 or the independence and impartiality of the judiciary.[150]

Justice Mainville's observation about the CJC is more broadly applicable about the overarching mandate that must, as a matter of constitutional principle, discipline the work of the actor conducting inquiries into judicial conduct. This is a claim about the organization's "internal administrative law" and returns us to the ethical effect of unwritten principles discussed in Part I. The internal administrative law of any administrative agency is concerned with all of the inward-facing law of that agency. As Metzger and Stack define it, the internal administrative law of an agency includes all of the internal norms and structures that control agency action, including internal policies, "rules, procedures, and specifications" governing how agency personnel carry out their jobs, operational measures governing inter-agency interactions, formal and informal norms governing allocation of authority and processes of communication, guidelines on the interpretation of statutes, unwritten agency practices, and any other "organizational forms" that govern agency operations.[151]

To fulfill its purpose of independent assessment of judicial conduct, the internal law of an actor that is responsible for conducting inquiries into judicial conduct must all be consistent with, and indeed in the service of,

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[150] *Supra* note 136 at para 143.

[151] Metzger & Stack, *supra* note 32 at 1249–56.

judicial independence. Again, this is consistent with the role of unwritten principles on institutional morality and the posture of public actors discussed in Part I. The principal concern here is not with the independence of the actor carrying out the inquiry, although that independence and impartiality is a logical consequence of a strict commitment to judicial independence. Rather, the principal concern that must infuse the institution's internal administrative law and the professional posture of the institutional actors must be about maintaining the independence of the judges whose conduct is under scrutiny. Thus, the procedures the actor adopts for carrying out its inquiries, the interpretation it gives of the "good behaviour" standard, the litigation strategies and arguments it pursues, and the informal ways its personnel interact with each other, with judges, and with the public, must all be infused with care for preserving the independence of the judges who are subject to removal. There must be, in other words, an internal ethical commitment to a decision-making process that reflects each of the features discussed here.

The internal administrative law of the actor that carries out inquiries into judicial conduct leads directly to the third requirement for these inquiries: they must be carried out in compliance with the duty of fairness. In relation to the CJC, Justice of Appeals John Evans explained in *Taylor v. Canada (AG)* that "it would be inimical to the sensitive role of the Council in enhancing the administration of justice in Canada" through "protect[ing] the independence of the judiciary"—not to mention the "private interest of judges in their reputations and livelihood" and the public's interest in the integrity of the justice system—not to guarantee both the judges and complainants who are affected by the CJC's decisions access to procedural rights.[152] This holds equally for any actor responsible for inquiries into judicial conduct. It would be nonsensical and contrary to entrenched commitments of law to suggest that administrative law's deep modern commitment to the expansive application of the duty to act fairly would not extend to a decision-maker whose statutory mandate is to, in essence, serve as one of the guardians of judicial independence.[153]

Fourth, the actions of the decision-maker carrying out this inquiry must be subject to review by the courts. Much could be said here, but the claim is actually quite simple. The rule of law demands that public actors, those who hold and exercise public power, must be accountable for their exercises of power. Just one explanation of countless such explanations is found in the majority reasoning in *Dunsmuir*, which provides that

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[152] *Taylor v Canada (AG)*, 2003 FCA 55 at para 79.

[153] See e.g. *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police* (1978), [1979] 1 SCR 311, 88 DLR (3d) 671; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.

> [b]y virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.[154]

This fundamental principle guaranteeing that public power cannot go unchecked is not disrupted if the public official in question is also a superior court judge operating in another capacity. Judges serving in administrative roles and exercising adjudicative functions outside their section 96 function are familiar to Canadian public law.[155] Indeed, Justice Noël in the *Girouard Application* responded as follows to the argument that the CJC's decisions are immune from judicial review:

> It is undeniable that a report recommending the removal of a judge has a serious impact on that judge, professionally and personally, and on his or her family. It is inconceivable that a single body, with no independent supervision and beyond the reach of all judicial review, may decide a person's fate on its own. Of course it is true that, in our society, the position of judge requires exemplary conduct, but is this a reason to render it subject to a single investigative body and to eliminate any possibility of recourse against the decision resulting from the inquiry? In my opinion, it is not. However prestigious and experienced a body may be, it is not immune from human error and may commit a major violation of the principles of procedural fairness that only an external tribunal, such as the Federal Court in this case, can remedy. As Justice Stratas of the Federal Court of Appeal recently recalled, such absolute power has no place within our democracy ...
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> Therefore, as per the fundamental principles of our democracy, all those who exercise public power, regardless of their status or the importance of their titles, must be subject to independent review and held accountable as appropriate. This also goes for the CJC and the chief justices who make up its membership.[156]

This reasoning reflects the fundamental notions of Canadian public law and its application is not unique to the CJC. It would apply to any body delegated the responsibility of carrying out the kinds of inquiries into judicial conduct imagined in this article. Ultimately, judicial independence demands that these inquiries be subject to some form of judicial oversight. The "possibility of review by a judge only increases judicial independence

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[154] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28. See also *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 12.

[155] See e.g. *Inquiries Act*, RSC 1985, c I-11; *Specific Claims Tribunal Act*, SC 2008, c 22, s 6(2); *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 3(2)(a). See also *Girouard Appeal*, *supra* note 2; *Douglas*, *supra* note 2 at paras 82–84.

[156] *Girouard Application*, *supra* note 2 at paras 6–7.

by preventing interference from the other branches of government" and ensuring that the inquiry is conducted within the limits of natural justice and the demands of legality.[157] It cannot be expected that the executive or legislature would be equipped to ensure that the actions of a body conducting inquiries into judicial misconduct meet public law standards of fairness, jurisdiction, and constitutionality.[158] Denying a party who is affected by the outcome of those proceedings an opportunity to test their fairness and legality through a judicial process would undermine judicial independence and the rule of law. It is of note here that the flexibility of design discussed above applies to the design of review processes as well.[159]

Conclusion

This article argues that the unwritten principle of judicial independence has structural effects on the constitutional process of removing judges: Judicial independence entails that an inquiry process precede the legislative and executive decision-making provided for in section 99(1). While this process can take many forms, the constitutional minimum is satisfied by an administrative process that is independent, subject to judicial oversight, bound by the duty of fairness, and carried out by an actor committed to judicial independence. With this conclusion in mind, we can return to the claims of the CJC in recent litigation and see that these claims are both right and wrong. They are right in that the Council currently fulfills a constitutionally required function, namely carrying out inquiries into complaints against judges and assessing judicial conduct against the standard for removal. And such inquiries, whether carried out by the CJC or some other actor, are necessary in order for any executive and legislative action taken under section 99(1) to be consistent with the demands of judicial independence. These inquiries must be independent of the political branches of government and subject to review by the courts. They must also be carried out in accordance with the duty of fairness and by actors embodying a robust institutional morality defined by judicial independence. These constitutional requirements give rise to some concerns about the current design and operation of the CJC. Moreover, the Council's claims are wrong to the extent they suggest that either the CJC as an institution or its membership are constitutionalized or constitute a court, or that the decisions of the Council or its inquiry committee are immune from judicial review. The first is not borne out by the demands of judicial independence and the second is inconsistent with them.

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[157] *Ibid* at para 105. See also *Girouard Appeal*, *supra* note 2 at para 101, citing *Douglas*, *supra* note 2 at para 162.

[158] See *Douglas*, *supra* note 2 at para 123.

[159] See e.g. *Therrien*, *supra* note 128 at para 148.

To the extent that Parliament retains the current model for satisfying the inquiry function, this article raises questions that must be addressed to ensure that the CJC and its operations are consistent with the demands of judicial independence. It also sets the terms for deeper reflection on the way that judicial discipline should be carried out in Canada's constitutional order.

But stepping back from the most immediate implications of this article for the Canadian public order and the forward-looking reform agenda, two broader lessons emerge from the ideas contemplated above, both of which call for further attention and are part of the larger project to which this article contributes. First, this study of the demands of judicial independence for the process of removing judges offers further insight into current understandings of the structural implications of unwritten constitutionalism. It offers another example of how the unwritten principles of the Constitution can support the existence of certain institutional processes, embodying certain well-defined features and fulfilling certain well-defined roles. The study of the CJC in particular helps highlight how some of these processes might be best understood as constitutionalized administrative processes, as they can be, and in the normal course likely will be, carried out by statutory actors operating within the administrative state. By presenting insight into potentially necessary connections between the Constitution and structures of the administrative state, this article advances ongoing conversations about administrative constitutionalism beyond matters of rights interpretation and implementation.

The second lesson is related but narrower. The ideas of this article force us to confront the ambivalence about the status of the administrative state in Canada's constitutional order.[160] The degree of independence needed for an actor like the CJC that enquires into judicial conduct sits uncomfortably with the common understanding of the administrative state as part of the executive branch of government and the Supreme Court's holding, if uniformly applied, that administrative actors are not subject to constitutional guarantees of independence.[161] The case of the CJC, or whatever actor fulfills this constitutional role, complicates both the place of the administrative state in the constitutional order and the constitutional boundaries of independence.

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[160] See Lorne Sossin, "Courts, Administrative Agencies, and the Constitution" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 231 at 238–44; Glover Berger, "Constitutional Status of the Administrative State", *supra* note 3.

[161] See *Ocean Port Hotel*, *supra* note 130 at para 30.