A TALE OF TWO IMMUNITIES: JUDICIAL AND PROSECUTORIAL IMMUNITIES IN CANADA

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The author discusses and analyzes some recent decisions emanating from the Supreme Court of Canada on the question of judicial and prosecutorial immunities in Canada. The analysis is, first, undertaken with particular attention given to pre-existing judicial precedent at common law. Next, public policy reasons for and against the need for judicial immunity, and its derivative in the form of prosecutorial immunity, are canvassed. Professor Law then looks to the evolving principle of judicial independence, which itself provides the policy underpinnings for judicial immunities, in order to explain the phenomena of judicial and prosecutorial immunities. Finally, these immunities, as defined by the Supreme Court of Canada, are discussed from a constitutional perspective.

L'auteur examine certaines des décisions récentes de la Cour suprême du Canada concernant les droits et immunités dont bénéficient la magistrature et les poursuivants au pays. Il analyse tout d'abord les décisions judiciaires faisant jurisprudence d'après la common law; puis, les raisons d'ordre public qui justifient ou infirment la nécessité de ces privilèges pour la magistrature; et enfin, l'immunité accordée aux poursuivants, laquelle dérive de la précédente. Afin d'expliquer l'immunité accordée aux magistrats et aux poursuivants, le professeur Law étudie ensuite le principe d'indépendance de la magistrature qui en est le fondement. Finalement, ces droits et immunités, tels que les définit la Cour suprême, sont abordés sous l'angle constitutionnel.

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I. INTRODUCTION

This is a tale of two immunities. It arises from two recent judgments of the Supreme Court of Canada: *Nelles* v. *Her Majesty the Queen in Right of Ontario et al.*[1] and *MacKeigan* v. *Hickman*.[2] The former decision concerns the entitlement of the Attorney-General of Ontario and his agents, Crown Attorneys, to assert an absolute immunity from suit in an action for malicious prosecution, while the latter concerns the privilege or immunity claimed by superior court judges from testifying in respect of their judicial functions. These cases have arisen at a time when many

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1. (1989), 98 N.R. 321 (S.C.C.).
2. (1989), 100 N.R. 81 (S.C.C.)

of the immunities and privileges historically asserted by both the executive branch of government and public officers are under attack and reconsideration.[3]

The immunities asserted by the prosecutors in *Nelles* and by the judges in *MacKeigan* are not the same in effect, but they rest on the same fundamental premise that protection from the normal operation of law is necessary, in some instances, to promote the proper discharge of official functions in the public interest. In *Nelles*, the established standard of absolute immunity was qualified, exposing crown prosecutors to suit for malicious prosecution, while in *MacKeigan*, the established judicial privilege from testifying was reaffirmed, and possibly expanded. The result of these two cases appears to be greater immunity for judges and diminished immunity for prosecutors. Accordingly, public prosecutors can be held to greater accountability in the performance of their prosecutorial functions while judges are, arguably, less accountable in the performance of their judicial duties.

This result seems surprising given the historical connection between judicial and prosecutorial immunities from civil suit and the close proximity of these two judgments in time. Immunities for both judges and prosecutors have been justified on the basis of the public interest in the independent and fearless discharge of their official functions. This has been viewed as essential to the proper administration of justice. Yet, on the basis of these decisions, the unique position of the judge, at law, is augmented in contrast to the position of public prosecutors, and perhaps other public officers. *Nelles* has created a dichotomy between judges and prosecutors in terms of immunity from civil suit. *MacKeigan* adds to this dichotomy in that it sets judges apart from other public officials, including public prosecutors, in terms of testimonial immunity. Therefore, the decisions of the Supreme Court of Canada in these two cases, appear to be of great significance to the subject of legal control over public officials in the administration of justice.

This article will attempt to place these decisions in their proper perspective, through an examination of the common law concerning judicial and prosecutorial immunities. I commence with a brief review of the facts, lower court judgments and the decisions of the Supreme Court. Next, a few comments will be made on the subject of public interest immunities for public officials. All of this will serve as a necessary setting for the discussion to follow on judicial and prosecutorial immunities. Judicial immunities will be considered first as they are the most clearly established at common law. However, before prosecutorial immunity, a derivative form of judicial immunity, is considered, I will examine the evolving concept or principle of judicial independence. This principle provides the policy underpinning for judicial immunities. As the principle develops, the judicial immunities which serve it, must also change. While it provides support for judicial immunities, it also serves as an explanation for the distinction drawn between judges and

3. For example, *Amex Potash* v. *Saskatchewan* (1976), 71 D.L.R. (3d) 1; *Operation Dismantle Inc.* v. *The Queen* (1985), 18 D.L.R. (4th) 481; *Carey* v. *The Queen* (1986), 30 C.C.C. (2d) 498, [1986] 2 S.C.R. 637, (1986), 35 D.L.R. (4th) 161; *Smallwood* v. *Sparling* (1982), 141 D.L.R. (3d) 395. At both the federal and provincial level, reform is under way with respect to proceedings against the Crown. The federal government introduced legislation on September 28, 1989 to reform proceedings against the federal Crown, (Bill C-38). The Ontario Law Reform Commission is near the completion of its two year study on Crown liability. It is anticipated that significant reforms to Ontario's *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393, will be recommended. As the Ontario Act is based on a Model Act proposed by the Uniformity Commissioners in 1950, Ontario reforms should prompt changes in the legislation of seven other Canadian provinces whose legislation is also based on the Model Act.

other officials in terms of legal accountability in the discharge of their official functions. Finally, after review of the law relating to prosecutorial immunity, I will consider these cases from a constitutional perspective, as the *Charter* and the Constitution played a significant, but varying, role in these decisions.

II. FACTS/LOWER COURT DECISIONS

The facts underlying the decisions in *Nelles* and *MacKeigan* provide clear evidence that in both cases, the system of criminal justice malfunctioned. Given the publicity surrounding the events of these cases, no more than a brief sketch of the facts and lower court judgments is necessary.

A. *NELLES* v. *HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO*

In 1981, the plaintiff, Susan Nelles, a nurse employed at Toronto's Hospital for Sick Children, was charged with four counts of first degree murder in connection with the mysterious deaths of a number of infants at the hospital. In 1982, after a lengthy preliminary inquiry, she was discharged on all four counts, as the evidence adduced was insufficient to warrant putting her on trial.[4] Subsequently, she commenced an action claiming damages against the Crown in right of Ontario, the Attorney General of the Province, and his agents, the Crown Attorneys involved,[5] and the police. Her claim was framed in negligence, malicious prosecution, and false imprisonment. In addition, she claimed that her rights under ss. 7 and 11(c) and (d) of the *Charter* had been infringed.

At the completion of formal pleadings, counsel for the Crown and the prosecutors brought an application for an order striking out the plaintiff's statement of claim on the ground that it disclosed no reasonable cause of action. The defendants relied on the statutory immunity of the Crown[6] and the common law immunity from suit accorded to public prosecutors. In a number of recent cases,[7] Canadian courts had recognized the absolute immunity of crown prosecutors from suit. Fitzpatrick J. granted the defendants' motion and dismissed the action against them on the grounds of the asserted statutory and common law immunities. Further, he was of the opinion that the *Charter* did not abrogate the common law immunity claimed by the Attorney General and his prosecutors.

On appeal to the Ontario Court of Appeal,[8] the appellant proceeded on the basis that her action was for malicious prosecution and the infringement of her *Charter* rights — the cause of action based in negligence was not pursued. Three submissions were considered by the Court. The first concerned the Crown's immun-

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4. *R.* v. *Nelles* (1982), 16 C.C.C. (3d) 97.
5. Throughout all proceedings, the courts did not draw a distinction between the position of the Attorney General and his agents, Crown Attorneys. If the Attorney General was entitled to claim an absolute immunity from suit so were his agents, the Crown Attorneys. For the purposes of this article, I shall make no distinction, and any reference to the legal position of Crown Attorneys is a statement of both their position and that of the Attorney General.
6. *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393, s. 5(6).
7. *Owsley* v. *Ontario* (1983), 34 C.P.C. 96; *Richman* v. *McMurtry* (1983), 41 O.R. (2d) 559; *Levesque* v. *Picard* (1985), 66 N.B.R. (2d) 87; Contra; *Curry* v. *Dargie* (1984), 28 C.C.L.T. 93 (C.A.); *German* v. *Major* (1985), 39 Alta. L.R. (2d) 270, 34 C.C.L.T. 257.
8. *Nelles* v. *Ontario* (1985), 51 O.R. (2d) 513 (C.A.).

ity under s. 5(6) of the *Proceedings Against the Crown Act*.[9] The appellant argued that this immunity only extended to prosecutorial functions of a "judicial" nature — the Crown would be vicariously liable for the tortious conduct of public prosecutors arising out of the discharge of their "investigative" or "administrative" functions. While the Court had some doubt whether the functions of the Attorney General and his prosecutors could be characterized as "judicial", it characterized the prosecutors' functions as "quasi-judicial",[10] which was sufficient to engage the protection of the legislation. Further, on the basis of the vicarious nature of the Crown's liability in tort, the Court reasoned that if servants or agents of the Crown are not personally liable by reason of their immunity from civil suit, then the Crown cannot be vicariously liable. In effect, the personal immunity accorded, by the common law, to the prosecutor, becomes the immunity of the Crown.

The second submission addressed the absolute immunity granted to the Attorney General and his agents, the Crown Attorneys. In the face of a substantial body of authority supporting an absolute immunity for public prosecutors, the appellant argued, on policy grounds, that such a broad and complete immunity was unwise and unnecessary. If the public interest in the administration of justice required an absolute immunity for public prosecutors then, logically, why not extend it to other classes of officials such as police officers? Surely, their need was as great.

In response, the Court of Appeal reviewed the Canadian,[11] American,[12] and English authorities[13] touching upon the question. The American authorities, particularly *Gregoire* v. *Biddle*[14] and *Imbler* v. *Pachtman*,[15] strongly supported the existence of an absolute immunity for public prosecutors, protecting them from civil suit even when they were alleged to have acted maliciously or in abuse of their office. The United Kingdom authorities were equivocal on the issue.[16] The bulk of Canadian authority reflected the American position, although one judge had acknowledged that an absolute immunity for public prosecutors was "a startling proposition" and "difficult to sustain".[17] In only two Canadian cases had the courts refused to recognize an absolute immunity from suit for public prosecutors.[18]

The Ontario Court of Appeal felt constrained by the overwhelming weight of authority in favour of an absolute immunity, even though it found the proposition to be "a troubling one".[19] The public policy rationales supporting an absolute immunity for a prosecutor in initiating and conducting a public prosecution clearly outweighed the countervailing policies calling for a qualified immunity. The "need

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9. *Supra*, note 6.

10. *Nelles*, *supra*, note 8 at 523.

11. *Owsley* v. *The Queen in Right of Ontario* (1983), 34 C.P.C. 96; *Richman* v. *McMurtry et al.* (1983), 41 O.R. (2d) 559; *Bosada* v. *Pinos* (1984), 44 O.R. (2d) 789; *Curry* v. *Dargie* (1984), 28 C.C.L.T. 93; *German* v. *Major* (1985), 39 Alta. L.R. (2d) 270, 34 C.C.L.T. 257.

12. *Gregoire* v. *Biddle* (1949), 177 F. 2d 579; *Imbler* v. *Pachtman* (1976), 96 S.Ct. 984.

13. *Hester* v. *MacDonald* (1961), S.C. 370; *Riches* v. *D.P.P.*, [1973] 2 All E.R. 935 (C.A.).

14. (1949), 177 F. 2d 579.

15. (1976), 96 S.Ct. 984.

16. Edwards, *The Attorney General, Politics and the Public Interest*, 1984.

17. *Bosada*, *supra*, note 11 at 794 per Pennell J.

18. *Curry*, *supra*, note 11; *German*, *supra*, note 11.

19. *Nelles*, *supra*, note 8, at 531 per Thorson, J.A.

to maintain public trust in the fearlessness and impartiality of those who must act and exercise discretion in the bringing and conducting of criminal prosecutions"[20] was greater, in the mind of the Court, than the right of the citizen, injured as a result of prosecutorial misconduct, to redress. A lesser, or qualified, standard of immunity would not suffice as it would expose all prosecutors to the possibility of suit on the alleged grounds of malice or abuse of office:[21]

> The problem, however, is to define any qualification that might be placed on the immunity in such a way as not to jeopardize or place at risk the very substantial interest which the public has in the integrity of the prosecutorial system.

In the opinion of the Court of Appeal, the policies in conflict did not lend themselves to a compromise in their resolution — the issue of prosecutorial immunity was a question of all or nothing. In the end result, public policy, in the Court's view, supported an absolute immunity from suit for prosecutors in the discharge of their official functions.

The third, and final submission, concerned the effect of the *Charter* on the common law immunity claimed by the Attorney General and his prosecutors. Arguably, a common law immunity should not prevent the courts from granting a remedy in damages under s. 24(1) of the *Charter*, where a citizen establishes a violation of his constitutional rights.[22] In an argument of some complexity, the appellant submitted that the conduct of the Attorney General and his prosecutors constituted an infringement of her rights under ss. 7 and 11(c) and (d) of the *Charter*. The Court of Appeal disagreed, holding that the alleged misconduct did not amount to an infringement or denial of the appellant's *Charter* rights. It questioned whether conduct, amounting to the tort of malicious prosecution, would, in every case, amount to an infringement of a person's constitutional rights. However, it expressly left open the question whether an appropriate remedy under s.24(1) would be an award in damages, when such an award had the effect of displacing a common law immunity such as that recognized for prosecutors in this case.

In the end result, the appeal was dismissed and the order of the trial judge striking out the actions was upheld.

B. *MACKEIGAN* v. *HICKMAN*

The decision of the Supreme Court of Canada in *MacKeigan* has its roots in the lengthy legal struggle of Donald Marshall Jr. to gain a reversal of his conviction for the murder of Sanford Seale, a Nova Scotia youth. At the time of his conviction in 1971, Marshall was a 17 year old boy. From the day of his arrest, and throughout his trial and subsequent imprisonment, he maintained his innocence. In 1982, his lawyers provided the police in Sydney, Nova Scotia with new information which lead to a further investigation by the R.C.M.P. and the local crown prosecutor. During the course of this investigation, several key witnesses, at the first trial, recanted their evidence, alleging that their original testimony had been compelled through police pressure. On the basis of this new evidence, the federal Minister of Justice

20. *Ibid.* at 535.
21. *Ibid.* at 536.
22. On the issue of a damage remedy for *Charter* infringements, see; Pilkington, Marilyn, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517; Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy" (1988) 52 Sask. L. Rev. 1.

referred the conviction to the Nova Scotia Court of Appeal for a redetermination under s. 617(b) of the *Criminal Code*.[23]

Two separate proceedings were conducted by the Nova Scotia Court of Appeal. First, a panel consisting of five justices, including the Chief Justice of Nova Scotia, Ian MacKeigan, considered applications to introduce new evidence. Some of these applications were granted in respect of certain witnesses, including Marshall, while the court reserved its decision on the other applications. At a subsequent hearing, the same panel, with one exception, heard the evidence. The new member of the panel, at the second hearing, was Pace J.A. who had been the Attorney General of Nova Scotia at the time of Marshall's conviction for murder.

On May 10, 1983, the Court of Appeal rendered its judgment.[24] It ordered that Marshall's conviction be quashed and directed an acquittal. At the conclusion of its judgment, the Court made a number of observations concerning the conduct of Donald Marshall throughout all of the proceedings, including his trial.[25] For example:

> There can be no doubt but that Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction.[26]
>
> However, the fact remains that Marshall's new evidence, despite his evasions, prevarications and outright lies, supports the essence of James McNeil's [an eye witness] story — namely that Seale was not killed by Marshall.[27]
>
> Any miscarriage of justice is, however, more apparent than real.[28]

These comments, and others, engendered public controversy; they were perceived as having an impact on the amount of compensation paid *ex gratia* to Marshall by the provincial government for his wrongful conviction and imprisonment.[29]

On October 28, 1986, the provincial government reacted to public concern about the Marshall case by appointing a Royal Commission to inquire into the investigation of the death of Seale, the charging and prosecution of Marshall, the trial and conviction of Marshall, and all other matters considered by the Commission to be relevant. The Commission consisted of three respected and experienced members of the Canadian federal judiciary: Chief Justice A. Hickman, of the Newfoundland Supreme Court, served as Chairman, and Associate Chief Justice L. Poitras of the Quebec Superior Court and Justice G. Evans of the Ontario High Court served as Commission members. The Commission construed their mandate broadly, including, within it, such matters as the Court of Appeal's redetermination proceedings and the process through which compensation was paid to Marshall.

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23. R.S.C. 1970, c. C-34.
24. *R.* v. *Marshall* (1983), 57 N.S.R. (2d) 286.
25. In *MacKeigan* v. *Hickman*, (1988) 43 C.C.C. 287 at 293, Glube C.J. characterized the comments of the Court of Appeal in the following terms:

    > They did what most trial judges do when they have to decide a case based on the credibility of various witnesses, namely they gave their analysis and opinion of the evidence they had received and heard as previously set out in their decision.
26. *Ibid.* at 322.
27. *Ibid.* at 320-321.
28. *Ibid.* at 321.
29. As Cory observed in *MacKeigan, supra*, note 2:

    > Not unexpectedly it appears that the derogatory comments made by the Court of Appeal . . . had an adverse impact on the quantum of compensation which was paid to Marshall.

In 1988, the Commission decided to question the members of the Court of Appeal who heard the reference. This was prompted by the testimony the Commission had received to date. For example, one witness had testified that he had overheard the trial prosecutor discuss the evidence of a potential witness with the then Attorney General, Leonard Pace. The testimony of this potential witness was key in gaining the acquittal of Donald Marshall twelve years later. As the prosecutor was now deceased, he could not be called to testify about any possible conversations with then Attorney General Pace. Letters requesting their attendance were sent to each member of the panel who heard the reference.[30] In the letter, Commission counsel advised the Justices that their testimony was required in relation to three matters:

1. The inclusion of Pace J.A. on the panel hearing the reference.
2. The composition of the record relied upon by the panel in reaching its conclusions.
3. Whether a miscarriage of justice occurred in the Marshall case, as indicated in the letter of transmittal from the court, forwarding the decision of the court to the federal Minister of Justice. What factors, in the opinion of the Chief Justice, constituted a miscarriage of justice?

All five Justices declined to attend and Orders to Attend were issued by the Commission.

In response to these Orders the five Justices asserted their judicial immunity and made application to the Supreme Court of Nova Scotia for a declaration that the Commission had no authority to compel their attendance. They also sought an order quashing the Orders to Attend and prohibiting the Commission from inquiring into their orders, decisions and opinions arising out of the Marshall reference.

Glube C.J., heard the application, and granted the declaration and other orders sought.[31] In a lengthy judgment, she reviewed all of the relevant authorities and set out, in detail, the arguments of all of the parties, including those of the two intervenors, Donald Marshall Jr. and the Attorney General of Nova Scotia.[32] While all of the parties agreed on the principle of judicial independence, they disagreed on the nature and scope of any judicial testimonial privilege associated with this principle of independence. The defendants argued for a qualified immunity. In support, they pointed to a number of decisions over the last decade, concerning immunity claims by, principally, the executive branch of government.[33] They argued that these decisions demonstrated an unwillingness on the part of the courts to accept claims for an absolute immunity. These authorities indicated that such immunities are on the decline, in favour of more openness and disclosure in government. In keeping with this evolving philosophy, the Court should not accept the plaintiff's position as an absolute rule but rather should weigh the public interest for disclosure

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30. MacKeigan C.J.N.S., Hart, Jones, Macdonald, and Pace, JJ.A.
31. *MacKeigan, supra*, note 25.
32. Marshall intervened on the side of the Commission, the Attorney General on the side of the Justices.
33. *Amex Potash Ltd.* v. *Government of Saskatchewan, supra*, note 3, a provision of the provincial Crown proceedings legislation held to be unconstitutional; *Operation Dismantle Inc.* v. *The Queen, supra*, note 3, cabinet decisions found to be reviewable and subject to judicial scrutiny to ensure that they were compatible with the Constitution; *Carey* v. *The Queen in right of Ontario, supra*, note 3, claim of absolute privilege for cabinet documents rejected; and *Smallwood* v. *Sparling, supra*, note 3, claim of absolute immunity from testifying by former Premier of a province rejected in the context of a federal inquiry conducted in the public interest.

against the public interest against disclosure. In other words, ". . . the court should weigh on the compellability side, the rule of law, equality, immunity cases in other constitutional contexts, the values of openness, fairness and completeness against the view of immunity involving finality, fearlessness and efficiency."[34]

The plaintiffs contended that they were entitled to an absolute immunity. They advanced, in support of their position, English authority to the effect that judges are not compellable witnesses before courts, or other bodies, in relation to matters occurring before them in court or in relation to their decision-making processes.[35] They argued their position was supported by the constitutional principle of judicial independence[36] — an absolute immunity from testifying was necessary to secure and maintain the independence of the judiciary from the executive and legislative branches of government. If the plaintiffs were required to testify before the Commission, they argued they would, in effect, be answerable to the legislative and executive branches of government for the discharge of their judicial responsibilities. Our system of independent and impartial justice according to the Rule of Law would be seriously impaired as a result. Relying on the recent authority of *Beauregard* v. *The Queen*,[37] they argued that judicial independence requires that the judiciary be completely separate, in authority and function, from the executive and legislative branches of government. As the courts occupy a special constitutional position in our system of government under law, an absolute immunity is needed to preserve this independence.

Glube C.J. accepted the arguments submitted by the plaintiffs. While the authorities on Crown privilege, cited by the defendants, indicated less curial deference to claims for immunity asserted by the executive branch in favour of greater openness and disclosure, the same reasoning did not apply to the judiciary. The judiciary was seen as being different from the executive and legislative branches of government:[38]

> The role of the courts is one of resolver of disputes, interpreter of the law and defender of the constitution, all of which require complete separation in authority and function from the other participants in the justice system, in particular, the executive and legislative branches of government.

Glube C.J. saw the issue, primarily, in terms of the public interest in judicial independence and not in terms of the public interest in greater disclosure of governmental information or in the complete disclosure of evidence. An absolute immunity was seen as necessary for the preservation and enhancement of the judiciary's independence. She reasoned that if judges are liable to account to the legislative or executive branch for their judicial decisions, then any image of independence or impartiality will be seriously impaired or lost. The authorities, reviewed by her, were unanimous in their support of the proposition that judges are not compellable witnesses in relation to their judicial duties. Such an immunity or privilege is not for the personal benefit of the judge, it is for the ". . . benefit of the public to

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34. *MacKeigan*, *supra*, note 25 at 317.

35. *Knowles' Trial* (1692), 12 How. St. Tr. 1167; *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418. See also the authorities reviewed by Glube C.J., *ibid.*, at pp. 299-301.

36. *Beauregard* v. *The Queen*, [1986] 2 S.C.R. 56, (1986), 30 D.L.R. (4th) 481 (S.C.C.); *Valente* v. *The Queen* (1985), 24 D.L.R. (3d) 161, [1985] 2 S.C.R. 673 (S.C.C.); and Lederman, W.R., "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 769.

37. *Ibid.*

38. *MacKeigan*, *supra*, note 25 at 324.

protect the judicial system against interference or influence which might pervert the course of justice."[39]

The decision of Glube C.J. was appealed by the Commission to the Appeal Division of the Nova Scotia Supreme Court. Burchell J. (ad hoc), on behalf of the Court, dismissed the appeal and rejected the appellants' arguments in the following terms:[40]

> That approach proposed by the appellants would ignore an opposite trend that is apparent in a long and unbroken line of cases holding that judges are not compellable witnesses as to any matters touching upon the performance of their judicial duties. Where such immunity was once recognized only in the case of High Court Justices, it has been extended in Canada in recent years to a variety of functionaries who, although they are not necessarily judges themselves, perform duties that are judicial in function or character.

III. SUPREME COURT OF CANADA

The Supreme Court of Canada issued its judgment in *Nelles* on August 14, 1989 and in *MacKeigan* on October 5, 1989. In *Nelles*, the Court, by a majority of five justices to one,[41] overturned the judgment of the Ontario Court of Appeal, ruling that the Attorney General and his agents, Crown attorneys, were only entitled to a qualified immunity from civil suit. Therefore, the appellant, Susan Nelles, could proceed with her action for malicious prosecution against the Attorney General and his agents. While exposing the Crown attorneys to a suit for malicious prosecution, the qualified immunity would serve to protect them from a civil suit based on errors in judgment or mistakes made by them in the course of their official duties.[42]

In coming to its decision, the Court analyzed the competing public policy concerns, including the right of an injured citizen to a remedy at common law and under the *Charter*, the need to maintain public confidence and trust in an impartial and independent public prosecutorial system, the need to deter prosecutors who maliciously abuse their office and the need to protect prosecutors from the harassing affect of frivolous and vexatious actions brought by disgruntled individuals. A policy analysis was necessary, as the Court found the English and Canadian authorities on the question to be divided and as the Court expressly refused to adopt the reasoning of the United States Supreme Court in *Imbler* v. *Pachtman*,[43] supporting an absolute immunity for prosecutors.

In *MacKeigan*, the Supreme Court upheld the judgments of both the Trial and Appeal Divisions of the Nova Scotia Supreme Court and dismissed the appeal. As a result, the justices of the Nova Scotia Supreme Court, Appeal Division, who sat on the Marshall reference, were not required to testify before the public inquiry established by the province to review the *Marshall* case. While the Court was unanimously of the opinion that judges enjoyed an absolute immunity or privilege from being compelled to testify in respect of their adjudicative functions, three

39. *Ibid.* at 336, quoting from *Morier* v. *Rivard*, [1985] 2 S.C.R. 716 at 737.

40. *MacKeigan* v. *Hickman* (1988), 87 N.S.R. (2d) 443 at 444.

41. L'Heureux-Dubé J., dissented.

42. *Nelles*, *supra*, note 1 at 351 per Lamer J.

43. (1976), 424 U.S. 409, (1976) 96 S. Ct. 984.

members[44] of the Court dissented, in part, on whether a similar level of immunity existed in respect of a judge's administrative functions:[45]

> There is first the privilege of the judiciary not to be questioned as to the decisions they have made on cases. This adjudicative privilege is of fundamental importance and is absolute in nature. Secondly, there is the privilege as to the administration of the courts. This administrative privilege is not of the same fundamental importance and is qualified in nature.

Wilson and Cory JJ. were of the opinion that the circumstances surrounding the wrongful conviction of Donald Marshall, and his subsequent acquittal, raised questions of such a serious magnitude that the qualified immunity attaching to the administrative functions of the judiciary must give way in the public interest. Therefore, in their opinion, the five Justices of Appeal were compellable witnesses before the Marshall Inquiry in relation to questions concerning the composition of the record and the composition of the judicial panel that heard the reference. In contrast, the majority's recognition of an absolute testimonial immunity or privilege was prompted by an overriding concern for the constitutional principle of judicial independence. Based on previous characterizations of the courts as impartial arbiters of disputes and protectors of the constitution,[46] McLachlin J. held that judicial independence required a separation, in function and authority, between the judiciary and the executive and legislative branches of government. If judges were compellable witnesses before a public inquiry established by the executive branch of government under the authority of the legislature, this essential separation of the court, in authority and function, would be infringed.

These decisions appear to be significant developments in the legal treatment of judges and public prosecutors, two of the main actors in the justice system. For centuries, judges have been legally protected in the performance of their judicial duties by common law immunities. These immunities have been fashioned, in the public interest, to protect the independence and impartiality of the judiciary. Chief among these is the judge's immunity from civil suit which, apart from the public interest, has also served the personal interest of the judge in protecting him from suit even though he has misconducted himself in the execution of his office. *MacKeigan* concerns a lesser known but related immunity — the judge's immunity from testifying in respect of his adjudicative functions. It, too, is predicated on the principle of judicial independence, in that it protects the judge from having to explain or account to others for his judicial actions or decisions. In *MacKeigan*, this immunity was extended to the administrative functions of a judge, in order to better protect the institutional independence of the judiciary from the other branches of government.

The concern for the independence of the judge, in the performance of his judicial functions, has spilled over, in the United States, to the office of the public prosecutor. In order to provide for the fearless and independent discharge of his duties, the judicial immunity from civil suit has been extended, on the basis of a functional analogy, to public prosecutors. While it appeared that a similar trend was under way in Canada, *Nelles* emphatically rejects an extension of judicial immunity to public prosecutors. As a result, a clear separation is evidenced between judges and

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44. Lamer, Cory, and Wilson JJ.
45. *Supra*, note 2 at 123-124, per Cory J.
46. *Beauregard*, *supra*, note 36.

prosecutors in terms of official immunity (or liability). Therefore, at common law, the judge appears to stand alone, at least in terms of immunity from suit.

IV. IMMUNITIES

Before embarking upon an analysis of these cases in the context of a review of the common law concerning judicial and prosecutorial immunities, a few general comments about immunities are in order.

Immunities, in one form or another, have long been a familiar feature of the legal landscape. Some, such as those asserted in these two cases, have their origins in the common law, while others are created and conferred by statute.[47] Some immunities can be considered to be absolute; that is, they do not recognize degrees of liability or amenability to the ordinary law. For example, in tort actions against public officials, absolute immunity means that ". . . even the most egregious, knowing and malicious acts of certain state officers, producing perhaps incalculable harm to constitutional rights, nonetheless can create no officer liability as a matter of law".[48] In a situation involving the compellability of testimony, an absolute immunity or privilege means that the officer cannot be compelled, under any circumstances, to testify. A qualified immunity, on the other hand, indicates a degree of relativity: the officer will be immune from liability, except where the conduct is of such a nature as to warrant an exception to the immunity; or the officer will not be a compellable witness, except where the furtherance of an overriding public interest requires that the immunity give way.

Immunities can be viewed from a number of perspectives. In one sense, they serve to protect a person from the processes of the ordinary law — in this, immunities appear to be antithetical to Dicey's notion of equality under the rule of law.[49] In another sense, they are hierarchial in nature; that is, they appear to clothe certain persons with a special or privileged status. In a society which recognizes the supremacy of the rule of law, immunities should be regarded with suspicion and their scope strictly controlled. In yet another sense, immunities can be viewed as

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47. For example, *Provincial Court Judges Act*, S.A. 1981, c. P-20.1, s. 16(1):

> "No action may be brought against a judge for any act done or omitted to be done in the execution of his duty or for any act done in a matter in which he has exceeded his jurisdiction unless it is proved that he acted maliciously and without reasonable and probable cause."

48. Wolcher, "Sovereign Immunity and the Supremacy Clause: Damages Against States in their Own Courts for Constitutional Violations" (1981) 69 Cal. L. Rev. 189 at 222.

49. Dicey, A.V., *The Law of the Constitution* (10th ed. 1967) at 193-194:

> "We mean in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition is subject to the ordinary law of the realm and answerable to the jurisdiction of the ordinary tribunals.
>
> In England the idea of legal equality, or the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority."

the product of a clash of fundamental values;[50] for example: the collective interest of the public vs. the interests of the individual; the rule of law vs. the need for discretionary decision making; the need to compensate insured persons vs. the need to protect the freedom of government to act; the doctrine of separation of powers between branches of government vs. the need to hold government accountable under law; fairness to the injured citizen vs. fairness to the government official; the need to promote the fearless discharge of official functions vs. the deterrence of official excess; and the need to protect the public treasury vs. the need to provide injured citizens with a sound means of compensation. The foregoing list of values, at play in a challenge to governmental action, is not exhaustive. Other, more specific, values may arise and be placed into the balance in a given suit. Also, the importance of a value may shift over time. Values which were once accorded great weight may decline in importance or relevance, reflecting the dynamics of the relationship between the citizen and the state.

Common law immunities claimed by public officers, chiefly in the context of damage actions brought against them by citizens complaining of a loss through governmental action, are not to be confused with the immunities or privileges claimed by the State or government; in our case, the Crown in right of Canada or the provinces. The immunities are fundamentally different, although significant similarities exist between them. The historical immunities or privileges of the government flow from the personal immunities of the monarch, who, at one time, many centuries ago, performed all governmental functions in the realm, be they judicial, executive, or legislative in nature. In that sense, modern government immunities are status-based immunities. Executive government, as the corporate successor to the sovereign, in her public capacity, has claimed many of the sovereign's immunities.

Undoubtedly, the historical principle of state immunity has influenced or prompted the recognition of absolute or qualified immunities for public officers.[51] The imposition of personal liability on an officer for an error in the discharge of his official functions, would appear to be harsh and unfair, in the absence of government liability. However, in a regime of government liability, an immunity for an officer would be less pressing, as the officer's liability would only be a conduit for imposing liability on the state. In short, the common law immunity of an officer from suit should be kept separate from the immunity (or liability) of government, as the former has arisen, in some circumstances, as a response to the latter.

In conclusion, common law immunities protecting public officers, are primarily public interest immunities. They rest, not so much on the status of the officer, but on a concern for the proper discharge of his functions. When this concern is manifested in the form of a qualified or absolute immunity, the immunity should be viewed as the product of a rough balancing of competing public policy values and concerns.

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50. Spader, "Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding" (1985) 61 Chicago Kent Law Review 61.

51. Shuck, P., *Suing Government* (New Haven: Yale University Press, 1983) at 35-41.

V. JUDICIAL IMMUNITIES

A. JUDICIAL IMMUNITY FROM CIVIL SUIT

The testimonial immunity or privilege claimed by the judges in *MacKeigan* is one of the common law immunities or privileges associated with judicial office. Others include the absolute immunity from civil suit possessed by superior court judges, and, possibly inferior court judges, and the principle of absolute privilege in judicial proceedings. Of these, perhaps the best known is the absolute immunity from civil suit.[52]

For centuries, it has been recognized that judges possess an immunity from civil suit in respect of anything said or done in their capacity as judges:[53]

> Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action.

The traditional justification for this absolute immunity is that it is necessary to protect the independence of the courts. In carrying out their core functions as the impartial arbiters of disputes, judges cannot decide in fear of possible litigation or liability arising out of their decisions. They must be free in thought and action. The personal independence of the judge would be compromised if his decisions were influenced by the fear of potential liability. The principle of absolute immunity exists not only for the personal benefit of the judge but for the benefit of the public as well.[54]

> The freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice are to be.[55]

An absolute immunity is possessed by superior court judges acting within their jurisdiction.[56] In contrast to the technical and narrow usage of the term "jurisdiction" in judicial review, it is used here in a broad and general fashion. For the purposes of absolute immunity from civil suit, jurisdiction is possessed when the judge is acting as a judge; that is, in a judicial capacity or manner.[57]

> A judge of a superior court is not liable for anything done by him while he is "acting as a judge", or "doing a judicial act" or "acting judicially" or "in the execution of his office" or "quatenus

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52. On the subject of judicial immunity from civil suit, see generally: Feldthusen, B., "Judicial Immunity: In Search of an Appropriate Limiting Formula" (1980) 29 U.N.B. Law Journal 73: Rubinstein, A., "Jurisdiction and Illegality" (Oxford: The Clarendon Press, 1965) at 127-149; Rubinstein, A., "Liability in Tort of Judicial Officers" (1963-64) 15 U.T.L.J. 317; Brazier, "Judicial Immunity and the Independence of the Judiciary" [1976] Public Law 397; Sadler, "Judicial and Quasi Judicial Immunities: A Remedy Denied" (1981-82) 13 Mel. U.L. Rev. 508.
53. *Sirois* v. *Moore*, [1975] 1 Q.B. 118 at 132 per Lord Denning, M.R.
54. *Fray* v. *Blackburn* (1863), 3 B & S 576 at 578:

    "The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of judges and prevent their being harrassed by vexacious actions."
55. *Garnett* v. *Ferrand* (1827), 6 B & C 611 at 625 per Lord Tenterden.
56. *Fray* v. *Blackburn*, *supra*, note 54.
57. *Sirois* v. *Moore*, *supra*, note 53 at 135 per Lord Denning, M.R.

> a judge". What do all of these mean? . . . I think each of the expressions means that a judge of a superior court is protected when he is acting in the bona fide exercise of his office and under the belief that he has jurisdiction, even though he may be mistaken in that belief and may not in truth have any jurisdiction.

Lord Denning's description of the scope of the superior court judge's immunity may be erroneous when he refers to the "bona fide exercise of his office", as it is clear that the immunity extends to the malicious actions of a judge. It is difficult to conceive of a situation where a superior court, as a court of general jurisdiction, could act outside its "jurisdiction", as defined above, so as to lose its immunity. Errors concerning the ambit of its jurisdiction will be treated as errors within the superior court's jurisdiction, so as to preserve its immunity. Some have asserted that superior court judges can never be liable in tort, as a consequence of their judicial acts, as they possess the jurisdiction to determine their own jurisdiction; "[t]he court itself is the arbiter on questions relating to what falls within its own jurisdiction".[58] This is probably overstating the position. Recently, the House of Lords in *In Re McC*[59] pointed out that limits do exist in respect of the immunity of a superior court judge from liability in tort. Lord Bridge referred to the example of a judge, who believing the jury's verdict of acquittal to be perverse, imposed a sentence of imprisonment on an accused. In such a case, a judge would likely be liable in damages for false imprisonment. However, extreme and hypothetical examples apart, "[t]he jurisdiction of a superior court is regarded as so broad that only the egregiously arbitrary act could expose the judge to liability."[60]

The position of the inferior court judge is significantly less secure. As a court of limited jurisdiction, whose jurisdictional decisions can be reviewed by a superior court, an inferior court judge can act outside, or in excess of his jurisdiction, and be held liable in tort.[61] If the plaintiff's cause of action is based in trespass, the loss of jurisdiction would have the consequence of removing the affirmative defence of the judge to a claim based upon a *prima facie* interference with an individual's property or person. The ensuing liability is strict and it does not matter that the error was made honestly and in good faith. Absent a cause of action in trespass, the liability of an inferior court judge is predicated upon malice.[62] When the judge has acted maliciously or for an improper purpose, he loses his jurisdictional mantle of protection. The malicious exercise of judicial authority, at the inferior court level, is actionable. The immunity of inferior court judges from liability in tort is therefore qualified — qualified in the sense that it is limited to a good faith, judicial act within jurisdiction. This is in sharp contrast to the absolute immunity accorded to superior court judges — they can act maliciously and still retain their immunity.

Lord Denning M.R. in *Sirois* was of the opinion that the position in which the inferior court judge was placed was harsh and unfair. He proposed an expansion in the principle of absolute immunity to include inferior court judges — both superior and inferior court judges were, after all, performing essentially the same functions. Therefore, judges of either superior or inferior courts would be immune

58. *Sirois* v. *Moore*, *supra*, note 53 at 138 per Buckley L.J. See also, Holdsworth, W., *A History of English Law*, Vol. VI, (London: Methuen & Co. Ltd., 1924) at 234-240.

59. [1985] 1 A.C. 528.

60. Hogg, *Liability of the Crown (2nd ed.)*, (Toronto: Carswell, 1989) at 147.

61. *Houlden* v. *Smith* (1850), 14 Q.B. 841.

62. *Sirois* v. *Moore*, *supra*, note 53 at 134.

from liability, even if they acted outside their jurisdiction, provided they made an honest error concerning their jurisdiction. In terms of trespass actions, this new principle would add measurably to the immunity of inferior court judges.

Lord Denning M.R.'s expansive notion of the principle of judicial immunity was rejected by the House of Lords in *In Re McC.*[63] There, the magistrate was held liable to a suit for false imprisonment, as he had erred in construing his jurisdiction to impose a sentence of detention.[64]

The distinction, in terms of immunity, maintained between judges of superior courts and judges of inferior courts can be criticized. The greater level of protection accorded to judges of superior courts appears to rest more on the status of the court than on any principled consideration of the judicial function and the policy reasons supporting such an immunity. Judges at both levels are performing essentially the same function. Superior and inferior court judges should both be free to make decisions unhindered by the prospect of liability. The public trust in the integrity and impartiality of the judiciary will be as severely undermined by suits against provincial court judges, as by suits against superior court judges.

Should judicial immunity include protection for malicious acts or decisions? I would submit not. It is difficult to see how an absolute immunity can be rationally accommodated within a system that adheres to the rule of law. No person who wields public power maliciously should be immune from responsibility to a party injured as a result. The judiciary is not so fragile an institution that it cannot withstand the imposition of liability on a judge when he abuses his trust by acting maliciously. The prospect of suit may deter such conduct, or at least cause judges to be more careful or circumspect in their judicial actions and comments. The possibility of suit should not impair the effective functioning of the judiciary — suits where substantial allegations of malice are made will be rare. At the present time, such suits can be brought against provincial court judges in some provinces.[65] No flood of litigation has been experienced in these jurisdictions. Further, the plaintiff

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63. *Supra*, note 59.

64. Hogg, *supra*, note 60 at 148, citing other commentators, agrees with the decision in *In Re McC*, on the basis that it accords too great an immunity to inferior court judges:

> "Lord Denning's new rule is premised on an extravagant assessment of the fragility of judicial independence and fails to accord sufficient weight to the interests of a person injured by an illegal judicial act".

The liability of inferior court judges was recently considered by the English Court of Appeal in *R.* v. *Manchester City Magistrate's Court*, [1989] 1 All E.R. 90. In that case, at pp. 96-97, Neill L.J., adopting the analysis of the trial judge, identified three categories of case in which inferior court judges would be exposed to liability for having acted without jurisdiction or having exceeded their jurisdiction:

1. Cases in which the inferior court judge does not have jurisdiction over the cause; i.e., a judge has acted outside his geographical or monetary limits;
2. Cases in which the inferior court judge has properly entered into jurisdiction but something quite exceptional has occurred in the course of the proceedings so as to oust his jurisdiction. For example, the judge has committed a gross procedural irregularity or has acted with malice;
3. Cases where the judge has acted in excess of his jurisdiction because he has made an order or imposed a sentence that is not properly supportable in law. For example, the judge imposes a sentence even though he has found the accused not guilty of the offence.

65. For example, *Alberta: Provincial Court Judges Act*, S.A. 1981, c.P-20.1, s.16 (1):

> "No action may be brought against the judge for any act done or admitted to be done in the execution of his duty or for any act done in a matter in which he has exceeded his jurisdiction unless it is proved that he acted maliciously and without reasonable and probable cause."

alleging malice on the part of a judge has a difficult onus to discharge. Frivolous and vexatious actions can be dismissed at a preliminary stage in the proceedings.

The principle of absolute immunity appears to primarily serve one interest. That is, the personal interest of the judge who, in acting maliciously, has abused his office. The private interests of the injured individual are not served by such a rule, nor, it is submitted, is the public interest. The public interest lies in an impartial, fair, independent, and accountable judiciary. There is no inherent contradiction in such an assertion, for the judiciary can be independent and, yet, accountable to citizens injured as a result of the malicious actions of its members. Public confidence in the judiciary, as an institution, is more likely to be weakened by a principle of absolute immunity, protecting malicious acts, than a rule of qualified immunity affording the injured citizen a means of redress.

The principle of absolute immunity has been recognized both in Canada and the United States. Recently, in *Morier* v. *Rivard*,[66] the Supreme Court of Canada reaffirmed the principle of absolute immunity for superior court judges. Its judgment also indicates that statutory provisions protecting inferior court judges and some administrative tribunals will be construed liberally so as to afford those who exercise "judicial" or "quasi-judicial" functions the greatest degree of protection possible.[67]

The Supreme Court of the United States also has recognized an absolute immunity from civil suit for superior court judges.[68] In *Bradley* v. *Fisher*,[69] the Court offered the following reasons in support of such an immunity:

1. The need to provide the judge with a decision-making atmosphere free from fear of personal consequences;
2. The losing side in litigation will want to sue the judge in retaliation for his loss;
3. The absence of an immunity will compel judges to maintain extensive records on which to base a defence in further suits brought by aggrieved parties;
4. In the absence of liability, a variety of mechanisms still exist to deal with judicial wrongdoing — for example, impeachment;
5. Judges will be exposed to vexatious litigation, as bad faith can be easily alleged.

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66. [1985] 2 S.C.R. 716.

67. On *Morier* v. *Rivard*, see generally: Hogg, *supra*, note 60 at 150-151; Petraglia, P., "Commissions and Civil Liability" (1987) 3 Admin. L.J. 18.

68. An absolute immunity for judges became firmly entrenched in American law with the decision of the United States Supreme Court in *Randall* v. *Brigham* (1868), 74 U.S. 523. In that case, Justice Field referred to the principle in the following terms at p. 536: "This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice". In 1967, in *Pierson* v. *Ray*, the Supreme Court of the United States held that the common law doctrine of absolute judicial immunity was not abrogated by 42 U.S.C. § 1983 which provided for an action in damages against a state official when he violated a person's constitutional rights. In *Stump* v. *Sparkman* (1978), 435 U.S. 349, the Supreme Court reaffirmed that judges are absolutely immune from liability for unconstitutional judicial acts committed under color of state law. To be protected by the immunity, all the judge had to do was to establish that he was performing a judicial act and that he possessed subject matter jurisdiction.

69. (1872) 13 Wall 335.

To conclude this part, it can be asserted that an absolute immunity for superior court judges is strongly entrenched in English, Canadian and American common law. It remains unquestioned,[70] for the most part, and any judicial attempts at revising the nature of the immunity or its scope are in the direction of expanding its ambit. It exists to protect judges from civil suits in the name of an independent judiciary. It is argued that suits against judges would undermine the public confidence in the judiciary, as an institution; as actions would detract from the perception that judges are ". . . wise, fair, just, capable, responsible or generally, as above reproach."[71] On a personal level, were it not for the immunity, the prospect of litigation would impair judges in the fearless and impartial discharge of their judicial duties:[72]

> Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: if I do this, shall I be liable in damages.

B. JUDICIAL IMMUNITY FROM TESTIFYING

A lesser known privilege, associated with judicial office, is the immunity of the judge from being compelled to testify as to the reasons for his decisions. Like the immunity from civil suit, this immunity is justified on the basis that it is needed to preserve the personal independence of the judge. It is asserted that the personal independence of the judge to decide, free from outside interference or influence, would be impaired if he were compelled to answer questions concerning his reasons for a particular decision. *Knowles' Trial*[73] is perhaps the earliest assertion of such an immunity. There, two judges of the Court of King's Bench were summoned before a committee of the House of Lords, and later, the House of Lords itself, to explain the Court's recognition of an accused's claim to a title.[74] Holt L.C.J. attended and responded to the committee's questions in the following terms:[75]

> I gave judgment according to my conscience. We are trusted with the law, we are protected, and not arraigned, and are not to give reasons for our judgment, and therefore I desire to be excused from giving any.

Later, before the House of Lords, he stated:[76]

> I have never heard of any such thing demanded of any judge as to give reasons for his judgment.

As the House of Lords did not proceed any further against the judges, it is assumed that the House accepted their arguments.

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70. Except by academic commentators. American legal journals and periodicals contain a significant number of articles criticizing the absolute immunity of judges from civil suit. Many suggest a qualified immunity in place of an absolute immunity. For example, see: Note, "Immunity of Federal and State Judges From Civil Suit — Time For a Qualified Immunity?" (1977) 27 Case W. Res. 727; Note, "Liability of Judicial Officers Under Section 1983" (1969) 79 Yale L.J. 322; Nagel, "Judicial Immunity and Sovereignty" (1978) 6 Hastings Constitutional L.Q. 237; King, "Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability" (1978) 20 Ariz. L.R. 549; Way, "A Call for Limits to Judicial Immunity: Must Judges be Kings in Their Own Courts?" (1981) 64 Judicature 390.
71. Feldthusen, *supra*, note 52 at 79.
72. *Sirois* v. *Moore*, *supra*, note 53 at 136 per Lord Denning M.R.
73. (1692) 12 State Trials 1167.
74. As a peer of the realm, the accused could not be tried in the Court of King's Bench. Any trial on the indictment would have to take place before the House of Lords.
75. *Knowles' Trial*, *supra*, note 73 at 1179.
76. *Ibid.* at 1182.

A similar immunity was claimed by the Chief Justice of the Court of King's Bench in Ireland in response to an action brought against him for assault and false imprisonment. In *Taffe* v. *Downes*,[77] the plaintiff argued that the defendant judge must come before the Court and explain his reasons for his judgment and actions. The Court dismissed the action, holding it to be an attack on the independence of judges. If the plaintiff's arguments were upheld, that independence would be severely compromised:[78]

> The honest, good and constitutional mind will always wish to find them entirely free and unbiased; and will rather entrust them with a high and unquestionable authority, and if guilty, leave their punishment to Parliament alone, then hazard their fortitude in independence by the alarm, and questions, pain and expense of as many actions as there may be acts of duty encountering the bad passions and prejudices of mankind.

This immunity has been recognized in subsequent cases. In *Duke of Buccleuch* v. *The Metropolitan Board of Works*,[79] the Court held that an arbitrator could not be compelled to testify as to his mental processes in arriving at his decisions. In *Zanatta* v. *McCleary*,[80] the Court held that a judge could not be compelled to testify on matters such as the admissibility of evidence before him, the mental processes underlying his judgment, and the consideration of other factors in reaching his judgment. There, the appellant had sought to introduce into evidence the extra-judicial comments of the trial judge on the merits of her claim, made after the trial, to her counsel at a local club. The immunity was applied in *Re Clendenning and Board of Police Commissioners for the City of Bellville*,[81] in conjunction with an application for a declaration that a provincial court judge was not a compellable witness before the Board of Police Commissioners. The declaration was granted on the basis that the provincial court judge shared in the immunity of superior court judges with respect to testifying about proceedings before them. As a superior court judge was not a compellable witness, neither was an inferior court judge.[82] Finally, the immunity was referred to by the Ontario Court of Appeal in *R.* v. *Moran*,[83] in relation to the testimony of a Justice of the Peace, at trial, concerning his thought processes in issuing a search warrant which was under attack by the accused. Martin J.A. commented:[84]

> It is clear that judges are not compellable to testify as to their mental processes or how they reach a decision in a case before them.

As an aside, it is interesting to note that this judicial privilege is not restricted to superior court judges. Some of the cases referred to above involve inferior court judges, justices of the peace, and decision-makers who are not judges. The immunity would appear to extend to persons performing judicial-type functions; that is, persons required to make an impartial decision in adjudication of a dispute between two or more persons.

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77. (1813), 3 Moo. P.C. 36 reported as a note in *Calder* v. *Hackett* (1840), 3 Moo. P.C. 28, 13 E.R. 12.
78. *Ibid.* at 18 per Mayne J.
79. (1872), L.R. 5 H.L. 418.
80. (1976), 1 N.S.W.L.R. 230.
81. (1976), 75 D.L.R. (3d) 33.
82. The Court adopted the reasoning of Lord Denning, M.R. in *Sirois* v. *Moore*, [1975] 1 Q.B. 118, that no distinction should be drawn between superior and inferior courts in terms of immunities.
83. (1987), 21 O.A.C. 257.
84. *Ibid.* at 269.

The decision of the Supreme Court of Canada in *MacKeigan* v. *Hickman* would appear to be the latest affirmation of this immunity. The setting for the assertion of the immunity is somewhat unique. The justices of the Nova Scotia Court of Appeal were ordered to attend before a public inquiry to answer questions relating to three matters: the composition of the panel on the Marshall reference; the composition of the record before the panel on the reference; and the factors identified by the panel in support of their conclusion that a miscarriage of justice had occurred in the Marshall trial and conviction. While all of the commissioners were experienced judges and while the commission enjoyed some of the powers of a superior court, it could not be said that they were acting as a court, adjudicating on a matter arising out of the actions of the judges of the Nova Scotia Court of Appeal.[85] The Inquiry's mandate was far broader: it was to enquire into the operations of the justice system in the Marshall case. Of the matters upon which the Commission wished to obtain judicial testimony, only two, and arguably, just one, concerned the decision-making processes of the Court.

McLachlin J. gave the judgment on behalf of a majority of the Court. She interpreted ss. 3 and 4 of the *Public Inquiries Act*,[86] to mean that, while the appellant commissioners could summon any person, including judges, they possessed only the powers of a superior court to compel testimony. The question, then, was whether a superior court could compel a judge to testify as to how he or she arrived at a particular decision or why a particular judge sat on a panel of a court? With respect to the first question, McLachlin J. was of the opinion that judges cannot be compelled to testify as to how they arrived at a particular judicial conclusion. This opinion was supported by the authorities, many of which have been referred to above. Further, a judge's immunity from testifying is "... essential to the personal independence of the judge, one of the two main aspects of judicial independence. The judge must not fear that after the issuance of his or her decision, he or she may be called upon to justify it to another branch of government."[87]

The commission was characterized as the "emanation" or instrument of the legislature or the executive. If it could compel judges to testify about their decision-making processes, the essential separation between the courts and the executive and legislative branches would be compromised:[88]

> ... the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive and legislative branches of government to explain

85. Nor could it be characterized as a commission of inquiry into the conduct of federally appointed judges. If this was the case, the Commission would be acting unconstitutionally. See the judgment of Wilson J. in *MacKeigan*, *supra*, note 2 at 133.

86. R.S.N.S. 1967, c. 250:

> 3. The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing (or on solemn affirmation if they are entitled to affirm in civil matters), and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire.
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> 4. The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court of Nova Scotia.

87. *MacKeigan*, *supra*, note 2 at 104, per McLachlin J.

88. *Ibid.*, per McLachlin J.

> and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, would strike at the most sacrosanct core of judicial independence.

Lamer, Cory, La Forest, and Wilson JJ. agreed with McLachlin J. in her conclusion that a judge enjoys an absolute immunity from testifying as to his or her mental processes in reaching judgment:[89]

> A judgment and a judge's reasons for judgment must be put on the record and are subject to scrutiny on appeal by the legal community and by the public at large. It is vital to the preservation of our system of justice that a judge not be required to answer any questions as to how a decision was reached. The reasons and decisions speak for themselves. If they are to be questioned an effective and comprehensive means of challenging them is provided by the appellate procedure.

All members of the Court were of the opinion that the immunity was necessary to protect judges in the performance of their adjudicative functions. Since a judge's decision-making processes lie at the heart of the adjudicative function, they are absolutely privileged. Accordingly, the respondent justices were not compellable in respect of questions concerning the factors identified by them in arriving at the conclusion that a miscarriage of justice occurred in the Marshall case.

But what about the other matters on which the commission sought judicial testimony: the composition of the record and the constitution of the panel that heard the reference? McLachlin J. was clearly of the opinion that an absolute immunity extended to questions concerning the composition of record, as it was intimately connected with the adjudicative function. In this conclusion she was joined by Lamer J. even though he agreed with the overall approach of Cory J.

Cory J. took a somewhat different approach to this issue. He divided the judicial immunity from testifying into two categories: an adjudicative privilege and an administrative privilege.[90]

> Nonetheless there is an important distinction to be drawn between the two types of judicial immunity. There is first the privilege of the judiciary not to be questioned as to the decisions they have made on cases. This adjudicative privilege is of fundamental importance and is absolute in nature. Secondly, there is the privilege as to the administration of the courts. This administrative privilege is not of the same fundamental importance and is qualified in nature.

This distinction was derived from the judgment of Le Dain J. in *Valente* v. *The Queen*[91] where he distinguished between the adjudicative and administrative independence of the courts. While adjudicative independence lies "at the very core and essence of judicial independence",[92] administrative independence ". . . functions as an adjunct."[93] Therefore, he reasoned that the independence of the judiciary would not always be impaired by execution or legislative action concerning the administration of the courts. In other words, the notion of judicial independence could tolerate a certain amount of executive or legislative control over the administration of the courts.

As the administrative independence of the courts is not as important as their adjudicative independence, "[i]t is appropriate that the administrative privilege be qualified and limited in its scope."[94] To better illustrate the relative nature and

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89. *Ibid.* at 123, per Cory J.
90. *Ibid.* at 123-124, per Cory J.
91. *Supra*, note 36.
92. *MacKeigan*, *supra*, note 2 at 124, per Cory J.
93. *Ibid.*, per Cory J.
94. *Ibid.* at 125, per Cory J.

limited scope of a qualified immunity, Cory J. referred to an American decision. *In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit,*[95] and the judgment of the Supreme Court in *Carey* v. *The Queen in Right of Ontario.*[96] In the first decision, the Court recognized a qualified privilege for certain judicial communications. Such a privilege would exist in respect of confidential communications between judges and it would also exist in respect of communications between judges and their staffs. The immunity, however, would only extend to communications between these parties for the purpose of official judicial business. In the latter decision, the Supreme Court of Canada rejected a Crown claim of absolute privilege for certain cabinet documents in conjunction with a request for their production. A qualified privilege was held to be sufficient when one balanced the need for government confidentiality against the need for full disclosure of all of the evidence.

In *MacKeigan*, Cory J. was of the opinion that the qualified privilege must give way to the greater public interest in the administration of justice. When the independence of the courts was balanced against the exceptional circumstances of this case, the qualified immunity could not stand. He was of the opinion that the principle of judicial independence existed "... to preserve and foster public confidence in the administration of justice".[97] This confidence had been shaken by events in the Marshall case:[98]

> The inescapable conclusion is that the administration of justice failed Donald Marshall. He was wrongfully convicted and imprisoned for a murder he did not commit. The panel hearing the directed reference included a member who could appear (no matter how erroneous that appearance might be) to a layman to be biased. It would have been impossible for Marshall to know what affidavits were actually before the court. As a party, he was entitled to know the material which was to be part of the record in order to meet the case presented against him. Something went seriously awry in the functioning of the judicial system in this case. . . .

In order to restore public confidence in the administration of justice, questions had to be asked and answered with respect to the composition of the record and the panel. In His Lordship's opinion, these questions would not impair the principle of judicial independence, as they "... pertain primarily to the manner in which justice was administered in this case, a matter of public concern. . .".[99]

As indicated previously, Lamer J. agreed with the principles ennunciated by Cory J. However, after applying these principles to the facts of this case, he came to the conclusion that the questions concerning the record were protected by an absolute immunity as they concerned the judge's adjudicative functions. Questions concerning the composition of the panel fell into the realm of the Court's administrative functions and accordingly a qualified privilege arose in respect of them. He was of the opinion that this privilege would give way to disclosure in exceptional circumstances — "... the only situation where this may ... occur, is when an investigation into the conduct and integrity of the chief justice or other justices is being conducted."[100] As, in his view, the commission lacked the authority to con-

95. (1986), 783 F.2d. 1488.
96. *Supra*, note 3.
97. *MacKeigan*, *supra*, note 2 at 129, per Cory J.
98. *Ibid.* at 120, per Cory J.
99. *Ibid.* at 129, per Cory J.
100. *Ibid.* at 113, per Lamer J.

duct such an investigation, answers to questions concerning the composition of the panel could not be compelled by it.

Wilson J. wrote in support of the decision of Cory J. She agreed that a distinction should be maintained between the nature and scope of any testimonial privilege attaching to the adjudicative function of the judiciary and any privilege associated with the administrative function. A qualified immunity, for administrative functions, would be adequate to meet the concerns of McLachlin J. that, absent an absolute immunity, the independence of the courts would be seriously undermined if the executive or the legislature were to interfere with the authority of a chief justice to assign judges to sit on a particular case. Wilson J. questioned whether that issue was really before the Court. Questions of MacKeigan C.J.N.S. as to why he assigned Pace J.A. to the Marshall panel would not impair his ability to assign judges in future cases. The assignment of Pace J.A. raised a *prima facie* case of a lack of impartiality on the part of one member of the panel. A public perception existed, according to Wilson J., that things went wrong in the Marshall case. One of these concerned an apparent lack of impartiality on the part of the panel. Since the purpose of the inquiry was to find out what went wrong in the Marshall case, she reasoned that the public interest required that questions concerning the composition of the panel be answered in order to remove any cloud of suspicion from the judiciary.[101]

> If the question is not asked or answered in a satisfactory way the public perception may well be that the composition of the panel was a factor in the reasons for judgment of the Court of Appeal and in the quantum of compensation ultimately awarded to Mr. Marshall.

Clearly, Wilson J. shared the concerns of Cory J. in respect of this question. The public confidence in the impartial and independent administration of justice was paramount. To restore this confidence, the qualified immunity of the judiciary with respect to administrative matters must give way or else ". . . there is a real risk that judicial immunity may be perceived by the public as being advanced for the protection of the judiciary rather than for the protection of the justice system. . . ."[102] However, she agreed with Lamer J. that judges, as part of their adjudicative function, possessed an immunity in relation to questions concerning why the record was constituted as it was. Nevertheless, that did not mean that the judges could not be asked to relate, as a factual matter, what constituted the record before them.

The judgment of the Supreme Court in *MacKeigan* v. *Hickman* has been discussed in some detail as the Court clearly was divided on the principles to be applied in the case of a claim for judicial immunity from testifying. Overall, the judgments of the Justices are unclear at times as individual judges, using one of two approaches, came to different conclusions on whether the justices of the Nova Scotia Court of Appeal would be required to answer one, two, or all of the questions raised by the Commission. Finally, a detailed analysis was necessary, given the paucity of case authority on the nature and scope of this immunity. The circumstances of this appeal presented the Court with a unique opportunity to rule on the question of a judicial testimonial privilege or immunity.

Nevertheless, the bottom line arising from the Supreme Court's judgment in *MacKeigan* v. *Hickman* appears to be as follows. In order to secure and maintain

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101. *Ibid.* at 132, per Wilson J.

102. *Ibid.* at 132, per Wilson J.

their personal independence, judges are absolutely immune from being required to testify on matters in relation to their adjudicative functions. These include, principally, the reasons for their decisions and the decision-making processes. The majority of the Supreme Court included, within the ambit of this immunity, testimony concerning decisions made in creating the record.

However, the Court was sharply divided as to the nature and scope of any testimonial immunity arising out of the administrative functions of the court. Three members were of the view that an absolute immunity attached to these functions in order to secure the institutional independence of the courts in the discharge of their adjudicative and administrative functions. In contrast, three other members of the Court were of the opinion that the administrative functions of the court attracted only a qualified or relative immunity; one that must give way where the public interest requires it. Such an immunity would not compromise the independence of the courts as it would give way only in exceptional circumstances. Two of these three judges were of the view that exceptional circumstances existed in this case. The qualified immunity must give way and questions must be answered concerning the composition of the panel in order to restore public confidence in the administration of justice.

The approach of Cory J. on this issue is, in my submission, the better vew. It represents a more balanced approach than that advocated by McLachlin J.[103] It affords an absolute immunity to judges in respect of their adjudicative functions — the very essence of their role as judges. The public interest is thus served by an absolute immunity in this respect, as it enables a judge to adjudicate free from any outside interference or influence. The need for an absolute immunity in respect of the courts' administrative functions is not so clear or compelling. It appears that a qualified immunity will suffice to preserve the independence of the judiciary in its administrative functions. Such a standard of immunity will not permit the executive or legislature to interfere unduly in the administration of the courts, for the immunity will give way only in exceptional circumstances. The courts have control of this situation as they will determine whether the circumstances of a particular case warrant the displacement of the immunity. Overall, a qualified immunity reflects that there must be some accountability on the part of the judiciary, in its administration of the courts.

The distinction between the adjudicative and administrative functions of courts is well established in American law. In a series of cases, the United States federal courts have discussed the immunity possessed by judges in relation to matters of administration.[104] These cases have involved suits against judges for personnel decisions made by them with respect to court officials and employees. The pattern that emerges from the decisions, in these cases, is somewhat uncertain. Immunity

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103. In spirit, the judgment of Cory J. would appear to coincide with the sentiments expressed by the court in *In the Matter of Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, *supra*, note 95 at 1521:

> "Like any testimonial privilege, the judicial privilege must be harmonized with the principle "the public . . . has the right to every man's evidence." "

104. See: *Forrester* v. *White* (1986), 792 F. 2d 647 at 653-54. See also: O'Connor J., "His Honor the Employer - No Longer Absolutely Immune For Hiring Decisions" (1989) 57 Cincinnati L.R. 1141; Roberts, "Qualified Immunity as a Defence to the Firing of Court Employees by Judges" (1988) 28 Santa Clara L. Rev. 659.

has been recognized, in some cases, when it appears that the personnel decision has been made by a judge in his judicial capacity. In other cases, it has not been recognized on the basis that the decision was made by a judge in his administrative or executive capacity. The cases simply make the point that it is often difficult to draw a distinction between the judicial and administrative acts of a judge.[105]

In *Forrester* v. *White*, a decision of the Federal Court of Appeal, 7th Circuit, the Court held that a state court judge was absolutely immune in an employment discrimination suit brought by a former employee under civil rights legislation.[106] The plaintiff, who had been employed by the judge as a juvenile and adult probation officer and as a director of court services, alleged that her termination constituted discrimination on the basis of her sex. The majority of the Court was of the opinion that the judge was immune as he was acting in his judicial capacity, within the scope of his authority, when he discharged the plaintiff from employment. This conclusion was based on the fact that the former employee was performing functions closely tied to the discretionary powers of the judge, which have been typically characterized as judicial acts. However, the Court went on to say:[107]

> We stress, however, that the nature of this relationship depends on the facts of each case. We cannot set forth a general rule, because the interaction between the judge and the members of his staff does not always appropriately implicate the decisions of the judge qua judge . . . Each court system differs in the manner in which it allocates responsibility to court personnel. However, because the employment relationship at issue here was dominated by acts that were unquestionably taken in the defendant's judicial capacity, the contested actions of the defendant in demoting and dismissing the plaintiff would affect his ability to act in a principled and independent manner in his role as a judge if he could not undertake these actions without the protection of the defense.

Accordingly, the defendant judge was granted an absolute immunity from liability.

In dissent, Posner J. was of the opinion that the court had gone too far in recognizing an absolute immunity in respect of employment decisions made by a judge. He pointed out:

> The only tenable rationale of absolute immunity is the need to protect officials from being seriously deflected from the performance of their duties. Absolute immunity is strong medicine, justified only when the danger of such deflection is very great. Analysis thus requires careful attention to the tradeoffs involved in a judgment to grant absolute immunity.

Therefore, the policy rationales supporting an absolute judicial immunity must be weighed against the policy rationales calling for liability.[108] An absolute immunity will be granted "[i]f the danger to judicial independence and finality of judgments is greater than the cost of lack of judicial accountability".[109] Posner J. was of the opinion that such was not the case in the action before him. His analysis of policy rationales for and against immunity would only support an absolute immunity for a judge's adjudicatory functions. It would not support an absolute immunity for a judge's administrative functions as an employer. The threat of a law suit should not deflect the judge from the effective performance of his duties any more than such a suit would deflect other employers from their activities.

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105. Note, "What Constitutes a Judicial Act for the Purposes of Judicial Immunity?" (1985) 53 Fordham L. Rev. 1503. Indeed, in *Forrester* v. *White* (1988), L. Ed. (2d) 555, O'Connor J. admitted at p. 565 that "[t]his Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity".

106. *Supra*, note 104. The action was brought under 42 U.S.C. § 1983.

107. *Ibid.* at 657-658.

108. This is not unlike the approach adopted by the Supreme Court of Canada in *Nelles* in relation to prosecutorial immunity; see the discussion following herein.

109. O'Connor, *supra*, note 104, at 1170.

On appeal, the Supreme Court of the United States overturned the judgment of the Circuit Court of Appeals.[110] In so doing, it adopted the analysis of Posner J.. Justice O'Connor, speaking for the Court, pointed out that immunities have been granted to government officials to protect the fearless and independent discharge of their duties when there is a danger they will be deflected from such a course by the threat of suit. On the whole, the courts have been cautious in recognizing these immunities, as they place an official outside the law. She was of the view that immunities were granted to serve and protect certain functions. They were not recognized on the basis of status.[111] In the case of a judge, an absolute immunity from civil suit has been granted not because the defendant is a judge but because of the need to protect his adjudicatory function. Thus, an absolute immunity was required to preserve the independence of the judiciary and to protect the judicial process from "intimidation and harassment".[112] However, the Supreme Court, on the basis of lower court decisions, drew a distinction between judicial acts and "the administrative, legislative or executive functions that judges may on occasion be assigned by law to perform".[113] Administrative acts, even though essential to the functioning of a court, have never been equated with judicial acts, when an immunity is under consideration. Generally speaking, public officials have not enjoyed an absolute immunity from suit arising out of employment decisions. The Court could see no reason to treat a judge differently from other public officials in terms of an immunity from suit in relation to employment decisions. Indeed, the courts have held such officials accountable in making employment decisions when they have failed to act in accordance with statute law or the Constitution. Just because a judge has the statutory authority to engage and terminate court officials does not, in itself, convert such actions into judicial acts, with a concommitant absolute immunity from suit.

In deciding the defendant judge was not entitled to claim an absolute immunity, the Supreme Court of the United States did not rule specifically on whether a judge would be entitled to a qualified immunity in respect of employment decisions. Although, it indicated that such an immunity may be available on the basis the judge was making a discretionary decision. One commentator has suggested that this will be of little protection in cases of discriminatory employment practices as a qualified immunity will only attach when the defendant's conduct does not violate clearly established constitutional standards of which a reasonable person should be aware.[114] Clearly, judges cannot assert that they are unaware that discrimination in employment is illegal.

Therefore, in the United States, absolute immunity is the rule only with respect to a judge's adjudicatory functions. An extension of this immunity to a judge's administrative functions has been held not to be warranted. An absolute immunity will not be granted to a judge, in the discharge of his administrative duties, simply because he is a judge.

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110. *Forrester* v. *White* (1988), L. Ed. (2d) 555.

111. *Ibid.* at 565 per O'Connor J.: "Here, as in other contexts, immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches".

112. *Ibid.* at 564.

113. *Ibid.* at 565.

114. *Harlow* v. *Fitzgerald* (1982), 457 U.S. 800 (U.S.S.C.).

It is submitted that this case, and others of a similar ilk, are of relevance to a discussion of judicial immunities in Canada. First, they provide support for the view that a distinction should be drawn between the adjudicatory and administrative functions of a judge in granting immunity from civil suit. The judge should be held accountable to the same degree as other public officials for his illegal or unconstitutional actions in discharging his administrative functions. The threat of suit, in this regard, should not deflect from his independence or the impartial discharge of his adjudicatory functions. The right of an injured citizen to a remedy clearly outweighs any perceived threat to the judge in adjudicating. Canadian courts should take a similar approach when confronted by suits against judges arising out of their administrative functions. Suits of this nature may be more common in the future, as Canadian courts attain their constitutional ideal of independence in administration.[115]

Secondly, these cases illustrate that an absolute immunity should be granted only after a careful weighing of all the policies and interests in issue. In this, the courts must be cognizant of their own occupational bias for, as Justice O'Connor observed in *Forrester*:[116]

> One can reasonably wonder whether judges, who have been principally responsible for developing the law of official immunities, are not inevitably more sensitive to the ill effects that vexatious law suits can have on the judicial function than they are to similar dangers in other contexts.

In *Nelles*, the court was of the opinion that the chilling effect of suit on a prosecutor's performance of his duties was exaggerated and speculative. Perhaps, a similar observation can be made with respect to the effect of civil actions on judges in the performance of their duties.

Further, in a civil suit against a judge arising out of his official functions, substantial weight must be accorded to the injured citizen's right to a remedy. This becomes even more crucial with the *Charter*'s guarantees of fundamental rights and freedoms. The appropriateness of a damage remedy for the judicial infringement of a person's *Charter* rights was considered by McDonald J. in *R.* v. *Germain*.[117] In that case, the Court found that a provincial court judge had abused his summary power of punishment for contempt of court. In failing to advise the accused of the specific nature of the complaint against him, the provincial court judge deprived the accused of his liberty by a procedure that was not in accordance with the principles of fundamental justice. This was contrary to s. 7 of the *Charter*. Further, the judge's order infringed the accused's right, under s. 9 of the *Charter*, not to be arbitrarily detained or imprisoned. The accused's conduct did not amount to contempt of court and therefore any judicial order of detention was arbitrary. While McDonald J. was of the opinion that a remedy in damages was just and appropriate under the circumstances, he would not impose liability on the judge personally:[118]

> In the present case the accused was deprived of his liberty by virtue of an order of a judge. There can be no suggestion that an order of compensation could be made against the judge personally. Making such an order against a judge personally would subvert the long established rule of public policy that, as Lord Diplock said in *Maharaj No. 2* at p. 679, "a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity".

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115. Colvin, "The Executive and the Independence of the Judiciary" (1986-87) 51 Sask. L. Rev. 229.
116. *Forrester* v. *White*, *supra*, note 110 at 564.
117. (1984), 53 A.R. 264 (Alta. Q.B.).
118. *Ibid.* at 274.

Instead, McDonald J. would impose liability directly on the state. Section 24(1) of the *Charter* provides a court with great flexibility in fashioning remedies for *Charter* infringements. Even though a judge is personally immune, direct liability can be imposed on the provincial Crown as the infringement of the accused's *Charter* rights occurred in connection with an exercise of the judicial power of the state. By this means, both the injured citizen's right to a remedy and the adjudicatory independence of the judge can be accommodated. This option is not available in the United States, where the doctrine of sovereign immunity may preclude a direct remedy against the government or state for the violation of an individual's constitutional rights.[119]

The recognition of an absolute judicial immunity, or privilege, from testifying should also entail a careful balancing of interests. Such an immunity or privilege should not be granted solely on the basis that the witness, whose testimony is sought, is a judge. In recent years, the Canadian courts have recognized that public officers enjoy no general testimonial immunity solely because they occupy, or have occupied, a public office.[120] Further, Canadian courts have rejected claims of absolute privilege for cabinet documents reasoning that ". . . cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest".[121] In determining whether a privilege will be granted in respect of the testimony of public officials or the production of government documents, the court is bound to weigh the conflicting interests. This includes the interest of the administration of justice in the disclosure of all facts. Any immunity, therefore, is relative, not absolute. Whether or not an immunity exists, in a given case, will depend on a court's assessment of where the public interest lies.

The same reasoning should guide the courts in the fashioning of an absolute testimonial privilege for judges. Such an immunity should only arise when the public interest demands. This determination will involve a consideration of a number of interests, only one of which is the public interest in the personal independence of the judge.[122] The public confidence in the administration of justice is another interest. It depends on the full disclosure of all relevant facts. The independence of the courts in their adjudicative functions as opposed to their administrative functions is another factor. Some measure of accountability in the latter respect may not seriously deflect the courts from the proper performance of their adjudicative functions. Finally, the court should remember that a testimonial privilege should only be recognized where it serves the public interest in the proper functioning of

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119. Dellinger, W., "Of Rights and Remedies, The Constitution as a Sword" (1972) 85 Harv. L. Rev. 1532; Shuck, P., *supra*, note 51 at 41-51.

120. *Re Mulroney et al.* v. *Coates* (1986), 54 O.R. (2d) 353; *Sparling* v. *Smallwood*, [1982] 2 S.C.R. 686; *C.D.I.C.* v. *Code* (1988), 84 A.R. 240 (Alta. C.A.).

121. *Carey* v. *The Queen*, *supra*, note 3 at 178 per LaForest J.

122. In the United States, the Supreme Court has not recognized an absolute testimonial privilege for judges. In *Dennis* v. *Sparks* (1980), 101 S. Ct. 183, the Court held that there was no constitutionally-based privilege immunizing judges from being required to testify about their judicial conduct in civil or criminal proceedings. In this respect, White J. stated at p. 188:

> Of course, testifying takes time and energy that otherwise might be devoted to judicial duties, and if cases such as this survive initial challenge and go to trial, the judge's integrity and that of the judicial process may be at stake in such cases. But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability . . . Neither are we aware of any rule generally exempting the judge from the normal obligation to respond as a witness when he has information material to a criminal or civil proceeding.

government, including the judicial power of the state. This was pointed out by Gibbs A.C.J. in *Sankey* v. *Whitlam*[123] in relation to a claim of privilege made by cabinet ministers. In his opinion, the evidentiary rule of Crown privilege should not "become a shield to protect wrongdoing by ministers in the execution of their office".[124] Therefore, disclosure may be necessary to protect that which non-disclosure was designed to protect; the proper functioning of government. This is particularly true when a serious charge of misconduct in government operations is made.[125] The same reasoning can be used in cases concerning judicial immunity from testifying. The minority in *MacKeigan* appears to have been cognizant of this. The public interest in the proper administration of justice required Chief Justice MacKeigan's testimony on the composition of the panel.

This concludes my discussion on judicial immunities. These immunities are judge-made, in furtherance of the public interest in an impartial and independent judiciary. The immunity from civil suit serves to maintain the judge's personal independence in the discharge of his judicial functions. He can decide impartially and fearlessly, free from the harassment of vexatious actions. These considerations would support a similar standard of immunity for both superior court and inferior court judges. The historic distinction between the two may be questionable when one considers the underlying public policy supporting an immunity from civil suit.

The judicial immunity from testifying also serves a similar purpose. On a personal level, a judge can decide free from the fear of having to justify his decisions afterwards to a disgruntled citizen or to the executive or legislative branches of government. On an institutional level, this immunity serves to protect the independence of the courts and maintain the essential separation of the judiciary from the other branches of government.

A constant theme running throughout the foregoing discussion, is the concern for the independence of the judiciary. As this principle evolves, so must the immunities which serve it.[126] However, in fashioning judicial immunities, the courts should not permit their pre-occupation with the principle of judicial independence to blind them to competing interests. These include the right of a citizen, injured as a result of judicial misconduct, to a remedy and the public interest in the disclosure of all relevant evidence.

VI. JUDICIAL INDEPENDENCE

The purpose of this part is not to undertake a historical review of the principle of judicial independence. This subject has been canvassed elsewhere.[127] Rather, the goal is to examine the principle, in a modern context, to determine its current meaning and usage. Apart from the decision of the Supreme Court in *MacKeigan* v. *Hickman*,[128] the principle of judicial independence has been the focus of two

123. (1978), 21 A.L.R. 505 (H.C.).

124. *Ibid.* at 532.

125. *Carey* v. *The Queen*, *supra*, note 3 at 182.

126. As McLachlin J. stated in *MacKeigan* v. *Hickman*, *supra*, note 2 at 104 ". . . judicial immunity is central to the concept of judicial independence".

127. Lederman, *supra*, note 36.

128. *Supra*, note 2.

other recent decisions of the Court.[129] The first of these, *Valente* v. *The Queen*[130] concerned the issue of whether a provincial court judge was an "independent and impartial tribunal" within the meaning of s. 11(d) of the *Charter* and therefore competent to exert jurisdiction over an accused person. A provincial court judge, in Ontario, had declined jurisdiction over such a person on the grounds that he was not an independent and impartial tribunal. The judge pointed to the extensive controls asserted by the executive and legislative branches of the government of Ontario over provincial court judges. Salaries of these judges were set by the executive without legislative scrutiny; salaries were not a charge on the consolidated revenue fund of the province; judges could be appointed to sit during pleasure; and the executive branch had the authority to make regulations for the inspection and destruction of a judge's books, documents, and papers. In essence, he submitted that the legislative framework surrounding provincial court judges portrayed them as civil servants.

The Ontario Court of Appeal[131] held that these controls did not impair the essential capacity of provincial court judges to make an independent and impartial adjudication. A provincial court judge was therefore an independent tribunal for the purposes of s. 11(d) of the *Charter*, notwithstandng the significant measure of control which could be exerted over him by the provincial Ministry of Justice. This decision was appealed to the Supreme Court of Canada.

Le Dain J., on behalf of the Supreme Court, drew a distinction between the requirements of "impartiality" and "independence". "Impartiality" refers to the subjective attitudes possessed by the members of a court: "[i]mpartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and parties in a particular case."[132] In contrast, "independence" refers to ". . . the traditional constitutional value of judicial independence. As such it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that reasons on objective conditions or guarantees."[133] Independence provides the foundation for a judge's impartiality.

His Lordship then pointed out that judicial independence involved both individual and institutional relationships. In terms of individual relationships, the judge must be secure in terms of tenure. In terms of institutional relationships, i.e., relationships between the judiciary and the other branches of government, Le Dain J. was of the view that these must be considered in a context of an objective assessment of their effect on the courts' capacity, as an institution, to act in an independent manner. He was of the view that no set formula or relational standards, in terms of substantive measures and procedural rules, existed to secure the independence of the judiciary:[134]

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129. See generally, Greene, Ian, "The Doctrine of Judicial Independence Developed by The Supreme Court of Canada" (1988) 26 O.H.L.J. 177; Colvin, *supra*, note 115.

130. *Supra*, note 36.

131. (1983), 41 O.R. (2d) 187.

132. *Valente*, *supra*, note 36 at 685 per Le Dain J.

133. *Ibid*. at 685.

134. *Ibid*. at 692. For a recent judicial view on the degree of independence the judiciary should enjoy with respect to court administration, see; Browne-Wilkinson, Sir Nicholas, "The Independence of the Judiciary in the 1980s", [1988] P.L. 44.

> Opinions differ on what is necessary or desirable, or feasible. This is particularly true, for example, of the degree of administrative autonomy it is thought the Courts should have.

In the absence of a formula, setting out the essential legislative or institutional framework necessary for judicial independence, Le Dain J. identified three essential conditions which must be met in order to satisfy the requirement of independence under s. 11(d) of the *Charter*. The first condition or requirement involved the security of tenure of judges. This condition will be met if a judge can be removed only for cause, in relation to his or her capacity to discharge judicial functions. The judge, subject to removal, must be given the opportunity to be heard at a judicial inquiry into his or her conduct or capacity. His Lordship held that a provision providing that a judge was to hold office at pleasure would not be sufficient to meet this essential condition.[135]

The second essential condition related to financial security. According to Le Dain J., this condition will be met when the judge's right to salary, pension and other remuneration is established by law and is not subject to executive interference. In the case of Ontario provincial court judges, this requirement was satisfied — the right to salary and the right to pensions was set by provincial legislation.

A third and final condition identified by Le Dain J. is perhaps the most controversial. It concerned ". . . the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function."[136] For greater certainty, His Lordship expanded upon the notion of administrative independence in the following terms:[137]

> assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of courtrooms and direction of administrative staff engaged in carrying out these functions, has been generally considered the essential or minimum requirement for "institutional" or "collective" independence.

On the basis of this reasoning, judicial independence, at the institutional level, will be defined not only in terms of "adjudicative independence", but "administrative independence". The fact that provincial court judges were subject to executive control in relation to some discretionary benefits did not, in the opinion of the Supreme Court, detract, in either sense, from the independence of the tribunal.

The degree to which the judiciary should control the administration of the courts has been an open question since the report of Mr. Justice Jules Deschênes on the independent judicial administration of the courts entitled "Maitres Chez Eux."[138] He saw the administration of the courts by the judiciary as being essential to judicial independence.[139] Three levels or stages of independence were referred to. The first involved freedom from excessive interference with the judiciary's security of tenure, case flow management, and access to support services. The second stage related to judicial control over the rule-making power of the courts. The third stage was complete independence in administration, free from any executive or legislative

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135. Provincial court judges who were appointed, on their retirement, to hold office at pleasure were held not to be sufficiently independent to satisfy s. 11(d) of the *Charter*.

136. *Valente, supra*, note 36 at 708.

137. *Ibid.* at 708.

138. Deschênes, J., "Maitre Chez Eux" (Ottawa: Canadian Judicial Council, 1981).

139. A view also shared by Chief Justice Brian Dickson of the Supreme Court of Canada in his address to the Canadian Bar Association, Halifax, August 21, 1985, "The Rule of Law: Judicial Independence and the Separation of Powers".

interference. Only when this latter stage was attained could the courts occupy a position as a separate branch of government:[140]

> Relations between the political and judicial authorities move on a horizontal plane. Neither is the other's subordinate; indeed, the sole mention of any inferior status is abhorrent to the judiciary. Judges are not public servants taking orders from the state, the court is not an agency of the state, and judges are not factotums of the state.

If this is an accurate assessment of the judiciary's role as one of the institutions of government, then the courts have come a long way, in terms of status, since the enactment of *The Constitution Act, 1867.*[141] Then, the judiciary was not seen as a third and separate branch of government. Judicial institutions were the creations of the legislature. Apart from the provisions in the *Constitution Act, 1867*[142] providing s.96 judges with security of tenure and financial security, the independence of the Canadian judiciary rested largely on English common law and tradition. *Valente* can be characterized as a first effort to rest the principle of judicial independence on firmer ground than tradition and constitutional convention. Section 11(d) of the *Charter* not only guarantees an accused a right to trial before an impartial and independent tribunal, it provides a constitutional foundation for the principle of judicial independence. To the extent that Canada's written constitutional arrangements are held to contain within them support for the principle of judicial independence, the status of the judiciary as an independent and separate branch of government is strengthened.

Beauregard v. *The Queen*[143] can be seen as a further step in this direction. The case arose out of a challenge to s. 29(1) of the *Judges Act.*[144] This provision amended the *Judges Act* so as to require judges to contribute to their pensions. The applicant, a federal judge, newly appointed at the time of the amendment, argued that it had the effect of reducing the salaries of federal judges. This, in turn, offended the constitutional principle that judicial salaries are not to be reduced. A question was also raised about the constitutional validity of effecting these changes through federal legislation, without the consent of the provinces as they possessed constitutional authority over "the administration of justice", under s. 92(14) of the *Constitution Act, 1867.*

Dickson C.J.C. gave the judgment for the majority of the Court.[145] While the issues before the Court were framed in quite narrow terms, he used the opportunity to give an expansive opinion on the principle of judicial independence. This principle was seen to run, as a common thread, through the respondent's submissions on the power of Parliament, under the Constitution, to amend the *Judges Act* so as to require pension contributions from judges.

In defining the modern principle of judicial independence, Dickson C.J.C. adopted the analysis of Le Dain J. in *Valente.* Conceptually, the principle must

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140. *Ibid.* at 141 (English Version).
141. 30 & 31 Vic., c. 3 (U.K.).
142. *Ibid.*, ss. 96-101.
143. *Supra*, note 36.
144. R.S.C. 1970, c. J-1, s. 29.1 [en. S.C. 1974-75-76 c. 81, s. 100].
145. Lamer and Estey JJ. agreed with Dickson C.J.; Beetz and MacIntyre JJ. dissented, in part, although they concurred in Dickson C.J.C.'s general discussion of judicial independence.

accommodate more than the individual aspect of judicial independence; it must be sufficiently broad to incorporate the institutional aspect:[146]

> the rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different, and equally important role, namely as protector of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.

This broad concept of judicial independence was seen to rest on three foundations. First, in our federal system, the courts serve as ". . . an impartial umpire to resolve disputes between two levels of government as well as between governments and private individuals who rely on the distribution of powers".[147] Secondly, the *Charter* has cast the courts in the role of the defender of individual human rights and liberties from government intervention.[148] Thirdly, the *Constitution Act, 1867* continued the English tradition of judicial independence in the Canadian superior courts.[149] In sum, the broad principle of judicial independence is the product of tradition, historic function, and constitutional role.

Dickson C.J.C. was of the opinion that the principle of judicial independence will only be achieved, in practice, if the courts are ". . . completely separate in authority and function from *all* other participants in the justice system".[150] This means that the courts must be separate and independent in their relationships from *both* the executive and the legislature. Applied to the circumstances of this case, judicial independence required that the financial security of judges be free from arbitrary interference by either the legislature or the executive. The legislation under attack did not interfere with the individual independence of judges or the institutional independence and integrity of the judiciary. Parliament had the constitutional obligation and authority, under s. 100 of the *Constitution Act, 1867* to fix and provide for judicial salaries and pensions.[151] It met this obligation, in this case, by putting into place a contributory pension scheme as part of an improved remuneration package for federal judges. Parliament's authority to legislate with respect to judicial salaries and pensions was not seen, however, as being unlimited. It could not, for example, enact such legislation for a colorable or improper purpose. It could not treat judges in a discriminatory fashion in comparison to other citizens. Dickson C.J.C. dismissed the appeal, as Parliament's actions did not fall into either of these categories. Judges were required to contribute towards their pensions in a similar manner to that expected of many Canadians.

The modern principle of judicial independence was once again in issue before the Supreme Court in *MacKeigan* v. *Hickman*.[152] You will recall that the principle

146. *Beauregard*, *supra*, note 36 at 70.
147. *Ibid.* at 71.
148. *Ibid.* at 72.
149. Ss. 96, 99, 100, 129.
150. *Beauregard*, *supra*, note 36 at 73.
151. "The Salaries, Allowances and Pensions of the Judges of the Superior, District and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick) and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary shall be fixed and provided by the Parliament of Canada."
152. *Supra*, note 2.

of judicial independence provided primary support for the finding of Glube, C.J. at trial[153] that the judges of the Court of Appeal were protected by a testimonial immunity. Before the Supreme Court, one of the arguments advanced by the respondents, in reply to the Commission's claim that it possessed the authority, under ss.3 and 4 of the *Public Inquiries Act*, to compel judges to testify, was that, if these provisions had that affect, they were unconstitutional as they infringed the constitutional principle of judicial independence.

The judgment of MacLachlin J. rested, almost entirely, on the modern principle of judicial independence. In defining this principle, she drew on the language and reasoning of Le Dain J. in *Valente* and Dickson C.J.C. in *Beauregard*. In her opinion, it was a constitutional principle with individual and institutional elements representing the personal independence of the judge and the institutional independence of the judiciary. At the individual level, the principle required that the judge be independent from outside interference or influence so as to enable him to impartially adjudicate disputes. At the institutional level, the principle required that the courts be independent in their adjudicative functions; completely separate, in function and authority, from the other branches of government. In other words, the modern principle of judicial independence must be broad enough to reflect the historic function of the judiciary as the impartial arbiter of disputes *and* the modern function of the judiciary as the defender of the Constitution:[154]

> [t]o summarize, judicial independence as a constitutional principle fundamental to the Canadian system of government possesses both individual and institutional elements. Actions by other branches of government which undermine the independence of the judiciary therefore attack the integrity of our Constitution. As protectors of our Constitution, the courts will not consider such intrusions lightly.

However, McLachlin J. did not interpret the modern principle of judicial independence to require an absolute separation between the judiciary and the executive and legislative branches of government. Of necessity, there must be relations between the judiciary and the other two branches of government.[155] But, in order not to infringe the principle of judicial independence, any relations must be of a kind and of a degree that they do not encroach upon the essential function and authority of the courts, as defined by the courts![156]

> What is required . . . is avoidance of incidents and relationships which could affect the independence of the judiciary in relation to the two critical judicial functions — judicial impartiality in adjudication and the judiciary's role as arbiter and protector of the Constitution.

Applying these principles to the case at bar, Justice McLachlin was of the opinion that an immunity from testifying was essential to the personal independence of the judge. In order to be completely separate in function and authority ". . . a judge cannot be required by the executive or legislative branches of government to explain or account for his or her judgment."[157] Further, the questions concerning the composition of the Marshall reference panel were seen to infringe upon the institutional independence of the judiciary. This independence extended to matters of administration which directly affected its adjudicative function. The assignment of judges

153. *Infra.*

154. *MacKeigan, supra*, note 2 at 101, per McLachlin J.

155. By way of example, she pointed to statutes which governed the appointment and retirement of judges and to the fact that Parliament can impeach federally-appointed judges for cause.

156. *MacKeigan, supra*, note 2 at 101, per McLachlin J.

157. *Ibid.* at 104, per McLachlin J.

was such a matter of administration.[158] The essential function and authority of the courts to adjudicate would be interfered with if the executive could instruct a chief justice on the assignment of judges or if the executive could require a chief justice to account for the assignment of a particular judge in a particular case. In either event, the principle of judicial independence would be offended.

However, in her conclusion, she made it clear that her decision, in this case, was not to be interpreted to mean that a judge could not be compelled to testify on these matters under any circumstances. A judge may well be a compellable witness before other bodies which possess the express power to compel judicial testimony in a setting designed to safeguard the essential integrity and independence of the courts. If the comments of Lamer J., in *MacKeigan*, are any indication, one of these bodies may be the Canadian Judicial Council, a federal body with the power to conduct investigations into the conduct or integrity of federal judges.

The remaining judgments in *MacKeigan* do not reveal any disagreement, in substance, with the statements of McLachlin J. concerning the modern principle of judicial independence. Cory J.'s dissent reveals a disagreement more of degree than of substance. While he disagreed with her finding that judges possess an absolute immunity in respect of questions concerning the composition of a panel, he did so on the basis that a qualified immunity was sufficient to preserve the administrative aspect of judicial independence in that respect. In this, he relied upon the distinction made by Le Dain J., in *Valente*, between adjudicative and administrative independence.[159] Cory J. was of the opinion that administrative independence must be treated as an adjunct to adjudicative independence. The independence of the courts in the discharge of their adjudicative functions was of paramount importance as it was vital to the administration of justice. Therefore, to secure this independence, he too recognized an absolute immunity, or privilege, for a judge in respect of questions concerning the reasons for his decision. However, he did not see the independence of the courts in matters of administration in quite the same light. As judicial independence in its administrative aspect was not as vital to the system of justice, a qualified immunity would suffice to secure the necessary institutional independence of the judiciary in this aspect. Such an immunity would meet the concerns expressed by McLachlin J. with respect to executive interference in the assignment of judges. But, a qualified immunity must give way, in exceptional circumstances, to permit questions to be asked of a chief justice in relation to the administration of his court. In this case, he found exceptional circumstances to exist. Serious questions had been raised with respect to the administration of the Court of Appeal. As a result, public confidence in the administration of justice was shaken. Proper answers must be given to these questions in order to restore public confidence. This is not inconsistent with the principle of judicial independence as it serves to maintain public confidence in the impartial administration of justice.

The Supreme Court of Canada has used the opportunities presented by *Valente*, *Beauregard* and *MacKeigan* to fashion a modern statement or principle of judicial independence. In its modern form, it recognizes not only the personal independence of a judge but the institutional independence of the judiciary as a separate branch

158. In this conclusion, she agreed with the reasoning of Le Dain J. in *Valente*, *supra*, note 36.

159. *Valente*, *supra*, note 130 at 712.

of government. While judicial independence, in its individual aspect, has long been recognized by the common law and supported by a tradition of independence, institutional independence is a more modern development. The Canadian Constitution, in particular the *Charter*, has provided the impetus for this development. As the Court pointed out in *Beauregard*, Canadian courts are charged, under the Constitution, with a number of important responsibilities. In a federal state governed by a written constitution, the courts play a unique role — they must interpret the Constitution in the resolution of disputes between the federal and provincial governments. Further, the *Charter* has cast the courts in the role of protector — they are charged with the responsibility of defending individual rights and freedoms against government intervention. In order to discharge these constitutional duties, the courts have reasoned that they must be completely separate in function and authority from the executive and legislative branches of government.

In *Valente*, the Supreme Court found constitutional support for the principle of judicial independence in s. 11(d) of the *Charter*. As a constitutional principle, it was extended beyond the adjudicative functions of the courts to matters of administration which ". . . bear directly and immediately on the exercise of the judicial function."[160] Constitutionally, the principle was defined in far broader terms than had hitherto been the case.

In *MacKeigan*, the Court used the constitutional principle of judicial independence to support the recognition of a judicial immunity from testifying. This immunity is a concrete expression of the principle of independence — its nature and scope assists in setting the necessary boundary between the judiciary and the other branches of government.

To conclude, these cases illustrate a major and, somewhat troubling, phenomenon. In the almost total absence of formal recognition of their constitutional status as an independent branch of government, the courts have been forced to fashion a statement of their own in the context of disputes about their own rights and powers. They are, in effect, defining the boundaries of their own powers. This should give rise to some concerns as ". . . it is doubtful whether judicial interpretation of a constitutional guarantee is the best way of resolving the complex and contentious policy issues that exist in this field."[161]

VII. PROSECUTORIAL IMMUNITY

At this point, the nature and scope of a common law immunity for public prosecutors will be examined. Strong links exist between this immunity and the judicial immunity from civil suit. Like the judge, the public prosecutor is a major actor in the administration of criminal justice. Traditionally, his functions have been seen in broader terms than those of defence counsel. He has been described as a "Minister of Justice" and as one "who ought to regard himself as part of the Court rather than as an advocate".[162] Whether this is, in reality, an accurate description

160. *Ibid.*

161. Russell, P.H., *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw-Hill Ryerson Ltd., 1987) at 97.

162. Manning, Morris, "Abuse of Powers by Crown Attorneys", [1979] L.S.U.C. Lectures 571 and 580 quoting Henry Bull Q.C.

of his role is a matter of controversy.[163] But the fact remains that the prosecutor enjoys substantial discretionary authority in the administration of criminal justice. He occupies a unique position in the system of criminal justice, with attendant public responsibilities which extend beyond the representation of one party. The fair and impartial exercise of these powers is necessary to the maintenance of public confidence in the impartial administration of justice.

Concerns of a similar nature have compelled a judicial immunity from civil suit to secure the personal independence of the judge in the discharge of his judicial functions. His actions as a judge must not be compromised or influenced by the prospect of personal liability. Therefore, to ensure the fearless and impartial discharge of a prosecutor's functions, an immunity of the same kind would appear to be in order. Such an immunity has been recognized in the United States, where it is considered to be an extension of the immunity possessed by judges. This extension of a judicial immunity has been aided by a characterization of the prosecutor's functions, in initiating and conducting a prosecution, as "judicial" or "quasi-judicial".[164] It would seem, therefore, that the prosecutor's immunity from civil suit rests on an analogy drawn between the adjudicative or judicial functions of a judge and the discretionary functions of a prosecutor.

An absolute immunity for public prosecutors was first recognized by the American federal courts in *Yaselli* v. *Goff*.[165] Subsequently, in a much cited decision, *Gregoire* v. *Biddle*,[166] an absolute immunity for prosecutors was reaffirmed. The plaintiff's action failed, even though the Court was of the opinion that the defendant's actions were prompted by personal spite. However, the primary importance of the case lies in Justice Learned Hand's assertion of the rationale for an absolute, as opposed to a qualified, immunity:[167]

> If it were possible to confine . . . complaints to the guilty, it would be monstrous to deny recovery. The justification is . . . that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial . . . would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

This absolute immunity from common law tort actions was later extended by the Supreme Court of the United States in *Imbler* v. *Pachtman*.[168] In that case, the

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163. Hogg, *supra*, note 60 at 152 suggests that it is not:

> ". . . the public prosecutor is counsel for the Crown, one of the contending adversaries in the proceedings."

164. For a recent expression of this, see *Mitchell* v. *Forsyth* (1985), 105 S. Ct. 2806, and *Forrester* v. *White*, *supra*, note 110 at 564, per O'Connor J.:

> In the years since *Bradley* was decided, this Court has not been quick to find that federal legislation was meant to diminish the common law protections extended to the judicial process . . . On the contrary, these protections have been held to extend to executive branch officials who perform quasi judicial functions, . . . or who perform prosecutorial functions that are "intimately concerned with the judicial phase of the criminal process". The common law's rationale for these decisions — freeing the judicial process from harrassment or intimidation, has been thought to require absolute immunity even for advocates and witnesses.

165. (1927), 275 U.S. 503.

166. (1949), 177 F.2d 579.

167. *Ibid.* at p. 580.

168. (1976), 96 S.Ct. 984.

same policy rationales which supported an immunity for prosecutors in common law suits were found to apply, with equal force, to actions brought against prosecutors based on the Constitution. Powell J., in his judgment for the Court, identified the following policy rationales or concerns which supported an immunity:

1. The threat of liability would undermine the prosecutor's performance of his duties;[169]
2. The public confidence in the prosecutor's office would suffer if it were understood that his decisions may be constrained or influenced by the fear of personal liability;[170]
3. An honest prosecutor would have great difficulty in defending his actions and his decisions in a suit brought against him years after the prosecution;[171]
4. The criminal justice system would suffer if the prosecutor exercised his discretion based on an assessment of his potential personal liability in damages;[172]
5. Prosecutors are liable to criminal and professional sanctions for their wrongful misconduct. These should be sufficient to deter such misconduct.[173]

An absolute immunity rather than a qualified, good faith immunity was thought to be essential even though this had the consequence of leaving ". . . the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."[174] The Court saw the broader public interest as being inadequately served by a qualified immunity — it would hamper, rather than promote, the fearless and vigorous performance of a prosecutor's duty.

Finally, utilizing a functional analysis, the Supreme Court limited the scope of the absolute immunity to "the judicial phase of the criminal process";[175] that is, to the initiation and conduct of the State's case. In theory, a prosecutor would be entitled to a lesser immunity in respect of his investigative and administrative functions.[176] However, the Supreme Court did not specifically rule on that question. In a separate judgment, White J. argued that an exception to the absolute immunity should exist in cases involving the unconstitutional suppression of evidence by a prosecutor.[177] The absence of an immunity would prompt the disclosure of all evidence by the prosecutor. Far from impeding the judicial process, a qualified immunity, in this one respect, would assist it.

One cannot help but note the similarities between the policy rationales asserted in support of an absolute immunity for judges, and for public prosecutors, in the

169. *Ibid.* at 992.
170. *Ibid.* at 992.
171. *Ibid.* at 992-993.
172. *Ibid.* at 993.
173. *Ibid.* at 994.
174. *Ibid.* at 993 per Powell J.
175. *Ibid.* at 995.
176. *Mitchell* v. *Forsyth*, *supra*, note 164.
177. *Ibid.* at 1001.

leading American cases. Both immunities serve to meet the concern that harassment through unfounded litigation, would detract from a judge's or a prosecutor's performance of their public duties or would impair their independent exercise of judgment.[178]

Prior to the decision of the Supreme Court of Canada in *Nelles* v. *Ontario*,[179] Canadian courts had, for the most part, adopted the American position with respect to an immunity for prosecutors. This is somewhat surprising as the English common law on the subject of public officer liability does not indicate strong support for immunities generally. Only a few Canadian[180] and English cases[181] can be cited in support of an immunity from liability in tort arising out of the exercise of "judicial" or "quasi-judicial" functions. These few cases cannot be said to strongly support an immunity doctrine. They are perhaps better characterized as standing for the proposition that an *ultra vires* exercise of statutory authority will not, in the absence of malice or a cause of action in trespass, give rise to liability in tort.

In contrast, public officer immunities, associated with the exercise of discretionary authority, are a common feature of American law.[182] In the United States, federal executive officers have been held to possess an absolute immunity from suit in respect of common law torts.[183] However, in respect of constitutional tort actions, public officials are only accorded a qualified or good faith immunity.[184]

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178. Peter Shuck in his book, *Suing Government*, *supra*, note 51, at 90-91 argues that an absolute immunity ought to be granted to a wide range of public officials on the basis of the reasons cited in support of an absolute immunity for judges:

> In fact, if we go back a step and closely examine the court's rationale for its long standing rule of absolute immunity for judges, the case for granting a lesser immunity to executive officials . . . appears quite weak. The Court has emphasized five justifications for absolute immunity: . . . But these are not convincing reasons for the judiciary's privileged status. Bureaucrats, no less than judges, are expected and required to act objectively and without regard to personal considerations. Those disadvantaged by executive decisions are as likely to be aggrieved and litigious as those who lose in judicial forums. The interest at stake in one are not obviously and importantly different from those at issue in the other. The propensity to "build a record" in response to fear of liability is not limited to judges; indeed, we have seen that it is a tempting strategy for most street level officials. Alternative remedies for controlling executive misconduct are far more numerous than those available against judges. Finally, . . . plaintiffs can allege bad faith — and force a trial on those allegations — quite as easily against executive officials.

179. *Supra*, note 1.

180. *Harris* v. *Law Society of Alberta*, [1936] S.C.R. 88; *National Freight Consultants Inc.* v. *Motor Transport Board*, [1978] 2 W.W.R. 230.

181. *Everett* v. *Griffiths*, [1921] A.C. 631; *Tozer* v. *Child* (1857), 7 E & B. 377, 119 E.R. 1286; *Partridge* v. *The General Council of Medical Education and Registration* (1890), 25 Q.B.D. 90.

182. On the subject of public officer immunities see; Shuck P., *supra*, note 51 at 35-43, 89-99; Jennings, "Tort Liability of Administrative Officers" (1936) 21 Minn. L. Rev. 263; and Davis, "Administrative Officers Tort Liability" (1956) 55 Mich. L. Rev. 201.

183. For example, *Spalding* v. *Vilas* (1896), 161 U.S. 483; *Barr* v. *Matteo* (1959), 360 U.S. 564.

184. *Butz* v. *Economou* (1978), 438 U.S. 507. See also: *Harlow* v. *Fitzgerald* (1982), 457 U.S. 800 in which the United States Supreme Court held, at 818, that:

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The subjective elements of the qualified immunity appear to have been removed.

Nevertheless, in *Owsley* v. *The Queen*,[185] Dupont J. recognized an absolute immunity for Crown prosecutors in the public interest:[186]

> The rule as to immunity is obviously designed not for the protection of public Crown officials, but for that of the general public. Any unusual inhibitions upon Crown officials in the due execution of their duties brought about by such threats of civil action can only enure to the detriment of society whose interests can best be served with vigour and objectivity, without fear and with absolute independence. Any injustices which may result to a litigant from improper actions on the part of such Crown officials must be deemed secondary to the primary general interest of society as a whole.

Similar comments are to be found in subsequent Canadian cases where an absolute immunity for crown prosecutors was upheld. Galligan J. in *Richman* v. *McMurtry*[187] specifically accepted the statements of Dupont J. in *Owsley*, quoted above. In addition, he held the American authorities on the question to be persuasive as ". . . the fundamental rights and responsibilities of public prosecutors in the Anglo-American system of criminal law are substantially the same in all jurisdictions".[188] While Pennell J., in *Bosada* v. *Pinos*,[189] expressed some doubt as to whether an absolute immunity for public prosecutors should exist, he felt constrained by the weight of authority to uphold such an immunity. The Ontario Court of Appeal in *Nelles*[190] accepted the policy rationales advanced by the American courts in support of an unqualified or absolute immunity for prosecutors from a suit in malicious prosecution. Finally, the New Brunswick Court of Appeal in *Levesque* v. *Picard*,[191] agreed with the judgment of the Ontario Court of Appeal in *Nelles*.

In contrast, only two recent decisions of the Canadian courts may be cited for the proposition that prosecutors do not enjoy an absolute immunity from a suit for malicious prosecution. In *Curry* v. *Dargie*,[192] the Nova Scotia Supreme Court, Appeal Division, rejected a claim of absolute immunity by a residential tenancy officer in an action for malicious prosecution. The leading Ontario authorities were reviewed and distinguished on the basis that the respondent was not performing a judicial function similar to that carried out by the Attorney-General and Crown Attorneys:[193]

> I do not believe that in the case at bar it can be said that the respondent in laying the information against the appellant was in fact carrying out a judicial function similar to those carried out by Attorneys General and prosecutors . . . she was simply setting in motion the forces of the justice system which would enable the persons charged with its administration to perform their duties. She was in no different position from the police informant or other person who lays information in a criminal case without reasonable and probable cause or believing that the offence had been committed and with some malicious intent. Such a person is always liable to action for malicious prosecution.

The other decision, *German* v. *Major*,[194] may be of limited significance to this discussion. There, an action was brought against a prosecutor for alleged miscon-

185. *Supra*, note 11 (Ont. H.C.).
186. *Ibid*. at 100-101.
187. *Supra*, note 11 (Ont. H.C.).
188. *Ibid*. at 563.
189. *Supra*, note 11 (Ont. H.C.).
190. *Supra*, note 8 (C.A.).
191. *Supra*, note 11.
192. *Supra*, note 11.
193. *Ibid*. at 110, per Hart J.A.
194. *Supra*, note 11 (Alta. C.A.).

duct in the laying of tax evasion charges against the plaintiff. The plaintiff framed his action in malicious prosecution and in negligence. The malicious prosecution suit failed as the Court of Appeal was of the opinion that the facts provided reasonable and probable cause for the prosecution of the plaintiff. The alternative ground of negligence also failed as the defendant was held not to owe a duty of care to the plaintiff, other than a duty to act in good faith. This latter duty was enforceable only in an action for malicious prosecution, which the Court had already dismissed.

The Alberta Court of Appeal in *German* did not directly address the issue of a common law immunity for prosecutors. The leading authorities supporting such an immunity were not canvassed or discussed. Rather, the Court concentrated on whether the plaintiff had established a cause of action in, either, malicious prosecution or negligence. The decision cannot, therefore, be characterized as a renunciation of the immunity principle.

To this point, the Canadian case law on the question of a common law immunity for prosecutors appeared to strongly support the existence of an absolute immunity. In this, the Canadian courts followed American authority, including the policy rationales offered by the courts, in those cases, in support of such an immunity. However, one point of difference should be mentioned. The American principle of absolute immunity operates not only in common law actions, that is, for malicious prosecution, but also in actions resting on an alleged infringement of a person's constitutional or civil rights. The Canadian principle of absolute immunity has only been recognized in cases involving a common law action for malicious prosecution. The existence of such an immunity in a damage action under the *Charter* appeared, therefore, to be an open question.

The appeal in *Nelles* provided the Supreme Court of Canada with an opportunity to rule on the existence and scope of an immunity for public prosecutors at common law. Strictly speaking, the issue as to whether a similar immunity existed in a damage action under the *Charter* was not before the Court. The appeal was framed only in terms of whether a common law immunity existed in a suit for malicious prosecution.[195]

Lamer J., for the majority of the Court, commenced his opinion with a review of the relevant United Kingdom,[196] American,[197] and Canadian[198] authorities. Surprisingly, he found the Canadian authorities to be in conflict, leaving the substantive issue of immunity for crown prosecutors undetermined. Such a conclusion is questionable. The overwhelming weight of Canadian authority would support an absolute immunity. The cases cited in opposition to the principle of absolute immunity are few — arguably, only one of the two deals with the issue directly. The two United Kingdom decisions reviewed by the Court appeared to be in conflict. The leading American authorities were considered and found not to be helpful, as they rested primarily on a functional approach to the issue of immunity. One will recall

195. The Court of Appeal in *Nelles*, [1985] 51 O.R. 513 had some doubts as to whether the *Charter* applied to the plaintiff's claim as the conduct complained of occurred before the proclamation of the *Charter*.

196. *Riches* v. *D.P.P.*, *supra*, note 13 (C.A.); *Hester* v. *MacDonald*, *supra*, note 13.

197. *Imbler* v. *Pachtman*, *supra*, note 168, *Wilkinson* v. *Ellis* (1980), 484 F. supp. 1072.

198. *Owsley* v. *The Queen in right of Ontario*, *supra*, note 11; *Richman* v. *McMurtry*, *supra*, note 11; *Levesque* v. *Picard*, *supra*, note 11; *Curry* v. *Dargie*, *supra*, note 11; *German* v. *Major*, *supra*, note 11; *Bosada* v. *Pinos*, *supra*, note 11.

that Powell J., in *Imbler* v. *Pachtman*,[199] had limited his finding of an absolute immunity for prosecutors to their "quasi-judicial" functions. A functional analysis or characterization was used, therefore, to limit the scope of any absolute immunity. The policy rationales identified by the United States Supreme Court in support of an absolute immunity apply only to the "judicial" or "quasi-judicial" functions of prosecutors.

It may be a question of semantics, but it does not appear that a characterization of the prosecutor's functions as "judicial" or "quasi-judicial" led the United States Supreme Court to its decision that prosecutors enjoyed an absolute immunity. Rather, the immunity was recognized on the basis of a number of policy rationales relating to the prosecutor's actions in initiating and conducting a prosecution.[200] Nevertheless, Lamer J. in *Nelles* is probably right in rejecting the functional approach as "unprincipled"[201] and "arbitrary".[202]

As administrative law illustrates, characterization or categorization of function, as a limiting or enabling device, quickly becomes the threshold issue. If a court, on review, characterizes an officer's functions as falling within a particular category, then the officer will be held to certain procedural obligations[203] or liable to certain remedies.[204] This approach tends to focus on the nature of the officer's function, not on the nature of his conduct or the consequences of his actions. Courts, in applying in individual cases the open-ended, ambiguous language associated with the functional approach, have come to different conclusions on the characterization of what appear to be similar functions. As a consequence, the law becomes a mass of contradictions. Characterization of an officer's function under one heading as opposed to another, serves as a form of code for the underlying policy decisions made by a court. The real reasons supporting a decision to review, or not to review, official action, in individual cases, become masked. As Lamer J. pointed out in *Nelles* ". . . characterization of functions is an unprincipled approach that obscures the central issue."[205]

To His Lordship, the central issue in *Nelles* was whether the prosecutors had acted without reasonable and probable cause and with malice. The question as to the function they were performing was irrelevant. In this, he is clearly in opposition to the United States Supreme Court's view, articulated in *Imbler* v. *Pachtman*[206] that a prosecutor's function in initiating and conducting a prosecution was important.[207]

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199. *Supra*, note 168 at 994-995.

200. *Infra*.

201. *Nelles*, *supra*, note 1 at 340:

> In my view to decide the scope of immunity on the basis of categorization of functions is an unprincipled approach. . . .

202. *Ibid.* at 339:

> In my view, the functional approach leads to arbitrary line drawing between prosecutorial functions.

203. For example, *Calgary Power* v. *Copithorne*, [1959] S.C.R. 24.

204. For example, *Ridge* v. *Baldwin*, [1964] A.C. 40 (H.L.).

205. *Nelles*, *supra*, note 1 at 340.

206. *Supra*, note 168.

207. In *Mitchell* v. *Forsyth*, *supra*, note 164, the United States Supreme Court held that a former Attorney General was not entitled to an absolute immunity from civil suit in respect of an illegal wiretap he ordered. The immunity covered only the acts of a prosecutor in initiating and conducting a criminal prosecution, it did not extend to acts of an investigatory nature such as issuing an order for a wiretap.

The public interest in a prosecutor's fearless and independent decision-making, in this respect, outweighed any public or private interests supporting a remedy in damages against a prosecutor who had acted maliciously. One might say that an allegation of malice was irrelevant to the United States Supreme Court in that it was concerned to protect certain prosecutorial functions from the detrimental effects of liability, regardless of the type of official misconduct alleged.

Therefore, the fundamental issue in *Nelles* was whether a prosecutor ought to be immunized from liability in an action for malicious prosecution. Any immunity would not automatically arise from a characterization of the prosecutor's functions, but from a general consideration of: the role of the prosecutor, the rights of an injured party, the misconduct complained of, and the public interest in support of as opposed to immunity. This approach is in keeping with the earlier analysis of the Supreme Court in *Carey* v. *The Queen*[208] involving a claim of Crown privilege to prevent the disclosure of certain documents. There, LaForest J. for the Court, rejected the claim after a careful weighing of the policies at issue; represented, on the one hand, by the public interest in disclosure and, on the other, by the public interest in the confidentiality of cabinet documents. As he correctly pointed out, the privilege claimed, in the case, was not a Crown privilege, it was ". . . more properly called a public interest immunity, one that, in the final analysis, is for the Court to weigh."[209] In *Nelles*, the absolute immunity claimed by the Attorney-General and his agents is not a prosecutorial immunity, it is a public interest immunity. Whether or not it will be recognized in any given case will depend on a balancing or weighing of policy concerns by a court to determine where the public interest lies. As Lamer J. stated: "[a] review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy."[210] One of the traditional policy rationales advanced in support of an absolute immunity is the argument that it ". . . encourages public trust and confidence in the impartiality of prosecutors".[211] While the Court found some merit in this argument, it also pointed out, in response, that public confidence is more likely to be severely shaken when it understands that a prosecutor, in whom a great trust is reposed, may abuse that trust with impunity. To shield the prosecutor from civil liability when he intentionally abuses his office renders him unaccountable to the public or to the parties injured by his actions. This is an alarming result in a legal system which values equality under the law,[212] and the Rule of Law.

Closely allied to this, is the concern that the prospect of liability will have a "chilling effect" on the prosecutor in the fearless and independent discharge of his functions.[213] It is argued that he will compromise the proper performance of his official duties in order to avoid liability. However, the Court was of the opinion that a lesser or qualified standard of immunity would be sufficient to meet this concern. Such an immunity would protect a prosecutor in the proper, good faith discharge of his responsibilities: ". . . errors in the exercise of discretion and

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208. *Supra*, note 3, (1986) 35 D.L.R. (4th) 161.
209. *Ibid.* at 173, per La Forest J.
210. *Nelles*, *supra*, note 1 at 351.
211. *Ibid.* at 346.
212. *Ibid.* at 346.
213. *Ibid.* at 348.

judgment are not actionable''.[214] One may reason from this that the absence of an absolute immunity will not entail the consequence of a negligence action against a prosecutor for the errors committed by him in the performance of his official functions.[215] But, the absence of an absolute immunity will expose the prosecutor to an action for malicious prosecution. Such an action involves an allegation that the prosecutor has deliberately misused his office for an improper purpose or motive, ''. . . a use inconsistent with the status of ''Minister of Justice'' ''.[216] To impose liability on a prosecutor when he has acted with malice and without reasonable and probable cause will have a beneficial, deterrent effect — civil liability for actions which are clearly outside the traditional prosecutorial function will augment deterrents already in place such as criminal prosecutions and internal or professional discipline. The imposition of civil liability on a prosecutor for an abusive or malicious exercise of his powers would be an effective weapon of specific deterrence. When the government is immune, the burden of liability will be borne by the prosecutor personally. This should deter him from similar conduct in the future or deter other prosecutors from similar misconduct. Yet, it is questionable whether personal liability will compel government to re-examine and amend its policies and procedures, so as to prevent prosecutorial misconduct of this type in the future. If, however, liability can be imposed on government, then such liability may prompt it to act and to change its procedures, so as to prevent conduct of this type from occurring again.[217]

The Supreme Court is clearly right in refusing to be ''spooked'' into a rule of absolute immunity on the basis of the speculative ''chilling effects'' argument. Little, or no, hard evidence exists in support of the proposition that liability will compromise the fair and impartial discharge of a prosecutor's functions. The argument overlooks the fact that the absence of an absolute immunity does not expose the prosecutor to a wide range of potential suits — ''[t]he only tort to which the public prosecutor is particularly exposed by reason of his duties is malicious prosecution.''[218] A plaintiff bringing such an action has a heavy onus to discharge; he ''. . . would have to prove both the absence of reasonable and probable cause in commencing the prosecution, *and* malice in the form of a deliberate and improper use of the office of the Attorney General or the Crown Attorney . . .''.[219] Few persons who have been acquitted will be able to meet this onus. Further, a court can deal with a meritless claim through its power to strike out, on preliminary motion, frivolous and vexatious actions.

Finally, the Court did not see a flood of litigation arising as a consequence of its decision not to clothe prosecutors with an absolute immunity in suits for malicious prosecution. The tort is difficult to establish; claims without merit can be struck before trial and costs can be levied against plaintiffs who bring such claims. These built-in deterrents should stem any anticipated flood of litigation which could

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214. *Ibid.* at 349.

215. This accords with the reasoning of Kerans J.A. in *German* v. *Major*, *supra*, note 11 (Alta. C.A.).

216. *Nelles*, *supra*, note 1 at 345. Here Lamer J. is referring to the classic description of the prosecutor. See the statement of Rand J. in *Boucher* v. *R.*, [1955] S.C.R. 16 at 23-24.

217. It could not in *Nelles*, *supra*, note 1, as the Court found the Crown to be immune on the basis of s. 5(6) of the Ontario *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393.

218. Hogg, *supra*, note 60 at 153.

219. *Nelles*, *supra*, note 1 at 345.

conceivably impair the public prosecutorial system. Lamer J. drew support for this conclusion from the situation in the province of Quebec, where suits against crown prosecutors for malicious prosecution had been permitted since 1966. There was no evidence of a flood of claims, as a result. The same conclusion is arrived at by Hogg, in his recent book entitled *Liability of the Crown*:[220]

> The difficulty of proving the elements of the tort of malicious prosecution surely enables public prosecutors to carry out their duties without undue trepidation and the very few reported cases in the Commonwealth belie the American concern for harassment by litigation. Indeed, the rationale for the immunity seems to apply with as much or more force to the police, and yet it has never been suggested that the police are immune from actions for malicious prosecution. In fact, there are very few cases of malicious prosecution against the police, and it seems unlikely that the police are deflected from their duties by fear of being sued for malicious prosecution.

The policy rationales discussed to this point involve only one side of a coin — the public interest in protecting the prosecutor from the harassment of suit. But what about the personal interest of the party injured as a result of the malicious conduct of the prosecutor? That was clearly not the focus of the American courts in granting prosecutors an absolute immunity. The policy rationales expressed in the leading American decisions did not appear to give the interests of the injured plaintiff much weight. For example, in *Imbler* v. *Pachtman*,[221] the fact that the plaintiff alleged an unconstitutional infringement of his civil rights did not cause the court to reconsider or turn from its emphasis on the harmful effects of liability.

Surely, the interests of the citizen injured as a consequence of a prosecutor's malicious conduct are deserving of as great a weight in any consideration of a public interest immunity. As Lamer J. stated in *Nelles*: "[r]egard must also be had for the victim of the malicious prosecution".[222] These interests are recognized through the imposition of liability. When a prosecutor acts without reasonable and probable cause, and with malice, he acts wrongly. When his wrongful conduct occasions injury to another, justice demands that the injured party be given a remedy. The common law has long recognized the right of a citizen to a remedy in damages against an officer, when that officer has acted maliciously in the purported discharge of his public duties.[223] Further, fairness dictates the imposition of liability. A citizen should not have to bear, personally, the loss caused by an official's *ultra vires* actions. Liability represents fairness, in shifting the loss from the injured party to the officer who has acted wrongly and caused him injury. Finally, liability means accountability. When a citizen acts wrongly and injures the property or person of another, he is held accountable to the injured party. The same principle should apply when a government official causes damage to another. A citizen, injured as the result of the malicious conduct of a prosecutor, has an interest in seeking to hold that prosecutor accountable. Immunity means that the prosecutor's conduct will be removed from the ordinary process of law — there can be no legal accountability:[224]

> the fundamental flaw with an absolute immunity for prosecutors is that the wrongdoer cannot be held accountable by the victim through the legal process.

To conclude this part, the judgment of the Supreme Court of Canada in *Nelles* is entirely consistent with the traditional theme of Anglo-Canadian law with respect

220. Hogg, *supra*, note 60 at 153.

221. *Supra*, note 168.

222. *Nelles*, *supra*, note 1 at 347.

223. *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121.

224. *Nelles*, *supra*, note 1 at 347.

to officer immunities. Generally speaking, apart from judges, the English common law has not recognized an immunity for public officers in the exercise of discretionary functions.[225] On the limited occasions where judicial immunities have been extended to other officers, the courts have insisted upon a strong analogy between the functions of the officer and the functions of a court. This is illustrated by the cases in which the judicial privilege for statements made in court proceedings has been extended to proceedings of administrative tribunals.[226] A tribunal, in order to share in this privilege, must have attributes similar to a court of justice in conducting an authorized inquiry:[227]

> It is applicable to all kinds of courts of justice; but the doctrine has never been carried further; and it seems that this immunity applies wherever there is an authorized inquiry, which though not before a court of justice, is before a tribunal which has similar attributes . . . This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that which the courts act.

In the case of public prosecutors, the analogy used to justify the extension of an absolute judicial immunity is laboured.[228] If the analogy is predicated on the fact that judges and prosecutors must make discretionary decisions of crucial importance to the impartial administration of justice, then the analogy would appear capable of supporting an absolute immunity for a broader range of high government officials who also make discretionary decisions in the public interest.[229]

The rejection of an absolute immunity for public prosecutors is a policy decision based on a consideration of a number of opposing concerns. The absence of an absolute immunity for prosecutors should not significantly expose them to suits for damages arising out of the discharge of their official functions. Further, the absence of an immunity recognizes the need to provide the injured citizen with a remedy when a fundamental civil right has been infringed through the malicious actions of a prosecutor.

VIII. CONSTITUTIONAL PERSPECTIVES

It remains to briefly consider the judgments of the Supreme Court of Canada in *Nelles* and *MacKeigan* from a constitutional law perspective. Both cases involve claims of immunity by major actors in the administration of justice. If these claims were upheld, judges and public prosecutors would be placed, in the performance

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225. See Brazier, *supra*, note 52. She argues for an extension of the absolute judicial immunity to public officers who exercise a judicial type of discretion; i.e., a decision made on the basis of an assessment of the evidence before them. Such an immunity is a public interest immunity designed to protect the fair, free and impartial discharge of the officer's functions. An American commentator, Shuck, would agree. See *supra*, note 178.

226. *Dawkins* v. *Lord Rokeby*, (1873) L.R. 8 Q.B. 255, (a military court of inquiry); *Addis* v. *Crocker*, [1961] 1 Q.B. 11, (a discipline committee of the Law Society); *Goffin* v. *Donnelly*, (1881) 6 Q.B.D. 307, (a select committee of the House of Commons).

227. *Royal Acquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 430 at 442 per Lord Esher M.R.

228. Hogg, *supra*, note 60 at 152:

> The analogy with the judge is not close. It is true that a public prosecutor must be scrupulously fair in presenting the evidence in favour of the Crown, but this is a far cry from being a judge: The public prosecutor is counsel for the Crown, one of the contending adversaries in the proceedings. As counsel, the prosecutor possesses none of the sentencing or the coercive powers of the judge, which are the powers that occasionally provoke tort actions against judges.

229. See Shuck, *supra*, note 178.

of their official responsibilities, outside the normal processes of law. One would expect that only the strongest reasons of public policy could justify such a result, particularly, as equality under the law is one of the major tenets of our constitutional system of government. Therefore, a resolution of these claims should compel a court to balance and weigh a number of conflicting values and interests, some of which will be constitutionally based.

In *Nelles*, the court rejected the respondent prosecutor's claims for an absolute immunity from a civil suit for malicious prosecution. In arriving at this conclusion, the Court chiefly utilized a policy approach which involved an analysis of the policies for and against an absolute immunity. A more legalistic approach to the question, based on a characterization of a prosecutor's functions, was rejected. The policy approach placed the issue of prosecutorial immunity in clearer focus — any immunity was, in truth, a public interest immunity. To determine where the public interest lay, the court considered not only the effect of liability on the prosecutor in the discharge of his functions, but also the effect of immunity on the rights of the citizen complaining of loss or injury as a result of the prosecutor's actions. As Justice Lamer stated "[g]ranting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights."[230] Such a consequence must be considered not only in terms of common law rights, but also in terms of constitutionally guaranteed rights under the *Charter*.

Lamer J. was of the opinion that actions which would constitute the tort of malicious prosecution, at common law, would also constitute an infringement of an individual's rights under s. 7 of the *Charter*; that is, a prosecution initiated with malice and without reasonable and probable cause would amount to a deprivation of an individual's right to liberty and security of the person, and would do so in a manner inconsistent with fundamental justice. If an absolute immunity for prosecutors was upheld, the Court may well be precluded from granting a just and appropriate remedy to injured citizens under s. 24(1) of the *Charter*:[231]

> The question arises then, whether s. 24(1) of the Charter confers a right to an individual to seek a remedy from a competent court. In my view it does. When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which is surely to allow courts to fashion remedies when constitutional infringements occur.

While the Court did not have to rule on the constitutional validity of an absolute immunity for prosecutors in *Nelles*, it was clearly influenced in its decision by the possible constitutional ramifications of such an immunity.

The *obiter* comments of Lamer J. may prove to be a harbinger of the Court's attitude towards statutory and common law immunities in damage actions under s. 24(1) of the *Charter*. To date, the Supreme Court has not yet had to address the issue of an affirmative damage remedy under the *Charter*.[232] When it does, it will undoubtedly have to address the issue of officer immunities. The right of a citizen, whose constitutional rights have been infringed as a result of governmental action, to a "just" and "appropriate" remedy in damages under the *Charter* may well compel a different approach to the issue of officer immunity[233] — an approach that

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230. *Nelles*, *supra*, note 1 at 347.

231. *Ibid.* at 347-348 per Lamer J.

232. Pilkington, *supra*, note 22; Cooper-Stephenson, *supra*, note 22; Dellinger, *supra*, note 119.

233. *Ibid.*, Pilkington, at 588-591.

places more emphasis on a citizen's constitutional right to a remedy than on the need to immunize the officer, which has been the traditional focus in these cases. In the end result, no immunity or a lesser standard of immunity may result. This, in turn, may cause the courts to question the prevailing standards of immunity in common law actions.

A number of observations can be made about the Court's probable reluctance to recognize claims of absolute immunity in damage actions against public officers under s. 24(1) of the *Charter*. First, absent statutory or common law immunities, officer liability under the *Charter* will be, potentially, great. A citizen, injured as a result of unconstitutional action, will have his remedy against the officer personally. When the conduct complained of is actuated by malice, as was allegedly the case in *Nelles*, the imposition of liability on the officer will have a beneficial effect in terms of deterrence. However, under a *Charter* regime of greater officer liability, any chilling effect of liability will be amplified. Without an immunity, this can only be alleviated by imposing liability, either vicariously or directly, on the Crown.

Secondly, the courts may be equally hostile to assertions of Crown immunity in response to damage actions against government or its officials under s. 24(1). Certainly, Lamer J. saw the possibility of a constitutional challenge to s. 5(6) of the *Ontario Proceedings Against the Crown Act*.[234] Further, the potential exists under the *Charter* to hold the Crown, at either the federal or provincial level, directly liable in tort.[235] This is in contrast to the situation in the United States where "sovereign immunity" may preclude an action against the government for unconstitutional action.[236]

> By contrast, s. 32 of the Canadian Charter of Rights and Freedoms expressly provides that the *Charter* applies to the Parliament and government of Canada and the legislatures and governments of the provinces. Accordingly, s.24 of the *Charter*, which enables Courts to remedy constitutional infringements, is enforceable against governments . . . claimants in Canada will not be limited to suing government officials when it is really the government itself which is responsible for a constitutional infringement.[237]

The imposition of direct liability on the government may facilitate the recognition of immunities for officers where the public interest demands it. As indicated above, the chilling effect of personal liability on the officer may be alleviated in this fashion.

Overall, a scheme of direct government liability in *Charter* damage actions, seems to be more fair than a scheme of vicarious liability predicated on the personal liability of a government servant or agent. The burden of responsibility for unconstitutional government action should not fall primarily on an officer. The suit against an officer, in his personal capacity, arose against the backdrop of Crown

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234. *Nelles*, *supra*, note 1 at 326. It is difficult to know on what basis a challenge could be made to s. 5(6). In the sense that the immunity of the Crown detracts from the principle of equality under the law, one could argue that, on the basis of s.15, the provision is unconstitutional. However, in a number of recent cases, questions have been raised about the application of s. 15 to the Crown. In these cases, the courts have refused to equate the Crown with an individual. See: *Leighton* v. *The Queen*, [1989] 1 F.C. 75 (F.C.T.D.); *Wright* v. *A.-G. of Canada* (1989), 36 C.R.R. 361; *R.* v. *Stoddart* (1987), 59 C.R. (3d) 134 (Ont. C.A.). Another approach would be to strike the provision down on the basis of s. 24(1): the immunity prevents the Court from awarding a just and appropriate remedy and is therefore unconstitutional. This is purely speculative, as the claim in *Nelles* was not for the infringement of a *Charter* right.

235. Pilkington, *supra*, note 22 at 534-535.

236. Dellinger, *supra*, note 119 at 1557.

237. Pilkington, *supra*, note 22 at 535.

immunity. It was largely a fiction designed to circumvent the immunity of government. When government is not immune from liability, as is the case in an action for a constitutional infringement, the need for such an officer suit largely disappears. Although it may be useful, in some circumstances, as a measure of specific deterrence directed at the offending officer.

Thirdly, the Supreme Court of Canada appears to be of the view that one standard of immunity should apply where the action is capable of being framed in either common law or constitutional terms. This avoids the incongruous situation existing in the United States which accords an officer, in respect of the same conduct, an absolute immunity to a common law claim but only a qualified immunity to a claim brought under the Constitution.[238] *Nelles* stands for the proposition that an absolute immunity should not permit the malicious infringement of an individual's rights, regardless of whether the action exists at common law or under the *Charter*:[239]

> We must be mindful that an absolute immunity has the effect of negating a private right of action and may bar a remedy under the *Charter*. As such, the existence of an absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.

In this, the focus of the Court is clearly on the infringement of an individual's rights. It appears that its constitutional role, as the protector of individual rights, has spilled over into the common law.

In sum, the Supreme Court in *Nelles* was clearly influenced by its constitutional concern to protect individual rights from infringement by government action. The right of a citizen to a remedy, when her rights were maliciously interfered with, outweighed any public interest in an immunity. In a sense, the *Charter* served as an "auxiliary dagger" in *Nelles*, prompting the Court to strike down an immunity in order to provide an affirmative common law remedy to the plaintiff.[240]

In contrast to *Nelles*, constitutional considerations were at the forefront in *MacKeigan*. The Commission's attempt to obtain judicial testimony was seen as an attack on the independence of the Canadian judiciary. In *Valente* and *Beauregard*, the Supreme Court of Canada had recognized the independent constitutional status of the Canadian judiciary, as a branch of government, separate, in function and authority, from the executive or legislative branches. This independence was encapsulated in the constitutional principle of judicial independence, defined in those cases. The modern constitutional principle of judicial independence is a far broader statement of independence than the traditional common law notion of independence, which had evolved to provide for the personal independence of the judge and impartial adjudication by the courts. A broader statement of judicial independence was required to reflect the role of the Canadian judiciary, in a constitutional state with an entrenched *Charter* of individual rights — in Canada, the courts are seen to be the protectors of the Constitution and the protectors of individual civil rights and liberties. In this role, the courts, as a social, as well as a legal,

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238. *Butz* v. *Economou* (1978), 438 U.S. 507.

239. *Nelles*, *supra*, note 1 at 351, per Lamer J.

240. With apologies to Walter Dellinger whose concept of the Constitution as a "sword" to fashion affirmative remedies for citizens injured as a consequence of unconstitutional action served as a basis for my description. See, Dellinger, *supra*, note 119.

institution, must be separate in authority and function from the other two branches of government.[241]

MacKeigan does not significantly add to the content of the constitutional principle of judicial independence. For the most part, the case represents an application of this principle. However, as a specific application, the decision does provide an opportunity for a better understanding of the modern principle. The Supreme Court was unanimous in its opinion that a judge is absolutely immune from testifying as to the reasons for his decision. This serves to protect the personal independence of the judge, in adjudication, which is essential to impartial decision-making. But even this immunity may not be absolute, for McLachlin J. states in closing:[242]

> I should not, however, be taken as suggesting that a judge could never be called to answer in any forum for the process by which a judge reached a decision or the composition of the court on a particular case. I leave to other cases the determination of whether judges might be called on matters such as these before other bodies which have express powers to compel such testimony and which possess sufficient safeguards to protect the integrity of the principle of judicial independence.

A majority of the Court was of the opinion that absolute immunity would extend to questions concerning the composition of the record. This, too, goes to the personal independence of the judge in adjudication. As Lamer J. states:[243]

> What evidence a court relies on for arriving at a given conclusion is an integral part of the adjudicative process . . . The extent to which a Court reveals these matters in a judgment is equally an integral part of the adjudicative process . . . However, if a court chooses not to do so, it may well, in some circumstances though surely not in all, have failed in its adjudicative duties but not in any administrative duty, and the justices cannot be compelled by the executive as witnesses to clarify and add to their judgment.

In other words, the judgment speaks for itself.

As related earlier, the Supreme Court was divided on whether Chief Justice MacKeigan could be compelled to answer the Commission's questions concerning the composition of the panel. Questions of this nature were seen to fall within the area of administration of the courts. The extent to which the courts are independent in their own administration is an open question.[244] Currently, the responsibility for the administration of the courts is shared by the executive, legislative, and judicial branches of government. Constitutionally, the provinces are given authority over the administration of the courts through s.92(14) of the *Constitution Act, 1982*. Le Dain J., in *Valente*, expressed the view that the principle of judicial independence, in its institutional aspect, called for a certain amount of independence "... with respect to matters of administration bearing directly on the exercise of its judicial function".[245] In other words, where the matter of administration was seen to bear directly on the judiciary's adjudicative function, the matter fell within

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241. *Beauregard*, *supra*, note 36.

242. *MacKeigan*, *supra*, note 2 at 107-108, per McLachlin J. As suggested previously, *infra*, one such body may be The Canadian Judicial Council.

243. *Ibid.* at 112, per Lamer J.

244. Serious questions can be raised about whether the courts ought to enjoy independent control over matters of administration not intimately related to adjudication. As Ian Greene observes in his article on the doctrine of judicial independence, *supra*, note 129 at 201:

> The argument that judges need to control administrative matters not directly related to adjudication in order to protect judicial independence is debatable.

Further, as Greene points out at pp. 201-204, greater judicial control over court administration will involve the courts in a whole host of new relationships and problems.

245. *Valente*, *supra*, note 36 at 708, per Le Dain, J.

the province of the judiciary, and its control over this matter must be completely separate from the other branches of government. The majority of the Supreme Court in *MacKeigan* were of the opinion that the assignment of judges fell within those matters of administration under the independent control of the judiciary. An absolute immunity from testifying in respect of such a matter was recognized in order to preserve the necessary separation in this respect between the judiciary and the executive or legislature. The minority was of the contrary opinion that a qualified immunity would be sufficient, under the circumstances, to secure the necessary constitutional independence of the judiciary.

By tying the judicial privilege from testifying to the constitutional principle of judicial independence, *MacKeigan* causes us to consider judicial immunities from a different perspective. Historically, judicial immunities have been recognized, at common law, to preserve the proper discharge of the judge's adjudicative function. In *MacKeigan*, the judicial immunity from testifying was held to be essential to the constitutional independence of the judiciary from interference by the executive or legislative branches of government. The immunity, therefore, rests in large part on a constitutional separation of powers. It is an immunity with constitutional, rather than common law, status.

In this regard, an analogy can be drawn between it and the legislative immunity recognized in the United States under the Speech and Debate clause of the Constitution.[246] The American legislative immunity is said to rest on constitutional text[247] and on the separation of powers between the federal and state governments. In contrast, judicial immunities are viewed as common law immunities, "designed to protect the smooth functioning of government".[248] The legislative immunity was embodied in constitutional text to protect the constitutional separation of powers — to prevent the legislative branch of government from being encroached upon by the executive or judicial branches. Yet, in interpreting this legislative immunity, the American courts have narrowed its ambit to apply to only functions of a legislative nature. The actions of legislators which are not necessary to the essential functioning of the legislature or are inconsistent with the integrity of the legislative process are exempted from the protective ambit of the immunity.

If the analogy is apt, the judicial immunity from testifying may be cast too broadly. Clearly, questions concerning the judge's reasons for his decision or his mental processes will go to the heart of the judicial function. An absolute immunity should be recognized in such an instance. However, all questions concerning the administration of the courts may not go to the essential adjudicatory function of the judiciary; or, they may involve administrative conduct which is inconsistent with the integrity of the judicial function. It is difficult to see how the questioning of a chief justice by a royal commission concerning the composition of a reference panel would impair the independence of the judiciary in the exercise of its adjudicative functions. Especially when the conduct complained of is adminis-

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246. U.S. Constitution, Art I, § 6 states, in part, that Members of the House of Representatives and the Senate:

> . . . shall in all cases, except thereon, felony and breach of peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same, and for any speech or debate in either House, they shall not be questioned in any other place.

247. Nagel, *supra*, note 70 at 245.

248. *Ibid.* at 245.

trative in nature and has resulted in questions concerning the impartiality of one member of the panel. The special circumstances of *MacKeigan* would seem to call for a flexible approach to the issue of immunity rather than a dogmatic application of the principle of judicial independence.

However, the Constitution served a completely different purpose in *MacKeigan*; it acted as a shield for the justices exempting them from the testimonial obligations of ordinary citizens.

IX. CONCLUSION

In *Nelles*, the Supreme Court of Canada rejected a principle of absolute immunity for public prosecutors in the discharge of their official functions. After a careful assessment of the policies in conflict, including the right of a citizen to a remedy, the Court was of the opinion that an absolute immunity from civil suit was ". . . not justified in the interests of public policy".[249] As a consequence, public prosecutors can now be sued for malicious prosecution. The possibility of such a suit was not viewed by the Court as hindering the proper performance of a prosecutor's duties. To the extent that a prosecutor was perceived to enjoy an absolute immunity from suit before the decision in *Nelles*, it can now be said that prosecutors will be held more accountable in the performance of their functions.

The policy assessment carried out by the Supreme Court in *Nelles* raises serious questions about the need for an absolute immunity from civil suit for judges. While the actors are different in terms of status, the same policy considerations would appear to govern the existence of an absolute judicial immunity from civil suit. A qualified immunity would appear to be adequate to meet any concern surrounding the harmful effects of suit on the proper functioning of the courts. At common law, inferior court judges possess only a qualified immunity from suit and they do not appear to have been hampered in the discharge of their functions by the prospect of litigation. When judges act maliciously or corruptly, or in violation of a person's constitutional rights, they too must be held accountable to the injured citizen. The citizen should not be forced to seek his remedy through appellate review; the cost of which will be borne by him personally. Further, current mechanisms of judicial discipline do not afford the injured citizen a remedy for the loss he has suffered.[250]

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249. *Nelles*, *supra*, note 1 at 351, per Lamer J.

250. The only avenue of recourse with respect to federal superior court judges is a complaint to the Canadian Judicial Council. This body, consisting of the chief justices and associate chief justices of the Superior Courts in Canada, was created by the Federal Parliament in 1971. The Council must investigate a complaint made against a judge by the Federal Minister of Justice and it may investigate complaints made by others. The Council has no direct powers of discipline. As Russell points out in his book, *supra*, note 161 at 184, it "relies primarily on admonitions and informal conciliation". After an investigation, it can recommend removal of the judge to the Minister of Justice or it can recommend that a judge's salary be terminated. At that point, the discipline proceedings move from the judicial to the political realm. There appear to be several flaws in this mechanism for judicial discipline. First, the only real sanction provided is removal by Parliament and this sanction may be inappropriate in many instances of judicial misbehaviour. As a result, there may be no formal sanction imposed on a judge who has misconducted himself but not so seriously as to warrant removal. Secondly, the Council is made up entirely of judges. There is no lay or professional input from either the public or the legal profession. Questions can be raised about the adequacy of a scheme which permits only judges to respond to complaints about judges.

In the face of a judge's immunity from civil suit, he may be able to gain compensation from government directly through the imposition of liability on the state. Section 24(1) of the *Charter* appears to be broad enough to accommodate the imposition of direct liability on government even though the judge may be personally immune. This avenue of approach may facilitate the development of other public interest immunities for public officers, apart from judges, in order to protect the fearless and objective discharge of their discretionary functions. However, the possibility of imposing direct liability on the state will only exist in actions brought under the *Charter*. Absent a cause of action under the *Charter*, a citizen will have to bear his own loss when injured by the corrupt or malicious actions of a judge.

The unique position of the judge above the law seems incongruous in a society which adheres to the principle of equality under the law and the Rule of Law. The immunization of the judge from legal responsibility for his malicious and corrupt actions appears suspiciously self-serving when the courts have held officers of the executive branch accountable, under the law, for their illegal actions. As one judge has pointed out, judicial immunity does not exist for judicial peace of mind, it exists in the public interest.[251] When the public interest in immunity is based upon exaggerated fears for judicial independence, it ought to be reconsidered.

In *MacKeigan*, the Supreme Court upheld a judicial immunity, or privilege, from testifying in order to protect the personal independence of the judge, and the institutional independence of the judiciary, from interference by the executive and legislative branches of government. The institutional aspect of judicial independence required that the courts be completely separate, in function and authority, from the executive and legislature. Institutional independence embraced not only matters of adjudication, but also matters of administration. A testimonial immunity was recognized in order to secure, in practice, the constitutional principle of judicial independence, as espoused by the Supreme Court in its earlier decisions of *Valente* and *Beauregard*.

Yet, the approach of the Supreme Court to the granting of such an immunity differs markedly from its approach in *Nelles*, or in other cases involving a claim of testimonial, or evidentiary, privilege by government officials or government itself. In these cases, the Court saw the existence, nature, and scope of any immunities to be a question of public policy. In the cases involving claims of Crown or executive privilege, the Supreme Court reasoned that the public interest and disclosure must be carefully weighed against the public interest against disclosure. This assessment of policy does not seem to be present in the Court's judgment in *MacKeigan*. The public interest in the individual and institutional independence of the judiciary, is presumed to be paramount and there is little or no discussion of the public interest in the disclosure of evidence, sought by the Commission. Nor is there any meaningful discussion as to the degree of accountability expected of the courts, as one of the separate branches of government. The constitutional principle of judicial independence appears to compel a different approach to judicial immunities than that used in fashioning public officer immunities.

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251. *Forrester* v. *White*, *supra*, note 104 at 660, per Posner J.:

> . . . the purpose of absolute immunity is not to make life easy for officials of any branch of government; it is not to foster judicial peace of mind.

Only in the dissenting judgments of Cory and Wilson JJ. do we find any discussion of the public interest in disclosure and then, only in relation to questions concerning matters of administration. Both were of the view that administrative independence was secondary to adjudicative independence. A qualified immunity would therefore suffice to secure the judiciary's institutional independence in this respect. A qualified immunity is a relative form of immunity that will give way, where the public interest demands. The public interest, in the exceptional circumstances found in the *MacKeigan* case, would likely cause any qualified immunity to give way. The perceived lack of impartiality on the part of one member of the panel was seen to undermine the public confidence in the courts and in the administration of justice. Accordingly, questions must be asked and satisfactorily answered to restore public confidence. Therefore, the need to maintain public confidence in the administration of justice was a policy interest of greater importance than the independence of the judiciary in the administration of their courts. The distinction recognized by three members of the Court between the adjudicative and the administrative functions of courts parallels a similar distinction made by American courts. In the United States, an absolute immunity from civil suit has only been recognized with respect to the judicial functions of courts, as opposed to their administrative functions.

The role of the courts, as a separate branch of government, is not so unique as to compel the courts to adopt a different approach to questions of judicial immunities from that used in cases concerning executive or legislative immunities. The courts, as the ultimate arbiters of all legal immunities, must remember that immunities exist *only* in the public interest. Judicial immunities will be tolerated *only* to the extent they are perceived to serve that interest. These immunities protect and maintain the independence of the courts. Public confidence in the work of the courts, and their impartial administration of justice, rests on the independence of the judiciary. In this sense, judicial immunities are necessary only to the extent that they maintain confidence in the judiciary and the justice system. When immunities are perceived by the public to be used by the judiciary for a selfish purpose, they hinder, not advance, the goals of judicial independence.