Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice), [2003] N.B.J. No. 321

New Brunswick Judgments

New Brunswick Court of Appeal

Turnbull, Larlee and Robertson JJ.A.

Heard: October 7, 2002.

Judgment: August 20, 2003.

No. 90/02/CA

[2003] N.B.J. No. 321 | [2003] A.N.-B. no 321 | 2003 NBCA 54 | 231 D.L.R. (4th) 38 | 260 N.B.R. (2d) 201 | 5 Admin. L.R. (4th) 45 | 40 C.P.C. (5th) 207 | 124 A.C.W.S. (3d) 1083

Between Provincial Court Judges' Association of New Brunswick, the Honourable Judge Michael McKee and the Honourable Judge Steven Hutchinson, (applicants) appellants, and Her Majesty the Queen in Right of the Province of New Brunswick as represented by the Minister of Justice, (respondent) respondent

(171 paras.)

Case Summary

Courts — Judges — Provincial courts — Compensation — Increase in compensation — Crown — Authority of Ministers — Judicial review — Scope of review — Standard of review — Practice — Evidence and proof — Affidavits — Admissibility.

Appeal by the Provincial Court Judges' Association of New Brunswick from the dismissal of their application for judicial review of the decision of the respondent Minister of Justice. In their submission to the 2001 Judicial Remuneration Commission, the Association sought salary parity with federally-appointed judges of the Court of Queen's Bench, who earned $200,000 annually. The Minister challenged the validity of the Association's claim that they were similar to Queen's Bench judges. He maintained that their current salary of $141,000 was adequate. The implementation of the 1998 Commission's salary recommendation resulted in a 40 per cent increase. The Minister argued that there was no material change in circumstances that warranted a further increase, and that the remuneration was adequate to attract qualified candidates. The 2001 Commission recommended that Provincial Court judge salaries should be increased to $170,000 over three years. It also recommended annual indexing to prevent erosion. The Minister only accepted the indexing proposal. The Association's application for judicial review of this decision was dismissed. The Association argued that the judge erred in admitting certain affidavits that supported the Minister's decision, as the affidavits contained additional evidence and new reasons to reject the Commission's recommendations.

HELD: Appeal dismissed.

The affidavits were improperly admitted, as the Minister did not have an unfettered discretion to raise issues or offer reasons that were never put to the Commission in the first place. However, the reasons advanced by the Minister for his refusal to implement the 2001 salary recommendation satisfied the applicable review standard of simple rationality. This standard required deference to the Minister's factual justification for his rejection decision. The Minister only had to provide a legitimate reason for rejection. Deference was owed to the Minister and not to the Commission. To grant deference to the

Commission would result in a constitutional process that resembled binding arbitration, which was not provided for in the Provincial Court Act. The Minister's objection that the salary increase was excessive failed to meet the simple rationality test. However, his contention that the salary of federally-appointed judges was based on considerations that were irrelevant in the provincial context was sound in fact and logic. The Association's parity argument was flawed. The Minister's contention that the current remuneration was sufficient to attract qualified candidates was equally sound.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 11(d).
Constitution Act, 1867, s. 100.
New Brunswick Rules of Court, Rules 38, 38.04(c), 38.06(c)
Provincial Court Act, R.S.N.B. 1973, c. P-21, s. 22.03(1), 22.03(6), 22.03(6)(a), 22.03(6)(a.1), 22.03(6)(b), 22.06(1).

Appeal From:

Appeal from judgment of the New Brunswick Court of Queen's Bench, Boisvert J., May 13, 2002.

Counsel

Robb Tonn, for the appellants. Nancy E. Forbes and Gaétan Migneault, for the respondent.

Reasons for judgment by: Robertson J.A. Concurred in by: Turnbull and Larlee JJ.A.

ROBERTSON J.A.

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Para. No.

1 Judicial independence has three core characteristics - security of tenure, financial security and administrative security. This appeal raises fundamental issues surrounding the financial security of New Brunswick's 26 Provincial Court judges.

2 In their submission to the 2001 Judicial Remuneration Commission, the judges sought salary parity with those of the Court of Queen's Bench who were receiving $200,000. Alternatively, the provincially appointed judges sought a salary differential of no more than $20,000. To them, it is not a question of equal pay for work of equal value, but rather a question of equal pay for equal work. The underlying premise is that a judge is a judge. In response, the Government challenged the validity of the comparison. It also maintained that the present remuneration package, that includes a salary of $141,000, was adequate in two respects. First, implementation of the 1998 Commission's salary recommendation resulted in a 40% increase and, as there had been no material change in circumstances, a further substantial increase was unwarranted. Second, the Government maintained that the present remuneration package was adequate in terms of attracting qualified candidates from the practicing Bar.

3 For salary purposes, the 2001 Commission narrowed the field of comparator groups to one: judges of the Court of Queen's Bench. In its view, these are the only persons whose job and method of appointment is similar to the Provincial Court judges. After concluding that the Province's economic circumstances were favourable, the Commission recommended that judicial salaries move from $141,000 to $170,000, over three years (2001-2003), plus annual indexing to prevent erosion. While the Commission rejected the principle of full parity with federally appointed puisne judges, its salary recommendation approximates 85% of the federal salary. It is not coincidental that New Brunswick's per capita personal income equals 85% of the Canadian average.

4 The Government readily agreed to the indexing of judicial salaries, but otherwise rejected the 2001 Commission's salary recommendation for a barrage of reasons. In turn, the appellant judges (hereafter "the Association") sought review on the ground that those reasons failed the Supreme Court's "simple rationality" test articulated in what is colloquially referred to as the P.E.I. Reference Case: see [1997] 3 S.C.R. 3. The review application was dismissed and, hence, the appeal to this Court: see (2002), 249 N.B.R. (2d) 275.

5 This appeal brings to a head the Association's struggle to obtain salary parity with judges of the Court of Queen's Bench. The parity argument had been advanced before the 1998 Commission, but sidestepped on the ground that a salary increase could be justified on other grounds. Regrettably, the complexity of the present case has been exacerbated by both parties. There is not even a consensus with respect to the mandate of judicial remuneration commissions and there are more fundamental problems.

6 The Association's unwavering focus on its parity argument quickly devolved into a question of assessing the relative workloads of the two courts. Indeed, the 2001 Commission went so far as to offer a rationale that explains why one court produces more written decisions than the other. The non-justiciable nature of such issues did not elude the Applications Judge whose decision is now challenged on the ground that he ostensibly reviewed the Commission's salary recommendation rather than reviewing the Government's rejection decision.

7 The Government has added to the complexity of the appeal in several ways. First, it succeeded in convincing the Applications Judge to admit into evidence several affidavits that the Association argues raise issues not pursued before the Commission or that bolster the Government's reasons for rejecting the Commission's salary recommendation. Second, the Government was successful in convincing the Applications Judge to formulate the review standard in no less than five ways. To complicate matters

further, there is case law that suggests that deference belongs to the Commission's recommendation, not the Government's rejection decision. Finally, and with great respect, the fact that the Government's rejection decision takes the form of 29 disjointed recitals exacerbates the task of applying any review standard. Moreover, we are faced with a conundrum not anticipated by the Supreme Court. Not all of the Government's reasons for rejecting the Commission's salary recommendation can withstand the simple rationality test. Some do, some do not. These are but a few of the issues that confront this Court.

8 In the reasons that follow, I conclude that four of the Association's five arguments are valid, but that the appeal should be dismissed. In my view, the Government advanced two cogent reasons for refusing to implement the 2001 Commission's salary recommendation. Those reasons meet the review standard of simple rationality.

9 First, the Government's contention that the salary of federally appointed puisne judges is based on considerations that are irrelevant in the provincial context is sound, both in fact and logic. In short, the Association's parity argument is fundamentally flawed and, therefore, it is simply unnecessary for this Court to be drawn into the equality debate as framed by the parties. I hasten to add that nothing turns on the distinction between a salary recommendation that embraces partial as opposed to full parity. The fact remains that the Commission effectively limited the number of comparator groups to one: judges of the Court of Queen's Bench. Moreover, it did so without regard to a directive laid down in the Provincial Court Act, R.S.N.B. 1973, c. P-21, as amended.

10 Second, the Government's contention that the remuneration presently available to New Brunswick's Provincial Court judges is adequate in terms of attracting qualified applicants is equally sound. Once the value of the judicial annuity is added to the present salary level, the value of the remuneration package lies between $192,000 and $215,000 per annum. This amount clearly meets or exceeds the salary expectations of those lawyers whose age and experience make them ideal candidates for judicial appointment: see discussion infra with respect to defining the group of potential candidates.

11 While the Government raised both matters before the 2001 Commission, the latter failed to address them. Consequently, the Government was entitled to reject the salary recommendation on this ground alone. I hasten to add that both reasons for rejection have a rational basis.

12 Notwithstanding my proposed disposition of the appeal, I cannot help but affirm the principle that judges of the Provincial Court are not quasi-senior civil servants. Successive governments have had difficulty in appreciating the legal significance of this constitutional reality. It is intolerable to perpetuate the mistaken understanding that judges of this Province are simply an arm of the government responsible for delivery of judicial services in the same way that "Service New Brunswick" fulfills its administrative mandate. It follows that the Government cannot limit the salary expectations of the judges to that being paid to senior provincial civil servants. Historically, this has been so. But today the law demands otherwise. However, this caveat does not detract from the Government's right to oppose salary parity with federally appointed judges on grounds that meet the review standard of simple rationality.

II BACKGROUND

i) Setting of Judicial Salaries (1989-2001)

13 In 1989, eight years before the Supreme Court concluded that all governments would have to establish judicial remuneration commissions, the New Brunswick Government appointed an independent commission to examine the adequacy of judicial salaries in this Province (the McLauchlan Commission). At that time, judicial compensation was the product of direct negotiations between the judges and both elected and non-elected representatives of the government. In some years, negotiations resulted in a salary change. In most years, the judges were treated on the same basis as non-bargaining employees in the civil service and received the same percentage increase in salary.

14 The McLauchlan Commission concluded that judicial salaries should be established in accordance with two criteria. First, they should be adequate to attract and retain highly qualified members of the Bar. Second, salaries should achieve a level of economic fairness relative to comparable professional groups consistent with the circumstances and the reasonable expectations of the New Brunswick community. The McLauchlan Commission recommended that the salary of provincial court judges be increased from $75,000 to $95,000, for the 1989 and 1990 years respectively, and increased in each of the following two years (1991-92) by $5,000, plus an amount representing the Industrial Composite Index. The government of the day did not accept the recommendation. Instead, it decided that the judges would receive salary increases equal to those of civil servants. By 1992 salaries rose to $94,000, a figure $18,000 less than what the McLauchlan Commission had recommended.

15 By 1998, the salary of Provincial Court judges in New Brunswick had risen to $100,000 (plus a car and clothing allowance of $5,500). Manitoba was the only province that paid a lower salary. Judges of that Province were paid $98,000. Judges in the Northwest Territories were the highest paid at $130,000. In 1998, federally appointed puisne judges, other than those of the Supreme Court, were earning $175,000.

16 Until 1997, the Government continued to negotiate directly with Provincial Court judges over salary and benefits. In response to the Supreme Court's 1997 ruling of a constitutional imperative that governments establish judicial remuneration commissions, the Provincial Court Act was amended accordingly. The relevant provisions deal with several essential matters, including the factors that must be examined before formulating an appropriate salary recommendation.

17 The 1998 Judicial Remuneration Commission was the first to issue recommendations with respect to judicial compensation and benefits. Before that Commission, the Association had sought a salary of $155,000 for the 1998 fiscal year and a requirement that the salary differential between provincially and federally appointed trial judges be no more than $20,000. Counsel to the Association argued that the compensation accorded its judges should not be based on salaries paid to their counterparts in the other provinces where judicial remuneration commissions were presently addressing the same issue. Counsel also argued that it was inappropriate to determine judicial salaries by direct reference to the salaries of government employees, as had been the recent experience in the Province. Finally, counsel argued that the present salary was insufficient to attract highly competent candidates. Interestingly enough, the Association advanced other grounds for the salary increase being sought. It outlined the growing jurisdiction and workload of the Provincial Court and the fact that, unlike other provinces, New Brunswick does not appoint Justices of the Peace to shoulder some of the burden. In this vein, the Association argued for partial parity with judges of the Court of Queen's Bench. This explains why the judges sought a salary of $155,000, which was $20,000 less than what Queen's Bench judges were receiving at that time.

18 The 1998 Commission concluded that the salary being paid to New Brunswick's Provincial Court judges was insufficient to attract the number and quality of candidates that was appropriate for that court.

The Commission was advised that the list of qualified candidates interested in an appointment was not long. The Commission went on to conclude that eligible members of the Bar preferred a federal appointment because of the salary differential and, therefore, the salary being paid to Provincial Court judges was insufficient to attract the number and quality of candidates necessary. However, the Commission recommended that for 1998 the salary move from $100,000 to $125,000 and not the $155,000 sought by the Association. Thus, the salary gap between provincially and federally appointed judges would remain at approximately $50,000. The 1998 Commission went on to recommend additional increases over the next two years, such that by 2000 New Brunswick's Provincial Court judges would receive $142,000. As is now customary, the Commission recommended yearly indexing to prevent erosion of judicial salaries.

19 In December 1998, the Government responded to the Commission's salary recommendation. While the Government accepted the recommendation to fix the 1998 salary level at $125,000, it rejected the Commission's salary recommendations for the following two years, except with respect to indexing.

20 On October 27, 2000, following an election and change of government, the remaining salary recommendations of the 1998 Commission were adopted. As of February 2001, the salary of New Brunswick's Provincial Court judges was fixed at $141,000. With indexing, I understand their present salary to be approximately $146,000.

ii) 2001 Commission Report

21 To appreciate fully the issues raised on this appeal, it is necessary to read the 2001 Commission's Report dealing with the salary issue. Accordingly, I have attached, as Appendix "A" to these reasons, the 2001 Commission's analysis. The following represents a distillation of the essential.

22 The 2001 Commission's salary recommendation is preceded by a discussion of four distinct topics: (1) the workload of the Provincial Court relative to the Court of Queen's Bench; (2) the legal ramifications of the PEI Reference Case; (3) economic conditions particular to New Brunswick; and (4) the relationship between Provincial Court and Queen's Bench salaries. I will deal will each of these in turn.

23 The 2001 Commission noted the increasing workload of New Brunswick's Provincial Court judges and the decreasing workload of Queen's Benches judges in criminal matters. The Commission also noted that Provincial Court judges are required to shoulder work that in other provinces is handled by Justices of the Peace, an office that does not exist in New Brunswick. The Commission also concluded that unlike Queen's Bench judges, Provincial Court judges cannot set aside sitting time in order to write Charter and aboriginal opinions and, therefore, must work evenings. As well, the Commission notes that judges of the Court of Queen's Bench have access to assistants when researching opinions, unlike Provincial Court judges. [It is a matter of public record that the Government does not provide Queen's Bench judges with law clerks.] The Commission concluded that none of this is to suggest that Provincial Court judges do more to further justice than do judges of the Queen's Bench.

24 Next, the 2001 Commission examined the legal implications of the PEI Reference Case. It concluded that the binding effect of a commission's recommendations is considerable. At p. 7 of the Report, the Commission states:

> There is no instance of a commission's recommendations being successfully ignored by a provincial government in Canada. It would appear therefore that despite the perception of a certain

> paradox among these principles the force of a commission's recommendations is very considerable.

25 The 2001 Commission then dealt with certain economic considerations. It concluded that the present financial situation in New Brunswick could not be considered an impediment to a "considered recommendation" respecting salary. The Commission referred to the March 2001 provincial budget in which the Minister of Finance gave no indication of any financial difficulty facing the Province. The Commission noted that the Minister had announced tax decreases, increases in expenditures and the establishment of a $100 million contingency fund. The Commission also noted that it could find no consistently enforced policy of negotiated wage restraint in the civil service.

26 Finally, the 2001 Commission turned to the issue of salary parity with judges of the Court of Queen's Bench. Its analysis begins with the observation that both federally and provincially appointed judges are drawn from the same pool and, therefore, it would be "irresponsible of the Commission not to look at the relationship" between the two groups of judges. The Commission noted that only the Government opposed the idea of salary parity or parity based on a fixed percentage of the federal salary. Parenthetically, this statement is inaccurate to the extent that the written submission of the New Brunswick Branch of the Canadian Bar Association does not endorse the principle of salary parity. Rather the NBCBA identified two appropriate comparator groups: senior civil servants and lawyers.

27 The 2001 Commission stated that those in favour of parity based their opinion on the premise that the Provincial Court judges have greater responsibilities. The Commission then noted that the Government rejected this position on the ground that the salary of federally appointed judges is set on a national basis and must take into account, for example, the need to attract candidates in communities such as Toronto where remuneration levels for lawyers are much higher than in New Brunswick. The Commission also noted that the Province opposed the full or partial parity proposal on the ground that it would eliminate the need of future commissions to address the salary question. The Commission also noted that the Government rejected the proposition that the salary differential between provincial and federally appointed puisne judges would make the former "second class members of the judiciary" because they are paid less.

28 The 2001 Commission was of the opinion that the wage difference between provincially and federally appointed trial judges could not be ignored. It reasoned that the only persons whose job and method of appointment is similar to that of Provincial Court judges are judges of Queen's Bench. That being said, the Commission acknowledged that this did not mean that it had to accept parity or fix the provincial salary by reference to a percentage of the federal one. The Commission empasized that "its job is more than to simply attach PCJ salaries to those members of the Court of Queen's Bench."

29 After dealing with the above topics, the 2001 Commission outlined its salary recommendation and the rationale adopted in support thereof. The Commission rejected the Government's argument that since the provincial judges had already received a 40% increase there was no need for a further increase, other than through indexing. The Commission rejected this argument for three reasons. First, the large increase arose because the Province had delayed in fully implementing the 1998 Commission's salary recommendation. Second, the judges received no compensation for the delay and, therefore, were deprived of $2,000 tied to indexing of salaries. Third, to deny the judges a salary increase for the three years in question would be in "violation" of the Supreme Court's ruling in the PEI Reference Case.

30 The 2001 Commission went on to hold that the amount of any salary increase would depend on four matters: (1) evidence of wage and salary policies of the Province; (2) the Province's economic situation;

(3) the requirements outlined in the PEI Reference Case; and (4) the relationship between provincial and federal judicial salaries.

31 With respect to the first matter, the Commission noted that the Province had been paying wage settlements in excess of the policy guideline of 1.5% per year.

32 With respect to the second matter, the Commission said nothing. Thus, it must be assumed that the Commission's earlier comment that the Province is not facing financial difficulty is applicable. The 2001 Commission noted that the Province receives an equalization transfer from the federal government. In that regard, the Commission reasoned that the effect of such transfer payments is to "guarantee[s] that all provinces provide an equal level of public service which would include judges". This observation is followed by reference to the fact that New Brunswick's reported per capita personal income is equal to 85% percent of the Canadian average.

33 With respect to the third matter, the requirements laid down in the PEI Reference Case, the 2001 Commission said nothing. Recall, however, that earlier on in its Report the Commission did conclude that a salary freeze would be contrary to the tenets of that decision.

34 With respect to the fourth matter, the 2001 Commission notes the salary of Queen's Bench judges will continue to rise above $200,000. The Commission then proposes an 8% salary increase for 2001 and a further 5% increase in each of the two succeeding years, plus an annual amount for indexing (New Brunswick Industrial Aggregate Index). If fully implemented, the recommendation would move the salaries of New Brunswick's Provincial Court judges from $140,000 to $170,000 over three years (2001-2003). The salary increase would leave a $30,000 gap between provincially and federally appointed trial judges and translates into an equivalent of approximately 85% of that earned by judges of the Court of Queen's Bench.

iii) Government's Response

35 The Government of New Brunswick accepted the proposition that the constitutional mandate of a judicial remuneration commission is to present an objective and fair set of recommendations dictated by the public interest. The Government goes on to reject the salary recommendation of the 2001 Commission. Of the 29 recitals offered by the Government for rejecting various Commission recommendations, 26 relate to the salary issue. For ease of reference I have included all 29 recitals. They read as follows:

Government Response to the

2001 JRC Recommendations

The Government has carefully considered the report of the 2001 Judicial Remuneration Commission and regrets that it is unable to accept the recommendations in their entirety.

1. WHEREAS the previous JRC established a compensation level of $141,206 as adequate, in keeping with the Supreme Court of Canada decision on this issue, and nothing has changed since that recommendation to warrant further substantial increases;
2. WHEREAS the salaries of Provincial Court Judges rose 49.24 per cent from $94,614 to $141,206 in the decade from 1990 to 2000;

3. WHEREAS the salaries of provincially remunerated senior judicial officials and senior Deputy Ministers were identical until 1993;

4. WHEREAS the salaries of the most senior Deputy Ministers in New Brunswick rose by 18.93 per cent from $94,614 to $112,528 in the same decade;

5. WHEREAS economic conditions in New Brunswick since the previous JRC recommendations do not support the salary increase proposed by the 2001 JRC which would give Provincial Court judges a one-year increase of 12.67 per cent for a cumulative 11-year increase of 68.16 per cent since 1990;

6. WHEREAS the 2001 JRC appears to have failed to address the primary purpose of independently setting judicial compensation in order to ensure judicial independence and "to protect against the possibility that judicial salaries will fall below the adequate minimum guaranteed by judicial independence";

7. WHEREAS the 2001 JRC does not appear to have recognized the importance of setting judicial salaries within the New Brunswick context, especially since the increases proposed by the 2001 JRC far exceed changes in economic indicators in New Brunswick since the current salary was established;

8. WHEREAS the 2001 JRC appears to have made its assessment primarily upon the prospect of the salaries of federally appointed and remunerated Superior Court judges, as of 2001, rising to over $200,000 during the next three years;

9. WHEREAS the 2001 JRC appears to have accepted the proposition that salaries of Provincial Court Judges in New Brunswick should maintain a degree of parity with that of the Judges of the Court of Queen's Bench of New Brunswick, which is inconsistent with the positions that judicial remuneration commissions have taken in other provinces;

10. WHEREAS the issue of what the federal government pays the judges it appoints across Canada should not be so controlling a factor in setting salaries of judges paid by provinces;

11. WHEREAS the 2001 JRC does not appear to have recognized that the current salary of $141,206, when combined with a generous pension package, was recommended by the previous JRC and, furthermore, the 2001 JRC has not demonstrated that the financial security of Provincial Court Judges has been substantially eroded since that increase;

12. WHEREAS the 2001 JRC has failed to demonstrate that a further increase of nearly 13 per cent for 2001 is necessary to maintain or achieve that security;

13. WHEREAS the 2001 JRC appears to have recommended increases to $161,709 and $169,805 in the years 2002 and 2003 respectively, plus an additional cost of living increase, not to ensure financial security for Provincial Court judges but rather to maintain a degree of parity with the judges of the Court of Queen's Bench;

14. WHEREAS, even if it could be demonstrated that an increase of nearly 13 per cent for 2001 was necessary to achieve financial security, the 2001 JRC has not demonstrated that further increases that it has recommended in each of the next two years are warranted in order to maintain the financial security of the Provincial Court judiciary;

15. WHEREAS the recommendation of the 2001 JRC to amend the pension provisions of the Provincial Court Act runs counter to the recommendation of the 1998 JRC to give long-serving judges a choice between the old and new pension plans, a recommendation that was accepted as reasonable by the Provincial Court Judges' Association, especially since nothing has changed to warrant enriching the plan further;

16. WHEREAS the 2001 JRC appears to have given little, if any, weight to the substantial security afforded to Provincial Court judges by their pension plan;

17. WHEREAS the 2001 JRC failed to address the issue of whether the current remuneration is sufficient to place Provincial Court judges beyond the reasonable, or speculative, possibility that they may be tempted to gain some financial advantage in rendering decisions affecting the government and thereby lose the confidence of the public in their independence;

18. WHEREAS, as of January 31, 2001, the present remuneration package was sufficient to have attracted 50 fully qualified candidates, with an average of 20-45 years as members of the Bar, eligible for appointment to the Provincial Court of New Brunswick;

19. WHEREAS the salary recommendation of the 2001 JRC for the current year would make New Brunswick Provincial Court judges the third highest paid in the country, after Ontario and Alberta, while a New Brunswick wage earner is ranked eighth out of ten in average earnings;

20. WHEREAS Provincial Court judges have now accumulated nearly 2000 days of unused vacation, with a current liability to the Province of $1,080,859, for an average carryover in excess of 79 days per judge;

21. WHEREAS the private sector life insurance carrier will not provide the level of insurance coverage recommended by the 2001 JRC and will only provide enhanced coverage through a cost increase for all members of the provincial public service enrolled in the group life insurance plan;

22. WHEREAS New Brunswick Provincial Court judges are currently in the top 5 per cent of New Brunswick wage earners, based on their present salaries;

23. WHEREAS the Government accepted that the 1998 JRC established a salary that was commensurate with maintaining the status, dignity and responsibility of the office of a judge of the Provincial Court and that an adjustment based on the rate of inflation would be sufficient to maintain that status;

24. WHEREAS the recommendation of the 2001 JRC that the salary of a judge of the Provincial Court be increased by $12,812 plus the rate of inflation far exceeds the amount required to maintain the status, dignity and responsibility of the office;

25. WHEREAS historically Provincial Court judges in New Brunswick have never had their salaries tied to the salaries of federally appointed and remunerated judges;

26. WHEREAS non-bargaining members of the public service, unlike Provincial Court judges, have had their salary increases restricted to increase of 0.0 or 1.5 per cent per annum for over a decade, with no adjustment for the cost of living;

27. WHEREAS the JRC did not cost its recommendations and, therefore, could not know the impact these costs would have on the finances of the provincial government;

28. WHEREAS the known costs of the recommendations of the 2001 JRC for the three year period will amount to over $3 million and will have a significant negative impact on the budget of the Province; and

29. WHEREAS the Government of New Brunswick is responsible for and accountable to the taxpayers of the Province for the prudent financial management of the affairs of the Province.

iv) Review Decision

36 On January 4, 2002, the Association brought an application for review of the Government's decision to reject all but a few of the 2001 Commission's recommendations, including that dealing with judicial salaries. In response to that application, the Government filed several affidavits in support of its reasons for rejecting most of the 2001 Commission's recommendations. The Association objected to the admissibility of the affidavits, but without prejudice to its position, and by agreement of the parties, and with the consent of the Applications Judge, the affiants were cross-examined.

37 On May 13, 2001, the Applications Judge upheld the decision of the Government with respect to the 2001 Commission's salary recommendation, but allowed the application with respect to pension, vacation and health care matters and declared those recommendations to be binding. The matter of life insurance was remitted to the Commission for reconsideration. Costs were awarded on a party and party basis.

38 With respect to the salary issue, the Applications Judge began his analysis by acknowledging that the onus was on the Government to justify its rejection of a recommendation according to the review standard of "simple rationality". He also held that the Commission had failed to properly appreciate its mandate. He observed that a commission's task is not to evaluate the value of a judge's labour, but rather to settle on a recommendation that preserves and maintains a state of financial security for judges. In particular, the Applications Judge agreed with the Government that one must assume that the compensation set by the 1998 Commission was adequate to preserve and maintain that state. In his opinion, the mandate of the 2001 Commission was to determine whether that level of compensation continued to be adequate in order to preserve the notion of financial security. Thus, in the opinion of the Applications Judge the 2001 Commission was obligated to consider whether in light of the cost of living in New Brunswick, the impact of inflation and other relevant factors, a reasonable person properly informed of such matters would conclude that Provincial Court judges possess the necessary independent status.

39 The Applications Judge concluded that the 2001 Commission's preoccupation with narrowing the salary differential between provincially and federally appointed judges came at the expense of considering the adequacy of judicial salaries in terms of maintaining the financial security of provincially appointed judges.

40 The Applications Judge went on to hold that the goal of a commission is to present an objective and fair set of recommendations that are dictated by the public interest. He observed that what is fair must be measured in terms of what is necessary to preserve judicial independence and that courts must be perceived by the public as being free to decide without fear of reprisal or sanction. This finding was in response to the Government's argument "that any reasonable person understanding the need for financial security looking at the present package realistically and practically would be confident that it protects judges from political interference through manipulation by other branches of government." The Applications Judge then formulated the review standard in terms of whether a reasonable person, appearing before the Provincial Court, would fear that he or she is not being heard by an independent tribunal because of the Government's refusal to move judicial salaries from $141,000 to $170,000. The Applications Judge responded in the negative. He also stated that his mandate was not to determine whether the 2001 Commission's recommendations are adequate, insufficient or overly generous. The Applications Judge went on to rule that the refusal of the Government to accept the 2001 Commission's salary recommendation will not result in judicial salaries falling below an acceptable minimum level.

41 The Government had argued that its reasons for rejection were adequate and not politically motivated, but founded on the social and economic conditions of New Brunswick. The Applications Judge accepted

that there was no evidence that the Government's decision was motivated for political reasons or that it was discriminating against judges in comparison to other persons paid from the public purse. The Applications Judge also accepted that there was no evidence that the refusal to accept the 2001 Commission's salary recommendation was motivated by an attempt to influence the course or outcome of litigation. In his opinion, the remuneration package was reasonable when compared with that available to other provincially and federally appointed judges and senior government officials and employees.

III ISSUES RAISED

42 The Association raises no less than eight issues on this appeal. In my view, they can be conveniently reduced to five. First, it is alleged that the Applications Judge misapprehended the mandate of judicial remuneration commissions. Second, it is alleged that the Applications Judge misapprehended his mandate by undertaking a review of the Commission's salary recommendation, rather than the reasons underscoring the Government's decision to reject the recommendation. Third, it is submitted that the Applications Judge erred in admitting into evidence several affidavits that did not form part of the Government's response to the Commission's Report. Four, it is argued that the Applications Judge misapprehended and misapplied the Supreme Court's simple rationality test. Five, the Applications Judge erred in failing to conclude that on the facts of this case the Government had failed to meet that test.

IV THE SALARY ISSUE SIMPLIFIED

43 It is apparent to me that the task of judicial remuneration commissions in New Brunswick is becoming unnecessarily complex. One need only examine the reports of successive federal remuneration commissions to realize the merit in this observation, at least when it comes to formulating a salary recommendation. Future provincial commissions may benefit from the following observations.

44 In the federal sphere, the task of formulating a salary recommendation is not complicated and the same would hold true in the provincial sphere, but for the parity argument. Federal remuneration commissions focus on three matters: (1) the ability of the government to pay; (2) identifying one or more appropriate comparator groups; and (3) the ability of the existing salary level to attract qualified candidates.

45 In recent years, the federal government has not opposed a recommended salary increase on fiscal grounds. That is to say the federal government does not plead impecuniosity. The financial circumstances in which this country presently finds itself do not support a credible argument that there should be a freeze in judicial salaries, let alone a reduction. Recall that the PEI Reference Case involved three provinces (Manitoba, Alberta and Prince Edward Island) reducing the salaries of Provincial Court judges because of fiscal problems faced by all levels of government.

46 In the federal context, remuneration commissions inevitably focus on the salary levels of one group of civil servants for comparative purposes. This group consists of senior deputy ministers (DM-3). The mid-point of the DM-3 salary range is then used for comparative purposes. In some years the federally appointed judges have argued against a salary comparison with this select group of civil servants. In other years, the contrary argument has been made. It all depends on what the mid-point salary level of a DM-3 happens to be.

47 Finally, federal remuneration commissions turn to the issue of whether existing judicial salaries are adequate in terms of attracting qualified applicants to the Bench. In this regard, the incomes of a select group of lawyers in private practice are examined. I will say more of this topic below. Suffice it to say that the problem of recruitment was the very problem that motivated the 1998 Commission to recommend that judicial salaries in this Province move to $141,000: see supra para. 18.

48 Subject to parity type arguments, the task of provincial remuneration commissions should be no more complicated than that of the federal commissions.

49 The ability of a government to pay is invariably a matter of public record. Thus, one does not need expert evidence to establish that a province's economic circumstances militate against a judicial salary increase. If the financial ability of a province to pay a salary increase is not in issue, or one that the commission believes lacks merit, the commission will seek to identify one or more comparator groups for purposes of assessing an appropriate salary recommendation.

50 In the present case, the parties identified four comparator groups. The first consists of those New Brunswick residents who fall within the top 5% of wage earners in the Province. The second group consists of senior civil servants. Specifically, the compensation paid to deputy ministers and senior lawyers within the civil service. The third group consists of other provincially appointed judges. The fourth consists of judges of the Court of Queen's Bench, that is to say federally appointed puisne judges.

51 A few comments are in order with respect to the validity or appropriateness of some of the comparator groups identified by the Government. The fact that the salary of New Brunswick's Provincial Court judges places them within the "top 5%" of provincial wage earners, is a meaningless statistic. At no time does the Government indicate the salary range for persons who so qualify. Moreover, the statistic could be used to counter the Government's position that an increase in judicial salaries is not warranted. I say this because this group of wage earners will consist of persons who earn substantially more than $141,000 a year. If, however, the Government is using this statistic as evidence that judges in this Province are well paid, relatively speaking, the Association cannot help but concede that point. But that is not an issue that confronts any remuneration commission.

52 Understandably, the Government will turn to the salary levels of senior civil servants, most notably deputy ministers and senior lawyers. As explained below, this comparator group remains problematic in New Brunswick. This is because the present salary of senior civil servants is substantially less than the present salary of New Brunswick's Provincial Court judges. Take for example, senior lawyers who earn $85,000 a year. I find it difficult to accept the argument that because a civil servant is woefully underpaid so too should judges.

53 The most obvious comparator group is judges. In this regard, s. 22.03(6)(a.1) of the Provincial Court Act directs a commission to examine the remuneration paid to other judges throughout Canada. While that directive necessarily includes federally appointed judges, as well as other Provincial Court judges, a commission is also directed to have regard to "factors which may justify the existence of differences" between what is being paid to New Brunswick's provincially appointed judges and other judicial groups. I will return to this issue below.

54 In the ideal setting, a provincial remuneration commission will examine the salary levels of judges in the other provinces and the federal sphere, for comparative purposes only. In the present case, the 2001

Commission's decision to focus exclusively on the salary of federally appointed judges is problematic in the sense that the salaries of other Provincial Court judges is ignored.

55 In the New Brunswick context, there is one other factor that must be examined before formulating a salary recommendation. The principle of "economic fairness" is prescribed by s. 22.03(6)(b) of the Provincial Court Act. It directs a commission to consider the salary increases given to other persons paid out of the public purse. Hence, in formulating a salary recommendation, a commission will have regard to the increases in salary awarded to both federal and provincial judges throughout Canada and, as well, increases awarded to those who are paid out of the public purse in New Brunswick. As well, it is incumbent on a commission to determine whether the existing salary level is sufficient for purposes of attracting qualified applicants to the Bench.

56 The model commission report will outline the salary arguments of each party, address those arguments and settle on an appropriate salary recommendation that explains why one position was preferred over another. All of this is to be done within the context of the requirements set down in the PEI Reference Case and the Provincial Court Act. Alternatively, it may be a case in which the commission accepts neither of two divergent positions and instead opts for a compromise solution, somewhere between the two extremes. Above all else, the commission must give reasons for its recommendations. Otherwise it is impracticable for the government to formulate a rational response, either for or against the salary recommendation. If the commission fails to address, for example, issues or arguments raised by the government, the latter has every reason to allege irrationality, on the commission's part, should the government decide to reject a commission recommendation. The exception to the rule would arise in cases where the government's argument is a frivolous or spurious one from the outset. In such circumstances, one could understand the unwillingness of a commission to deal with the argument. In this regard, the reviewing court will be guided by common-sense.

57 Regrettably, this is not the ideal case. The arguments and issues are numerous. But in the end the Association's appeal rests on the validity of its decision to seek salary parity with federally appointed judges.

V THE COMMISSION'S MANDATE

i) The Mandate Issue

58 The Association submits that the Applications Judge misconstrued the mandate of judicial remuneration commissions in accepting the Government's formulation. The latter asserted that the 2001 Commission was to begin with the premise that the compensation set by the 1998 Commission was adequate and, therefore, the role of the 2001 Commission was simply to determine whether it remained so. The Applications Judge agreed. At paragraph 46, he held: "the role of salary commissions is to consider, after a fixed period of time has elapsed since its last report, the adequacy of judicial salaries and benefits of the cost of living in the Province and also the other factors relevant to financial security". In the next paragraph the Applications Judge quotes with approval the following two passages from the Government's written submission:

> Instead of addressing the central issue of financial security, the 2001 JRC Report reads more like a public sector labour adjudication decision than an assessment as to whether the remuneration of

> the Provincial Court Judiciary has so eroded since the implementation of the 1998 JRC recommendations that it was no longer adequate to protect the Judiciary from political interference.
>
> In the final analysis, then, following the implementation of the 1998 JRC recommendations, the question before the 2001 JRC was whether, in light of the cost of living in New Brunswick, the impact of inflation and the other relevant factors in which the New Brunswick Provincial Court Judiciary is situate, a reasonable person properly informed of such matters would conclude that the Provincial Court judiciary enjoyed the necessary independent status. In other words, the primary task of the JRC must be an examination of the adequacy of the remuneration of the Provincial Court Judiciary in light of the cost of living and other factors relevant to that security.

59 It is understandable that the Association would object to the Government's understanding of the Commission's mandate. It automatically eliminates the Association's right to seek salary parity with federally appointed judges, an issue that was effectively sidestepped by the 1998 Commission when it recommended a salary increase based on the need to attract qualified candidates to the Provincial Bench. To complicate matters, the Government also speaks of the Commission's mandate in terms of ensuring that judicial salaries are commensurate with the status, dignity and responsibility of the judicial office. Another formulation embraces the notion that a commission is to ensure that judicial salaries do not fall below a minimally acceptable level. Admittedly, these alternative formulations can be traced to Chief Justice Lamer's reasons in the PEI Reference Case. Those reasons represent the common law position, to which I now turn.

ii) The Common Law Position

60 Remuneration Commissions serve a dual constitutional function with respect to ensuring the independence of the judiciary. First, they seek to insulate the courts from political interference through economic manipulation. In theory, a government could utilize its authority to set judicial salaries as a vehicle to influence the course and outcome of adjudication. Thus, remuneration commissions are able to filter out government attempts to change judicial salaries for "improper or colourable purposes". The second constitutional function of these commissions is to depoliticize the process of determining changes to, or freezes in, judicial salaries. Remuneration commissions are the means by which these two objectives are capable of realization. However, those objectives should not be confused with the mandate of a commission, which is to present an objective and fair set of recommendations informed by the public interest. Let me explain.

61 Remuneration commissions must arrive at recommendations by reference to objective criteria and not political expediencies. As Chief Justice Lamer stated, at para. 173 of the PEI Reference Case, the goal of remuneration commissions is to present "an objective and fair set of recommendations dictated by the public interest". He went on to state that a commission's objectivity can be promoted by ensuring that it is fully informed by receiving submissions from the judiciary, the executive and the legislature. Chief Justice Lamer recommended that a commission's objectivity could be strengthened by including in the enabling legislation a list of relevant factors to guide its deliberations. Though he did not attempt to provide an exhaustive list of factors, Chief Justice Lamer did refer to the need to ensure that judges' salaries remain adequate, the need to attract excellent candidates to the judiciary and the need for cost of living increases. In this regard, it is worth reproducing para. 173 of Chief Justice Lamer's reasons:

> In addition to being independent, the salary commissions must be objective. They must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies. The goal is to present "an objective and fair set of recommendations dictated by the

> public interest" (Canada, Department of Justice, Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits (1996), at p. 7). Although s. 11(d) does not require it, the commission's objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and consider submissions from the judiciary, the executive, and the legislature. In Ontario, for example, the Provincial Judges' Remuneration Commission is bound to consider submissions from the provincial judges' association and the government (Courts of Justice Act, Schedule, para. 20). Moreover, I recommend (but do not require) that the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations. These factors need not be exhaustive. A list of relevant factors might include, for example, increases in the cost of living, the need to ensure that judges' salaries remain adequate, as well as the need to attract excellent candidates to the judiciary.

62 Chief Justice Lamer also asks whether s. 100 of the Constitution Act 1867 or s. 11(d) of the Charter imposes some substantive limits on the extent of salary reductions for the judiciary, a point that was left unanswered in an earlier Supreme Court decision: Beauregard v. Canada, [1986] 2 S.C.R. 56. Chief Justice Lamer answered the question in the affirmative. He explained that the Constitution protects judicial salaries from falling below an acceptable minimum level in order to protect the judiciary from political interference through economic manipulation and, correlatively, to preserve public confidence in the administration of justice. If salaries are too low there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary. At the same time, the former Chief Justice states that the guarantee of a minimum salary is not meant for the benefit of the judiciary, but rather for the benefit of the public. In arriving at this conclusion, Chief Justice Lamer refers to a number of international instruments that recognize the concept of a minimum salary. Included is Article 18(b) of the Draft Universal Declaration on the Independence of Justice which states: "The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation".

63 On the issue of a minimum judicial salary, Chief Justice Lamer made three observations. First, he expressly declined the opportunity to address the question of what the minimum acceptable level of judicial remuneration is. Second, while the requirement of a basic minimum judicial salary provides security against reductions in remuneration, he also held that the requirement applies equally to the erosion of judicial salaries through inflation. Finally, Chief Justice Lamer held that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. As he explained at para. 196: "Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their fair share of the burden in difficult economic times".

64 At this point, I wish to make a few observations with respect to formulating the mandate of a commission in terms of ensuring that judicial salaries do not fall below a minimum level or that they be adequate in terms of maintaining the dignity of the judicial office. In theory, it is possible that judicial salaries could fall below the "minimum acceptable level". But no one seems willing to venture an opinion as to what the minimum might be. In the PEI Reference Case Chief Justice Lamer declined the opportunity to answer the question. In my opinion, a judicial salary that is unable to attract sufficient numbers of highly qualified applicants might well be judged to have fallen below the required "minimum". A judicial salary that acts as a deterrent to attracting lawyers to the Bench is not acceptable. With respect to the notion that judicial salaries should be commensurate with the dignity of the office, it is

difficult to appreciate how this directive could have any meaningful effect on a commission's deliberations. In my opinion, nothing is gained by encouraging commissions to examine the adequacy of judicial salaries by reference to such inherently vague notions.

iii) The Statutory Context

65 In response to the Supreme Court of Canada's directive that governments establish remuneration commissions, New Brunswick amended its Provincial Court Act. The legislation describes the mandate of the provincial commissions in terms of evaluating the adequacy of judicial salaries and benefits. While a commission is entitled to examine factors that it deems relevant, the legislation does identify certain factors that must be examined. Included in the list are those which would justify salary differentials between New Brunswick's Provincial Court judges and those of other members of the judiciary in Canada. The relevant provisions read as follows:

> 22.03(1) The Commission shall
>
> (a) conduct an inquiry with respect to
>
> (i) the salaries and other amounts paid to the chief judge, the associate chief judge and judges, and
>
> (ii) the adequacy of pension, vacation and sick leave benefits provided to judges, and
>
> (b) provide to the Minister a report with recommendations regarding the appropriate salaries and other amounts to be paid to judges and the appropriate pension, vacation and sick leave benefits to be provided to them.
>
> ...
>
> 22.03(6) In making its report and recommendations, the Commission shall consider the following factors:
>
> (a) the adequacy of judges' remuneration having regard to the cost of living or changes in real per capita income,
>
> (a.1) the remuneration of other members of the judiciary in Canada as well as the factors which may justify the existence of differences between the remuneration of judges and that of other members of the judiciary in Canada.
>
> (b) economic fairness, including the remuneration of other persons paid out of the Consolidated Fund,
>
> (c) the economic conditions of the Province, and
>
> (d) any other factors the Commission considers relevant to its review.

66 In light of s. 22.03(6)(a), a commission recommendation for annual cost of living increases to prevent erosion of judicial salaries is to be expected. The case law does not reveal any instance of a government refusing to recognize the need for indexing of judicial salaries. Hence, I will say no more of this issue.

67 When assessing the adequacy of judicial salaries, comparisons are unavoidable. A comparison with salaries being paid to Provincial Court judges outside New Brunswick is to be expected and the same

holds true for salaries paid to federally appointed judges. However, s. 22.03(6)(a.1) of the legislation cautions that there may be reasons that justify a salary differential, a factor that a commission is required to examine before reaching a salary recommendation.

68 As well, a commission may look to other wage earners for comparative purposes. The comparative groups include those who are paid from the public purse. The financial treatment accorded civil servants is relevant for a number of reasons. In part, the salary treatment accorded others who are paid out of the public purse is reflective of a government's ability to pay. However, this factor has another dimension. Paragraph 22.03(6)(b) dictates that "economic fairness", vis à vis others paid out of the public purse, is a relevant consideration. That principle dictates that judges cannot claim, for example, immunity from universal cost-cutting measures. A commission must ask why it is that judges are to be treated differently than others paid from the public purse.

iv) The Issue Addressed

69 Clearly, the mandate of judicial remuneration commissions in New Brunswick is to recommend appropriate remuneration for judges informed by the public interest. A salary recommendation must take into account all relevant factors, including those prescribed by the Provincial Court Act. Nothing is gained by framing the commission's mandate in terms of identifying a minimum salary or one that preserves the dignity of the judicial office. These notions are too vague and, in truth, subsumed in the understanding that a commission will recommend "appropriate" compensation having regard to relevant factors. I am also of the view that one of those relevant factors is the 1998 Commission's salary recommendation and the accompanying rationale.

70 One has to understand the past before gazing to the future. In my view, there is merit to the understanding that one begins with the premise that the 1998 Commission's salary recommendation represented fair compensation for New Brunswick's provincially appointed judges. The work of previous commissions provides a contextual background on which future commissions can build. I hasten to add that in cases where the previous judicial remuneration was not fixed by an independent remuneration commission, it cannot be presumed that the previous salary recommendation was adequate.

71 However, I agree with the Association that a subsequent commission need not blindly accept the validity of a salary recommendation made by a previous commission. The PEI Reference Case supports this view.

72 Chief Justice Lamer cautioned judges that the need to guard against government manipulation of judicial salaries, and to depoliticize the process of salary negotiations, had a negative aspect. Judges had to relinquish the right to negotiate directly with a government, negotiations that could conceivably lead to a greater salary increase than that recommended by an independent commission. Thus, it is conceivable that a remuneration commission could arrive at a recommendation that the judges believe is fundamentally unfair, but which the government is only too eager to accept. As Chief Justice Lamer explains at paras. 189 and 190, the purpose of the institutional dimension of financial security is not to guarantee judges a mechanism for the setting of judicial salaries which is "fair" to their economic interests:

> I recognize that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to other persons paid from the public purse, because they cannot lobby the executive and the legislature with respect to their level of remuneration. The point is put

> very well by Douglas A. Schmeiser and W. Howard McConnell in The Independence of Provincial Court Judges: A Public Trust (1996), at p. 13:
>
> Because of the constitutional convention that judges should not speak out on political matters, judges are at a disadvantage vis-à-vis other groups when making a case to governments for increments in salaries.
>
> I have no doubt that this is the case, although to some extent, the inability of judges to engage in negotiations is offset by the guarantees provided by s. 11(d). In particular, the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table. Moreover, a commission serves as an institutional sieve which protects the courts from political interference through economic manipulation, a danger which inheres in salary negotiations.
>
> At the end of the day, however, any disadvantage which may flow from the prohibition of negotiations is a concern which the Constitution cannot accommodate. The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.

73 Chief Justice Lamer's observation that judges might not receive the level of remuneration that they might otherwise receive under a regime of salary negotiations can arise in one of two ways. First, the remuneration commission may recommend something that is unacceptable to the judges or, second, the government may reject a recommendation that the judges believe is acceptable. With respect to the first possibility, it is my understanding that a commission's recommendations are not amenable to judicial review, save in exceptional circumstances. One cannot lose sight of the fact that a recommendation is simply that. It is neither binding nor final.

74 In summary, there is a rebuttable presumption that the salary recommendation made by a previous commission represented appropriate compensation. But unless the appropriateness of the previous commission's recommendation is challenged, the presumption remains in place. Thus, the Association was entitled to raise its parity argument before the 2001 Commission, an issue that the 1998 Commission did not address for reasons outlined earlier. This is not to suggest that the Association can persist with the argument before future commissions. To the contrary, in the reasons that follow it becomes clear that the Association's parity argument is fatally flawed.

VI JUDICIAL REVIEW OF WHAT?

75 The Association maintains that the Applications Judge effectively reviewed the 2001 Commission's salary recommendation rather than the Government's response. The Association concedes that the Applications Judge acknowledged that his mandate was to determine whether the Government had justified its rejection decision. However, the Association maintains that, when the Applications Judge's reasons are read as a whole, it is evident that he focused on the reasoning of the Commission and not the Government.

76 I agree that the Applications Judge's reasons could be interpreted as a review of the Commission's decision rather than the Government's. But this is as much the fault of both the Commission and Association as it is the fault of the Applications Judge.

77 It is regrettable that the Association pursued its parity argument in terms of the workloads of each court. It is one thing to make an equality argument based on the adage that a judge is a judge and quite another to draw distinctions on the basis that one group of judges is required, for example, to provide more written decisions than another. The idea that the Commission would become preoccupied with whether New Brunswick's Provincial Court Judges are accorded less writing time than Queen's Bench judges and, therefore, required to work evenings is, to say the least, unfortunate. For the Commission to go on and explain the discrepancy between the numbers of written decisions in terms of the Queen's Bench judges having access to law clerks is both wrong in fact and irrelevant to the Commission's mandate. Queen's Bench judges in New Brunswick are provided with neither law clerks, nor for that matter secretaries. The same holds true for New Brunswick's Provincial Court judges. But as these matters go to the issue of administrative independence, I need not dwell on these embarrassments.

78 It is equally true that the Applications Judge did not address the "rationality" of the Government's 26 reasons for rejecting the Commission's salary recommendation. That being said, it is understandable that the Applications Judge would focus on the Government's submission to the Commission and the latter's reasons for its salary recommendation. The Commission's failure to address the issues raised in the Government's submission and to consider all relevant factors before arriving at a recommendation is glaring. Such omissions would be grounds for seeking to quash the Commission's decision, if it were subject to judicial review, which it is not. Such patent errors could have formed part of the Government's reasons for rejecting the Commission's salary recommendation. However, the fact that the Government chose not to frame its rejection decision in such terms is not fatal.

79 In the circumstances of this case, it falls on this Court to determine whether the Government's reasons for rejecting the Commission's salary recommendation satisfy the review standard of simple rationality.

VII ADMISSIBILITY OF AFFIDAVITS

80 The Association argues that the Applications Judge erred in admitting into evidence affidavits tendered in support of the Government's decision to reject the Commission's salary recommendation. The Association maintains that four of the affidavits advance additional evidence and new reasons for rejecting the Commission's salary recommendation. Three other affidavits were admitted into evidence, but as they pertain to matters not in issue, I will confine my analysis to those relevant to the disposition of this appeal.

81 The Government explains that the relevant affidavits were sworn by those involved in the preparation of the Government's response to the Commission's Report. The affidavits allegedly explain in detail the process followed by the Government and the information that it reviewed before deciding whether to accept the recommendations, either in whole or in part.

82 The affiant Bryan Whitfield is the Senior Policy Advisor in the Research and Planning Branch of the Department of Justice. He estimated the cost arising from implementation of the 2001 Commission's recommendations. The affiant Conrad Ferguson is an actuary in private practice. He provided the Government with advice on several issues, including the average yearly cost of salary and benefits for a judge at various salary levels. The affiant James Turgeon is the Executive Director of the Economic and

Fiscal Policy Division of the Department of Finance. His affidavit outlines the present economic condition of the Province. The affiant Lori Anne McCracken is employed with the Government's Office of Human Resources. Her affidavit deals with salary increases granted within the civil service, including non-bargaining employees who had received an average percentage increase of 1.5% per annum over the last decade.

83 The Association notes that none of the affiants was the decision-maker and maintains that the material put forward is only a selection of what officials provided to the real decision-maker. As well, the Association submits that the evidence of the affiants is, by its nature unreliable for the purpose for which it was tendered, which was to support the Government's written reasons for rejecting the Commission's salary recommendation. The Association submits that the evidence contained in the affidavits is at best speculative and should not have been admitted.

84 The Government counters that the affidavits were sworn by those involved in the preparation of its response to the Commission's Report. The affidavits are said to explain in detail the process followed by the Government and the information that it reviewed before deciding whether to accept the recommendations, either in whole or in part.

85 The Government maintains that just as the affidavit of Judge Cumming, together with a number of exhibits, was admitted into evidence on behalf of the Association, so too should the Government's affidavit evidence. As well, the Government maintains that it should be permitted to introduce evidence that is expressly referred to in the Government's response to the Commission's Report. In support of its position, the Government cites Ontario Judges Association v. Ontario (Chair Management Board) (2002), 58 O.R. (3d) 186 (Div. Ct.).

86 In my respectful view, the Applications Judge erred in admitting into evidence the Government's affidavit evidence.

87 First, the analogy drawn between the Cumming affidavit and those tendered by the Government is fundamentally flawed. Judge Cumming's affidavit and the exhibits attached thereto constitute the record on the application, as contemplated by Rule 38 of the Rules of Court and, in particular Rules 38.04(c) and 38.06(c). That record consists of the parties' written submissions to the 2001 Commission, together with a copy of the Report and the Government's response. Judge Cumming's affidavit does not introduce new evidence or facts, nor any rationale with respect to the positions of either the Association or the Government. The same cannot be said of the affidavits submitted by the Government on the review application. See generally Tessier v. New Brunswick (1988), 91 N.B.R. (2d) 361 (C.A.) and Dionne v. Sawyer (1990), 106 N.B.R. (2d) 25 (C.A.).

88 Second, I reject the proposition that the Government is entitled to supplement the application record by including affidavit evidence that did not form part of the Government's official response to the Commission's Report. If the Government is intent on elaborating on its reasons for rejecting a recommendation, by reference to the advice proffered by others, then such evidence must form part of the Government's official response to which the "simple rationality" review standard can be applied.

89 I can think of only one instance in which affidavit evidence might be admissible in circumstances where the Government's rejection decision is subject to judicial review. Events arising after the Government issued its formal response, and that it could not have reasonably anticipated, might warrant consideration on the review application. The other option is for the Government to remit the matter to the commission for reconsideration in light of the intervening circumstances.

90 The Government cites one Ontario decision in support of its argument that the affidavits in question were property admitted by the Applications Judge. In Ontario Judges Association v. Ontario (Chair Management Board), the Ontario government had rejected the pension recommendation made by the Fourth Triennial (1998-2001) Remuneration Commission. The majority of the commission recommended that the government choose one of three options. However, in arriving at its recommendation the commission did not cost- out each option. Following release of the commission's report, the government retained an actuary to cost out each of the three pension options. The government then formally rejected all three pension options. On judicial review the government offered affidavit evidence relating to the cost of each of the three options. The Provincial Court judges objected to its admissibility. The Ontario Divisional Court ruled in favour of the government. At paragraph 35 the court reasoned:

> We are of the view that after receiving the Commission's recommendations regarding the judges' pension, the Government of Ontario was entitled to ask "What will these pension proposals cost when coupled with the automatic effect on judges' pensions brought about by the 28 per cent salary increase?" We are of the view that the Government of Ontario was entitled to seek advice from whatever source it chose before accepting or rejecting the recommendations of the Commission. Moreover, in our view, the Government of Ontario is entitled to put before the Court the advice given when called upon to "justify its decision in a court of law". Because the advice regarding pensions would only be sought and provided after the Government of Ontario had been advised of the Commission's recommendations, excluding extraordinary circumstances, the only avenue open to the Government of Ontario to justify its decision was to file affidavit evidence in order to place before the court what advice was sought and what advice was received. The preparation and filing by the Government of Ontario of the disputed affidavits were actions that arose out of necessity.

91 On the facts, as interpreted by the Ontario Divisional Court, the Government of Ontario had no choice but to seek actuarial advice after it received the commission's report. Whether or not the actuarial advice should have been tendered with the government's response, rather than at the time of the judicial review application, is an issue that was not raised. For these reasons, I do not find the Ontario decision helpful.

92 There is one decision that indirectly supports my position on the admissibility of affidavits issue. In Newfoundland Assn. of Provincial Court Judges v. Newfoundland (1998), 191 D.L.R. (4th) 225, the Newfoundland & Labrador Court of Appeal addressed the question of whether governments could reject commission recommendations on the basis of a rationale not raised prior to the commission rendering its recommendations. Writing for the majority, Green J.A. (as he then was) stated at paras. 92 and 93:

> A second aspect of the review of any reason given for not accepting a commission recommendation, while not articulated as such in the Provincial Court Judges Case No. 1, is inherent in the reasoning of the Court. It is this: a reason given by the government for departing from a commission recommendation will prima facie not (except perhaps in cases of "dire and exceptional emergency precipitated by unusual circumstances" that could not have been reasonably anticipated at the time of the commission hearings) be regarded as legitimate or rational if it represents a rationale that was not raised before and submitted to the commission during its deliberations. In other words, the government cannot save its best argument for rebuttal in the political forum of the legislature and in effect "blindside" the judges and the commission itself with a reason that has not been subjected to scrutiny and rational analysis as part of the commission process.

> This follows from the purpose and function of the commission process. The process is designed to bring an objective and rational examination to bear on all aspects of the issue. The analysis according to "objective criteria" would be incomplete if all of the criteria which were relevant were not placed before, and discussed in front of, the commission. The commission should be "fully informed" (para. 173) about the nature of the submission being made so that it can "consider and report on the proposed change or freeze" (para. 174). Since the positions of the parties are to be tested on the anvil of rational debate, it follows that the reasons underlying the positions will have to be exposed. While the executive or the legislature, in making a decision to disagree on the commission's recommendations, is perfectly free to rely on a reason already rejected by the commission, it will nevertheless have to do so in the face of the fact that that reason has already been considered by an independent commission on the basis of "objective criteria" applicable to the totality of the circumstances, and not found persuasive.

93 In summary, the Government does not possess an unfettered right to raise issues or offer reasons that were never put to the Commission in the first place. In brief, the Government is not permitted to "bootstrap" its reasons for rejection by reference to arguments or evidence that could have been placed before the Commission but were not. And it makes no difference whether these new grounds are introduced as part of the Government's response or at the time judicial review is being sought.

94 I recognize that the law must be otherwise in circumstances where the commission's report introduces, for the first time, issues or findings that were neither raised nor addressed by either of the two parties prior to a commission issuing its report. In such circumstances, either party may pursue one of two options. They can ask the commission to reconsider the recommendation and be given the opportunity to address the new issue. If the request falls on deaf ears, then the government is entitled to address the issue in its official response. If the government fails to raise the issue in its formal response, the omission cannot be cured on the judicial review application.

95 In as much as the Government is not permitted to introduce new issues or evidence on the review application, so too should the Government be prohibited from augmenting the application record with a view to bolstering its reasons for rejecting a commission recommendation. The Government's formal response must speak for itself. In the present case, the Government's affidavits contain additional evidence respecting issues that were before the 2001 Commission, evidence that in my view seeks to bolster the Government's reasons for rejecting the Commission's salary recommendation. The Government cannot shelter behind the argument that the evidence referred to in the affidavits is touched in the Government's recitals that form its rejection decision. If that evidence were relevant it would have been or should have been attached to the Government's formal response. For these reasons, the affidavit evidence was inadmissible.

VIII THE STANDARD OF REVIEW

i) Identifying the Proper Review Standard

96 In his reasons, the Applications Judge correctly states that the review standard is that of simple rationality. The Association maintains, however, that his subsequent formulation of that standard is in error. My reading of the decision below reveals five distinct formulations of the review standard.

97 First, at paragraph 38 of his reasons, the Applications Judge refers approvingly to the Government's position that: "any reasonable person understanding the need for the financial security of judges, looking

at the present package realistically and practically would be confident that it protects the judges from political interference through [financial] manipulation by the other branches of government."

98 Second, at paragraphs 52 and 53, the Applications Judge quotes from the Supreme Court's decision in Valente v. The Queen, [1985] 2 S.C.R. 673 and formulates the review standard by reference to what was said in that case: "Would a reasonable person appearing before the Provincial Court fear that he or she was not being heard by an independent tribunal because the Province declined to raise judicial salaries from $141,000 to $170,000"? The Applications Judge responded negatively.

99 Third, at paragraph 59, the Applications Judge concludes that there is no evidence that the Government's decision to reject the 2001 Commission's salary recommendation was intended to influence or alter the outcome of decisions being made in the Provincial Court. This formulation of the review standard coincides with the Government's formulation. Would a reasonable person, understanding the need for the financial security of judges and looking at the present package realistically and practically, be confident that it protects the judges "from political interference through [financial] manipulation by the other branches of government." The Applications Judge provides a positive response.

100 Four, at paragraph 61, the Applications Judge rejects the Association's argument that the refusal to move judicial salaries from $141,000 to $170,000, over three years, results in salaries falling below the minimum level. In short, the Applications Judge concluded that the rejection decision did not result in judicial salaries falling below the elusive minimum.

101 Finally, at paragraph 63, the Applications Judge formulates the review standard in terms of whether the Government has articulated a legitimate reason for rejecting the 2001 Commission's salary recommendation, save that dealing with indexing. In my respectful view, this formulation is the correct one.

102 Above all else, this is not a case in which the applicable review standard involves a quantitative assessment as to whether existing salary levels ($141,000) have fallen below the constitutional minimum. I am also of the view that the relevant standard does not require a determination as to whether the Government's refusal to accept the Commission's salary recommendation is a colourable attempt to interfere with judicial independence. Let me explain my position.

103 In none of the decided cases is there a hint that a government is seeking to influence the outcome of litigation before the courts. For example, a government may be unwilling to grant a salary increase to judges on the basis that it cannot afford it. The reality may well be that the government regards "its judges" as overpaid civil servants but is unwilling to express this view in writing. But this does not amount to a colourable attempt to influence the outcome of judicial decisions.

104 I am also of the view that the review standard does not involve the perception of the reasonably informed person as to whether the remuneration paid to judges protects them against manipulation at the hands of a government. This formulation may be found in the Supreme Court jurisprudence preceding the PEI Reference Case, but has been surpassed by the analysis provided in that case.

105 My understanding of the simple rationality test is drawn from the Supreme Court's ruling in the PEI Reference Case. At paragraph 133, Chief Justice Lamer makes his first reference to the review standard:

> Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature.

> Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision -- if need be, in a court of law. As I explain below, when governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy.

106 I have not lost sight of the fact that Chief Justice Lamer states that a commission's non-binding recommendations should not be set aside lightly. But I am also aware that those comments were made in the context of judges being singled out for a pay reduction, in which case the burden of justification, which rests on the government, will be a heavy one. This approach makes eminent good sense.

107 It is at paragraph 176 of the PEI Reference Case that Chief Justice Lamer addresses the standard of review issue:

> The model mandated as a constitutional minimum by s. 11(d) is somewhat different from the ones I have just described. My starting point is that s. 11(d) does not require that the reports of the commission be binding, because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds, as I said above, is an inherently political matter. Of course, it is possible to exceed the constitutional minimum mandated by s. 11(d) and adopt a binding procedure, as has been done in some provinces.
> [Emphasis added]

108 At paragraph 179, Chief Justice Lamer holds that judicial independence requires that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to a commission's report within a specified time. If the branch of government responsible for setting judicial salaries chooses not to accept one or more of the recommendations then it must justify its decision by offering reasons. Chief Justice Lamer goes on to state that the standard of justification required under s. 11(d) of the Charter is not the same as required under s. 1 of the Charter, which Chief Justice Lamer acknowledges is a very rigorous standard. At paragraph 182 Chief Justice Lamer writes:

> I hasten to add that these comments should not be construed as endorsing or establishing a general duty to give reasons, either in the constitutional or in the administrative law context. Moreover, I wish to clarify that the standard of justification required under s. 11(d) is not the same as that required under s. 1 of the Charter. Section 1 imposes a very rigorous standard of justification. Not only does it require an important government objective, but it requires a proportionality between this objective and the means employed to pursue it. The party seeking to uphold the impugned state action must demonstrate a rational connection between the objective and the means chosen, that the means chosen are the least restrictive means or violate the right as little as reasonably

> possible, and that there is a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgment of the right.

109 It is at paragraph 183 that Chief Justice Lamer lays down the tenets of the simple rationality standard:

> The standard of justification here, by contrast, is one of simple rationality. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis. However, the absence of this analysis does not mean that the standard of justification is ineffectual. On the contrary, it has two aspects. First, it screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government, similar to the way that we have evaluated whether there was an economic emergency in Canada in our jurisprudence under the division of powers (Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373). [Emphasis added]

110 It is clear that the review standard does not require the court to engage in a searching analysis of the government's decision, as is required under s. 1 of the Charter. As well, the Supreme Court cautions that even where a reason for rejecting a salary recommendation is dependent on a factual matter, the reviewing court is to review the reasonableness of the factual claim in the same way that the Supreme Court evaluated the Federal Government's claim of an economic emergency in the Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373. It will be recalled that in that case the Supreme Court did not demand exacting evidence of the federal government's claim of a "national economic emergency", one that required a legislative solution to the problem of runaway inflation. In effect, deference was granted to the federal government's assertion that there was a problem of nation-wide proportions that had to be addressed.

111 Parenthetically, care should be taken not to confuse the administrative law standard of reasonableness simpliciter with the notion of reasonableness employed by Chief Justice Lamer. When one looks at the reasons and facts of the Anti-Inflation Case, it is clear that the Supreme Court did not subject the government's assertion, that a national emergency existed, to a probing review as is required when the review standard is reasonableness simpliciter.

112 At paragraph 184, Chief Justice Lamer cautions that some government decisions to reject a commission recommendation will satisfy the simple rationality test more easily than others because they pose less of a danger of being used as means of economic manipulation and, hence, political interference. He gives the example of an "across-the-board" reduction in salaries of all those paid from the public purse. By contrast, Chief Justice Lamer held that a salary measure directed at judges alone might require a fuller explanation. Paragraph 184 reads as follows:

> Although the test of justification -- one of simple rationality -- must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference. Across-the-board measures which affect substantially every person who is paid from the public purse, in my

> opinion, are prima facie rational. For example, an across-the-board reduction in salaries that includes judges will typically be designed to effectuate the government's overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest. By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.

113 In conclusion, the simple rationality test requires deference to the government's factual justification for its rejection decision. In other respects, a government decision to reject a salary recommendation does not require a searching examination. A government need only articulate a "legitimate" reason for rejection. I will say more of the simple rationality test below.

ii) Deference to Whom?

114 While it is clear to me that the reviewing court owes deference to the government's decision, there is case law that supports the view that it is the commission's recommendation that is owed deference. In Alberta v. Bodner (2002), 222 D.L.R. (4th) 284, the majority of the Alberta Court of Appeal held that the government's decision to reject a commission recommendation involved a two-fold test. First, the government had to establish the existence of exceptional circumstances and, second, establish that its reasons passed the simple rationality test. The Association invokes this decision in support of its position on this appeal.

115 In Bodner v. Alberta the majority agreed with the Applications Judge that the refusal of the Alberta Government to implement certain recommendations of a remuneration commission, involving Justices of the Peace, did not meet the standard of justification - simple rationality. The remuneration commission had recommended a salary equal to two thirds of the salary of Alberta's Provincial Court judges (partial parity). The Justices of the Peace, who remain members of the Alberta Law Society, had sought a ratio of four-fifths. The majority of the Court of Appeal concluded that the reviewing court must conduct a "thorough and searching examination of the reasons proffered" by the government. In its opinion, "simple rationality is not easy to achieve". At paragraph 121, the majority reasoned: "The expectation is that each party will make its case, challenge that of the other, and live with the recommendations." Specifically, the majority went on to impose a two-fold test to be applied on judicial review. First, the government must demonstrate that extraordinary circumstances exist and, second, the reasons for rejection must pass the test of rationality. At paragraph 130 of its reasons the majority held:

> As a consequence, the standard of justification for rejection must be congruent with the constitutional purpose of a commission. This means that before government can constitutionally resort to its power to reject, it must first demonstrate that extraordinary circumstances of sufficient importance or significance exist. Having done so, the reasons must then pass the test of rationality in this constitutional context: they must be reasonable, their factual foundation must be reasonable, they cannot be utilized as a means of economic manipulation and they must have a rational connection to the circumstances alleged.

116 On the facts, the majority in Bodner v. Alberta held that there was nothing in the record to suggest that any political or economic exigencies existed that justified resort to the government's rejection power. In addition, the majority held that the government's reasons for rejecting the salary recommendation of the commission did not meet the constitutional standard of rationality.

117 With great respect, I cannot subscribe to the review standard imposed by the majority in Bodner v. Alberta. I recognize that the administrative process for dealing with remuneration issues can be compared

to one in which one of the litigants sits on appeal of the tribunal's decision. But, I am also cognizant that the constitutional role of the tribunal is unique. It provides the means by which the spectre of economic manipulation of the judicial decision-making process can be avoided and the means by which to depoliticize the process of salary negotiation. Specifically, I find that the first prong of the review standard articulated in Bodner is not supported by the reasons offered by Chief Justice Lamer in the PEI Reference Case. Admittedly, there is a reference in that case to a requirement of exceptional circumstances, but it is made in relation to the possibility of a government implementing a salary change without first remitting the matter to the constitutionally mandated remuneration commission. At paragraph 137 of his reasons, Chief Justice Lamer notes that in exceptional circumstances a government may reduce or freeze judges' salaries without prior recourse to a remuneration commission:

> I also note that the components of the collective or institutional dimension of financial security need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances, for example, such as the outbreak of war or pending bankruptcy. In those situations, governments need not have prior recourse to a salary commission before reducing or freezing judges' salaries.

118 The above passage was cited with approval in a subsequent Supreme Court decision: Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405. In that case, the Supreme Court was dealing with the right of the New Brunswick Government to eliminate the position of supernumerary judge for New Brunswick's provincially appointed judges without first remitting the matter to "an independent, effective and objective body prescribed by the Constitution". Writing for a unanimous Court, Justice Gonthier held that exceptional circumstances did not exist that warranted by-passing the commission process. At paragraph 72, Justice Gonthier reasoned:

> Given the vital role played by judicial independence within the Canadian constitutional structure, the standard application of s. 1 of the Charter could not alone justify an infringement of that independence. A more demanding onus lies on the government. Thus, in the Provincial Court Judges Reference, supra, at para. 137, it was indicated that the elements of the institutional dimension of financial security did not have to be followed in cases of dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy. In this case, it is clear that such circumstances did not exist in New Brunswick at the time when Bill 7 was passed. Moreover, no arguments were made by the appellant in this regard.

119 In summary, the understanding that a government cannot depart from a salary recommendation without first satisfying an "exceptional circumstances" test has, in my respectful view, no foundation in law. If the law were otherwise it would be difficult to appreciate why the Supreme Court framed the constitutional role of remuneration commissions in terms of a recommendatory mandate. If the Supreme Court intended that deference belongs to the commissions, it is difficult to appreciate why the Supreme Court imposed a less demanding review standard on a government decision, at least when compared to the more exacting standard available under s. 1 of the Charter. In my respectful view, to grant deference to the commission rather than the government comes perilously close to adopting a constitutional process that resembles binding arbitration. This is not to deny that such an option is available, provided the commission meets the other constitutional requirements; namely, objectivity and independence. In my view, a process of binding arbitration is consistent with the constitutional requirement that the commission be effective. However, the Provincial Court Act does not presently provide for binding arbitration and, thus, we are required to review the Government's rejection decision on the standard of simple rationality.

120 Despite my disagreement with the majority opinion rendered in Bodner v. Alberta, I cannot help but note that each of the government's reasons for rejecting the commission's salary recommendation in that case was evaluated on the review standard of simple rationality. Though the minority and majority opinions disagreed on whether the remuneration commission overlooked certain factual assumptions and how those errors should be rectified, their respective reasons reflect a consensus on many points. As is so often the case, we spend more time on identifying the proper review standard than we do in applying it to the case at hand.

iii) The Meaning of Simple Rationality

121 In Newfoundland Association of Provincial Court Judges v. Newfoundland (2000), 191 D.L.R. (4th) 225 (Nfld. & Lab. C.A.) Green J.A. (as he then was) held at para. 94, that the simple rationality test does not require the government to demonstrate that the commission recommendation is wrong, irrational or unreasonable. It need only demonstrate the rationality of its own decision. Indeed, it could well be the case that the reasons given by both the commission and the government are classified as rational, in which case the latter's decision stands. Moreover, it is not for the reviewing court to substitute its own opinion for that of the government or to decide whether the government's reasons for rejection are right or wrong. In this regard, Green J.A. cites with approval the Conférence des juges du Québec v. Québec v. Québec (Procureure Général), [2000] R.J.Q. 744 at paras. 77-78. I agree, subject to one observation. It is much easier to establish the rationality of one's own decision by identifying the irrationality of another's.

122 The jurisprudence dictates that the government must articulate a legitimate reason to explain why it has chosen to depart from a commission recommendation. This leads to the question whether the government can reject a commission's salary recommendation simply because it is not prepared to give the same weight to relevant factors as did the commission. It seems to me that the government may validly do so, provided it gives reasons. For example, the government cannot simply assert that it is giving greater weight to the salary level of one group that is paid from the public purse rather than another. It must explain why: see Bodner v. Alberta, per Côté J.A. at paras. 16 & 39 and Newfoundland Provincial Court Judges v. Newfoundland at para. 93.

123 The case law reveals a consensus as to the kinds of reasons that will not pass the simple rationality test. A number of propositions, first enunciated by the Alberta Court of Appeal in Alberta Provincial Judges' Association v. Alberta, (1999), 177 D.L.R. (4th) 418 reproduced at paragraph 95 of Green J.A.'s reasons in Newfoundland Provincial Court Judges v. Newfoundland are instructive. These propositions illustrate what is or is not an acceptable basis for rejecting a commission's recommendation:

1. A ground of rejection that does not meet the simple test of logic cannot be a rational reason and hence does not meet the test set out in the Provincial Court Judges Case No. 1 (para. 47);
2. A reason for rejection which is based on a comparison between the compensation recommended by the commission and the compensation paid to other groups must involve a comparison of things on an equivalent basis (para. 51);
3. The reasons given must be adequate and intelligible; the court reviewing a government's grounds to reject need not guess at meanings any further than reasonable implication would take one (para. 61);

4. An unsupported assertion or mere conclusion is not a reason, let alone a rational one (para. 62-63);
5. While the government can assign different weight to a particular factor than that assigned by the commission, it must give proper reasons for doing so; it cannot merely assert that greater or lesser weight is due (para. 65);
6. To constitute a rational reason, a ground given for rejecting the commission's conclusions "must be germane", in the sense of considering only relevant matters and disregarding irrelevant ones (para. 67-68);
7. A conclusion reached by the government which does not flow logically or obviously from the grounds advanced for rejecting the commission's conclusions will not be acceptable (para. 81);
8. Grounds asserted by government for rejecting the commission's conclusions that are based on alleged facts which are incontestably untrue or contrary to the uncontradicted evidence are not rational reasons (para. 84);
9. Where the reasons given for rejecting the commission's recommendations or conclusions are meaningless without stating the facts to which they relate, then such facts must be stated (para. 85);
10. Reasons to reject the commission's recommendations cannot be illegal or unconstitutional (para. 89);
11. Where the government expressly invited the commission to weigh or not weigh some factor, and the commission does what it is asked to do, the subsequent rejection of the commission's recommendations on the ground that the commission weighed, or did not weigh that factor, which the government now says it should not have done, would not be regarded as logical or rational, because such "about face" conduct by the government would have the effect of making the commission ineffective (paras. 94-96);
12. A government which rejects the conclusions of a compensation commission must do so "frankly and sincerely" and must state its true reasons (para. 113).

124 In future, if the Government finds itself in the position of having to reject a commission recommendation it should bear these simple propositions in mind.

IX APPLYING THE REVIEW STANDARD

i) The Problem with Recitals

125 The principal difficulty in this case is applying the review standard to the 29 recitals that form the Government's response to the 2001 Commission's recommendations. Of the 29 recitals, I could identify three that do not apply to the salary recommendation (Recitals 15, 20 and 21). The remaining recitals are disjointed in the sense that they are not logically grouped. For example, the recitals that reasonably bear on the parity issue are dispersed throughout the Government's response. See Recitals 8, 9, 10, 13 and 25.

126 My point is an obvious one. The offering of disjointed recitals exacerbates the difficulty of applying

any review standard. Does the reviewing court examine each of the recitals independently of one another, tally up those that meet the rationality standard and those that do not before arriving at a legal conclusion? In my view, this is not what the Supreme Court had in mind, nor would it be fair to set aside the Government's rejection decision simply because some of its reasons fail to meet the rationality standard.

127 This leads me to ask why the Government chose to formulate its response in the form of recitals. The affidavit evidence, discussed above, reveals that the Government's response was a committee effort. The problem with this approach is summed up in the adage; too many cooks spoil the broth. Alternatively, the use of recitals may have been driven by the Supreme Court's reasons in the PEI Reference Case. In that case, Chief Justice Lamer anticipates that the authority to fix judicial salaries will rest with either the executive or the legislature. If the decision-maker is the executive, the rejection reasons are to be found in its report. If the decision-maker is the legislature, Chief Justice Lamer envisaged that the reasons for rejection would be placed in the recital to the resolution of the legislature rejecting a commission's recommendation. This is set out in paragraph 180 of the PEI Reference Case:

> Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary in a court of law. The reasons for this decision would be found either in the report of the executive responding to the contents of the commission's report, or in the recitals to the resolution of the legislature on the matter. An unjustified decision could potentially lead to a finding of unconstitutionality. The need for public justification, to my mind, emerges from one of the purposes of s. 11(d)'s guarantee of judicial independence -- to ensure public confidence in the justice system. A decision by the executive or the legislature, to change or freeze judges' salaries, and then to disagree with a recommendation not to act on that decision made by a constitutionally mandated body whose existence is premised on the need to preserve the independence of the judiciary, will only be legitimate and not be viewed as being indifferent or hostile to judicial independence, if it is supported by reasons.

128 This leads one to ask who is responsible for fixing judicial salaries in New Brunswick? Having regard to s. 22.06(1) of the Provincial Court Act, it would appear that the Minister of Justice is vested with the decision-making authority to set judicial salaries. However, it may well be that the Minister's position is guided by the views of the Cabinet. In either case, there is an obligation on the Minister to inform both the commission and the legislature that a commission recommendation has been rejected. Subsection 22.06(1) reads as follows:

> 22.06(1)The recommendations of the Commission in the report
>
> (a) may be accepted, in which case they shall be implemented with due diligence, or
>
> (b) may be rejected in whole or in part, in which case the Minister shall advise the Commission and the Legislative Assembly as to the recommendations or the parts of the recommendations that are not being implemented.

129 In summary, there is no need for the Minister to draft a negative response to a commission recommendation in terms of a series of recitals. A more effective manner remains available: an explanatory report.

130 The fact remains that the Government's reasons for rejecting the 2001 Commission's salary recommendation are expressed as recitals. This leaves us with two possible approaches to applying the proper review standard. One is to examine each of the recitals in isolation and determine whether the simple rationality standard is satisfied. The other option is to group those recitals that together form the

basis of a reason for rejecting the Commission's salary recommendation. In my view, the latter option is the proper one. Clearly, a number of recitals make no sense unless examined in the context of others. Furthermore, it is unrealistic to apply the review standard to each recital and to come to a determination as to whether, on balance, the Government's reasons satisfy that standard. This is not to deny that several of the recitals do not pass the simple rationality test. In this regard, a few illustrations are in order.

131 Two of the recital's found in the Government's response clearly fail the rationality test. At Recital 27, the Government faults the Commission for failing to cost out its salary recommendation. At Recital 28, the Government reveals that the cost of the recommendations will exceed $3 million, for the three-year period, and that it will have a significant impact on the budget of the Province. [It is not clear whether that figure represents the cost for all of the recommendations or simply the salary recommendation.]

132 Frankly, I am troubled that the Government would offer such a tenuous excuse for rejecting the Commission's salary recommendation. If the Government were truly concerned with the financial impact of any salary increase, it could have raised the matter with the Commission, which it did not according to the record before us. The Government could have performed the simple arithmetical calculation based on the salary of federally appointed judges and provided the same to the Commission. As to the bald allegation that the salary increase ($1 million per year) will have a significant impact on the Province's budget, there is not a scintilla of evidence to support this contention.

133 There are three other recitals that do nothing to support the Government's decision to reject the 2001 Commission's salary recommendation. Recital 6 accuses the Commission of failing to address the question of whether judicial salaries will fall below the minimum guaranteed by judicial independence. Recital 16 accuses the Commission of failing to consider whether the current remuneration is sufficient to prevent the possibility of economic manipulation of the judicial decision-making process. Recital 24 asserts that the Commission's salary recommendation exceeds the amount required to maintain the status and dignity of the judicial office.

134 As I have already discussed, the notion that the mandate of the Commission is to ensure that judicial salaries have not fallen below the constitutional minimum is misplaced. The same holds true with respect to the view that a commission can somehow identify a salary level that is commensurate with the dignity of the office. These mandates or standards are simply too elusive and certainly there is no willingness on the Government's part to venture an opinion with respect to what the appropriate salary level might be. Above all, none of the decided cases reveal factual circumstances which would support the inference that a government was attempting to set salary levels for purposes of economic manipulation of the judicial decision-making process or that it is even a realistic concern.

135 Recital 19 is equally problematic. The Government rejects the 2001 Commissions' salary recommendation on the ground that New Brunswick's Provincial Court judges would be the third highest paid in the country, after Ontario and Alberta, and yet a New Brunswick wage earner is ranked eighth out of ten in average earnings. The Government's logic eludes me. I am to assume that because New Brunswick wage earners are paid less than workers in other provinces, so too should the judges of this Province be paid less than their provincial counterparts. Why? Is the Government asserting an equality argument that because one provincial wage earner is, relatively speaking, poorly paid so too should all other wage earners? Furthermore, the Government did not explain why New Brunswick's Provincial Court judges should rank lower. I can speculate that the Government might maintain that Ontario and Alberta are "have" provinces while New Brunswick qualifies as a "have not". But it is not my role to speculate on what the Government may have been thinking at the time it prepared its response to the Commission's recommendation, nor to perpetuate the belief that New Brunswick functions at a welfare level.

136 If the Recitals are looked at contextually, rather than individually, it is evident that the Government is advancing four distinct reasons for rejecting the Commission's salary recommendation. To this end I have regrouped the recitals according to themes that are consistent with the Government's position before the 2001 Commission.

ii) Reasons for Rejection

137 Putting the Government's recitals in their best light, I was able to discern four reasons why it rejected the 2001 Commission's salary recommendation. In my view, only two satisfy the applicable review standard.

a) Present Salary is Adequate

138 The Government insists that the present salary level is adequate in the sense that there has been no material change in circumstances since implementation of the 40% salary increase recommended by the 1998 Commission: see Recital 1. In my view, this bald assertion fails the simple rationality test. For example, the Government does not deal with the fact that the salaries of other provincial and federal judges have risen since implementation of the 1998 Commission's salary recommendation. That being said, I must confess that the manner in which the Commission disposed of this argument is flawed.

139 It will be recalled that the 2001 Commission rejected this argument for three reasons. First, the large increase arose because the Province had delayed in fully implementing the 1998 Commission's salary recommendation. Second, the judges received no compensation for the delay and, therefore, were deprived of $2,000 tied to indexing of judicial salaries. Third, to deny the judges a salary increase for three years in question would be in "violation" of the Supreme Court's ruling in the PEI Reference Case. With respect, these reasons are, to say the least, problematic.

140 It is true that the Government did not implement fully the 1998 Commission's salary recommendation until October of 2000, nearly two years after the recommendation was made. It is equally true that the delay meant that the judges did not receive retroactive pay that included an amount for indexing. That being so, it would have been open for the 2001 Commission to rectify the problem by recommending that the salary of judges be adjusted to reflect what the judges would have received had the 1998 Commission's salary recommendation been fully implemented in a timely manner.

141 Most troublesome is the 2001 Commission's finding that the failure to recommend a salary increase would be contrary to the Supreme Court's ruling in the PEI Reference Case. As well, the Commission went so far as to conclude that the binding or persuasive force of a commission's salary recommendation is considerable. In my respectful view, the Commission's understanding of the law is questionable and, in any event, irrelevant to its assigned task. I am acutely aware that we are not sitting on an appeal from a review of the Commission's recommendation but rather from a judicial review of the Government's reasons for rejection. I am also aware that I have identified flaws in the reasoning of the Commission, reasons that the Government could have advanced but which it did not. In future, however, the Government should provide a commission with independent senior legal counsel to assist the lay tribunal in its deliberation. The Supreme Court has laid down the constitutional requirement that remuneration commissions be independent and effective. In my view, they cannot be effective unless provided with legal counsel.

b) Salary Increase is Excessive

142 Nowhere does the Government state in unequivocal terms that the Province cannot afford the salary increase recommended by the 2001 Commission. Recital 5 alleges that the Province's economic circumstances do not support a one-year salary increase of 13%. As well, Recitals 27, 28 and 29 allege that the Commission did not cost out its salary recommendation. Together those recitals might suggest that the government opposed the Commission's salary recommendation on the ground of impecuniosity. If that were the intention of the Government then it should have raised the issue squarely with the Commission. In any event, it is a matter of public record that the economic circumstances of this Province do not warrant a reduction or freeze in judicial salaries. The Government reported a budgetary surplus for 2000. In short, there would have been no merit to the Government's plea of impecuniosity had it been advanced.

143 When Recitals 1, 2, 3 and 29 are read together, it is clear to me that the Government believes that the proposed salary increase is excessive, at least when compared to the increases awarded to others paid out of the public purse. That argument is sanctioned by s. 22.03(6)(b) of the Provincial Court Act. That provision directs a commission to look at the matter of "economic fairness" as between judges and those paid out of the Consolidated Fund.

144 Recital 3 indicates that until 1993 the salaries of Provincial Court judges in New Brunswick were identical to those paid to senior judicial officials and senior Deputy Ministers. Recital 2 indicates that the judges received a 49% increase over the next decade while the salaries of the senior Deputy Ministers rose by only 19%. Recital 26 states that non-bargaining members of the public service, unlike the judges, have had their salary increases restricted to between 0 and 1.5% per annum over the last decade.

145 Collectively these recitals leave the impression that the Government is objecting to the judges being paid more than senior civil servants; specifically senior lawyers and Deputy Ministers. Is the comparison a valid one? In my view, it is not for the reason that salary levels of these civil servants is substantially below the judge's present salary level. Senior lawyers (25 plus years experience) are woefully underpaid at $85,000. The salary of Deputy Ministers in New Brunswick tops out at $113,000. The record below reveals that the only other civil servants in this Province who are paid beyond the $113,000 mark are salaried physicians ($150,000).

146 The fact is that the present salary level of judges already exceeds what is being paid to senior members of the civil service. The Government appears to be suggesting that we rewind the clock to the time when there was parity between the salaries of New Brunswick's Provincial Court Judges and senior civil servants. This we cannot do. It follows that a comparison between the salaries paid to this group of civil servants and judges is inappropriate, except perhaps with respect to other salaried professionals.

147 Finally, I turn to the Government's reliance on the fact that non-bargaining employees within the civil service have been restricted to yearly increases of no more than 1.5% over the last decade: see Recital 26. I find this argument disturbing for two reasons. First, it merely affirms that these non-bargaining employees would fare better in a unionized setting. The Government's own evidence reveals that unionized employees receive significantly larger salary increases through the bargaining process than those who must bargain from a position of inequality. Second, the Government's insistence that judges of this Province be treated no better, nor any worse, than non-bargaining employees conflicts with the Supreme Court's caution that judges are not civil servants. As I have already pointed out, prior to the establishment of the McLauchlan Commission, New Brunswick's Provincial Court judges were treated on the same basis as non-bargaining employees in the civil service and received the same percentage increase

in salary. It could be argued that the Government is attempting to do indirectly what it cannot do directly; treat judges like civil servants. For these reasons, I find that the Government's objection to the 2001 Commission's salary recommendation based on "excessiveness" fails to meet the review standard of simple rationality.

c) The Parity Argument

148 As the parity issue lies at the heart of this appeal, it is instructive to outline the way in which the parties advanced their respective positions before the 2001 Commission.

149 The Association's initial written submission is telling. It asks for parity with the judges of the Court of Queen's Bench. The Association begins its analysis with the premise that judges are not civil servants subject to the economic whim of the Government. The Association goes on to posit that societal respect for those who hold positions of trust is recognized by the level of remuneration afforded the position, as reflected in the salary levels paid to university presidents, corporate executives, senior members of the Bar and "most appropriately" judges of the Court of Queen's Bench. The Association then refers to the increasing workload of the Provincial Court and the decreasing workload of the Court of Queen's Bench in respect of criminal matters. Reference is also made to the fact that New Brunswick does not retain Justices of the Peace, as is true in other provinces. In the opinion of the Association the "issue is one of simple equity between those who perform the judicial function in New Brunswick". Finally, the Association submitted that if the 2001 Commission should determine that parity with Court of Queen's Bench judges is "not attainable at this time", the Commission should consider establishing a fixed differential of no more than $20,000 in the two salaries.

150 The Association's submission states further that following the release of the 1998 Commission's Report the salary recommendations of other provincial remuneration commissions had been acted on. Consequently, the salary level of other Provincial Court judges was said to be comparable to that of the federally appointed judges. As of 2001, Ontario's provincially appointed judges were the highest paid at $172,000. Newfoundland & Labrador and Manitoba both recorded a salary level of $112,000, the lowest in Canada. The $141,000 salary being received by New Brunswick's judges placed them in the middle of the spectrum. Later on in its submission, the Association posits that New Brunswick's provincially appointed judges must be placed in "a position of parity with other provincial benches and a position closer to that of the federal bench".

151 The New Brunswick Branch of the Canadian Bar Association submitted that the Provincial Court judges were entitled to more than annual cost of living increases. In its view, the salaries being paid to senior federal civil servants and New Brunswick practitioners should be used for comparative purposes.

152 The Law Society of New Brunswick recommended that there be parity with federally appointed judges and, alternatively, that the differential be no more than $20,000.

153 The Government submitted that a comparison between the compensation of Provincial Court judges in New Brunswick and judges of the Court of Queen's Bench is inappropriate for two reasons. First, the Government argued that the nature of the work and responsibilities is vastly different. Second, the Government argued that the fixing of federal judicial salaries involves consideration of factors that have no application in the provincial context. Specifically, the Government referred to the difficulty faced by federal commissions in recommending a salary that would attract highly qualified applicants living in the larger metropolitan areas of Canada. It is an accepted fact that the income levels of this group of practitioners is greater than those practising in smaller communities. The Government noted that because

of the fact that there is a uniform federal judicial salary, federal commissions had to make compromises which served the broader public interest. I will say more of this rationale in the reasons that follow.

154 There is no doubt that the 2001 Commission viewed judges of the Queen's Bench as the most appropriate group for comparative purposes. At page 11 of its Report, the Commission held: "The only persons, in fact, whose job and method of appointment are similar to the [Provincial Court judges] in New Brunswick are judges of the Court of Queen's Bench". Indeed, there is no indication that the Commission was concerned with the salary levels of Provincial Court judges in other provinces. At the same time, the 2001 Commission acknowledged that it could not simply recommend that the provincially appointed judges receive full salary parity with judges of the Court of Queen's Bench. After acknowledging that economic conditions were not adverse to a salary increase, the 2001 Commission settled on a salary recommendation that would leave the provincially appointed judges with a salary $30,000 less than their federal counterparts. The recommended percentage increase appears to be based on the fact that the per capita income of New Brunswickers is approximately 85% of the national average.

155 The Government rejected the 2001 Commission's acceptance of the proposition that the salaries of New Brunswick's provincially appointed judges should maintain a degree of parity with judges of the Court of Queen's Bench. Specifically, the Government maintained that the Commission should not have regarded the salaries being paid to federally appointed judges as "the controlling factor" when formulating its salary recommendation. The Government's position is set out in Recitals 8, 9, 10, 13, and 25.

156 I recognize that the 2001 Commission did not fix the salary of New Brunswick's Provincial Court judges as a percentage of the federal salary. Had it done so, then arguably future provincial commissions would have no role in fixing judicial salaries. Attention would inevitably focus on the salary recommendation of federal commissions, to the exclusion of the framework set out in the Provincial Court Act. This may explain why the Commission tied the salary recommendation to New Brunswick's average per capita income. But I am at a loss to see why the provincial salary should be 85% of the federal salary simply because New Brunswick's average personal income is 85% of the national average. Paragraph 22.03(6)(a) of the Provincial Court Act contemplates an entirely different use for this statistic. A commission must review the adequacy of judicial salaries by reference to the cost of living or "changes in real per capita income".

157 I agree with the Government's stance that it was inappropriate for the 2001 Commission to focus on the salary level of federally appointed judges to the exclusion of other equally relevant comparator groups, in particular the salaries paid to other Provincial Court judges. Recall that s. 22.03(6)(a.1) makes it mandatory for commissions to consider judicial salaries paid elsewhere in Canada and, as well, to consider any factors which would justify the existence of salary differences.

158 With respect, I do not believe the 2001 Commission understood the Government's argument opposing salary parity with federally appointed judges and, in particular, the considerations which are relevant to the setting of judicial salaries in the federal context. It is to that matter that I now turn.

159 Historically, federal judicial remuneration commissions have consistently accepted that the federal salary should be uniform and, with one exception, not reflect geographic differences. Additionally, federal commissions have consistently recognized that the uniform salary must be set at a level that is capable of attracting highly qualified candidates. This factor is problematic with respect to potential applicants practising law in Canada's larger metropolitan centres. Their incomes and salary expectations are understandably greater than those practising in smaller communities. Rather than recommending a salary differential based on the geographic location of a judge's residence, federal commissions have concluded

that the salary level must be set at a level which does not have a chilling effect on recruitment in the largest metropolitan areas of the country. For this reason, the recommended federal salary is adjusted to reflect this geographic disparity.

160 The 2000 Federal Judicial Compensation and Benefits Commission concluded that the pool of highly qualified candidates for appointment to the Bench consists largely of lawyers in private practice (82% of those appointed from 1990 to 1999 were appointed from the practising Bar). This was said to underscore the importance and relevance of a comparison between the incomes of lawyers in private practice and judicial salaries. The Commission also noted that since 1989 the largest metropolitan areas account for 52% of the appointments to the judiciary. Those areas are: Toronto, Montreal, Vancouver, Ottawa-Hull, Edmonton, Calgary and Quebec City. The Commission also noted that since 1989, 69% of the judges were between the ages of 44 to 56, at the time of appointment.

161 The federal judges argued before the 2000 Federal Commission that the comparator group should consist of the top third of income earners amongst lawyers between the ages of 44-56. This submission had the effect of targeting an income range with a mid-point at the 83rd percentile within the comparator population. The Federal Commission accepted the opinion of its experts that the income of those falling within the 75th percentile was more appropriate.

162 The 1997 tax data supplied to the 2000 Federal Commission revealed that lawyers in Ontario who fell into the comparator population, and whose income fell within the 75th percentile, earned $260,000. For lawyers in Toronto that figure climbed to $343,000. By contrast, New Brunswick lawyers falling within the 75th percentile of the comparator population earned $177,000. Given that the federal judicial salary is driven, in part, by the salary expectations of those practising in the larger metropolitan areas of Canada, it is clear that the salary expectations of those seeking a federal judicial appointment in New Brunswick are more easily satisfied than those seeking appointments in a province such as Ontario. This reality stems from the fact that the federal salary fails to take into account pronounced regional disparities in the income of those practitioners considered, at least by the judiciary, to form the group of lawyers most likely to generate outstanding candidates for judicial appointment.

163 In these circumstances, the Government of New Brunswick is justified in its contention that the Association's claim to salary parity with federally appointed puisne judges is misguided. The federal salary is fixed by reference to factors that have no application in the provincial context. Specifically, the fact that the federal salary is uniform, so as not to reflect regional differences, and that it is set at a level that is capable of attracting qualified candidates in major metropolitan areas throughout Canada, where salary levels are much higher than in the small urban centres, are factors that need not concern provincial remuneration commissions. Thus, the Government has identified a "factor" that justifies the existence of a salary differential between provincially and federally appointed judges as contemplated by s. 22.03(6)(a.1).

164 One other point must be addressed. Elsewhere, it has been held that a salary recommendation based on a percentage or ratio of the salary level of another court differs from a recommendation embracing full parity. The latter type of recommendation is said to depend on notions of equality, while the former does not: see Bodner v. Alberta at paragraph 46. With respect, I cannot accept the distinction. The reality is that a salary recommendation based on full or partial parity with judges of another court means that other comparator groups are being ignored. Partial parity is based on the concept of equality with differences; differences that are reflected in the degree of parity recommended. The problem, of course, is that the remuneration commission is faced with the most difficult task of justifying the amount of the salary

differential. Unless the commission gives compelling reasons for its recommendation, the government will simply reject it on the basis that it is purely arbitrary.

165 In summary, before the 2001 Commission, the Government advanced a legitimate reason why provincial judicial salaries should not be tied to that being paid to federally appointed judges. Admittedly, the 2001 Commission's Report acknowledges the Government's argument. What the Commission failed to do was address that argument, notwithstanding that it was required to do so under s. s. 22.03(6)(a.1) of the Provincial Court Act. For these reasons, the Government's decision to reject the Commission's salary recommendation meets the simple rationality test.

d) Attracting Qualified Applicants - The Pension Factor

166 In its submission to the 2001 Commission, the Association argued that parity with federally appointed judges would deepen the pool from which applicants for appointment to the Provincial Court are drawn. The Association then argued that it is difficult to attract lawyers to the Bench having regard to income levels of lawyers between the ages of 44 and 56 who fall within the 75th percentile level ($177,000 for New Brunswick lawyers as of 1997). A salary of $141,000 was said to be inadequate in terms of attracting outstanding candidates. The Association agreed that a salary commensurate with that paid to judges of the Court of Queen's Bench would attract the best candidates for appointment to the provincial bench.

167 In its response, the Government argued that the present salary level of New Brunswick's Provincial Court judges, together with the value of their judicial annuity, was more than adequate to attract highly qualified applicants. No one challenged the Government's assertion that the value of a judge's compensation package varied between $192,000 and $215,000, depending on the judge's age of appointment and retirement date. The Government also noted that there were 50 qualified candidates seeking appointment to the Provincial Bench. [There is some disagreement as to whether there were 50 applicants and whether all 50 were qualified. At the very least, there appears to have been a pool of at least 30 qualified applicants.]

168 It is universally accepted that the value of the judicial pension is a significant factor to be taken into account in comparing the income position of judges and lawyers in private practice. As the 2000 Federal Remuneration Commission so adroitly observed, at p. 42 of its Report: "it may be safely assumed that the judicial annuity is an important engine driving recruitment". This is because lawyers in private practice do not have the benefit of pension arrangements or pension schemes and are obliged to save for their retirement through Registered Retirement Savings Plans and from after-tax savings on an on-going basis. Of course, the value of a judicial pension depends on assumptions about the age of appointment and retirement of a judge and the economic value of the ability to elect supernumerary status. Using 1997 figures the 2000 Federal Remuneration Commission estimated that a lawyer in private practice would need an additional yearly pre-tax income of between $95,000 and $120,000 to fund the annuity benefit that is available to federally appointed judges. Once the value of the judicial annuity is added to a judge's salary, it is permissible to make a meaningful comparison between the salary levels of judges and private practitioners who fall within the comparator population: lawyers in private practice between the ages of 44 and 56.

169 The 2001 Commission Report does not even acknowledge the Government's position, let alone give reasons for rejecting it. In the circumstances, the Government was entitled to reassert, by way of Recitals 11, 16 and 18, its position that the present remuneration package is capable of attracting qualified lawyers to the Bench, once the value of the judicial annuity is acknowledged.

X CONCLUSION

170 Applying the review standard of simple rationality, the Government's decision to reject the 2001 Salary Commission must stand.

XI DISPOSITION

171 I would dismiss the appeal. The fact that the Association was successful with respect to four of the five issues raised is a sufficient basis on which to decline to make any order as to costs.

ROBERTSON J.A.
We concur:
TURNBULL J.A.
LARLEE J.A.

* * * * *

APPENDIX "A"

2001 Report of the Judicial Remuneration Commission

Pertaining to Salary Issue

The Judicial Remuneration Commission is pleased to submit its report for 2,001 regarding appropriate salaries and other amounts to be paid to Provincial Court Judges (PCJ), the chief judge and associate chief judge as well as appropriate pension, vacation and sick leave benefits to be provided to them.

Among the variety of matters which the Commission considered was remuneration of other members of the Judiciary in Canada together with factors which may justify the existence of differences between the remuneration of judges and that of other members of the judiciary in Canada. In addition, it weighed economic fairness affecting the remuneration of other persons paid out of the Consolidated fund.

The Commission received submissions from, and held hearings with the Province of New Brunswick, the Provincial Court Judges Association, and the Chief Judge. Submissions were also received from the New Brunswick Chapter of the Canadian Bar Association and the Law Society of New Brunswick.

PCJ Work load

The 25 PCJ deal with all criminal cases in New Brunswick except murder. Because of the nature, great variety and numbers of matters before them, they have no effective control over the docket of their court.

Most judgments are given orally because of the high number of cases which come before them and the need to proceed as quickly as possible since most cases are double booked. In addition, recent years have seen PCJ increasingly occupied with progressively complex matters involving the Canadian Charter of Rights and Freedoms and claims of aboriginal rights, which require written opinions.

Between April 1, 1999 and March 31, 2000, there were 48,391 criminal and quasi-criminal cases before PCJs. Of those which are traffic violations, 46% were disposed of in five days or less. In addition, however, 4,795 charges involving youth and young offenders were dealt with by PCJ sitting as youth court judges.

In the same period, criminal appearances at the Court of Queen's Bench were 563 and have decreased over the past three years by an average of 10% per year.

Alone among provinces, New Brunswick has abandoned the system of Justices of the Peace, which make up a separate court in all other provinces, and whose judges are paid up to, or in excess of, $80,000 a year. In New Brunswick, PCJ shoulder these duties, requiring, among other things, availability on a rotation basis for weekend duties.

Unlike their colleagues on the Court of Queen's Bench, PCJ cannot set aside time from their court appearances to write opinions on aboriginal or Charter cases, obligations they are forced to meet on days off or in the evenings, on cases which sometimes last for several weeks.

Criminal cases, particularly those involving drugs, which consume an increasing time for PCJ, are becoming far more complicated; and in many instances financial resources available to the defence are so substantial that the time devoted to dealing with these matters is concomitantly increased.

Finally, as the Province adopts more regulatory measures, such as it did recently to control the theft of wood from Crown lands, the burden on PCJ increases, since it is their court which deals with provincial and municipal offences.

None of this is to suggest that the PCJ contribute more to the furtherance of justice in New Brunswick than do judges of the Court of Queen's Bench or that they should be paid more than their colleagues on this superior court.

However, unlike Judges of the Court of Queen's Bench, PCJ do not have assistants to help them in researching opinions.

Legal Basis for how governments must deal with salaries and financial arrangements of PCJ

In 1997, as a result of legal suits brought in Prince Edward Island, British Columbia, Alberta and Manitoba about the way PCJ salaries had been dealt with, the Supreme Court of Canada issued a decision establishing the process by which provincial governments must approach salary and other financial arrangements for PCJ. The summary sets out major principles which should govern the collective or institutional dimension of financial security for PCJ; viz -

> "1. It is obvious to us that governments are free to reduce, increase, or freeze the salaries of provincial court judges, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class".
>
> "2. Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective, according to the criteria that I have laid down in these reasons. Any changes to or freezes in judicial remuneration require prior recourse to the independent body, which will review the proposed reduction or increase to, or freeze in, judicial remuneration. Any changes to or freezes in judicial renumeration [sic] made without prior recourse to the independent body are unconstitutional".
>
> "3. As well, in order to guard against the possibility that government inaction could be used as a means of economic manipulation, by allowing judges' real wages to fall because of inflation, and in order to protect against the possibility that judicial salaries will fall below the adequate

> minimum guaranteed by judicial independence, the commission must convene if a fixed period of time (e.g. three to five years) has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors".
>
> "4. The recommendations of the independent body are non-binding. However, if the executive or legislature chooses to depart from these recommendations, it has to justify its decision according to a standard of simple rationality - if need be, in a court of law".
>
> "5. Under no circumstances is it permissible for the judiciary to engage in negotiations over renumeration [sic] with the executive or representatives of the legislature. However, that does not preclude chief justices or judges, or bodies representing judges, from expressing concerns or making recommendations to governments regarding judicial remuneration". (Canada Supreme Court Reports, Part 1, 1997 Vol. 3, Pages 158-159)

Provisions 1 & 4 would seem to allow the Province to pay whatever salaries they wish, as long as it meets certain procedures about the appointment and duties of a remuneration commission. As well, it must prevent PCJ salaries from falling because it fails to index them to the cost of living. Also, it is unable to negotiate over salary or other financial conditions with the judges.

On the other hand, the Province - again under #4 - must justify its decision to depart from recommendations of the Commission on the basis of what is called a standard of simple rationality which includes the possibility of finding itself in court to justify what it has done.

The prospect of having to face the Judges Association in court last Fall forced the Province to implement two-thirds of the earlier Judicial Remuneration Commission's recommendation, which it had declined to do in 1998.

Section 3 deals with the possibility that by doing nothing about a Commission's recommendations, a province may decrease judges' salaries either by not dealing with inflation or allowing their salaries to fall below "the adequate minimum guaranteed by judicial independence", an amount which is not spelled out.

There is no instance of a commission's recommendations being successfully ignored by a provincial government in Canada. It would appear therefore that despite the perception of a certain paradox among these principles, the force of a commission's recommendations is very considerable.

Economic Conditions Particular to New Brunswick

The Provincial Court Act, which establishes this Commission, requires the Commission to consider the economic situation in New Brunswick when formulating its recommendations.

In making it clear that provincial rather than national considerations should be paramount in our deliberations (though the Act does say we can look at other factors) this could result in a claim that general economic hardship in New Brunswick prevents the Government from accepting Commission recommendations.

The economic situation of the province is measured not only by a variety of financial factors, such as provincial expenditures and revenues, federal transfers, public service salaries, private sector wages, debt servicing ratios, provincial output, effect of corporate and income taxes, industrial growth, etc., but also by opinions which the government may have on the political significance of these and related matters.

Thus, at various times of a government's cycle, the economic situation may be considered bright or dismal, depending upon economic and political analyses of various measurements of input and output.

What level of salaries of PCJ and the other financial arrangements constitute unacceptable economic pressure depends on the significance of the cost of proposed salary to the general cost of related government activities and its wage packet, as well as to the existence of a broadly-based wage restraint

policy, together with the relationship which the Supreme Court decision manner of setting PCJ salaries has with other wage negotiations.

In the year ending March 31, 2000, the total cost of justice to the government of New Brunswick was $133,825,656, of which (using the widely-accepted calculation of 80% to represent the cost of salaries) salaries accounted for approximately $107,000,000.

Commenting upon his budget March 27 last, the Provincial Finance minister gave no indication of any financial difficulty facing New Brunswick. He announced instead tax decreases, expenditure increases and the establishment of a $100 million contingency fund.

The existence of a consistently-enforced policy of negotiated wage restraint is, at best, unclear. We have noted that the settlement with the nurses for example, at 9.5% for the first year and 1.5% thereafter, was well in excess of the announced limit of 1.5% a year. Demands of doctors and the court stenographers are being dealt with by compulsory arbitration, a situation which generally results in settlements higher than the employer would have wished. Hospital employees, following back-to-work legislation, received two percent per year, rather than the 1.5%.

Given the magnitude of the expenditures of the Department of Justice, the small number of PCJ, the general economic situation in New Brunswick and the inconsistency of wage restraint, the Commission can only conclude that it is unlikely that financial difficulty would stand in the way of a considered recommendation.

As far as a relationship is concerned between the way in which judges' salaries are decided and the manner in which other persons paid by the Province of New Brunswick are treated, there is none.

9. Relationship of PCJ salaries to those of the Judges of the Court of Queen's Bench

The pool of New Brunswick lawyers from which PCJ are chosen is the same as that from which the Court of Queen's Bench judges are selected. Only the paymaster is different. It would be irresponsible of the Commission not to look at the relationship.

The PCJ, the Law Society of New Brunswick and the N.B. Chapter of the Canadian Bar, either want PCJ to achieve salary parity with the Court of Queen's Bench judges or, short of that, a salary based upon a fixed relative percentage.

The Province rejects this because Queen's Bench judges' salaries are set by the Government of Canada on a national basis to take into account levels necessary to attract candidates in Toronto, for example, where salaries for private lawyers are much higher than they are in New Brunswick.

The Province notes also that to simply connect PCJ salaries with those of a another court paid by another government would make the work of this Commission irrelevant. It denies that PCJ are in any way second class members of the judiciary because they are paid less than the Queen's Bench. However, it does insist on a distinction between an inferior court, in this case the Provincial Court, and a superior court, The Court of Queen's Bench, which can be traced to the early 18th century in Britain and is reflected in salary differences.

Those in favour of raising PCJ to the same salary as members of the Court of Queen's Bench believe that their greater responsibilities warrant it.

Without wishing to debate the merits of the development of the court system over the past 300 years, the Commission feels that the wage difference between PCJ and members of the Court of Queen's Bench cannot be ignored.

The only persons, in fact, whose job and method of appointment are similar to the PCJ in New Brunswick are judges of the Court of Queen's Bench.

However, recognising this is different from insisting either on parity with the salaries or in establishing some lock-step arrangement which would keep PCJ remuneration at a constant percentage, either above or below Court of Queen's Bench salaries.

The Supreme Court decision on the one hand acknowledges the constitutional right of provinces to pay judges, or treat them how they wish; and, on the other, recognises the force of Section 11 of the Canadian Charter of Rights and Freedoms.

This, among other enablements, guarantees that a person charged with an offence shall "be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

The Commission views its task as one of understanding the natural disposition of the Province to exercise its jurisdiction over PCJ and a need that it meet the obligations imposed by Section 11 of the Constitution and the Supreme Court decision. It therefore endorses the notion that its job is more than to simply attach PCJ salaries to those of members of the Court of Queen's Bench.

Salary Proposal

In their submission, the Province notes that since the PCJ received a 40% increase within the last six months or so, there is no reason to consider a further increase.

The effect of this would be to freeze the salaries of PCJ for three years, except, presumably, for a cost-of-living adjustment which all employees get.

The reason that this large increase occurred when it did, was that the Province did not pay what the last Commission recommended.

Faced with the prospect of having to answer in court for its failure to implement two-thirds of the recommendations of the Judicial Remuneration Commission in 1998, the Province capitulated. But PCJ received no compensation for the fact that one-half of this amount was paid a year late and PCJ were deprived of $2,000 in indexing when the Province chose to index their salaries on the basis of the fiscal, rather than calendar year.

It is the view of this Commission that the suggestion made by the Province that nothing be paid for a further three years would be in violation of the the Supreme Court ruling.

What an actual increase should be over a three-year period depends partly on the evidence of wage and salary policies of the Province and its economic situation, to which reference has been made earlier, as well as to the requirements of the Supreme Court ruling and the relationship between the PCJ salary and that of the Court of Queen's Bench.

Over the past few months, it has become evident that the Province has paid, or anticipates paying, salary increases which are in excess of their publicly-stated wage guideline of 1.5% per year.

Nurses, because they were regarded as needing a "one-time" increase of eight per cent to make their salaries competitive, received 9.5% for the first year, and 1.5% after that.

As was noted in the section of this report dealing with the province's economic situation, doctors and court stenographers will have their salaries set by compulsory arbitration which may result in higher salaries than the Province's hopes. Hospital workers, forced back to work through legislation, received increases in excess of the wage guidelines.

The Province receives an equalisation transfer from the Government of Canada, which guarantees that all provinces provide an equal level of public service, which would include judges.

According to figures contained in the submission of the Province to this Commission, New Brunswick reported personal income per capita in 1999 equal to 85% of the Canadian average.

Considering these factors and the prospect of salaries of Judges of the Queen's Bench rising to just over $200,000, and continuing to rise by about $2,000, it is proposed that PCJ receive 8% in the first year and a further 5% in the succeeding two years to keep them in reasonable relationship to judges of the Court of Queen's Bench. This would result in an annual salary as follows, beginning January 1, 2001 and effective on the same date in the succeeding two years:

2,001	-$154,018
2,002	-$161,709
2,003	-$169,805

In addition, the Commission recommends that the Province apply to these annual salary amounts, the New Brunswick Industrial Aggregate Index, as published by Statistics Canada, to be effective the beginning of each calendar year starting in 2,001 and continuing until 2,003 and the $10,000 and $5,000 addition to the judges' salary, to the Chief Judge and Associate Chief Judge, respectively.

In this third year, the annual salaries of PCJ would be approximately $30,000 less than the salaries of judges of the Court of Queen's Bench, and marginally lower than the percentage that New Brunswick's personal income per capita was in 1999 of the national average.

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