2022 YUKON JUDICIAL COMPENSATION COMMISSION

TERRITORIAL COURT OF YUKON JUDICIARY
BOOK OF DOCUMENTS

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2. *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44 ("***Bodner***")

3. Report of the 2016 Yukon Judicial Compensation Commission ("**2016 JCC Report**")

4. Conference Board of Canada: "Solid Foundations: Yukon's Outlook to 2045", April 30, 2024

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IN THE MATTER of a Reference from the Lieutenant Governor in Council pursuant to Section 18 of the Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, Regarding the Remuneration of Judges of the Provincial Court of Prince Edward Island and the Jurisdiction of the Legislature in Respect Thereof
AND IN THE MATTER of a Reference from the Lieutenant Governor in Council pursuant to Section 18 of the Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, Regarding the Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island
Merlin McDonald, Omer Pineau and Robert Christie, appellants;
v.
The Attorney General of Prince Edward Island, respondent;
and
The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, interveners;
And between
Her Majesty The Queen, appellant;
v.
Shawn Carl Campbell, respondent;
And between
Her Majesty The Queen, appellant;
v.
Ivica Ekmecic, respondent;
And between

Her Majesty The Queen, appellant;
v.
Percy Dwight Wickman, respondent;
and
The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, interveners;
And between
The Judges of the Provincial Court of Manitoba as represented by the Manitoba Provincial Judges Association, Judge Marvin Garfinkel, Judge Philip Ashdown, Judge Arnold Conner, Judge Linda Giesbrecht, Judge Ronald Myers, Judge Susan Devine and Judge Wesley Swail, and the Judges of the Provincial Court of Manitoba as represented by Judge Marvin Garfinkel, Judge Philip Ashdown, Judge Arnold Conner, Judge Linda Giesbrecht, Judge Ronald Myers, Judge Susan Devine and Judge Wesley Swail, appellants
v.
Her Majesty The Queen in right of the province of Manitoba as represented by Rosemary Vodrey, the Minister of Justice and the Attorney General of Manitoba, and Darren Praznik, the Minister of Labour as the Minister responsible for The Public Sector Reduced Work Week and Compensation Management Act, respondent;
and
The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Judges Conference, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, interveners.

[1997] 3 S.C.R. 3

[1997] S.C.J. No. 75

File Nos.: 24508, 24778, 24831, 24846.

Supreme Court of Canada

1996: December 3, 4; 1997: September 18 *.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

ON APPEAL FROM THE PRINCE EDWARD ISLAND SUPREME COURT, APPEAL DIVISION ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

* Reasons for judgment on rehearing reported at [1998] 1 S.C.R. 3.

Constitutional law -- Judicial independence -- Whether express provisions in Constitution exhaustive written code for protection of judicial independence -- True source of judicial independence -- Whether judicial independence extends to Provincial Court judges -- Constitution Act, 1867, preamble, ss. 96 to 100 -- Canadian Charter of Rights and Freedoms, s. 11(d).

Constitutional law -- Judicial independence -- Components of institutional financial security -- Constitution Act, 1867, s. 100 -- Canadian Charter of Rights and Freedoms, s. 11(d).

Courts -- Judicial independence -- Provincial Courts -- Changes or freezes to judicial remuneration -- Provincial governments and legislatures reducing salaries of Provincial Court judges as part of overall economic measure -- Whether reduction constitutional -- Procedure to be followed to change or freeze judicial remuneration -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s. 3(3) -- Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 17(1) -- Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 -- Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, s. 9(1).

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- Provincial Courts -- Institutional financial security -- Changes or freezes to judicial remuneration -- Provincial governments and legislatures reducing salaries of Provincial Court judges as part of overall economic measure -- Whether reduction infringed judicial independence -- If so, whether infringement justifiable -- Procedure to be followed to change or freeze judicial remuneration -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s. 3(3) -- Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 17(1) -- Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 -- Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, s. 9(1).

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- Provincial Courts -- Individual financial security -- Provincial legislation providing that Lieutenant Governor in Council "may" set judicial salaries -- Whether legislation infringes judicial independence -- If so, whether infringement justifiable -- Canadian Charter of Rights and

Freedoms, ss. 1, 11(d) -- Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 17(1).

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- Provincial Courts -- Individual financial security -- Discretionary benefits -- Provincial legislation conferring on Lieutenant Governor in Council discretion to grant leaves of absence due to illness and sabbatical leaves -- Whether legislation infringes judicial independence -- Canadian Charter of Rights and Freedoms, s. 11(d) -- Provincial Court Act, R.S.P.E.I. 1988, c. P-25, ss. 12(2), 13.

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Courts -- Judicial independence -- Provincial Courts -- Salary negotiations -- Provincial legislation permitting negotiations "between a public sector employer and employees" -- Whether negotiation provisions applicable to Provincial Court judges -- Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51, s. 12(1).

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Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- Provincial Courts -- Administrative independence -- Provincial Court located in same building as certain departments which are part of executive -- Provincial Court judges not administering their own budget -- Designation of place of residence of Provincial Court judges -- Attorney General opposing funding for judges to intervene in court case -- Lieutenant Governor in Council having power to make regulations respecting duties and powers of Chief Judge and respecting rules of courts -- Whether these matters undermine administrative independence of Provincial Court -- Canadian Charter of Rights and Freedoms, s. 11(d) -- Provincial Court Act, R.S.P.E.I. 1988, c. P-25, ss. 4, 17.

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- Provincial Courts -- Administrative independence -- Place of residence -- Sittings of court -- Provincial legislation authorizing Attorney General to designate judges' place of residence and court's sitting days -- Whether legislation infringes upon administrative independence of Provincial Court -- If so, whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 13(1)(a), (b).

Courts -- Constitutionality of legislation -- Notice to Attorney General -- Constitutionality of provincial legislation not raised by counsel -- Superior court judge proceeding on his own initiative without giving required notice to Attorney General -- Whether superior court judge

erred in considering constitutionality of legislation.

Criminal law -- Appeals -- Prohibition -- Three accused challenging constitutionality of their trials before Provincial Court arguing that court not an independent and impartial tribunal -- Accused seeking various remedies including prohibition in superior court -- Superior court judge making declarations striking down numerous provisions found in provincial legislation and regulations -- Superior court judge concluding that declarations removed source of unconstitutionality and ordering trials of accused to proceed or to continue -- Court of Appeal dismissing Crown's appeals for want of jurisdiction -- Whether s. 784(1) of Criminal Code limited to appeals by unsuccessful parties -- Whether declarations prohibitory in nature and within scope of s. 784(1) -- Criminal Code, R.S.C., 1985, c. C-46, s. 784(1).

These four appeals raise a range of issues relating to the independence of provincial courts, but are united by a single issue: whether and how the guarantee of judicial independence in s. 11(d) of the Canadian Charter of Rights and Freedoms restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. In these appeals, it is the content of the collective or institutional dimension of financial security for judges of Provincial Courts which is at issue.

In P.E.I., the province, as part of its budget deficit reduction plan, enacted the Public Sector Pay Reduction Act and reduced the salaries of Provincial Court judges and others paid from the public purse in the province. Following the pay reduction, numerous accused challenged the constitutionality of their proceedings in the Provincial Court, alleging that as a result of the salary reductions, the court had lost its status as an independent and impartial tribunal under s. 11(d) of the Charter. The Lieutenant Governor in Council referred to the Appeal Division of the Supreme Court two constitutional questions to determine whether the Provincial Court judges still enjoyed a sufficient degree of financial security for the purposes of s. 11(d). The Appeal Division found the Provincial Court judges to be independent, concluding that the legislature has the power to reduce their salary as part of an "overall public economic measure" designed to meet a legitimate government objective. Despite this decision, accused persons continued to raise challenges based on s. 11(d) to the constitutionality of the Provincial Court. The Lieutenant Governor in Council referred a series of questions to the Appeal Division concerning all three elements of the judicial independence of the Provincial Court: financial security, security of tenure, and administrative independence. The Appeal Division answered most of the questions to the effect that the Provincial Court was independent and impartial but held that Provincial Court judges lacked a sufficient degree of security of tenure to meet the standard set by s. 11(d) of the Charter because s. 10 of the Provincial Court Act (as it read at the time) made it possible for the executive to remove a judge without probable cause and without a prior inquiry.

In Alberta, three accused in separate and unrelated criminal proceedings in Provincial Court challenged the constitutionality of their trials. They each brought a motion before the Court of Queen's Bench, arguing that, as a result of the salary reduction of the Provincial Court judges pursuant to the Payment to Provincial Judges Amendment Regulation and s.

17(1) of the Provincial Court Judges Act, the Provincial Court was not an independent and impartial tribunal for the purposes of s. 11(d). The accused also challenged the constitutionality of the Attorney General's power to designate the court's sitting days and judges' place of residence. The accused requested various remedies, including prohibition and declaratory orders. The superior court judge found that the salary reduction of the Provincial Court judges was unconstitutional because it was not part of an overall economic measure -- an exception he narrowly defined. He did not find s. 17 of the Provincial Court Judges Act, however, to be unconstitutional. On his own initiative, the superior court judge considered the constitutionality of the process for disciplining Provincial Court judges and the grounds for their removal and concluded that ss. 11(1)(b), 11(1)(c) and 11(2) of the Provincial Court Judges Act violated s. 11(d) because they failed to adequately protect security of tenure. The superior court judge also found that ss. 13(1)(a) and 13(1)(b) of that Act, which permit the Attorney General to designate the judges' place of residence and the court's sitting days, violated s. 11(d). In the end, the superior court judge declared the provincial legislation and regulations which were the source of the s. 11(d) violations to be of no force or effect, thus rendering the Provincial Court independent. As a result, although the Crown lost on the constitutional issue, it was successful in its efforts to commence or continue the trials of the accused. The Court of Appeal dismissed the Crown's appeals, holding that it did not have jurisdiction under s. 784(1) of the Criminal Code to hear them because the Crown was "successful" at trial and therefore could not rely on s. 784(1), and because declaratory relief is non-prohibitory and is therefore beyond the ambit of s. 784(1).

In Manitoba, the enactment of The Public Sector Reduced Work Week and Compensation Management Act ("Bill 22"), as part of a plan to reduce the province's deficit, led to the reduction of the salary of Provincial Court judges and of a large number of public sector employees. The Provincial Court judges through their Association launched a constitutional challenge to the salary cut, alleging that it infringed their judicial independence as protected by s. 11(d) of the Charter. They also argued that the salary reduction was unconstitutional because it effectively suspended the operation of the Judicial Compensation Committee ("JCC"), a body created by The Provincial Court Act whose task it is to issue reports on judges' salaries to the legislature. Furthermore, they alleged that the government had interfered with judicial independence by ordering the withdrawal of court staff and personnel on unpaid days of leave, which in effect shut down the Provincial Court on those days. Finally, they claimed that the government had exerted improper pressure on the Association in the course of salary discussions to desist from launching this constitutional challenge, which also allegedly infringed their judicial independence. The trial judge held that the salary reduction was unconstitutional because it was not part of an overall economic measure which affects all citizens. The reduction was part of a plan to reduce the provincial deficit solely through a reduction in government expenditures. He found, however, that a temporary reduction in judicial salaries is permitted under s. 11(d) in case of economic emergency and since this was such a case, he read down Bill 22 so that it only provided for a temporary suspension in compensation, with retroactive payment due after the Bill expired. The Court of Appeal rejected all the constitutional challenges.

Held (La Forest J. dissenting): The appeal from the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island should be allowed in part.

Held (La Forest J. dissenting on the appeal): The appeal and cross-appeal from the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island should be allowed in part.

Held: The appeal in the Alberta cases from the Court of Appeal's judgment on jurisdiction should be allowed.

Held (La Forest J. dissenting in part): The appeal in the Alberta cases on the constitutional issues should be allowed in part.

Held (La Forest J. dissenting in part): The appeal in the Manitoba case should be allowed.

Per Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: Sections 96 to 100 of the Constitution Act, 1867, which only protect the independence of judges of the superior, district and county courts, and s. 11(d) of the Charter, which protects the independence of a wide range of courts and tribunals, including provincial courts, but only when they exercise jurisdiction in relation to offences, are not an exhaustive and definitive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867 -- in particular its reference to "a Constitution similar in Principle to that of the United Kingdom" -- which is the true source of our commitment to this foundational principle. The preamble identifies the organizing principles of the Constitution Act, 1867 and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text. The same approach applies to the protection of judicial independence. Judicial independence has now grown into a principle that extends to all courts, not just the superior courts of this country.

Since these appeals were argued on the basis of s. 11(d) of the Charter, they should be resolved by reference to that provision. The independence protected by s. 11(d) is the independence of the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the state. The three core characteristics of judicial independence are security of tenure, financial security, and administrative independence. Judicial independence has also two dimensions: the individual independence of a judge and the institutional or collective independence of the court of which that judge is a member. The institutional role demanded of the judiciary under our Constitution is a role which is now expected of provincial courts. Notwithstanding that they are statutory bodies, in light of their increased role in enforcing the provisions and in protecting the values of the Constitution, provincial courts must enjoy a certain level of institutional independence.

While s. 11(d) of the Charter does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions of the Constitution Act, 1867 do to superior court judges, the constitutional parameters of the

power to change or freeze superior court judges' salaries under s. 100 are equally applicable to the guarantee of financial security provided by s. 11(d) to provincial court judges.

Financial security has both an individual and an institutional dimension. The institutional dimension of financial security has three components. First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, 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. However, to avoid the possibility of, or the appearance of, political interference through economic manipulation, a body, such as a commission, must be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature. Provinces are thus under a constitutional obligation to establish bodies which are independent, effective and objective. Any changes to or freezes in judicial remuneration made without prior recourse to the body are unconstitutional. Although the recommendations of the body are non-binding they should not be set aside lightly. If the executive or legislature chooses to depart from them, it has to justify its decision according to a standard of simple rationality -- if need be, in a court of law. Across-the-board measures which affect substantially every person who is paid from the public purse are prima facie rational, whereas a measure directed at judges alone may require a somewhat fuller explanation. Second, under no circumstances is it permissible for the judiciary -- not only collectively through representative organizations, but also as individuals -- to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. That does not preclude chief justices or judges, or bodies representing judges, however, from expressing concerns or making representations to governments regarding judicial remuneration. Third, any reductions to judicial remuneration cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation. In order to guard against the possibility that government inaction could be used as a means of economic manipulation, by allowing judges' real salaries 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 body must convene if a fixed period of time 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. The components of the institutional dimension of financial security need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances.

Prince Edward Island

The salary reduction imposed by s. 3(3) of the Provincial Court Act, as amended by s. 10

of the Public Sector Pay Reduction Act, was unconstitutional since it was made by the legislature without recourse to an independent, objective and effective process for determining judicial remuneration. In fact, no such body exists in P.E.I. However, if in the future, after P.E.I. establishes a salary commission, that commission were to issue a report with recommendations which the legislature declined to follow, a salary reduction such as the impugned one would probably be prima facie rational, and hence justified, because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds. Since the province has made no submissions on the absence of an independent, effective and objective process to determine judicial salaries, the violation of s. 11(d) is not justified under s. 1 of the Charter.

Section 12(1) of the Public Sector Pay Reduction Act, which permits negotiations "between a public sector employer and employees" to find alternatives to pay reductions, does not contravene the principle of judicial independence since the plain meaning of a public sector employee does not include members of the judiciary.

Sections 12(2) and 13 of the Provincial Court Act, which confer a discretion on the Lieutenant Governor in Council to grant leaves of absence due to illness and sabbatical leaves, do not affect the individual financial security of a judge. Discretionary benefits do not undermine judicial independence.

The question concerning the lack of security of tenure created by s. 10 of the Provincial Court Act has been rendered moot by the adoption in 1995 of a new s. 10 which meets the requirements of s. 11(d) of the Charter.

The location of the Provincial Court's offices in the same building as certain departments which are part of the executive, including the Crown Attorneys' offices, does not infringe the administrative independence of the Provincial Court because, despite the physical proximity, the court's offices are separate and apart from the other offices in the building. As well, the fact that the Provincial Court judges do not administer their own budget does not violate s. 11(d). This matter does not fall within the scope of administrative independence, because it does not bear directly and immediately on the exercise of the judicial function. For the same reason, the Attorney General's decision both to decline to fund and to oppose an application to fund legal counsel for the Chief Judge and judges of the Provincial Court as interveners in a court case did not violate the administrative independence of the court. The designation of a place of residence of a particular Provincial Court judge, pursuant to s. 4 of the Provincial Court Act, does not undermine the administrative independence of the judiciary. Upon the appointment of a judge to the Provincial Court, it is necessary that he or she be assigned to a particular area. Furthermore, the stipulation that the residence of a sitting judge only be changed with that judge's consent is a sufficient protection against executive interference. Finally, s. 17 of the Provincial Court Act, which authorizes the Lieutenant Governor in Council to make regulations respecting the duties and powers of the Chief Judge (s. 17(b)) and respecting rules of court (s. 17(c)), must be read subject to s. 4(1) of that Act, which confers broad administrative powers on the Chief Judge, including the assignment of judges, sittings of the court and court lists, the allocation of courtrooms, and the direction of administrative staff carrying out these functions. Section 4(1) therefore vests with the Provincial Court, in

the person of the Chief Judge, control over decisions which touch on its administrative independence. In light of the broad provisions of s. 4(1), s. 17 does not undermine the administrative independence of the court.

Alberta

The Court of Appeal had jurisdiction to hear the Crown's appeals under s. 784(1) of the Criminal Code. First, it is unclear that only unsuccessful parties can avail themselves of s. 784(1). In any event, even if this limitation applies, the Court of Appeal had jurisdiction. Although the Crown may have been successful in its efforts to commence and continue the trials against the accused, it lost on the underlying findings of unconstitutionality. Second, this is a case where the declaratory relief was essentially prohibitory in nature, and so came within the scope of s. 784(1), because the trial judgment granted relief sought in proceedings by way of prohibition. This Court can thus exercise the Court of Appeal's jurisdiction and consider the present appeal.

The salary reduction imposed by the Payment to Provincial Judges Amendment Regulation for judges of the Provincial Court is unconstitutional because there is no independent, effective and objective commission in Alberta which recommends changes to judges' salaries. However, if in the future, after Alberta establishes a salary commission, that commission were to issue a report with recommendations which the provincial legislature declined to follow, a salary reduction such as the impugned one would probably be prima facie rational because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds.

Section 17(1) of the Provincial Court Judges Act, which provides that the Lieutenant Governor in Council "may" set judicial salaries, violates s. 11(d) of the Charter. Section 17(1) does not comply with the requirements for individual financial security because it fails to lay down in mandatory terms that Provincial Court judges shall be provided with salaries.

Section 13(1)(a) of the Provincial Court Judges Act, which confers the power to "designate the place at which a judge shall have his residence", and s. 13(1)(b), which confers the power to "designate the day or days on which the Court shall hold sittings", are unconstitutional because both provisions confer powers on the Attorney General to make decisions which infringe upon the administrative independence of the Provincial Court. Section 13(1)(a)'s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. Section 13(1)(b) violates s. 11(d) because the administrative independence of the judiciary encompasses, inter alia, "sittings of the court".

The province having made no submissions on s. 1 of the Charter, the violations of s. 11(d) are not justified. The Payment to Provincial Judges Amendment Regulation is therefore of no force or effect. However, given the institutional burdens that must be met by Alberta, this declaration of invalidity is suspended for a period of one year[1]. Sections 13(1)(a) and (b) and 17(1) of the Provincial Court Judges Act are also declared to be of no force or effect.

Since the accused did not raise the constitutionality of s. 11(1)(b), (c) and (2) of the Provincial Court Judges Act, it was not appropriate for the superior court judge to proceed on his own initiative, without the benefit of submissions and without giving the required notice to the Attorney General of the province, to consider their constitutionality, let alone make declarations of invalidity.

Manitoba

The salary reduction imposed by s. 9(1) of Bill 22 violated s. 11(d) of the Charter, because the government failed to respect the independent, effective and objective process -- the JCC -- for setting judicial remuneration which was already operating in Manitoba. Moreover, at least for the 1994-95 financial year, s. 9(1)(b) effectively precluded the future involvement of the JCC. Although Manitoba may have faced serious economic difficulties in the time period preceding the enactment of Bill 22, the evidence does not establish that it faced sufficiently dire and exceptional circumstances to warrant the suspension of the involvement of the JCC. Since Manitoba has offered no justification for the circumvention of the JCC before imposing the salary reduction on Provincial Court judges, the effective suspension of the operation of the JCC is not justified under s. 1 of the Charter. The phrase "as a judge of The Provincial Court or" should be severed from s. 9(1) of Bill 22 and the salary reduction imposed on the Provincial Court judges declared to be of no force or effect. Even though Bill 22 is no longer in force, that does not affect the fully retroactive nature of this declaration of invalidity. Mandamus should be issued directing the Manitoba government to perform its statutory duty, pursuant to s. 11.1(6) of The Provincial Court Act, to implement the report of the standing committee of the provincial legislature, which had been approved by the legislature. If the government persists in its decision to reduce the salaries of Provincial Court judges, it must remand the matter to the JCC. Only after the JCC has issued a report, and the statutory requirements laid down in s. 11.1 of The Provincial Court Act have been complied with, is it constitutionally permissible for the legislature to reduce the salaries of the Provincial Court judges.

The Manitoba government also violated the judicial independence of the Provincial Court by attempting to engage in salary negotiations with the Provincial Judges Association. The purpose of these negotiations was to set salaries without recourse to the JCC. Moreover, when the judges would not grant the government an assurance that they would not launch a constitutional challenge to Bill 22, the government threatened to abandon a joint recommendation. The surrounding circumstances indicate that the Association was not a willing participant and was effectively coerced into these negotiations. No matter how one-sided, however, it was improper for government and the judiciary to engage in salary negotiations. The expectations of give and take, and of threat and counter-threat, are fundamentally at odds with judicial independence. It raises the prospect that the courts will be perceived as having altered the manner in which they adjudicate cases, and the extent to which they will protect and enforce the Constitution, as part of the process of securing the level of remuneration they consider appropriate. The attempted negotiations between the government and the judiciary were not authorized by a legal rule and thus are incapable of being justified under s. 1 of the Charter because they are not prescribed by law.

Finally, the Manitoba government infringed the administrative independence of the Provincial Court by closing it on a number of days. It was the executive, in ordering the withdrawal of court staff, pursuant to s. 4 of Bill 22, several days before the Chief Judge announced the closing of the Provincial Court, that shut down the court. Section 4 is therefore unconstitutional. Even if the trial judge had been right to conclude that the Chief Judge retained control over the decision to close the Provincial Court throughout, there would nevertheless have been a violation of s. 11(d), because the Chief Judge would have exceeded her constitutional authority when she made that decision. Control over the sittings of the court falls within the administrative independence of the judiciary. Administrative independence is a characteristic of judicial independence which generally has a collective or institutional dimension. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, important decisions regarding administrative independence cannot be made by the Chief Judge alone. The decision to close the Provincial Court was precisely this kind of decision. Manitoba has attempted to justify the closure of the Provincial Court solely on the basis of financial considerations, and for that reason, the closure of the court cannot be justified under s. 1. Although reading down s. 4 of Bill 22 to the extent strictly necessary would be the normal solution in a case like this, this is difficult in relation to violations of s. 11(d) because, unlike other Charter provisions, s. 11(d) requires that judicial independence be secured by "objective conditions or guarantees". To read down s. 4 to its proper scope would in effect amount to reading in those objective conditions and guarantees. This would result in a fundamental rewriting of the legislation. If the Court, however, were to strike down s. 4 in its entirety, the effect would be to prevent its application to all those employees of the Government of Manitoba who were required to take leave without pay. The best solution in the circumstances is to read s. 4(1) as exempting provincial court staff from it. This is the remedy that best upholds the Charter values involved and will occasion the lesser intrusion on the role of the legislature.

Per La Forest J. (dissenting in part): There is agreement with substantial portions of the majority's reasons but not with the conclusions that s. 11(d) of the Charter prohibits salary discussions between governments and judges, and forbids governments from changing judges' salaries without first having recourse to "judicial compensation commissions". There is also disagreement with the assertion concerning the protection that provincially appointed judges, exercising functions other than criminal jurisdiction, are afforded by virtue of the preamble to the Constitution Act, 1867. Only minimal reference was made to this issue by counsel and, in such circumstances, the Court should avoid making far-reaching conclusions that are not necessary to the case before it. Nevertheless, in light of the importance that will be attached to the majority's views, the following comments are made. At the time of Confederation, there were no enforceable limits on the power of the British Parliament to interfere with the judiciary. By expressing, by way of preamble, a desire to have "a Constitution similar in Principle to that of the United Kingdom", the framers of the Constitution Act, 1867 did not give courts the power to strike down legislation violating the principle of judicial independence. The framers did, however, by virtue of ss. 99-100 of the Constitution Act, 1867, entrench the fundamental components of judicial independence set out in the Act of Settlement of 1701. Because only superior courts fell within the ambit of the Act of Settlement and under "constitutional" protection in

the British sense, the protection sought to be created for inferior courts in the present appeals is in no way similar to anything found in the United Kingdom. Implying protection for judicial independence from the preambular commitment to a British-style constitution, therefore, entirely misapprehends the fundamental nature of that constitution. To the extent that courts in Canada have the power to enforce the principle of judicial independence, this power derives from the structure of Canadian, and not British, constitutionalism. Our Constitution expressly contemplates both the power of judicial review (in s. 52 of the Constitution Act, 1982) and guarantees of judicial independence (in ss. 96-100 of the Constitution Act, 1867 and s. 11(d) of the Charter). Given that the express provisions dealing with constitutional protection for judicial independence have specifically spelled out their application, it seems strained to extend the ambit of this protection by reference to a general preambular statement. It is emphasized that these express protections for judicial independence are broad and powerful. They apply to all superior court and other judges specified in s. 96 of the Constitution Act, 1867 as well as to inferior (provincial) courts exercising criminal jurisdiction. Nothing presented in these appeals suggests that these guarantees are not sufficient to ensure the independence of the judiciary as a whole. Should the foregoing provisions be found wanting, the Charter may conceivably be brought into play.

While salary commissions and a concomitant policy to avoid discussing remuneration other than through the making of representations to commissions may be desirable as matters of legislative policy, they are not mandated by s. 11(d). To read these requirements into that section represents both an unjustified departure from established precedents and a partial usurpation of the provinces' power to set the salaries of inferior court judges pursuant to ss. 92(4) and 92(14) of the Constitution Act, 1867. The guarantee of judicial independence inhering in s. 11(d) redounds to the benefit of the judged, not the judges. Section 11(d) therefore does not grant judges a level of independence to which they feel they are entitled. Rather, it guarantees only that degree of independence necessary to ensure that tribunals exercising criminal jurisdiction act, and are perceived to act, in an impartial manner. Judicial independence must include protection against interference with the financial security of the court as an institution. However, the possibility of economic manipulation arising from changes to judges' salaries as a class does not justify the imposition of judicial compensation commissions as a constitutional imperative. By employing the reasonable perception test, judges are able to distinguish between changes to their remuneration effected for a valid public purpose and those designed to influence their decisions. Although this test applies to all changes to judicial remuneration, different types of changes warrant different levels of scrutiny. Changes to judicial salaries that apply equally to substantially all persons paid from public funds would almost inevitably be considered constitutional. Indeed, a reasonable, informed person would not view the linking of judges' salaries to those of civil servants as compromising judicial independence. Differential increases to judicial salaries would warrant a greater degree of scrutiny, and differential decreases would invite the highest level of review. In determining whether a differential change raises a perception of interference, regard must be had to both the purpose and the effect of the impugned salary change. In considering the effect of differential changes on judicial independence, the question is whether the distinction between judges and other persons paid from public funds amounts to a

"substantial" difference in treatment. Trivial or insignificant differences are unlikely to threaten judicial independence. Finally, in most circumstances, a reasonable, informed person would not view direct consultations between the government and the judiciary over salaries as imperiling judicial independence. If a government uses salary discussions to attempt to influence or manipulate the judiciary, the government's actions will be reviewed according to the same reasonable perception test that applies to salary changes.

Since the governments of P.E.I. and Alberta were not required to have recourse to a salary commission, the wage reductions they imposed on Provincial Court judges as part of an overall public economic measure were consistent with s. 11(d) of the Charter. There is no evidence that the reductions were introduced in order to influence or manipulate the judiciary. A reasonable person would not perceive them, therefore, as threatening judicial independence. As well, since salary commissions are not constitutionally required, the Manitoba government's avoidance of the commission process did not violate s. 11(d). Although Bill 22 treated judges differently from most other persons paid from public funds, there is no evidence that the differences evince an intention to interfere with judicial independence. Differences in the classes of persons affected by Bill 22 necessitated differences in treatment. Moreover, the effect of the distinctions on the financial status of judges vis-à-vis others paid from public monies is essentially trivial. The Manitoba scheme was a reasonable and practical method of ensuring that judges and other appointees were treated equally in comparison to civil servants. A reasonable person would not perceive this scheme as threatening the financial security of judges in any way. However, the Manitoba government's refusal to sign a joint recommendation to the JCC, unless the judges agreed to forego their legal challenge of Bill 22, constituted a violation of judicial independence. The government placed economic pressure on the judges so that they would concede the constitutionality of the planned salary changes. The financial security component of judicial independence must include protection of judges' ability to challenge legislation implicating their own independence free from the reasonable perception that the government might penalize them financially for doing so.

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By Lamer C.J.

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Ontario (Attorney General), [1987] 2 S.C.R. 2; Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148; Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; R. v. Power, [1994] 1 S.C.R. 601; R. v. Lippé, [1991] 2 S.C.R. 114; Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369; R. v. Big M Drug Mart Ltd. (1983), 25 Alta. L.R. (2d) 195, aff'd (1983), 5 D.L.R. (4th) 121, aff'd [1985] 1 S.C.R. 295; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Askov, [1990] 2 S.C.R. 1199; R. v. Collins, [1987] 1 S.C.R. 265; Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084; R. v. Morgentaler, [1993] 3 S.C.R. 463; R. v. Sparrow, [1990] 1 S.C.R. 1075; Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211; Judges v. Attorney-General of Saskatchewan, [1937] 2 D.L.R. 209; Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373; Mahe v. Alberta, [1990] 1 S.C.R. 342; Lowther v. Prince Edward Island (1994), 118 D.L.R. (4th) 665; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Laba, [1994] 3 S.C.R. 965; R. v. Paquette (1987), 38 C.C.C. (3d) 333; R. v. Yes Holdings Ltd. (1987), 40 C.C.C. (3d) 30; Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267; Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69; R. v. Thomsen, [1988] 1 S.C.R. 640; Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177; Schachter v. Canada, [1992] 2 S.C.R. 679; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; R. v. Oakes, [1986] 1 S.C.R. 103; McKinney v. University of Guelph, [1990] 3 S.C.R. 229; Egan v. Canada, [1995] 2 S.C.R. 513; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038.

By La Forest J. (dissenting in part)

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APPEAL and CROSS-APPEAL from a judgment of the Prince Edward Island Supreme Court, Appeal Division (1995), 130 Nfld. & P.E.I.R. 29, 405 A.P.R. 29, 124 D.L.R. (4th)

528, 39 C.P.C. (3d) 241, [1995] P.E.I.J. No. 66 (QL), in the matter of a reference concerning the independence and impartiality of the Provincial Court judges of Prince Edward Island. Appeal allowed in part, La Forest J. dissenting. Cross-appeal allowed in part.

APPEAL from a judgment of the Alberta Court of Appeal (1995), 169 A.R. 178, 97 W.A.C. 178, 31 Alta. L.R. (3d) 190, 100 C.C.C. (3d) 167, [1995] 8 W.W.R. 747, [1995] A.J. No. 610 (QL), dismissing for want of jurisdiction the Crown's appeal from a judgment of the Court of Queen's Bench (1994), 160 A.R. 81, 25 Alta. L.R. (3d) 158, [1995] 2 W.W.R. 469, [1994] A.J. No. 866 (QL), declaring certain sections of the Provincial Court Judges Act of no force or effect. Appeal on issue of jurisdiction allowed. Appeal on constitutional issues allowed in part, La Forest J. dissenting in part.

APPEAL from a judgment of the Manitoba Court of Appeal (1995), 102 Man. R. (2d) 51, 93 W.A.C. 51, 37 C.P.C. (3d) 207, 125 D.L.R. (4th) 149, 30 C.R.R. (2d) 326, [1995] 5 W.W.R. 641, [1995] M.J. No. 170 (QL), allowing the Crown's appeal and dismissing the Provincial Court judges' cross-appeal from a judgment of the Court of Queen's Bench (1994), 98 Man. R. (2d) 67, 30 C.P.C. (3d) 31, [1994] M.J. No. 646 (QL), dismissing the Provincial Court judges' application to have The Public Sector Reduced Work Week and Compensation Management Act declared unconstitutional, but reading down the legislation. Appeal allowed, La Forest J. dissenting in part.

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The judgment of Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by

THE CHIEF JUSTICE:--

I. Introduction

1 The four appeals handed down today -- Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (No. 24508), Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island (No. 24778), R. v. Campbell, R. v. Ekmecic and R. v. Wickman (No. 24831), and Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice) (No. 24846) -- raise a range of issues relating to the independence of provincial courts, but are united by a single issue: whether and how the guarantee of judicial independence in s. 11(d) of the Canadian Charter of Rights and Freedoms restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. Moreover, in my respectful opinion, they implicate the broader question of whether the constitutional home of judicial independence lies in the express provisions of the Constitution Acts, 1867 to 1982, or exterior to the sections of those documents. I am cognizant of the length of these reasons. Although it would have been possible to issue a set of separate but interrelated judgments, since many of the parties intervened in each other's cases, I find it convenient to deal with these four appeals in one set of reasons. Given the length and complexity of these reasons, I thought it would be useful and convenient to provide a summary, which is found at para. 287.

2 The question of judicial independence, not only under s. 11(d) of the Charter, but also under ss. 96-100 of the Constitution Act, 1867, has been the subject of previous decisions of this Court. However, the aspect of judicial independence which is engaged by the impugned reductions in salary -- financial security -- has only been dealt with in any depth by Valente v. The Queen, [1985] 2 S.C.R. 673, and Beauregard v. Canada, [1986] 2 S.C.R. 56. The facts of the current appeals require that we address questions which were left unanswered by those earlier decisions.

3 Valente was the first decision in which this Court gave meaning to s. 11(d)'s guarantee of judicial independence and impartiality. In that judgment, this Court held that s. 11(d) encompassed a guarantee, inter alia, of financial security for the courts and tribunals which come within the scope of that provision. This Court, however, only turned its mind to the nature of financial security which is required for individual judges to enjoy judicial independence. It held that for individual judges to be independent, their salaries must be secured by law, and not be subject to arbitrary interference by the executive. The question which arises in these appeals, by contrast, is the content of the collective or institutional dimension of financial security for judges of provincial courts, which was not at issue in Valente. In particular, I will address the institutional arrangements which are comprehended by the guarantee of collective financial security.

4 Almost a year after Valente was heard, but before it had been handed down, this Court heard the appeal in Beauregard. In that case, the Court rejected a constitutional

challenge to federal legislation establishing a contributory pension scheme for superior court judges. It had been argued that the pension scheme amounted to a reduction in the salaries of those judges during their term of office, and for that reason contravened judicial independence and was beyond the powers of Parliament. Although the Court found that there had been no salary reduction on the facts of the case, the judgment has been taken to stand for the proposition that salary reductions which are "non-discriminatory" are not unconstitutional.

5 There are four questions which arise from Beauregard, and which are central to the disposition of these appeals. The first question is what kinds of salary reductions are consistent with judicial independence -- only those which apply to all citizens equally, or also those which only apply to persons paid from the public purse, or those which just apply to judges. The second question is whether the same principles which apply to salary reductions also govern salary increases and salary freezes. The third question is whether Beauregard, which was decided under s. 100 of the Constitution Act, 1867, a provision which only guarantees the independence of superior court judges, applies to the interpretation of s. 11(d), which protects a range of courts and tribunals, including provincial court judges. The fourth and final question is whether the Constitution -- through the vehicle of s. 100 or s. 11(d) -- imposes some substantive limits on the extent of permissible salary reductions for the judiciary.

6 Before I begin my legal analysis, I feel compelled to comment on the unprecedented situation which these appeals represent. The independence of provincial court judges is now a live legal issue in no fewer than four of the ten provinces in the federation. These appeals have arisen from three of those provinces -- Alberta, Manitoba, and Prince Edward Island ("P.E.I.") -- in three different ways. In Alberta, three accused persons challenged the constitutionality of their trials before judges of the Provincial Court; in Manitoba, the Provincial Judges Association proceeded by way of civil action; in P.E.I., the provincial cabinet brought two references. In British Columbia, the provincial court judges association has brought a civil suit on a similar issue. I hasten to add that that latter case is not before this Court, and I do not wish to comment on its merits. I merely refer to it to illustrate the national scope of the question which has come before us in these appeals.

7 Although the cases from the different provinces are therefore varied in their origin, taken together, in my respectful view, they demonstrate that the proper constitutional relationship between the executive and the provincial court judges in those provinces has come under serious strain. Litigation, and especially litigation before this Court, is a last resort for parties who cannot agree about their legal rights and responsibilities. It is a very serious business. In these cases, it is even more serious because litigation has ensued between two primary organs of our constitutional system -- the executive and the judiciary -- which both serve important and interdependent roles in the administration of justice.

8 The task of the Court in these appeals is to explain the proper constitutional relationship between provincial court judges and provincial executives, and thereby assist in removing the strain on this relationship. The failure to do so would undermine "the web of institutional relationships... which continue to form the backbone of our constitutional system" (Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, at para. 3).

9 Although these cases implicate the constitutional protection afforded to the financial security of provincial court judges, the purpose of the constitutional guarantee of financial security -- found in s. 11(d) of the Charter, and also in the preamble to and s. 100 of the Constitution Act, 1867 -- is not to benefit the members of the courts which come within the scope of those provisions. The benefit that the members of those courts derive is purely secondary. Financial security must be understood as merely an aspect of judicial independence, which in turn is not an end in itself. Judicial independence is valued because it serves important societal goals -- it is a means to secure those goals.

10 One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule. It is with these broader objectives in mind that these reasons, and the disposition of these appeals, must be understood.

II. Facts

A. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

11 These two cases, which were heard together in these proceedings, arose out of two references which were issued by the Lieutenant Governor in Council of P.E.I. to the Appeal Division of the P.E.I. Supreme Court.

12 The first reference, Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, was issued on October 11, 1994 by Order in Council No. EC646/94, pursuant to s. 18 of the Supreme Court Act, R.S.P.E.I. 1988, c. S-10, and came about as a result of reductions in the salaries of judges of the P.E.I. Provincial Court by the Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51. This statute reduced the salaries of the judges and others paid from the public purse in P.E.I. by 7.5 percent effective May 17, 1994. The Act was part of the province's plan to reduce its budget deficit. Following the pay reduction, numerous accused persons challenged the constitutionality of proceedings before them in the Provincial Court, alleging that as a result of the salary reductions, the court had lost its status as an independent and impartial tribunal under s. 11(d) of the Charter. In response to the uncertainty created by these challenges, the provincial government issued a reference to elucidate the constitutional contours of the power of the provincial legislature to decrease, increase or otherwise adjust the remuneration of judges of the Provincial Court, and to determine whether the judges of the Provincial Court still enjoyed a sufficient degree of financial security for the purposes of s. 11(d). The Appeal Division rendered judgment on December 16, 1994: (1994), 125 Nfld. & P.E.I.R. 335, 389 A.P.R. 335, 120 D.L.R. (4th) 449, 95 C.C.C. (3d) 1, 33 C.P.C. (3d) 76, [1994] P.E.I.J. No. 123 (QL). For present purposes, it is sufficient to simply state that the court found the judges of the Provincial Court to be independent.

13 The second reference, Reference re Independence and Impartiality of Judges of the

Provincial Court of Prince Edward Island, was issued on February 13, 1995, by Order in Council No. EC132/95, and arose out of the controversy surrounding the first reference. Despite the Appeal Division's decision in the first reference, accused persons continued to raise challenges based on s. 11(d) to the constitutionality of the P.E.I. Provincial Court. In particular, Plamondon Prov. Ct. J. (formerly Chief Judge) issued a judgment in which he strongly criticized the Appeal Division's decision, and refused to follow it: R. v. Avery, [1995] P.E.I.J. No. 42 (QL).

14 The second reference was much more comprehensive in nature, and contained a series of questions concerning all three elements of the judicial independence of the P.E.I. Provincial Court: financial security (the issue in the first reference), security of tenure, and institutional (or administrative) independence. The Appeal Division rendered judgment on May 4, 1995, and answered most of the questions to the effect that the Provincial Court was independent and impartial: (1995), 130 Nfld. & P.E.I.R. 29, 405 A.P.R. 29, 124 D.L.R. (4th) 528, 39 C.P.C. (3d) 241, [1995] P.E.I.J. No. 66 (QL). The appellants (who are the same appellants as in the first reference) appeal from this holding. However, the court did hold that Provincial Court judges lacked a sufficient degree of security of tenure to meet the standard set by s. 11(d) of the Charter. The respondent Crown cross-appeals from this aspect of the judgment.

15 Because of their length and complexity, I have chosen to append the questions put in the two P.E.I. references as Appendices "A" and "B".

B. R. v. Campbell, R. v. Ekmecic and R. v. Wickman

16 This appeal arises out of three separate and unrelated criminal proceedings commenced against the respondents Shawn Carl Campbell, Ivica Ekmecic, and Percy Dwight Wickman in the province of Alberta. Campbell was charged with unlawful possession of a prohibited weapon, contrary to s. 90(1) of the Criminal Code, R.S.C., 1985, c. C-46, and subsequently, in connection with the charge of unlawful possession, with failing to attend court in contravention of s. 145(5) of the Criminal Code. Wickman was charged with two different offences -- operating a motor vehicle while his ability to operate that vehicle was impaired by alcohol, in violation of s. 253(a) of the Criminal Code, and operating a motor vehicle after having consumed alcohol in such a quantity that his blood alcohol level exceeded 80 milligrams, in contravention of s. 253(b) of the Criminal Code. Ekmecic was charged with unlawful assault contrary to s. 266 of the Criminal Code.

17 The three respondents pled not guilty, and the Crown elected to proceed summarily in all three cases. The accused appeared, in separate proceedings, before the Alberta Provincial Court. At various points in their trials, they each brought a motion before the Alberta Court of Queen's Bench, arguing that the Provincial Court was not an independent and impartial tribunal for the purposes of s. 11(d). The trials for Campbell and Ekmecic were both adjourned before they commenced. Wickman, by contrast, moved for and was granted an adjournment after the Crown had completed its case and six witnesses had testified for the defence, including the accused. Amongst the three of them, the respondents sought orders in the nature of prohibition, certiorari, declarations, and stays.

18 The allegations of unconstitutionality, inter alia, dealt with a 5 percent reduction in the salaries of judges of the Provincial Court brought about by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, and s. 17(1) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, which is the statutory basis for the aforementioned regulation. The 5 percent reduction was accomplished by a 3.1 percent direct salary reduction, and by 5 unpaid days leave of absence. The respondents also attacked the constitutionality of changes to the judges' pension plan by the Provincial Judges and Masters in Chambers Pension Plan Amendment Regulation, Alta. Reg. 29/92, and the Management Employees Pension Plan, Alta. Reg. 367/93, which respectively had the effect of reducing the base salary for calculating pension benefits, and limiting cost of living increases to 60 percent of the Consumer Price Index. In addition, the respondents challenged the constitutionality of the power of the Attorney General to designate the court's sitting days and judges' place of residence. McDonald J., on the motions, also put at issue the process for disciplining Provincial Court judges and the grounds for removal of judges of the Provincial Court.

19 Finally, and in large part, the constitutional challenges seem to have been precipitated by the remarks of Premier Ralph Klein during a radio interview. Mr. Klein stated that a judge of the provincial youth court, who had indicated that he would not sit in protest over his salary reduction, should be "very, very quickly fired".

20 All three motions were heard by McDonald J., who found that the Alberta Provincial Court was no longer independent: (1994), 160 A.R. 81, 25 Alta. L.R. (3d) 158, [1995] 2 W.W.R. 469, [1994] A.J. No. 866 (QL). However, he obviated the need for a stay by issuing a declaration that provincial legislation and regulations which were the source of the s. 11(d) violation were of no force or effect. As a result, although the Crown lost on the constitutional issue, it won on the issue of the stay. The Crown appealed to the Alberta Court of Appeal, which held that it did not have jurisdiction to hear the appeals, and therefore did not consider the merits of the arguments: (1995), 169 A.R. 178, 97 W.A.C. 178, 31 Alta. L.R. (3d) 190, 100 C.C.C. (3d) 167, [1995] 8 W.W.R. 747, [1995] A.J. No. 610 (QL). The Crown now appeals to this Court, both on the question of the Court of Appeal's jurisdiction and the merits of the constitutional issue. I stated constitutional questions on June 26, 1996. These questions can be found in Appendix "C".

C. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

21 This appeal deals with reductions to the salaries of judges of the Manitoba Provincial Court, by The Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, otherwise known as "Bill 22". Bill 22 led to the reduction of the salaries of a large number of public sector employees, including employees of Crown corporations, hospitals, personal care homes, child and family services agencies, municipalities, school boards, universities and colleges. The legislation was passed as part of a plan to reduce the province's deficit. Bill 22 provided for different treatment of the several classes of employees to which it applied. It provided that public sector employers "may" require employees to take unpaid days of leave. However, judges of the Provincial Court, along with persons who received remuneration as members of a Crown agency or a board, commission or committee to which they were appointed by the government, received a

mandatory reduction of 3.8 percent in the 1993-94 fiscal year. For the next fiscal year, Bill 22 provided that judges' salaries were to be reduced

> by an amount that is generally equivalent to the amount by which the wages of employees under a collective agreement with Her Majesty in right of Manitoba are reduced in the same period as a result of a requirement to take days or portions of days of leave without pay in that period.

In the second year, the pay reduction of judges of the Provincial Court could have been achieved by days of leave without pay. Similar provisions governed the salary reduction for members of the provincial legislature. By contrast, medical practitioners were dealt with by a different set of provisions in Bill 22, which fixed the total payments for 1993-94 at 98 percent of the total payments in the 1992-93 fiscal year, and payments for the 1994-95 year by an amount obtained by multiplying the payment for the 1993-94 year by a factor laid down in regulation. Bill 22 was time-limited legislation, and is no longer in effect.

22 The Manitoba Provincial Judges Association launched a constitutional challenge to the salary cut, alleging that it infringed their judicial independence as protected by s. 11(d) of the Charter. They also argued that the salary reduction was unconstitutional because it effectively suspended the operation of the Judicial Compensation Committee, a body created by The Provincial Court Act, R.S.M. 1987, c. C275, whose task it is to issue reports on judges' salaries to the provincial legislature. Furthermore, they alleged that the government had interfered with judicial independence by ordering the withdrawal of court staff and personnel on unpaid days of leave ("Filmon Fridays"), which in effect shut down the Provincial Court on those days. Finally, they claimed that the government had exerted improper pressure on the Association in the course of salary discussions to desist from launching this constitutional challenge, which also allegedly infringed their judicial independence. The trial judge held that the salary reduction violated s. 11(d), but read down Bill 22 so that it only provided for a temporary suspension in compensation, with retroactive payment due after the Bill expired: (1994), 98 Man. R. (2d) 67, 30 C.P.C. (3d) 31, [1994] M.J. No. 646 (QL). The Court of Appeal rejected all the constitutional challenges: (1995), 102 Man. R. (2d) 51, 93 W.A.C. 51, 37 C.P.C. (3d) 207, 125 D.L.R. (4th) 149, 30 C.R.R. (2d) 326, [1995] 5 W.W.R. 641, [1995] M.J. No. 170 (QL). The Judges of the Provincial Court, as represented by the Association, now appeal to this Court. I stated constitutional questions on June 18, 1996. These questions can be found in Appendix "D".

III. Decisions Below

A. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

(1) Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island: Decision of the Appeal Division of the P.E.I. Supreme Court (1994), 125 Nfld. & P.E.I.R. 335

23 The Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island contains two questions; the text of the reference can be found in Appendix "A". The first question asks if the provincial legislature has the power to decrease, increase, or otherwise adjust the remuneration of judges of the P.E.I. Provincial Court either as part of an "overall public economic measure" or "in certain circumstances established by law". If the first question is answered in the affirmative, the second question must be answered. That question asks whether judges of the Provincial Court enjoy sufficient financial security for that court to be an independent and impartial tribunal for the purposes of s. 11(d) of the Charter and any other such sections as may be applicable.

24 The judgment of the court was given by Mitchell J.A., who answered both questions in the affirmative. He began his judgment by sketching the factual background to the reference -- that the salary reduction of judges of the Provincial Court occurred at a time when the provincial government "was faced with a severe deficit problem and saw an urgency to cutting its spending so as to get the Province's finances into acceptable order" (p. 337). Accordingly, he characterized the Public Sector Pay Reduction Act, the legislation whereby judges' salaries had been reduced, as a deficit reduction measure.

25 Mitchell J.A. then proceeded to canvass this Court's judgments in Valente, Beauregard, and R. v. Généreux, [1992] 1 S.C.R. 259, to draw out the proposition that the provincial legislature had the authority to reduce the salary and benefits of Provincial Court judges if three conditions were met: the reduction was part of an "overall public economic measure", the reduction did not "remove the basic degree of financial security which is an essential condition" for judicial independence, and the reduction did not amount to "arbitrary interference with the judiciary in the sense that it [was] being enacted for an improper or colourable purpose, or that it discriminate[d] against judges vis-à-vis other citizens" (p. 340). A public economic measure, he held, could include a general pay reduction for all those who hold public office, including judges. Furthermore, the change to judges' salaries could not alter the basic requirement of financial security, that salaries be established by law and be beyond arbitrary interference by the government in a manner that could affect the independence of the individual judge.

26 Relying on this analysis, Mitchell J.A. gave the answer of a "qualified yes" to question 1. Legislatures were constitutionally competent to adjust judicial salaries, as long as they adhered to the requirements of s. 11(d).

27 Mitchell J.A. then turned to question 2, but characterized it as dealing not with the level of salary that judges receive, but rather with both the means which the provincial legislature had employed to reduce that salary and the reasons for that reduction. He concluded that judges of the P.E.I. Provincial Court were still independent for the purposes of s. 11(d), because of the circumstances surrounding the adoption of the Public Sector Pay Reduction Act. The Act had reduced their salaries as part of an overall public economic measure designed to meet a legitimate government objective. It was non-discriminatory in that it applied generally to virtually everyone paid from the public purse. Furthermore, after the salary reduction, the right of judges to their salaries remained established by law and was beyond arbitrary interference by the government. Finally, there was no evidence that the Act had been enacted for an improper or colourable purpose.

Mitchell J.A. therefore answered "yes" to question 2.

(2) Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island: Decision of the Appeal Division of the P.E.I. Supreme Court (1995), 130 Nfld. & P.E.I.R. 29

(a) Introduction

28 This reference consists of eight questions, which can be found in Appendix "B". In this paragraph, I will outline the structure and content of these questions. The first question is framed in general terms, and asks the court to determine whether judges of the P.E.I. Provincial Court have sufficient security of tenure, institutional independence, and financial security to constitute an independent and impartial tribunal for the purposes of s. 11(d) of the Charter. The next three questions (questions 2, 3, and 4) ask whether specific provisions of the legislation governing Provincial Court judges (the Provincial Court Act, R.S.P.E.I. 1988, c. P-25), particular amendments thereto, and the organization and operation of the provincial court system in the province undermine the security of tenure (question 2), institutional independence (question 3), and financial security (question 4) of Provincial Court judges. Question 5 is a residual question, which asks if there is any other factor or combination of factors which undermines the independence of judges of the P.E.I. Provincial Court. Question 6 asks whether s. 11(d) of the Charter requires Provincial Court judges to have the same level of remuneration as superior court judges. Question 7 is predicated upon an affirmative answer to question 6, and asks in what particular respect or respects it would be necessary to provide the same level of remuneration to the two groups of judges. Question 8 asks whether the violations of s. 11(d), if any, can be justified under s. 1 of the Charter.

(b) Statement of Facts

29 Appended to the second reference is a lengthy statement of facts. According to the terms of the reference, this Court is expected to have regard to this statement of facts in answering questions 1, 2, 3, 4 and 5. It is therefore necessary to give an account of what that statement of facts says.

30 The statement of facts begins by adverting to the concern about the state of judicial independence in the P.E.I. Provincial Court, following the enactment of the Public Sector Pay Reduction Act. The degree of concern is indicated by the fact that over 70 cases before the Provincial Court were adjourned to allow defendants to apply to the Supreme Court of P.E.I. for a determination of the independence of Provincial Court judges. At the time of the issuing of the reference, 20 such cases were pending before the P.E.I. Supreme Court.

31 The statement of facts then proceeds to explain how judges of the P.E.I. Provincial Court are remunerated. At the time of this reference, the three members of the Provincial Court of P.E.I. were paid an annual salary of $98,243. The statement of facts also contrasts the salaries of Provincial Court judges with the per capita income averages across Canada and in P.E.I., and provides some data on income distribution within a

number of provinces, including P.E.I. These statistics convey the general impression that Provincial Court judges in P.E.I., even after the salary reductions, are paid very well relative to the population as a whole, particularly in P.E.I.

32 The statement of facts then moves on to discuss the manner in which the salaries of judges of the Provincial Court of P.E.I. are set. Until the mid-1980s, the salaries of Provincial Court judges were established by the Executive Council (i.e., the cabinet) of P.E.I., after informal consultations by the Attorney General and the Deputy Attorney General with the judges. It was customary for Provincial Court judges to receive the same salary increases as senior members of the public sector, whose salary increases were in turn generally "in line" with those increases received by other public sector employees. However, in 1986-87, the government commissioned a report by Professor Wade MacLauchlan to examine the remuneration of Provincial Court judges. The report's recommendation that Provincial Court judges' salaries should be equal to the average of provincial court judges' salaries across Canada, was implemented through an amendment to the Provincial Court Act in 1988 (An Act to Amend the Provincial Court Act, S.P.E.I. 1988, c. 54).

33 The statement of facts then goes on to discuss how the government arrived at the conclusion that it should reduce its provincial deficit. The basic thrust is that the province's annual deficit in the early 1990s had been significantly greater than expected. As a result, the province had sought to control the provincial deficit through salary reductions, culminating in the Public Sector Pay Reduction Act. The statement notes that in the years before the enactment of the Act, there had been discussions between the judges of the P.E.I. Provincial Court and the government in which the judges agreed to a pay reduction and then a salary freeze. As well, immediately before the enactment of the Act, the government had indicated a willingness to discuss alternative measures whereby the reduction in remuneration envisioned by the Act could be achieved with the judges. The statement acknowledges that Chief Judge Plamondon indicated his desire to meet with the government; however, for reasons not explained, the requested meeting did not take place.

34 The next portion of the statement of facts seeks to explain the role of the provincial government in the administration of the P.E.I. Provincial Court. The picture which emerges is that administrators make many of the important day-to-day decisions at the court, including those which directly affect the working conditions of judges (e.g., the hiring, dismissal, setting of work hours, and management of sick leaves of staff), and also ensure that the Provincial Court operates within a budget set by the province. However, Provincial Court judges have discretion with respect to the hours of their work, holidays and time off, continuing legal education, and the setting and maintaining control and operation of their own schedules and dockets. Collectively, they assign dockets, arraignment days and courtrooms for cases. As well, a government official, the Director of Legal and Judicial Services, represents the Attorney General on a committee consisting of the Chief Justices of the P.E.I. Supreme Court Appeal and Trial Divisions and the Chief Judge of the Provincial Court. This committee meets periodically to discuss general administration and budgeting issues for the court system.

35 The last portion of the statement of facts sheds some light on the role of then Chief Judge Plamondon. It appears that Chief Judge Plamondon sought and was granted intervener status for the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, and retained counsel. However, although his legal fees were initially paid for by the Legal Aid Plan, which assured him that it would continue to do so, he was subsequently denied legal aid, apparently according to the direct orders of the Attorney General of P.E.I. A motion for government funded counsel before the Appeal Division failed. The then Chief Judge subsequently withdrew as an intervener in that reference. He has since retired.

(c) Question 1

36 As I mentioned above, question 1 asks in general terms if judges of the P.E.I. Provincial Court enjoy sufficient security of tenure, financial security, and administrative independence for the purposes of s. 11(d) of the Charter. Mitchell J.A., speaking for the Appeal Division, answered "no", but solely on the ground that Provincial Court judges lacked sufficient security of tenure. The lack of security of tenure arose as a result of s. 10 of the Provincial Court Act, which provided for the removal of Provincial Court judges by the Lieutenant Governor in Council. According to Mitchell J.A., the effect of the provision was to allow the removal of a judge without an independent inquiry to establish cause, in circumstances where a judge was suspended because the Lieutenant Governor in Council had "reason to believe that a judge" was "guilty of misbehaviour or" was "unable to perform his duties properly", and the judge did not request an inquiry. Relying on Valente, Mitchell J.A. held that s. 10 undermined judicial independence, which requires that a judge be removable only for cause, and in all circumstances that the cause be subject to independent review.

(d) Question 2

37 Question 2 raises a series of questions about security of tenure. Mitchell J.A. grouped questions 2(a), (d), and (e) together, and answered "no" to all three questions. Question 2(a) asks whether the pension provision in s. 8(1)(c) of the Provincial Court Act infringes the judges' security of tenure; question 2(d) asks whether s. 12(2) of the Act, which confers a discretion on the Lieutenant Governor in Council to grant a leave of absence to a Provincial Court judge, infringes security of tenure; question 2(e) asks the same question, but with respect to a similar provision of the Act which governed sabbatical leaves (s. 13). In answering in the negative, Mitchell J.A. stated (at p. 51) that "[s]imilar and, in some instances, even less ideal measures were in issue in Valente" but were nevertheless upheld by this Court.

38 Mitchell J.A. also answered "no" to questions 2(b) and 2(c). Question 2(b) asks whether security of tenure had been affected by changes to the remuneration of P.E.I. Provincial Court judges; Mitchell J.A. held that this question had already been answered in the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island. Question 2(c) queries the constitutionality of the provisions in the Provincial Court Act governing the disciplining and removal of Provincial Court judges, which Mitchell J.A. discussed under question 1. As a result, he held that this question had already been

addressed.

39 Question 2(f) asks whether future alterations to the pension provisions in s. 8 of the Provincial Court Act, which increased or decreased pension benefits, changed the contributions payable by the government and judges of the P.E.I. Provincial Court, increased or decreased the years of service required to be entitled to a pension, or increased or decreased the indexing of pension benefits or provided for the use of some alternative index, would infringe upon security of tenure. Mitchell J.A. held, relying on Beauregard, that unless such alterations were enacted for an improper or colourable purpose, or were discriminatory vis-à-vis other citizens, they would be constitutional.

40 Finally, Mitchell J.A. gave a negative answer to question 2(g), which asks whether setting the salaries of Provincial Court judges in P.E.I. at the average of the remuneration of provincial court judges in the other Atlantic provinces (Nova Scotia, New Brunswick, and Newfoundland) violates security of tenure. He simply stated that this method for calculating remuneration had no bearing on judicial independence and impartiality.

(e) Question 3

41 Question 3 poses a series of questions regarding the institutional independence of the P.E.I. Provincial Court. He grouped questions 3(a), (b), (c), (d), (f), and (g), together, and answered "no", because they addressed matters which did not bear immediately and directly on the court's adjudicative function. These questions ask whether the following matters undermine the institutional independence of the Provincial Court: the location of the Provincial Courts in relation to the offices of superior courts, legal aid offices, Crown Attorneys' offices, and the offices of the representatives of the Attorney General (question 3(a)); the fact that the judges do not administer the budget of the court (question 3(b)); the designation of a place of residence of a particular Provincial Court judge (question 3(c)); communication between a Provincial Court judge, the Director of Legal and Judicial Services in the Office of the Attorney General or the Attorney General on issues relating to the administration of justice (question 3(d)); the denial of legal aid to Chief Judge Plamondon in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (question 3(f)); and a regulation enacted pursuant to the Public Sector Pay Reduction Act in order to clarify that Provincial Court judges did not fall within those provisions of the Act which allow public sector employees to negotiate alternatives to simple pay reductions (question 3(g)).

42 Mitchell J.A. also answered question 3(e) in the negative. That question asks whether the vacancy of the position of Chief Judge undermined the institutional independence of the P.E.I. Provincial Court. Mitchell J.A. held that as long as the duties of the Chief Judge which bore upon the administrative independence of the court were not exercised by persons other than judges of that court, institutional independence was not compromised.

(f) Question 4

43 Question 4 poses a series of questions regarding the financial security of judges of

the Provincial Court. Mitchell J.A. answered question 4(a) in the negative, referring to his judgment in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island. This question asks whether a general pay reduction for all persons paid from the public purse which is enacted by the provincial legislature infringes on the financial security of the members of the court.

44 Mitchell J.A. then grouped questions 4(b), (c), (d), (e), (f), (g), (i), (j) and (k) together, and answered "no" to all of them, merely stating that he was relying on the authorities cited by counsel, including Valente, and MacKeigan v. Hickman, [1989] 2 S.C.R. 796. These questions ask about the effect on the financial security of the P.E.I. Provincial Court of: a remuneration freeze for all persons paid from the public purse, including Provincial Court judges (question 4(b)); the fact that Provincial Court judges' salaries are not automatically adjusted annually to account for inflation (question 4(c)); the ability of Provincial Court judges to negotiate any aspect of their remuneration (question 4(d)); the fact that the formula for establishing the salaries of Provincial Court judges allows the legislative assemblies of other provinces to establish the salaries of P.E.I. Provincial Court judges (question 4(e)); the conferral of a discretion by s. 12(2) of the Provincial Court Act on the Lieutenant Governor in Council to grant a leave of absence for illness to Provincial Court judges (question 4(f)); a provision conferring a similar discretion to provide sabbatical leave (question 4(g)); the amendment of the formula to determine the salaries of Provincial Court judges by the Act to Amend the Provincial Court Act, S.P.E.I. 1994, c. 49, which provides that the salary of judges of the P.E.I. Provincial Court shall be the average of the salaries of provincial court judges in Nova Scotia, New Brunswick and Newfoundland on April 1 of the preceding year (question 4(i)); the denial of legal aid to Chief Judge Plamondon for his intervention in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (question 4(j)); and a regulation enacted pursuant to the Public Sector Pay Reduction Act in order to clarify that Provincial Court judges did not fall within those provisions of the Act which allow public sector employees to negotiate alternatives to simple pay reductions (question 4(k)).

45 Finally, Mitchell J.A. held that he had already answered question 4(h), which deals with potential alterations to pension provisions identical to those raised by question 2(f).

(g) Question 5

46 Mitchell J.A. declined to answer this question, which asks if there is any other factor or combination of factors which undermines the independence of judges of the P.E.I. Provincial Court, because it was too nonspecific.

(h) Question 6

47 Question 6 asks whether s. 11(d) of the Charter requires that provincial court judges be entitled to the same level of remuneration as superior court judges. Simply stating that he was relying on Valente and Généreux, Mitchell J.A. answered "no".

(i) Question 7

48 Question 7 is predicated on an affirmative answer to question 6. Given his answer to question 6, Mitchell J.A. found it unnecessary to answer this question.

(j) Question 8

49 Question 8 asks whether the infringements of s. 11(d) of the Charter, if there are any, are justified under s. 1. Mitchell J.A. held that they could not be, because to try a person charged with an offence before a tribunal which was not independent and impartial "would be completely incompatible with the notion of a free and democratic society" (p. 55).

B. R. v. Campbell, R. v. Ekmecic and R. v. Wickman

(1) Decision of the Court of Queen's Bench of Alberta (1994), 160 A.R. 81

50 The Alberta Court of Queen's Bench, per McDonald J., addressed all three aspects of judicial independence: financial security, security of tenure, and institutional independence. McDonald J. found that each of these aspects of judicial independence was lacking in the Alberta Provincial Court. I confine my description of his judgment to those issues which were pursued on appeal.

(a) Financial Security

51 McDonald J. first considered the constitutional contours of s. 11(d), as they pertained to reductions in the salaries of judges. His analysis proceeded in three stages. First, relying on the preamble to and s. 100 of the Constitution Act, 1867 he concluded that the salaries of superior court judges, once ascertained and established, may not be reduced, either through a direct reduction or by the failure to adjust those salaries to keep pace with inflation, and that the same level of protection should apply to provincial court judges. Second, he arrived at the same conclusion by reference to the purposes of s. 11(d). Third, despite the general rule against reductions in judges' salaries, he accepted that judges' salaries could be reduced by an "overall economic measure".

52 McDonald J. held that the salaries of superior court judges could not be reduced, either through a direct reduction or by the failure to maintain the real value of those salaries, on the basis of a number of different sources. One source was the British Constitution. In his opinion, the principle that judges' salaries could not be reduced was a constitutional rule in the United Kingdom, which had been established by the Act of Settlement of 1701, 12 & 13 Will. 3, c. 2, and the Commissions and Salaries of Judges Act of 1760, 1 Geo. 3, c. 23, and which had in turn become part of the Canadian Constitution through the operation of the preamble to the Constitution Act, 1867, which states that Canada has a constitution "similar in Principle to that of the United Kingdom".

53 Another source was s. 100 of the Constitution Act, 1867. McDonald J. made two arguments here. His first argument relied on the text of s. 100, which provides that superior court judges' salaries shall be "fixed" by Parliament. McDonald J. interpreted "fixed" to be equivalent to "cannot be reduced" (p. 122). He buttressed this argument with a second --

that Beauregard had already held that judges' salaries could not be reduced.

54 Having concluded that superior court judges' salaries could not be reduced, McDonald J. held that the same rule should apply to provincial court judges' salaries. He reasoned that if provincial court judges received a lesser degree of constitutional protection, accused persons who appeared before them might have the impression that they were receiving second-class justice. McDonald J. appreciated the difficulty with this holding -- that it contradicts language in Valente which suggests that s. 11(d) does not automatically provide the same degree of protection for the independence of provincial court judges as the judicature provisions of the Constitution Act, 1867, provide to superior court judges. McDonald J., however, confined the scope of Valente, holding that it had only considered the means whereby judges' salaries are set, not the substantive issue of what level of remuneration judges are entitled to.

55 McDonald J. also arrived at the conclusion that the salaries of provincial court judges could not be reduced by an entirely different route -- through a purposive analysis of s. 11(d). In his view, there are two purposes behind the guarantee of judicial independence in s. 11(d): to promote judicial productivity, since judges with a sense of financial security are "more likely to work above and beyond the call of duty" (p. 130), and to recruit to the bench "lawyers of great ability and first-class reputation" (p. 131). Reductions in judges' salaries were prohibited by s. 11(d), in his opinion, because they undermined those purposes.

56 Although McDonald J. articulated a general rule against the reduction of judges' salaries, he accepted that judges' salaries could be reduced as part of an overall economic measure. However, he defined that exception in very narrow terms, so that judges' salaries could be reduced only by a general income tax or "a graduated income tax which is applicable overall to all citizens who are at the same level of earnings" (p. 138). In support, he cited Beauregard, where the pension scheme at issue was similar to other pension schemes which had been established for a substantial number of other Canadians.

57 Applying these principles to the facts of the case before him, McDonald J. declared the 5 percent salary reduction for judges of the Alberta Provincial Court brought about by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, to be unconstitutional. Although his reasoning is not entirely clear on this point, it seems that the reduction fell afoul of s. 11(d) because it was not an overall economic measure -- it only applied to Provincial Court judges. In addition, he found that the government's failure to increase judges' salaries in accordance with increases in the cost of living violated judges' financial security, because it amounted to a de facto reduction.

58 However, McDonald J. rejected a challenge to s. 17(1) of the Provincial Court Judges Act, which provides that the Lieutenant Governor in Council "may make regulations... fixing the salaries to be paid to judges". That provision had been challenged because it was permissive and did not require salaries to be provided, because it did not prevent the executive branch from decreasing salaries or benefits, because it did not prevent the executive from providing different salaries to different types of judges, and because it did not prohibit remuneration on the basis of job performance. McDonald J. rejected all of these arguments. Some he rejected by reading down s. 17(1), so that the provision

required the setting of salaries, did not authorize the reduction of salaries except as part of an overall economic measure, and did not authorize performance related remuneration. He also held that s. 11(d) did not prohibit different salaries for different judges.

59 McDonald J. then turned to two other issues relating to financial security. First, he addressed the process for determining judges' salaries. He held that judicial independence required neither an independent committee, nor a set formula to determine salaries. What the guarantee of financial security provided to judges, in his opinion, was an assurance that their salaries would not be reduced except as part of an overall economic measure, and that they would be increased to take into account changes in the cost of living. The mechanism for setting the salary is not integral to achieving this goal. Furthermore, since s. 11(d) did not mandate a particular process for setting judges' salaries, McDonald J. also held that judicial independence would not be undermined by salary negotiations between the judiciary and the executive.

60 Second, McDonald J. addressed the question of changes to judges' pensions. He held that the same restriction which applied to reductions in salaries also applied to reductions in pensions -- those reductions must be part of an overall economic measure which applies to the population as a whole. In addition, as for salaries, the failure to increase pensions to keep pace with inflation was tantamount to a reduction, and was therefore prohibited by s. 11(d) of the Charter unless the failure to index was part of an overall economic measure. However, in the absence of sufficient evidence, he declined to determine if changes to the pension plan of the judges of the Alberta Provincial Court had violated s. 11(d).

(b) Security of Tenure

61 McDonald J. found that two different sets of provisions of the Provincial Court Judges Act violated s. 11(d) of the Charter, because they provided insufficient security of tenure. The first set of provisions relates to the membership of the Judicial Council, the body charged with considering complaints made against judges of the Alberta Provincial Court. Sections 10(1)(d) and 10(1)(e) permit non-judges to be members of the Judicial Council. McDonald J. held that the presence of non-judges on the Judicial Council contravened s. 11(d), because Valente had held that security of tenure required that judges only be dismissed after a "judicial inquiry". A judicial inquiry, according to McDonald J., is an inquiry by judges only. As a result, he found ss. 11(1)(c) and 11(2) of the Act, which empower the Council to investigate complaints, make recommendations to the Minister of Justice and Attorney General, and refer complaints to the Chief Judge of the Court or a committee of the Judicial Council for inquiry and report, to be unconstitutional.

62 The second set of provisions related to the grounds for the removal of judges of the Alberta Provincial Court. Section 11(1)(b) of the Provincial Court Judges Act provides that "lack of competence" and "conduct" are grounds for removal. McDonald J. held that these provisions are overbroad, because they potentially impugn conduct which may be unrelated to the capacity of a judge to perform his or her official duties. At worst, the provisions could be used to dismiss judges for the inability to "interpret and apply the law correctly... whether in a specific case or in more than one case" (p. 161).

(c) Institutional Independence

63 Finally, McDonald J. held that the provisions of the Provincial Court Judges Act which permit the Attorney General to designate the place of residence (s. 13(1)(a)) and the sitting days (s. 13(1)(b)) of judges of the Alberta Provincial Court violated s. 11(d). He arrived at this conclusion on the basis of the view that the purpose of institutional independence is to safeguard the ability of the court to use its judicial resources as efficiently as possible, in order to ensure a timely trial for accused persons. As well, he cited Valente's explicit statement that control over sittings of the court is an essential component of institutional independence.

(d) Disposition

64 Although he made several findings of unconstitutionality, McDonald J. denied the stays sought by Campbell and Ekmecic, on the ground that his declarations removed the source of the unconstitutionality and had rendered the Alberta Provincial Court independent. Furthermore, although Wickman's trial had already proceeded before a non-independent judge, he denied the request for orders in the nature of certiorari and prohibition, because to do otherwise would be to countenance an abuse of process, since the defence had waited to the end of the trial to raise these constitutional issues.

(e) Remarks of Premier Klein

65 McDonald J. held that the remarks of Premier Klein did not amount to a violation of judicial independence. Although the Premier's comments may have been unwise, they did not give rise to a reasonable apprehension that the executive would interfere with the independence of the Alberta Provincial Court.

(2) Decision of the Court of Appeal of Alberta (1995), 169 A.R. 178

66 The Crown appealed. The decision of the Court of Appeal dealt solely with the question of whether that court had jurisdiction to hear the case. A majority of the court (Conrad J.A. dissenting), held that it did not have jurisdiction.

67 There was a consensus on the court that the Crown's appeal required a statutory basis to proceed. The interpretive debate focussed on the meaning and scope of s. 784(1) of the Criminal Code, which provides that:

> 784. (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of mandamus, certiorari or prohibition.

Two issues were addressed by the court: first, whether a successful party (in this case, the Crown) could rely on s. 784(1) to appeal a decision which granted it relief, but not the relief sought; and second, whether a declaration was a form of relief sufficiently akin to mandamus, certiorari or prohibition to come within the scope of the provision.

68 Harradence J.A. answered both questions in the negative. His starting point was that a provision which allowed a successful party to appeal was sufficiently unusual that it would have to be explicitly and very clearly spelled out in the Criminal Code. Section 784(1), in his opinion, did not meet the requisite standard of clarity. O'Leary J.A. concurred with him on this point. Furthermore, speaking alone, Harradence J.A. rejected the argument that the declarations were in effect prohibitory in nature. Although the declaratory orders may have removed a flaw in the jurisdiction of the Alberta Provincial Court, he reasoned that they did not affect the proceedings taken or proposed to be taken before the Provincial Court.

69 By contrast, Conrad J.A. (dissenting) answered both questions in the affirmative. Addressing the second issue first, she held that the declarations made by McDonald J. at trial were equivalent to prohibitions, and therefore came within the scope of s. 784(1). Her argument seemed to be that the trial judge, through the declarations, effectively prohibited "the commencement, or continuation, of the subject trials in front of a court subject to the impugned provisions" (p. 193 (emphasis in original)). With respect to the first issue, she held that s. 784(1) was not limited to appeals by unsuccessful parties, but instead permitted appeals from decisions which granted or refused the relief sought. Conceivably, this could include an appeal from a party who was successful but did not receive the relief desired, like the Crown in this case.

C. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

(1) Decision of the Court of Queen's Bench of Manitoba (1994), 98 Man. R. (2d) 67

70 The central issue at trial was the nature of the protection for financial security provided by s. 11(d), and whether the provisions of Bill 22 met that constitutional standard. Two questions were addressed: first, whether s. 11(d) permits reductions in judges' salaries, and if so, under what circumstances; and second, whether s. 11(d) mandates any particular process for the setting of judges' salaries.

71 On the first question, Scollin J. took the same position as McDonald J. in Campbell -- that judges' salaries may be reduced only as part of an overall economic measure which affects all citizens. As such, the reduction of judges' salaries by Bill 22 was unconstitutional, because it was part of a plan to reduce the provincial deficit solely through a reduction in government expenditures.

72 However, Scollin J. then proceeded to part company with McDonald J.'s judgment in one crucial respect -- he held that the standard set by s. 11(d) is only required for permanent reductions in judicial salaries. In economic emergencies, temporary reductions, by contrast, are allowed. Scollin J. held that the facts of this case disclosed an economic emergency, which he defined (at p. 77) as a situation

> [w]here, in the judgment of the Government, fiscal demands on the public treasury can be met only by immediate but determinate restraints on the

Government's own spending....

Thus, in his disposition of the appeal, Scollin J. read down Bill 22 to provide for the temporary suspension of full compensation, and the full retroactive repayment of all compensation when Bill 22 expired.

73 The second question was addressed in the context of s. 11.1 of The Provincial Court Act, which establishes an independent commission (the Judicial Compensation Committee) that makes recommendations to the provincial legislature on salaries of judges of the Manitoba Provincial Court. It was argued that Bill 22 effectively rendered the commission inoperative, by imposing a salary reduction without the legislature first receiving the commission's report, and therefore violated s. 11(d) because the statutory provisions creating the commission had "quasi-constitutional" status which allowed those provisions to prevail over Bill 22. Scollin J. rejected this argument on two grounds: first, that Bill 22 did not purport to disband or disrupt the work of the Judicial Compensation Committee, and therefore the question of any conflict between the Bill and the provisions creating the Committee did not arise; and second, that the Committee process did not have quasi-constitutional status, and so could not prevail over Bill 22.

74 It was also argued at trial that there had been a violation of judicial independence because of the decision to close down the courts on days which the government had designated as unpaid days of leave for its employees ("Filmon Fridays"). Scollin J. rejected this argument, because the decision to close down the courts was not taken by the executive (in the person of the Attorney General), but by the Chief Judge of the Manitoba Provincial Court. A number of factors were determinative: the Chief Judge was consulted about the withdrawal of court staff; the Chief Judge directed that the courts be closed down on those days, and had the Chief Judge decided that the Provincial Court would remain open on those days, the government had given an assurance that sufficient staff would be made available.

75 Finally, the trial judge considered and rejected an argument that the government had exerted improper pressure on the judges of the Provincial Court. The allegation arose out of a request by the government that the judges state whether they intended to challenge Bill 22, in advance of the government agreeing to present a joint submission with the judges to the Judicial Compensation Committee. Scollin J. held that the request was "indiscreet" but "immaterial" (p. 79).

(2) Decision of the Court of Appeal of Manitoba (1995), 102 Man. R. (2d) 51

76 The Court of Appeal's views on the nature of the guarantee of financial security are not entirely clear. At one point, the court stated that s. 11(d) protects judges against "arbitrary interference" by the legislature or the executive which is "motivated by an improper or colourable purpose" (p. 63), at another that s. 11(d) prohibits the "discriminatory treatment of judges". However, despite this ambiguity, the court rejected the submission that a salary cut for judges is constitutional only if it is part of an overall economic measure, although it accepted that the fact that a reduction is part of such a measure would go to a finding that the reduction "was not enacted for an improper or

colourable purpose" (p. 65).

77 The court then went on to apply the standard of discriminatory treatment, and addressed the argument that Bill 22 was unconstitutional because of the distinctions it drew among different persons who were paid from the public purse. On the facts, the court found that differences in the classes of persons affected by Bill 22 necessitated different treatment, and were therefore not discriminatory. In particular, the court pointed to the fact that other persons governed by Bill 22 were in a collective bargaining relationship with the government, a situation from which "judges would undoubtedly resile" (p. 66).

78 In addition to determining whether Bill 22 discriminated against judges of the Manitoba Provincial Court, the court asked how the reasonable person would perceive the cuts. It concluded that since the cuts were of a broadly based nature, and were motivated by budgetary concerns, they would not create the impression that judicial independence had been compromised.

79 As the trial judge had done, the Court of Appeal rejected the argument that the provisions creating the Judicial Compensation Committee somehow received constitutional protection against Bill 22, and expressly agreed with Scollin J. that Bill 22 did not conflict with those provisions. Moreover, it pointed out that s. 3 of Bill 22 provides that the Bill prevails over any conflicting legislation.

80 The Court of Appeal confined its analysis of the alleged unconstitutionality of the closing of the Manitoba Provincial Court to the decision of the Attorney General that Crown attorneys take unpaid days of leave ("Filmon Fridays") as part of the deficit reduction scheme centred around Bill 22. To the court, this particular decision did not interfere with the institutional independence of the Provincial Court, because it did not touch upon that court's adjudicative function. Rather, it concerned the prosecution of criminal offences, for which the executive has constitutional responsibility.

81 The court agreed with the trial judge's conclusion that the pressure exerted on the judges' association by the government was immaterial.

IV. Financial Security

A. Introduction: The Unwritten Basis of Judicial Independence

82 These appeals were all argued on the basis of s. 11(d), the Charter's guarantee of judicial independence and impartiality. From its express terms, s. 11(d) is a right of limited application -- it only applies to persons accused of offences. Despite s. 11(d)'s limited scope, there is no doubt that the appeals can and should be resolved on the basis of that provision. To a large extent, the Court is the prisoner of the case which the parties and interveners have presented to us, and the arguments that have been raised, and the evidence that we have before us, have largely been directed at s. 11(d). In particular, the two references from P.E.I. are explicitly framed in terms of s. 11(d), and if we are to answer the questions contained therein, we must direct ourselves to that section of the Constitution.

83 Nevertheless, while the thrust of the submissions was directed at s. 11(d), the respondent Wickman in Campbell et al. and the appellants in the P.E.I. references, in their written submissions, the respondent Attorney General of P.E.I., in its oral submissions, and the intervener Attorney General of Canada, in response to a question from Iacobucci J., addressed the larger question of where the constitutional home of judicial independence lies, to which I now turn. Notwithstanding the presence of s. 11(d) of the Charter, and ss. 96-100 of the Constitution Act, 1867, I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts. The existence of that principle, whose origins can be traced to the Act of Settlement of 1701, is recognized and affirmed by the preamble to the Constitution Act, 1867. The specific provisions of the Constitution Acts, 1867 to 1982, merely "elaborate that principle in the institutional apparatus which they create or contemplate": Switzman v. Elbling, [1957] S.C.R. 285, at p. 306, per Rand J.

84 I arrive at this conclusion, in part, by considering the tenability of the opposite position -- that the Canadian Constitution already contains explicit provisions which are directed at the protection of judicial independence, and that those provisions are exhaustive of the matter. Section 11(d) of the Charter, as I have mentioned above, protects the independence of a wide range of courts and tribunals which exercise jurisdiction over offences. Moreover, since well before the enactment of the Charter, ss. 96-100 of the Constitution Act, 1867, separately and in combination, have protected and continue to protect the independence of provincial superior courts: Cooper, supra, at para. 11; MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725, at para. 10. More specifically, s. 99 guarantees the security of tenure of superior court judges; s. 100 guarantees the financial security of judges of the superior, district, and county courts; and s. 96 has come to guarantee the core jurisdiction of superior, district, and county courts against legislative encroachment, which I also take to be a guarantee of judicial independence.

85 However, upon closer examination, there are serious limitations to the view that the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence. The first and most serious problem is that the range of courts whose independence is protected by the written provisions of the Constitution contains large gaps. Sections 96-100, for example, only protect the independence of judges of the superior, district, and county courts, and even then, not in a uniform or consistent manner. Thus, while ss. 96 and 100 protect the core jurisdiction and the financial security, respectively, of all three types of courts (superior, district, and county), s. 99, on its terms, only protects the security of tenure of superior court judges. Moreover, ss. 96-100 do not apply to provincially appointed inferior courts, otherwise known as provincial courts.

86 To some extent, the gaps in the scope of protection provided by ss. 96-100 are offset by the application of s. 11(d), which applies to a range of tribunals and courts, including provincial courts. However, by its express terms, s. 11(d) is limited in scope as well -- it only extends the envelope of constitutional protection to bodies which exercise jurisdiction over offences. As a result, when those courts exercise civil jurisdiction, their independence would not seem to be guaranteed. The independence of provincial courts adjudicating in

family law matters, for example, would not be constitutionally protected. The independence of superior courts, by contrast, when hearing exactly the same cases, would be constitutionally guaranteed.

87 The second problem with reading s. 11(d) of the Charter and ss. 96-100 of the Constitution Act, 1867 as an exhaustive code of judicial independence is that some of those provisions, by their terms, do not appear to speak to this objective. Section 100, for example, provides that Parliament shall fix and provide the salaries of superior, district, and county court judges. It is therefore, in an important sense, a subtraction from provincial jurisdiction over the administration of justice under s. 92(14). Moreover, read in the light of the Act of Settlement of 1701, it is a partial guarantee of financial security, inasmuch as it vests responsibility for setting judicial remuneration with Parliament, which must act through the public means of legislative enactment, not the executive. However, on its plain language, it only places Parliament under the obligation to provide salaries to the judges covered by that provision, which would in itself not safeguard the judiciary against political interference through economic manipulation. Nevertheless, as I develop in these reasons, with reference to Beauregard, s. 100 also requires that Parliament must provide salaries that are adequate, and that changes or freezes to judicial remuneration be made only after recourse to a constitutionally mandated procedure.

88 A perusal of the language of s. 96 reveals the same difficulty:

> 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Section 96 seems to do no more than confer the power to appoint judges of the superior, district, and county courts. It is a staffing provision, and is once again a subtraction from the power of the provinces under s. 92(14). However, through a process of judicial interpretation, s. 96 has come to guarantee the core jurisdiction of the courts which come within the scope of that provision. In the past, this development has often been expressed as a logical inference from the express terms of s. 96. Assuming that the goal of s. 96 was the creation of "a unitary judicial system", that goal would have been undermined "if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts": Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714, at p. 728. However, as I recently confirmed, s. 96 restricts not only the legislative competence of provincial legislatures, but of Parliament as well: MacMillan Bloedel, supra. The rationale for the provision has also shifted, away from the protection of national unity, to the maintenance of the rule of law through the protection of the judicial role.

89 The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself.

90 The proposition that the Canadian Constitution embraces unwritten norms was recently confirmed by this Court in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319. In that case, the Court found it constitutional for the Nova Scotia House of Assembly to refuse the media the right to record and broadcast legislative proceedings. The media advanced a claim based on s. 2(b) of the Charter, which protects, inter alia, "freedom of the press and other media of communication". McLachlin J., speaking for a majority of the Court, found that the refusal of the Assembly was an exercise of that Assembly's unwritten legislative privileges, that the Constitution of Canada constitutionalized those privileges, and that the constitutional status of those privileges therefore precluded the application of the Charter.

91 The relevant part of her judgment concerns the interpretation of s. 52(2) of the Constitution Act, 1982, which defines the "Constitution of Canada" in the following terms:

> 52. ...
>
> (2) The Constitution of Canada includes
>
> (a) the Canada Act 1982, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b). [Emphasis added.]

The media argued that parliamentary privileges did not enjoy constitutional status, and hence, were subject to Charter scrutiny like any other decision of a legislature, because they were not included within the list of documents found in, or referred to by, s. 52(2). McLachlin J. rejected this argument, in part on the basis of the wording of s. 52(2). She held that the use of the word "includes" indicated that the list of constitutional documents in s. 52(2) was not exhaustive.

92 Although I concurred on different grounds, and still doubt whether the privileges of provincial assemblies form part of the Constitution (Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876, at para. 2), I agree with the general principle that the Constitution embraces unwritten, as well as written rules, largely on the basis of the wording of s. 52(2). Indeed, given that ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it is of no surprise that our Constitution should retain some aspect of this legacy.

93 However, I do wish to add a note of caution. As I said in New Brunswick Broadcasting, supra, at p. 355, the constitutional history of Canada can be understood, in part, as a process of evolution "which [has] culminated in the supremacy of a definitive written constitution". There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost importance to articulate what the source of those unwritten norms is.

94 In my opinion, the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the Constitution Act, 1867. The relevant paragraph states in full:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

Although the preamble has been cited by this Court on many occasions, its legal effect has never been fully explained. On the one hand, although the preamble is clearly part of the Constitution, it is equally clear that it "has no enacting force": Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, at p. 805 (joint majority reasons). In other words, strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it.

95 But the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language: Driedger on the Construction of Statutes (3rd ed. 1994), by R. Sullivan, at p. 261. The preamble to the Constitution Act, 1867, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J., the preamble articulates "the political theory which the Act embodies": Switzman, supra, at p. 306. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.

96 What are the organizing principles of the Constitution Act, 1867, as expressed in the preamble? The preamble speaks of the desire of the founding provinces "to be federally united into One Dominion", and thus, addresses the structure of the division of powers. Moreover, by its reference to "a Constitution similar in Principle to that of the United Kingdom", the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged. To my mind, both of these aspects of the preamble explain many of the cases in which the Court has, through the normal process of constitutional interpretation, stated some fundamental rules of Canadian constitutional law which are not found in the express terms of the Constitution Act, 1867.

97 I turn first to the jurisprudence under the division of powers, to illustrate how the process of gap-filling has occurred and how it can be understood by reference to the preamble. One example where the Court has inferred a fundamental constitutional rule which is not found in express terms in the Constitution is the doctrine of full faith and credit. Under this doctrine, the courts of one province are under a constitutional obligation to

recognize the decisions of the courts of another province: Hunt v. T & N PLC, [1993] 4 S.C.R. 289. The justification for this rule has been aptly put by Professor Hogg (Constitutional Law of Canada (3rd ed. 1992 (loose-leaf)), vol. 1, at p. 13-18):

> Within a federal state, it seems obvious that, if a provincial court takes jurisdiction over a defendant who is resident in another province, and if the court observes constitutional standards..., the resulting judgment should be recognized by the courts of the defendant's province.

Speaking for the Court in Hunt, La Forest J. identified a number of sources for reading the doctrine of full faith and credit into the scheme of the Constitution: a common citizenship, interprovincial mobility of citizens, the common market created by the union, and the essentially unitary structure of our judicial system. At root, these factors combined to evince "the obvious intention of the Constitution to create a single country": Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, at p. 1099. An alternative explanation of the decision, however, is that the Court was merely giving effect to the "[d]esire" of the founding provinces "to be federally united into One Dominion", an organizing principle of the Constitution that was recognized and affirmed in the preamble, and which was given express form in the provisions identified by La Forest J.

98 Another example where the Court has inferred a basic rule of Canadian constitutional law despite the silence of the constitutional text is the doctrine of paramountcy. Simply stated, the doctrine asserts that where both the Parliament of Canada and one or more of the provincial legislatures have enacted legislation which comes into conflict, the federal law shall prevail. The doctrine of paramountcy is of fundamental importance in a legal system with more than one source of legislative authority, because it provides a guide to courts and ultimately to citizens on how to reconcile seemingly inconsistent legal obligations. However, it is nowhere to be found in the Constitution Act, 1867. The doctrinal origins of paramountcy are obscure, although it has been said that it "is necessarily implied in our constitutional act": Huson v. Township of South Norwich (1895), 24 S.C.R. 145, at p. 149. I would venture that the doctrine of paramountcy follows from the desire of the confederating provinces "to be federally united into One Dominion". Relying on the preamble explains, for example, why federal laws are paramount over provincial laws, not the other way around.

99 The preamble, by its reference to "a Constitution similar in Principle to that of the United Kingdom", points to the nature of the legal order that envelops and sustains Canadian society. That order, as this Court held in Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, at p. 749, is "an actual order of positive laws", an idea that is embraced by the notion of the rule of law. In that case, the Court explicitly relied on the preamble to the Constitution Act, 1867, as one basis for holding that the rule of law was a fundamental principle of the Canadian Constitution. The rule of law led the Court to confer temporary validity on the laws of Manitoba which were unconstitutional because they had been enacted only in English, in contravention of the Manitoba Act, 1870. The Court developed this remedial innovation notwithstanding the express terms of s. 52(1) of the Constitution Act, 1982, that unconstitutional laws are "of no force or effect", a provision that suggests that declarations of invalidity can only be given immediate effect. The Court did

so in order to not "deprive Manitoba of its legal order and cause a transgression of the rule of law" (p. 753). Reference re Manitoba Language Rights therefore stands as another example of how the fundamental principles articulated by preamble have been given legal effect by this Court.

100 Finally, the preamble also speaks to the kind of constitutional democracy that our Constitution comprehends. One aspect of our system of governance is the importance of "parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion": Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at p. 330, per Rand J. Again, the desire for Parliamentary government through representative institutions is not expressly found in the Constitution Act, 1867; there is no reference in that document, for example, to any requirement that members of Parliament or provincial legislatures be elected. Nevertheless, members of the Court, correctly in my opinion, have been able to infer this general principle from the preamble's reference to "a Constitution similar in Principle to that of the United Kingdom".

101 One implication of the preamble's recognition and affirmation of Parliamentary democracy is the constitutionalization of legislative privileges for provincial legislatures, and most likely, for Parliament as well. These privileges are necessary to ensure that legislatures can perform their functions, free from interference by the Crown and the courts. Given that legislatures are representative and deliberative institutions, those privileges ultimately serve to protect the democratic nature of those bodies. The Constitution, once again, is silent on this point. Nevertheless, and notwithstanding the reservations I have expressed above, the majority of this Court grounded the privileges of the Nova Scotia Legislative Assembly in the preamble's reference to "a Constitution similar in Principle to that of the United Kingdom": New Brunswick Broadcasting, supra. It argued that since those privileges inhered in the Parliament in Westminster, the preamble indicated that the intention of the Constitution Act, 1867 was that "the legislative bodies of the new Dominion would possess similar, although not necessarily identical, powers" (p. 375). Similarly, in discussing the jurisdiction of courts in relation to the exercise of privileges of the Senate or one of its committees, Iacobucci C.J. (as he then was) considered the significance of the preamble's reference to "a Constitution similar in Principle to that of the United Kingdom" in Southam Inc. v. Canada (Attorney General), [1990] 3 F.C. 465 (C.A.), at pp. 485-86:

> Strayer J. was of the opinion that courts had such a jurisdiction and found, in particular, that the adoption of the Charter fundamentally altered the nature of the Canadian Constitution such that it is no longer "similar in Principle to that of the United Kingdom" as is stated in the preamble to the Constitution Act, 1867. Accepting as we must that the adoption of the Charter transformed to a considerable extent our former system of Parliamentary supremacy into our current one of constitutional supremacy, as former Chief Justice Dickson described it, the sweep of Strayer J.'s comment that our Constitution is no longer similar in principle to that of the United Kingdom is rather wide. Granted much has changed in the new constitutional world of the Charter. But just as purists of

> federalism have learned to live with the federalist constitution that Canada adopted in 1867 based on principles of parliamentary government in a unitary state such that the United Kingdom was and continues to be, so it seems to me that the British system of constitutional government will continue to co-exist alongside the Charter if not entirely, which it never did, but certainly in many important respects. The nature of [sic] scope of this co-existence will depend naturally on the jurisprudence that results from the questions brought before the courts.

102 Another implication of the preamble's recognition of Parliamentary democracy has been an appreciation of the interdependence between democratic governance and freedom of political speech. Thus, members of the Court have reasoned that Parliamentary democracy brought with it "all its social implications" (Switzman, supra, at p. 306, per Rand J.), including the implication that these institutions would

> wor[k] under the influence of public opinion and public discussion... [because] such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals.

(Reference re Alberta Statutes, [1938] S.C.R. 100, at p. 133, per Duff C.J.)

Political freedoms, such as the right to freedom of expression, are not enumerated heads of jurisdiction under ss. 91 and 92 of the Constitution Act, 1867; the document is silent on their very existence. However, given the importance of political expression to national political life, combined with the intention to create one country, members of the Court have taken the position that the limitation of that expression is solely a matter for Parliament, not the provincial legislatures: Reference re Alberta Statutes, supra, at p. 134, per Duff C.J., and at p. 146, per Cannon J.; Saumur, supra, at pp. 330-31, per Rand J., and at pp. 354-56, per Kellock J.; Switzman, supra, at p. 307, per Rand J., and at p. 328, per Abbott J.

103 The logic of this argument, however, compels a much more dramatic conclusion. Denying jurisdiction over political speech to the provincial legislatures does not limit Parliament's ability to do what the provinces cannot. However, given the interdependence between national political institutions and free speech, members of the Court have suggested that Parliament itself is incompetent to "abrogate this right of discussion and debate": Switzman, supra, at p. 328, per Abbott J.; also see Rand J. at p. 307; Saumur, supra, at p. 354, per Kellock J.; OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57, per Beetz J. In this way, the preamble's recognition of the democratic nature of Parliamentary governance has been used by some members of the Court to fashion an implied bill of rights, in the absence of any express indication to this effect in the constitutional text. This has been done, in my opinion, out of a recognition that political institutions are fundamental to the "basic structure of our Constitution" (OPSEU, supra, at p. 57) and for that reason governments cannot undermine the mechanisms of political

accountability which give those institutions definition, direction and legitimacy.

104 These examples -- the doctrines of full faith and credit and paramountcy, the remedial innovation of suspended declarations of invalidity, the recognition of the constitutional status of the privileges of provincial legislatures, the vesting of the power to regulate political speech within federal jurisdiction, and the inferral of implied limits on legislative sovereignty with respect to political speech -- illustrate the special legal effect of the preamble. The preamble identifies the organizing principles of the Constitution Act, 1867, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.

105 The same approach applies to the protection of judicial independence. In fact, this point was already decided in Beauregard, and, unless and until it is reversed, we are governed by that decision today. In that case (at p. 72), a unanimous Court held that the preamble of the Constitution Act, 1867, and in particular, its reference to "a Constitution similar in Principle to that of the United Kingdom", was "textual recognition" of the principle of judicial independence. Although in that case, it fell to us to interpret s. 100 of the Constitution Act, 1867, the comments I have just reiterated were not limited by reference to that provision, and the courts which it protects.

106 The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the Act of Settlement of 1701. As we said in Valente, supra, at p. 693, that Act was the "historical inspiration" for the judicature provisions of the Constitution Act, 1867. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the Constitution Act, 1982, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

107 I also support this conclusion on the basis of the presence of s. 11(d) of the Charter, an express provision which protects the independence of provincial court judges only when those courts exercise jurisdiction in relation to offences. As I said earlier, the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the Constitution Act, 1867. Even though s. 11(d) is found in the newer part of our Constitution, the Charter, it can be understood in this way, since the Constitution is to be read as a unified whole: Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, at p. 1206. An analogy can be drawn between the express reference in the preamble of the Constitution Act, 1982 to the rule of law and the implicit inclusion of that principle in the Constitution Act, 1867: Reference re Manitoba Language Rights, supra, at p. 750. Section 11(d), far from indicating that judicial independence is constitutionally enshrined for provincial courts only when those courts exercise jurisdiction over offences, is proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear.

108 I reinforce this conclusion by reference to the central place that courts hold within the Canadian system of government. In OPSEU, as I have mentioned above, Beetz J. linked limitations on legislative sovereignty over political speech with "the existence of certain political institutions" as part of the "basic structure of our Constitution" (p. 57). However, political institutions are only one part of the basic structure of the Canadian Constitution. As this Court has said before, there are three branches of government -- the legislature, the executive, and the judiciary: Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at p. 469; R. v. Power, [1994] 1 S.C.R. 601, at p. 620. Courts, in other words, are equally "definitional to the Canadian understanding of constitutionalism" (Cooper, supra, at para. 11) as are political institutions. It follows that the same constitutional imperative -- the preservation of the basic structure -- which led Beetz J. to limit the power of legislatures to affect the operation of political institutions, also extends protection to the judicial institutions of our constitutional system. By implication, the jurisdiction of the provinces over "courts", as that term is used in s. 92(14) of the Constitution Act, 1867, contains within it an implied limitation that the independence of those courts cannot be undermined.

109 In conclusion, the express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. However, since the parties and interveners have grounded their arguments in s. 11(d), I will resolve these appeals by reference to that provision.

B. Section 11(d) of the Charter

110 As I mentioned earlier, these appeals were heard together because they all raise the question of whether and how s. 11(d) of the Charter restricts the manner by and extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. Before I can address this specific question, I must make some general comments about the jurisprudence under s. 11(d).

111 The starting point for my discussion is Valente, where in a unanimous judgment this Court laid down the interpretive framework for s. 11(d)'s guarantee of judicial independence and impartiality. Le Dain J., speaking for the Court, began by drawing a distinction between impartiality and independence. Later cases have referred to this distinction as "a firm line": Généreux, supra, at p. 283. Impartiality was defined as "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (Valente, supra, at p. 685 (emphasis added)). It was tied to the traditional concern for the "absence of bias, actual or perceived". Independence, by contrast, focussed on the status of the court or tribunal. In particular, Le Dain J. emphasized that the independence protected by s. 11(d) flowed from "the traditional constitutional value of judicial independence", which he defined in terms of the relationship of the court or tribunal "to others, particularly the executive branch of government" (p. 685). As I expanded in R. v. Lippé, [1991] 2 S.C.R. 114, the independence protected by s. 11(d) is the independence of

the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the state.

112 Le Dain J. went on in Valente to state that independence was premised on the existence of a set of "objective conditions or guarantees" (p. 685), whose absence would lead to a finding that a tribunal or court was not independent. The existence of objective guarantees, of course, follows from the fact that independence is status oriented; the objective guarantees define that status. However, he went on to supplement the requirement for objective conditions with what could be interpreted as a further requirement: that the court or tribunal be reasonably perceived as independent. The reason for this additional requirement was that the guarantee of judicial independence has the goal not only of ensuring that justice is done in individual cases, but also of ensuring public confidence in the justice system. As he said (at p. 689):

> Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

However, it would be a mistake to conclude that Le Dain J. intended the objective guarantees and the reasonable perception of independence to be two distinct concepts. Rather, the objective guarantees must be viewed as those guarantees that are necessary to ensure a reasonable perception of independence. As Le Dain J. said himself, for a court or tribunal to be perceived as independent, that "perception must... be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence" (p. 689).

113 Another point which emerges from Valente relates to the question of whose perceptions count. The answer given is that of the reasonable and informed person. This standard was formulated by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, at p. 394, with respect to a reasonable apprehension of bias, and was cited with approval in Valente, supra, at p. 684:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude...."

That test was adapted to the determination of judicial independence by Howland C.J.O. in his judgment in the Ontario Court of Appeal in R. v. Valente (No. 2) (1983), 2 C.C.C. (3d) 417, at pp. 439-40:

> The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their

> historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude [that the tribunal or court was independent].

To my mind, the decisions of Howland C.J.O. in Valente, and de Grandpré J. in National Energy Board, correctly establish the standard for the test of reasonable perception for the purposes of s. 11(d).

114 After establishing these core propositions, Le Dain J. in Valente went on to discuss two sets of concepts; the three core characteristics of judicial independence, and what I term the two dimensions of judicial independence.

115 The three core characteristics identified by Le Dain J. are security of tenure, financial security, and administrative independence. Valente laid down (at p. 697) two requirements for security of tenure for provincial court judges: those judges could only be removed for cause "related to the capacity to perform judicial functions", and after a "judicial inquiry at which the judge affected is given a full opportunity to be heard". Unlike the judicature provisions of the Constitution Act, 1867, which govern the removal of superior court judges, s. 11(d) of the Charter does not require an address by the legislature in order to dismiss a provincial court judge.

116 Financial security was defined in these terms (at p. 706):

> The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. [Emphasis added.]

Once again, the Court drew a distinction between the requirements of s. 100 of the Constitution Act, 1867 and s. 11(d); whereas the former provision requires that the salaries of superior court judges be set by Parliament directly, the latter allows salaries of provincial court judges to be set either by statute or through an order in council.

117 Finally, the Court defined the administrative independence of the provincial court, as control by the courts "over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (p. 712). These were defined (at p. 709) in narrow terms as

> assignment of judges, sittings of the court, and court lists -- as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions....

Although this aspect of judicial independence was also referred to as "institutional independence" in Valente at p. 708, that term, as I explain below, has a distinct meaning altogether, and should not be confused with administrative independence.

118 The three core characteristics of judicial independence -- security of tenure,

financial security, and administrative independence -- should be contrasted with what I have termed the two dimensions of judicial independence. In Valente, Le Dain J. drew a distinction between two dimensions of judicial independence, the individual independence of a judge and the institutional or collective independence of the court or tribunal of which that judge is a member. In other words, while individual independence attaches to individual judges, institutional or collective independence attaches to the court or tribunal as an institutional entity. The two different dimensions of judicial independence are related in the following way (Valente, supra, at p. 687):

> The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

119 It is necessary to explain the relationship between the three core characteristics and the two dimensions of judicial independence, because Le Dain J. did not fully do so in Valente. For example, he stated that security of tenure was part of the individual independence of a court or tribunal, whereas administrative independence was identified with institutional or collective independence. However, the core characteristics of judicial independence, and the dimensions of judicial independence, are two very different concepts. The core characteristics of judicial independence are distinct facets of the definition of judicial independence. Security of tenure, financial security, and administrative independence come together to constitute judicial independence. By contrast, the dimensions of judicial independence indicate which entity -- the individual judge or the court or tribunal to which he or she belongs -- is protected by a particular core characteristic.

120 The conceptual distinction between the core characteristics and the dimensions of judicial independence suggests that it may be possible for a core characteristic to have both an individual and an institutional or collective dimension. To be sure, sometimes a core characteristic only attaches to a particular dimension of judicial independence; administrative independence, for example, only attaches to the court as an institution (although sometimes it may be exercised on behalf of a court by its chief judge or justice). However, this need not always be the case. The guarantee of security of tenure, for example, may have a collective or institutional dimension, such that only a body composed of judges may recommend the removal of a judge. However, I need not decide that particular point here.

121 What I do propose, however, is that financial security has both an individual and an institutional or collective dimension. Valente only talked about the individual dimension of financial security, when it stated that salaries must be established by law and not allow for executive interference in a manner which could "affect the independence of the individual judge" (p. 706). Similarly, in Généreux, speaking for a majority of this Court, I applied Valente and held that performance-related pay for the conduct of judge advocates and members of a General Court Martial during the Court Martial violated s. 11(d), because it could reasonably lead to the perception that those individuals might alter their conduct

during a hearing in order to favour the military establishment.

122 However, Valente did not preclude a finding that, and did not decide whether, financial security has a collective or institutional dimension as well. That is the issue we must address today. But in order to determine whether financial security has a collective or institutional dimension, and if so, what collective or institutional financial security looks like, we must first understand what the institutional independence of the judiciary is. I emphasize this point because, as will become apparent, the conclusion I arrive at regarding the collective or institutional dimension of financial security builds upon traditional understandings of the proper constitutional relationship between the judiciary, the executive, and the legislature.

C. Institutional Independence

123 As I have mentioned, the concept of the institutional independence of the judiciary was discussed in Valente. However, other than stating that institutional independence is different from individual independence, the concept was left largely undefined. In Beauregard this Court expanded the meaning of that term, once again by contrasting it with individual independence. Individual independence was referred to as the "historical core" of judicial independence, and was defined as "the complete liberty of individual judges to hear and decide the cases that come before them" (p. 69). It is necessary for the fair and just adjudication of individual disputes. By contrast, the institutional independence of the judiciary was said to arise out of the position of the courts as organs of and protectors "of the Constitution and the fundamental values embodied in it -- rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important" (p. 70). Institutional independence enables the courts to fulfill that second and distinctly constitutional role.

124 Beauregard identified a number of sources for judicial independence which are constitutional in nature. As a result, these sources additionally ground the institutional independence of the courts. The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government. Institutional independence also inheres in adjudication under the Charter, because the rights protected by that document are rights against the state. As well, the Court pointed to the preamble and judicature provisions of the Constitution Act, 1867, as additional sources of judicial independence; I also consider those sources to ground the judiciary's institutional independence. Taken together, it is clear that the institutional independence of the judiciary is "definitional to the Canadian understanding of constitutionalism" (Cooper, supra, at para. 11).

125 But the institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government: see Cooper, supra, at para. 13. This is also clear from Beauregard, where this Court noted (at p. 73) that although judicial independence had historically developed as a bulwark against the abuse of executive power, it equally applied against "other potential intrusions, including any from the legislative branch" as a result of legislation.

126 What follows as a consequence of the link between institutional independence and the separation of powers I will turn to shortly. The point I want to make first is that the institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court judges. I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.

127 This role is most evident when we examine the remedial powers of provincial courts with respect to the enforcement of the Constitution. Notwithstanding that provincial courts are statutory bodies, this Court has held that they can enforce the supremacy clause, s. 52 of the Constitution Act, 1982. A celebrated example of the use of s. 52 by provincial courts is R. v. Big M Drug Mart Ltd. (1983), 25 Alta. L.R. (2d) 195 (Prov. Ct.) (upheld by this Court in [1985] 1 S.C.R. 295), which became one of the seminal cases in Charter jurisprudence. Provincial courts, moreover, frequently employ the remedial powers conferred by ss. 24(1) and 24(2) of the Charter, because they are courts of competent jurisdiction for the purposes of those provisions: Mills v. The Queen, [1986] 1 S.C.R. 863. Thus, provincial courts have the power to order stays of proceedings: e.g., R. v. Askov, [1990] 2 S.C.R. 1199. As well, provincial courts can exclude evidence obtained in violation of a Charter right: e.g., R. v. Collins, [1987] 1 S.C.R. 265. They use ss. 24(1) and 24(2) because of their dominant role in the adjudication of criminal cases, where the need to resort to those remedial provisions most often arises.

128 In addition to enforcing the rights in ss. 7-14 of the Charter, which predominantly operate in the criminal justice system, provincial courts also enforce the fundamental freedoms found in s. 2 of the Charter, such as freedom of religion (Big M) and freedom of expression (Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084). As well, they police the federal division of powers, by interpreting the heads of jurisdiction found in ss. 91 and 92 of the Constitution Act, 1867: e.g., Big M and R. v. Morgentaler, [1993] 3 S.C.R. 463. Finally, many decisions on the rights of Canada's aboriginal peoples, which are protected by s. 35(1) of the Constitution Act, 1982, are made by provincial courts: e.g., R. v. Sparrow, [1990] 1 S.C.R. 1075.

129 It is worth noting that the increased role of provincial courts in enforcing the provisions and protecting the values of the Constitution is in part a function of a legislative policy of granting greater jurisdiction to these courts. Often, legislation of this nature denies litigants the choice of whether they must appear before a provincial court or a superior court. As I explain below, the constitutional response to the shifting jurisdictional boundaries of the courts is to guarantee that certain fundamental aspects of judicial independence be enjoyed not only by superior courts but by provincial courts as well. In other words, not only must provincial courts be guaranteed institutional independence, they must enjoy a certain level of institutional independence.

130 Finally, although I have chosen to emphasize that judicial independence flows as a consequence of the separation of powers, because these appeals concern the proper

constitutional relationship among the three branches of government in the context of judicial remuneration, I do not wish to overlook the fact that judicial independence also operates to insulate the courts from interference by parties to litigation and the public generally: Lippé, supra, at pp. 152 et seq., per Gonthier J. As Professor Shetreet has written (in "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in S. Shetreet and J. Deschênes, eds., Judicial Independence: The Contemporary Debate (1985), 590, at p. 599):

> Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions.

D. Collective or Institutional Financial Security

(1) Introduction

(a) Summary of General Principles

131 Given the importance of the institutional or collective dimension of judicial independence generally, what is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized. As I explain below, in the context of institutional or collective financial security, this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse.

132 I begin by stating these components in summary fashion.

133 First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, 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. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions, and for the sake of convenience, we will refer to the independent body required by s. 11(d) as a commission as well. 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.

134 Second, under no circumstances is it permissible for the judiciary -- not only collectively through representative organizations, but also as individuals -- to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. As I explain below, salary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence. When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, are a form of "horse-trading". The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

135 Third, and finally, any reductions to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.

136 I note at the outset that these appeals raise the issue of judges' salaries. However, the same principles are equally applicable to judges' pensions and other benefits.

137 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.

(b) The Link Between the Components of Institutional or Collective Financial Security and the Separation of Powers

138 These different components of the institutional financial security of the courts inhere, in my view, in a fundamental principle of the Canadian Constitution, the separation of powers. As I discussed above, the institutional independence of the courts is inextricably bound up with the separation of powers, because in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government.

139 The separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies: see Cooper, supra, at para. 13. However, there is also another aspect of the separation of powers -- the notion that the principle requires that the different branches of government only interact, as much as possible, in particular ways. In other words, the relationships between the different branches of government should have a particular character. For example, there is a hierarchical relationship between the executive and the legislature, whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory form: see Cooper, supra, at paras. 23 and 24. In a system of responsible government, once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement those choices.

140 What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.

141 To be sure, the depoliticization of the relationships between the legislature and the executive on the one hand, and the judiciary on the other, is largely governed by convention. And as I said in Cooper, supra, at para. 22, the conventions of the British Constitution do not have the force of law in Canada: Reference re Resolution to Amend the Constitution, supra. However, to my mind, the depoliticization of these relationships is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as s. 11(d) of the Charter, must be interpreted in such a manner as to protect this principle.

142 The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. Even the most casual observer of current affairs can attest to this. For example, the salary reductions for the judges in these appeals were usually part of a general salary reduction for all persons paid from the public purse designed to implement a goal of government policy, deficit reduction. The decision to reduce a government deficit, of course, is an inherently political decision. In turn, these salary cuts were often opposed by public sector unions who questioned the underlying goal of deficit reduction itself. The political nature of the salary reductions at issue here is underlined by the fact that they were achieved through legislation, not collective bargaining and contract negotiations.

143 On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive;

judges, by definition, are independent of the executive. The three core characteristics of judicial independence -- security of tenure, financial security, and administrative independence -- are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.

144 The political nature of remuneration from the public purse has been recognized by this Court before, in the area of public sector labour relations. In Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211, we held that the Charter applied to collective agreements to which the government was a party. In arriving at this conclusion, the Court considered the argument that the Charter ought not to apply because public sector employment relationships were private and non-public in nature. This argument was rejected. La Forest J., speaking for the majority on this point, said at p. 314:

> ... government activities which are in form "commercial" or "private" transactions are in reality expressions of government policy....

145 With respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. An unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication. Admittedly, this would be very different from the kind of political interference with the judiciary by the Stuart Monarchs in England which is the historical source of the constitutional concern for judicial independence in the Anglo-American tradition. However, the threat to judicial independence would be as significant. We were alive to this danger in Beauregard, supra, when we held (at p. 77) that salary changes which were enacted for an "improper or colourable purpose" were unconstitutional. Moreover, as I develop below, changes to judicial remuneration might create the reasonable perception of political interference, a danger which s. 11(d) must prevent in light of Valente.

146 The challenge which faces the Court in these appeals is to ensure that the setting of judicial remuneration remains consistent -- to the extent possible given that judicial salaries must ultimately be fixed by one of the political organs of the Constitution, the executive or the legislature, and that the setting of remuneration from the public purse is, as a result, inherently political -- with the depoliticized relationship between the judiciary and the other branches of government. Our task, in other words, is to ensure compliance with one of the "structural requirements of the Canadian Constitution": Hunt, supra, at p. 323. The three components of the institutional or collective dimension of financial security, to my mind, fulfill this goal.

(2) The Components of Institutional or Collective Financial Security

(a) Judicial Salaries Can Be Reduced, Increased, or Frozen, but not Without Recourse to an Independent, Effective and Objective Commission

147 As a general principle, s. 11(d) allows that the salaries of provincial court judges

can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, the imperative of protecting the courts from political interference through economic manipulation requires that an independent body -- a judicial compensation commission -- be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government. 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 salaries to fall because of inflation, and also to protect against the possibility that judges' salaries will drop below the adequate minimum required 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.

(l) Reductions and Increases to, and Freezes in the Salaries of Judges Raise Concerns Regarding Judicial Independence

148 I arrive at these propositions through an argument that begins with the question of whether superior court judges, whose independence is protected by s. 100 of the Constitution Act, 1867, may be reduced at all. That question faced us in Beauregard. That case involved a constitutional challenge to s. 29.1 of the Judges Act, R.S.C. 1970, c. J-1, which makes it mandatory for superior court judges to contribute a percentage of their salary to a pension plan. Prior to the enactment of s. 29.1, the pension plan had been non-contributory. Justice Beauregard challenged the constitutionality of s. 29.1, alleging that it reduced judicial remuneration, and for that reason undermined the independence of the judiciary.

149 The Court dismissed the constitutional challenge. However, there was considerable debate among the parties to this litigation as to the basis of that decision. Some of the parties suggested that Beauregard stands for the view that the salaries of superior court judges may not be reduced at all. They argued that the Court upheld s. 29.1 only because, on the facts, there was no net reduction of judicial remuneration, and that the basic submission made by Justice Beauregard -- that salaries may not be reduced -- was not disagreed with. In support they pointed to the Court's statement that the contributory scheme "did not diminish, reduce or impair the financial position of federally-appointed judges" (p. 78), because it was implemented as part of a package of substantial salary increases.

150 However, this is an erroneous interpretation of Beauregard. In fact, that decision stands for exactly the opposite position -- that Parliament can reduce the salaries of superior court judges. This conclusion is implicit in the analogy drawn and relied upon by the Court between the contributory scheme and income tax, another measure which imposed financial burdens on judges. The Court pointed out that the imposition of income tax on judges had withstood constitutional challenge (Judges v. Attorney-General of

Saskatchewan, [1937] 2 D.L.R. 209 (P.C.)), and then stated that the pension scheme was not relevantly different. Although both schemes could reduce the take-home pay of judges, neither of them impaired judicial independence. As Dickson C.J. said at p. 77:

> It is very difficult for me to see any connection between... judicial independence and Parliament's decision to establish a pension scheme for judges and to expect judges to make contributions toward the benefits established by the scheme.

151 It is therefore clear from Beauregard that s. 100 permits reductions to the salaries of superior court judges. However, as I outlined in my introductory remarks, the decision raises four questions which we must answer in order to resolve these appeals. I deal with three of these questions here, and return to the fourth later on in these reasons.

152 The first question addresses the issue of what kinds of salary reductions are consistent with the principle of judicial independence, as protected by s. 100. Beauregard held that reductions which were enacted for an improper or colourable purpose are prohibited by s. 100. Some of the parties to this litigation pointed to passages in Beauregard which suggest, in addition, that s. 100 prohibits reductions in judicial remuneration except through measures which apply to the population as a whole, such as income tax or sales tax. They noted that Dickson C.J. placed a great deal of weight on the fact that contributory pension schemes for judges treated judges "in accordance with standard, widely used and generally accepted pension schemes in Canada", that there were "similar pension schemes for a substantial number of other Canadians" (p. 77), and that "pension schemes are now widespread in Canada" (p. 78). More importantly, they emphasized that Dickson C.J. stated that reductions in judges' salaries would be unconstitutional if they amounted to the "discriminatory treatment of judges vis-à-vis other citizens" (p. 77 (emphasis added)).

153 However, Beauregard should not be read so literally. It is important to recall that the contributory pension scheme for superior court judges at issue there was not part of a scheme for the public at large, and in this sense discriminated against the judiciary vis-à-vis other citizens. Moreover, not only was the Court very much aware of this fact, it did not regard this fact to be constitutionally significant. This is clear from the Court's comparison of income tax and mandatory contributions to the Canada Pension Plan, on the one hand, and the impugned pension scheme, on the other, which the Court conceded were factually different in the following terms, at p. 77:

> These two liabilities [i.e., income tax and mandatory contributions to the Canada Pension Plan] are, of course, general in the sense that all citizens are subject to them whereas the contributions demanded by s. 29.1 of the Judges Act are directed at judges only. [Emphasis added.]

This factual difference, however, did not translate "into any legal consequence" (p. 77).

154 I take Beauregard's reference to the principle of non-discrimination to mean that judges' salaries may be reduced even if that reduction is part of a measure which only

applies to substantially every person who is paid directly from the public purse. This interpretation is consistent with the views of numerous commentators on the constitutionality of reductions to judicial salaries under s. 100. Professor Hogg, supra, at p. 7-6, for example, dismisses the argument that s. 100 prohibits a reduction in judicial remuneration which is non-discriminatory in the sense that it applies "to the entire federal civil service as well". Similarly, Professor Lederman suggests (in "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 1139, at p. 1164) that a "general income tax of ten per cent on all public salaries... including the judicial salaries" would be constitutionally valid.

155 What I have just said, however, does not mean that Parliament is constitutionally prohibited, in all circumstances, from reducing judicial remuneration in a manner which does not extend to all persons paid from the public purse. As I now discuss, although identical treatment may be preferable, it is not required in all circumstances.

156 To explain how I arrive at this conclusion, I return to one of the goals of financial security -- to ensure that the courts be free and appear to be free from political interference through economic manipulation. To be sure, a salary cut for superior court judges which is part of a measure affecting the salaries of all persons paid from the public purse helps to sustain the perception of judicial independence precisely because judges are not being singled out for differential treatment. As Professor Renke has explained (in Invoking Independence: Judicial Independence as a No-cut Wage Guarantee (1994), at p. 30):

> Financial security is an essential condition of judicial independence. It must not, however, be considered abstractly. It must be considered in relation to its purpose, which is, ultimately, to protect the judiciary from economic manipulation by the legislature or executive. Where economic measures apply equally to clerks, secretaries, managers, public sector workers of all grades and departments, as well as judges, how could judges be manipulated?

Conversely, if superior court judges alone had their salaries reduced, one could conclude that Parliament was somehow meting out punishment against the judiciary for adjudicating cases in a particular way.

157 However, many parties to these appeals presented a plausible counter-argument by turning this position on its head -- that far from securing a perception of independence, salary reductions which treat superior court judges in the same manner as civil servants undermine judicial independence precisely because they create the impression that judges are merely public employees and are not independent of the government. This submission has a kernel of truth to it. For example, as I have stated above, if judges' salaries were set by the same process as the salaries of public sector employees, there might well be reason to be concerned about judicial independence.

158 What this debate illustrates is that judicial independence can be threatened by measures which treat judges either differently from, or identically to, other persons paid from the public purse. Since s. 100 clearly permits identical treatment (Beauregard), I am driven to the conclusion that it is illogical for it to prohibit differential treatment as well. That

is not to say, however, that the distinction between differential and identical treatment is a distinction without a difference. In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse. This is why we focussed on discriminatory measures in Beauregard. As Professor Renke, supra, has stated in the context of current appeals (at p. 19):

> ... if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges' exemption could be thought to be the result of secret deals, or secret commitments to favour the government. An exemption of judges from across-the-board pay cuts is as likely to generate suspicions concerning judicial independence as the reduction of judicial compensation in the context of general public sector reductions.

159 The second question which emerges from Beauregard arises from the first -- whether the danger of political interference through economic manipulation can arise not only from reductions in the salaries of superior court judges, but also from increases and freezes in judicial remuneration. To my mind, it can. Manipulation and interference most clearly arise from reductions in remuneration; those reductions provide an economic lever for governments to wield against the courts. But salary increases can be powerful economic levers as well. For this reason, salary increases also have the potential to undermine judicial independence, and engage the guarantees of s. 100. Salary freezes for superior court judges raise questions of judicial independence as well, because salary freezes, when the cost of living is rising because of inflation, amount to de facto reductions in judicial salaries, and can therefore be used as means of political interference through economic manipulation.

160 The third question which arises from Beauregard is the applicability of the jurisprudence under s. 100 of the Constitution Act, 1867, to the interpretation of s. 11(d) of the Charter. Section 100, along with the rest of the judicature provisions, guarantees the independence of superior court judges. Section 11(d), by contrast, guarantees the independence of a wide range of tribunals and courts, including provincial courts, and for the reasons explained above, is the central constitutional provision in these appeals. Since Beauregard defines the scope of Parliament's powers with respect to the remuneration of superior court judges, it was argued before this Court that it had no application to the cases at bar.

161 To some extent, this question was dealt with in Valente, where the Court held that s. 11(d) did not entitle provincial court judges to a number of protections which were constitutionally guaranteed to superior court judges. For example, while superior court judges may only be dismissed by a resolution of both Houses of Parliament, this Court expressly rejected the need for the dismissal of provincial court judges by provincial legislatures. As well, whereas the salaries of superior court judges must ultimately be fixed by Parliament, the Court held that the salaries of provincial court judges may be set either by legislation or by order in council.

162 However, Valente should not be read as having decided that the jurisprudence under s. 100 is of no assistance in shaping the contours of judicial independence as it is protected by s. 11(d). Rather, all that Valente held is that s. 11(d) does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions do to superior court judges. In the particular circumstances, though, s. 11(d) may in fact provide the same level of protection to provincial court judges as the judicature provisions do to superior court judges.

163 The relevance of the judicature provisions, and s. 100 in particular, to the interpretation of s. 11(d) emerges from their shared commitment to judicial independence. The link between these two sets of provisions can be found in Beauregard itself, where the Court developed the distinction between individual independence and institutional independence by reference to Valente. I also alluded to the link between these two sets of provisions in my separate reasons in Cooper. As I have suggested, this link arises in part as a function of the fact that both ss. 11(d) and 100 are expressions of the unwritten principle of judicial independence which is recognized and affirmed by the preamble to the Constitution Act, 1867.

164 What the link between s. 11(d) and the judicature provisions means is that certain fundamental aspects of judicial independence are enjoyed not only by superior courts, but by provincial courts as well. In my opinion, the constitutional parameters of the power to change or freeze judges' salaries under s. 100, as defined by Beauregard and developed in these reasons, fall into this category.

165 In conclusion, the requirements laid down in Beauregard and developed in these reasons with respect to s. 100 and superior court judges, are equally applicable to the guarantee of financial security provided by s. 11(d) to provincial court judges. Just as Parliament can change or freeze the salaries of superior court judges, legislatures and executives of the provinces can do the same to the salaries of provincial court judges.

(ii) Independent, Effective and Objective Commissions

166 Although provincial executives and legislatures, as the case may be, are constitutionally permitted to change or freeze judicial remuneration, those decisions have the potential to jeopardize judicial independence. The imperative of protecting the courts from political interference through economic manipulation is served by interposing an independent body -- a judicial compensation commission -- between the judiciary and the other branches of government. The constitutional function of this body is to depoliticize the process of determining changes or freezes to judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government to increase, reduce, or freeze judges' salaries.

167 I do not wish to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating these bodies. Moreover, different provinces should be free to choose procedures

and arrangements which are suitable to their needs and particular circumstances. Within the parameters of s. 11(d), there must be scope for local choice, because jurisdiction over provincial courts has been assigned to the provinces by the Constitution Act, 1867. This is one reason why we held in Valente, supra, at p. 694, that "[t]he standard of judicial independence for purposes of s. 11(d) cannot be a standard of uniform provisions".

168 Before proceeding to lay down the general guidelines for these independent commissions, I must briefly comment on Valente. There is language in that decision which suggests that s. 11(d) does not require the existence of independent commissions to deal with the issue of judicial remuneration. In particular, Le Dain J. stated that he did "not consider the existence of such a committee to be essential to security of salary for purposes of s. 11(d)" (p. 706). However, that question was not before the Court, since Ontario, the province where Valente arose, had an independent commission in operation at the time of the decision. As a result, the remarks of Le Dain J. were strictly obiter dicta, and do not bind the courts below and need not today be overruled by this Court.

169 The commissions charged with the responsibility of dealing with the issue of judicial remuneration must meet three general criteria. They must be independent, objective, and effective. I will address these criteria in turn, by reference, where possible, to commissions which already exist in many Canadian provinces to set or recommend the levels of judicial remuneration.

170 First and foremost, these commissions must be independent. The rationale for independence flows from the constitutional function performed by these commissions -- they serve as an institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary. It would undermine that goal if the independent commissions were under the control of the executive or the legislature.

171 There are several different aspects to the independence required of salary commissions. First, the members of these bodies must have some kind of security of tenure. In this context, security of tenure means that the members of commissions should serve for a fixed term, which may vary in length. Thus, in Manitoba, the term of office for the Judicial Compensation Committee is two years (Provincial Court Act, s. 11.1(1)), whereas the term of office for British Columbia's Judicial Compensation Committee and Ontario's Provincial Judges Remuneration Commission is three years (Provincial Court Act, R.S.B.C. 1979, c. 341, s. 7.1(1); Courts of Justice Act, R.S.O. 1990, c. C.43, Schedule (Appendix A of Framework Agreement), para. 7), and in Newfoundland, the term of its salary tribunal is four years (Provincial Court Act, 1991, S.N. 1991, c. 15, s. 28(3)). In my opinion, s. 11(d) does not impose any restrictions on the membership of these commissions. Although the independence of these commissions would be better served by ensuring that their membership stood apart from the three branches of government, as is the case in Ontario (Courts of Justice Act, Schedule, para. 11), this is not required by the Constitution.

172 Under ideal circumstances, it would be desirable if appointments to the salary commission were not made by any of the three branches of government, in order to

guarantee the independence of its members. However, the members of that body would then have to be appointed by a body which must in turn be independent, and so on. This is clearly not a practical solution, and thus is not required by s. 11(d). As we said in Valente, supra, at p. 692:

> It would not be feasible... to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter....

What s. 11(d) requires instead is that the appointments not be entirely controlled by any one of the branches of government. The commission should have members appointed by the judiciary, on the one hand, and the legislature and the executive, on the other. The judiciary's nominees may, for example, be chosen either by the provincial judges' association, as is the case in Ontario (Courts of Justice Act, Schedule, para. 6), or by the Chief Judge of the Provincial Court in consultation with the provincial judges' association, as in British Columbia (Provincial Court Act, s. 7.1(2)). The exact mechanism is for provincial governments to determine. Likewise, the nominees of the executive and the legislature may be chosen by the Lieutenant Governor in Council, although appointments by the Attorney General as in British Columbia (Provincial Court Act, s. 7.1(2)), or conceivably by the legislature itself, are entirely permissible.

173 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.

174 Finally, and most importantly, the commission must also be effective. The effectiveness of these bodies must be guaranteed in a number of ways. First, there is a constitutional obligation for governments not to change (either by reducing or increasing) or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes of this nature secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed change or freeze. Second, in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of

inflation, and that inaction could therefore be used as a means of economic manipulation, the commission must convene if a fixed period of time 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, and issue a recommendation in its report. Although the exact length of the period is for provincial governments to determine, I would suggest a period of three to five years.

175 Third, the reports of the commission must have a meaningful effect on the determination of judicial salaries. Provinces which have created salary commissions have adopted three different ways of giving such effect to these reports. One is to make a report of the commission binding, so that the government is bound by the commission's decision. Ontario, for example, requires that a report be implemented by the Lieutenant Governor in Council within 60 days, and gives a report of the Provincial Judges' Remuneration Commission statutory force (Courts of Justice Act, Schedule, para. 27). Another way of dealing with a report is the negative resolution procedure, whereby the report is laid before the legislature and its recommendations are implemented unless the legislature votes to reject or amend them. This is the model which has been adopted in British Columbia (Provincial Court Act, s. 7.1(10)) and Newfoundland (Provincial Court Act, 1991, s. 28(7)). The final way of giving effect to a report is the affirmative resolution procedure, whereby a report is laid before but need not be adopted by the legislature. As I shall explain below, until the adoption of Bill 22, this was very similar to the procedure followed in Manitoba (Provincial Court Act, s. 11.1(6)).

176 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.

177 For the same reasons, s. 11(d) does not require a negative resolution procedure, although it does not preclude it. Although the negative resolution procedure still leaves the ultimate decision to set judicial salaries in the hands of the legislature, it creates the possibility that in cases of legislative inaction, the report of the commission will determine judicial salaries in a binding manner. In my opinion, s. 11(d) does not require that this possibility exist.

178 However, whereas the binding decision and negative resolution models exceed the standard set by s. 11(d), the positive resolution model on its own does not meet that standard, because it requires no response to the commission's report at all. The fact that the report need not be binding does not mean that the executive and the legislature should be free to ignore it. On the contrary, for collective or institutional financial security to have any meaning at all, and to be taken seriously, the commission process must have a meaningful impact on the decision to set judges' salaries.

179 What judicial independence requires is that the executive or the legislature,

whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified amount of time. Before it can set judges' salaries, the executive must issue a report in which it outlines its response to the commission's recommendations. If the legislature is involved in the process, the report of the commission must be laid before the legislature, when it is in session, with due diligence. If the legislature is not in session, the government may wait until a new sitting commences. The legislature should deal with the report directly, with due diligence and reasonable dispatch.

180 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.

181 The importance of reasons as the basis for the legitimate exercise of public power has been recognized by a number of commentators. For example, in "Developments in Administrative Law: The 1992-93 Term" (1994), 5 S.C.L.R. (2d) 189, at p. 243, David Dyzenhaus has written that

> what justifies all public power is the ability of its incumbents to offer adequate reasons for their decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.

Frederick Schauer has made a similar point ("Giving Reasons" (1995), 47 Stan. L. Rev. 633, at p. 658):

> ... when decisionmakers... expect respect for decisions because the decisions are right rather than because they emanate from an authoritative source, then giving reasons... is still a way of showing respect for the subject....

182 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.

183 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).

184 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.

185 By laying down a set of guidelines to assist provincial legislatures in designing judicial compensation commissions, I do not intend to lay down a particular institutional framework in constitutional stone. What s. 11(d) requires is an institutional sieve between the judiciary and the other branches of government. Commissions are merely a means to that end. In the future, governments may create new institutional arrangements which can serve the same end, but in a different way. As long as those institutions meet the three cardinal requirements of independence, effectiveness, and objectivity, s. 11(d) will be complied with.

(b) No Negotiations on Judicial Remuneration Between the Judiciary and the Executive and Legislature

186 Negotiations over remuneration are a central feature of the landscape of public sector labour relations. The evidence before this Court (anecdotal and otherwise) suggests that salary negotiations have been occurring between provincial court judges and provincial governments in a number of provinces. However, from a constitutional standpoint, this is inappropriate, for two related reasons. First, as I have argued above, negotiations for remuneration from the public purse are indelibly political. For the judiciary to engage in salary negotiations would undermine public confidence in the impartiality and independence of the judiciary, and thereby frustrate a major purpose of s. 11(d). As the Manitoba Law Reform Commission has noted (in the Report on the Independence of Provincial Judges (1989), at p. 41):

> ... it forces them [i.e. judges] into the political arena and tarnishes the public perception that the courts can be relied upon to interpret and apply our laws without concern for the effect of their decisions on their personal careers or well-being (in this case, earnings).

187 Second, negotiations are deeply problematic because the Crown is almost always a party to criminal prosecutions in provincial courts. Negotiations by the judges who try those cases put them in a conflict of interest, because they would be negotiating with a litigant. The appearance of independence would be lost, because salary negotiations bring with them a whole set of expectations about the behaviour of the parties to those negotiations which are inimical to judicial independence. The major expectation is of give and take between the parties. By analogy with Généreux, the reasonable person might conclude that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive. As Professor Friedland has written in A Place Apart: Judicial Independence and Accountability in Canada (1995), at p. 57, "head-to-head bargaining between the government and the judiciary [creates]... the danger of subtle accommodations being made". This perception would be heightened if the salary negotiations, as is usually the case, were conducted behind closed doors, beyond the gaze of public scrutiny, and through it, public accountability. Conversely, there is the expectation that parties to a salary negotiation often engage in pressure tactics. As such, the reasonable person might expect that judges would adjudicate in such a manner so as to exert pressure on the Crown.

188 When I refer to negotiations, I use that term as it is understood in the labour relations context. Negotiation over remuneration and benefits involves a certain degree of "horse-trading" between the parties. Indeed, to negotiate is "to bargain with another respecting a transaction" (Black's Law Dictionary (6th ed. 1990), at p. 1036). That kind of activity, however, must be contrasted with expressions of concern and representations by chief justices and chief judges of courts, or by representative organizations such as the Canadian Judicial Council, the Canadian Judges Conference, and the Canadian Association of Provincial Court Judges, on the adequacy of current levels of remuneration. Those representations merely provide information and cannot, as a result, be said to pose a danger to judicial independence.

189 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.

190 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.

191 Finally, it should be noted that since these cases are only concerned with remuneration, the above prohibition addresses only negotiations which directly concern that issue. I leave to another day the question of other types of negotiations. For example, the judiciary and government can negotiate the form that the commission is to take, as was done in Ontario, where the Courts of Justice Act, Schedule, embodies an agreement between the government and the provincial court judges designed "to establish a framework for the regulation of certain aspects of the relationship between the executive branch of the government and the Judges, including a binding process for the determination of Judges' compensation" (para. 2). Agreements of this sort promote, rather than diminish, judicial independence.

(c) Judicial Salaries May Not Fall Below a Minimum Level

192 Finally, I turn to the question of whether the Constitution -- through the vehicle of either s. 100 or s. 11(d) -- imposes some substantive limits on the extent of salary reductions for the judiciary. This point was left unanswered by Beauregard. I note at the outset that neither the parties nor the interveners submitted that judicial salaries were close to those minimum limits here. However, since I have decided to lay down the parameters of the guarantee of collective or institutional financial security in these reasons, I will address this issue briefly.

193 I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure 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 from the executive or the legislature or to receive benefits from one of the litigants. Perhaps more importantly, in the context of s. 11(d), there is the perception that this could happen. As Professor Friedland has written, supra, at p. 53:

> We do not want judges put in a position of temptation, hoping to get some possible financial advantage if they favour one side or the other. Nor do we want the public to contemplate this as a possibility.

I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is "for our sake, not for theirs" (p. 56).

194 The idea of a minimum salary has been recognized in a number of international instruments. Article 11 of the Basic Principles on the Independence of the Judiciary, which was adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, states that:

> 11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. [Emphasis added.]

The U.N. Basic Principles were endorsed by the United Nations General Assembly on November 29, 1985 (A/RES/40/32), which later invited governments "to respect them and to take them into account within the framework of their national legislation and practice" (A/RES/40/146) on December 13, 1985. A more recent document is the Draft Universal Declaration on the Independence of Justice, which the United Nations Commission on Human Rights invited governments to take into account when implementing the U.N. Basic Principles (resolution 1989/32). Article 18(b) provides that:

> 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.

195 I offer three final observations. First, I do not address the question of what the minimum acceptable level of judicial remuneration is. We shall answer that question if and when the need arises. However, I note that this Court has in the past accepted its expertise to adjudicate upon rights with a financial component, such as s. 23 of the Charter (see Mahe v. Alberta, [1990] 1 S.C.R. 342). Second, although the basic minimum salary provides financial security against reductions in remuneration by the executive or the

legislature, it is also a protection against the erosion of judicial salaries by inflation.

196 Finally, I want to emphasize 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. 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 share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.

E. Application of Legal Principles

197 I shall now measure the salary reductions in P.E.I., Alberta, and Manitoba according to the procedural and substantive aspects of the collective or institutional financial security of the judiciary. As we shall see shortly, the reductions in each of these provinces fall short of the standard set down by s. 11(d). What remedial consequences follow from these findings of unconstitutionality, however, are another matter entirely, to which I shall turn at the conclusion of this judgment.

(1) Prince Edward Island

(a) Salary Reduction

198 The salaries of Provincial Court judges in P.E.I. were and continue to be set by s. 3(3) of the Provincial Court Act. Until May 1994, s. 3(3) of the Provincial Court Act provided that:

> 3. ...
>
> (3) The remuneration of judges for any year shall be determined by calculating the average of the remuneration of provincial court judges in the other provinces of Canada as of April 1 in that year.

What this provision did was to fix the salaries of judges of the P.E.I. Provincial Court judges at a level equal to the average of the salaries of provincial court judges across the country.

199 However, s. 3(3) was amended in two ways on May 19, 1994. First, for judges appointed on or after April 1, 1994, the formula for calculating salaries was changed from the national average to the average of the three other Atlantic provinces in the preceding year, by s. 1 of An Act to Amend the Provincial Court Act, S.P.E.I. 1994, c. 49. Second, and more importantly, s. 3(3) was amended by the addition of the words "less 7.5%" at the end of the salary formula, by s. 10 of the Public Sector Pay Reduction Act. As amended, s. 3(3) now reads in full:

3. ...

(3) The remuneration of judges for any year shall be determined

(a) in respect of judges appointed before April 1, 1994, by calculating the average of the remuneration of provincial court judges in the other provinces of Canada as of April 1 in that year, less 7.5%;
(b) in respect of judges appointed on or after April 1, 1994, by calculating the average of the remuneration of provincial court judges in the provinces of Nova Scotia, New Brunswick and Newfoundland on April 1 of the immediately preceding year, less 7.5%.

The evidence we have before us demonstrates that the net effect of these changes was to reduce judges' salaries by approximately 7.5 percent from $106,123.14 in 1993, to $98,243 as of May 17, 1994.

200 These changes were made by the legislature without recourse having first been made to an independent, objective, and effective process for determining judicial remuneration. In fact, no such body exists in P.E.I. Salaries cannot be reduced without first considering the report of a salary commission; if they are, then the reduction is unconstitutional. It is evident that the 7.5 percent reduction was therefore unconstitutional.

201 However, if in the future, after P.E.I. establishes a salary commission, that commission were to issue a report with recommendations which the provincial legislature declined to follow, a salary reduction such as the impugned one would probably be prima facie rational, and hence justified, because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds. I arrive at this view on the basis of an analysis of the Public Sector Pay Reduction Act. As the statement of facts which is appended to the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island indicates, the Act was an overall measure which was directed at everyone who is paid from the public purse. The Act draws a distinction between "Public Sector Employees" and "Persons Paid From Public Funds"; Provincial Court judges fall into the latter group. Public sector employees are governed by Part II of the Act. The definition of public sector employees is very inclusive, and can be gleaned from s. 1(d), which defines the public sector employers who are covered by the Act. Included in this list are the provincial government, school boards, Crown agencies and corporations, health and community services councils and regional authorities, universities, and colleges. Section 6(1) provides that public sector employees who are paid more than $28,000 per year had their salaries reduced by 7.5 percent (to a minimum of $26,950 -- see s. 6(2)); and the salaries of those who made less than $28,000 annually were reduced by 3.75 percent. I do not consider the smaller salary reduction of those paid considerably less than Provincial Court judges to be of any significance for the disposition of these appeals.

202 There is no comparable definition of persons paid from public funds, who are governed by Part III of the Act, to the definition of those persons governed by Part II. The approach of Part III is to deal with different categories of persons separately, partly because these persons are paid in different ways. However, notwithstanding these differences, a 7.5 percent reduction is applied in one way or another to all of these persons. For example, the annual, daily, or periodical allowances of members of provincial tribunals, commissions, and agencies are reduced by 7.5 percent (s. 9). Salary reductions for physicians are achieved by a 7.5 percent reduction of the envelope of funding set aside for the P.E.I. Medical Society (s. 11). Finally, a 7.5 percent reduction is achieved for judges of the P.E.I. Provincial Court by s. 10, which I have described above.

203 In sum, the Public Sector Pay Reduction Act imposed an across-the-board cut which reduced the salaries of substantially every person remunerated from public funds, including members of the P.E.I. Provincial Court. On its face, it is therefore prima facie rational. The facts surrounding the enactment of the Act support this initial conclusion. The Act was enacted as part of a government policy to reduce the provincial deficit, and was therefore designed to further the public interest. Although it is hard to assess the reasonableness of the factual foundation for this claim in the absence of a trial record, the statement of facts appended to the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island suffices for the purposes of this illustrative discussion.

(b) Other Issues Regarding Financial Security

204 The appellants raised a number of objections to the treatment of Provincial Court judges by the Public Sector Pay Reduction Act and the Provincial Court Act. I have dealt with most of them in the course of my general analysis on collective or institutional financial security. Moreover, a number of the reference questions address specific aspects of financial security which I have also dealt with in my general analysis. However, there are two that I would like to address here, if only briefly.

(I) Negotiations

205 First, the appellants object that the Public Sector Pay Reduction Act is unconstitutional because it provides for the possibility of salary negotiations between judges of the P.E.I. Provincial Court and the executive. The appellants centre their submissions on s. 12(1), which is found in Part IV, entitled "Saving for Future Negotiations". According to the appellants, s. 12(1) permits negotiations between any persons whose salaries are reduced by the Act and the government to find alternatives to pay reductions. If s. 12(1) had this effect, I would agree with the appellants that it contravened the principle of judicial independence. I note that this view of the Act has been taken by MacDonald C.J. of the P.E.I. Supreme Court, Trial Division in Lowther v. Prince Edward Island (1994), 118 D.L.R. (4th) 665. Moreover, as the court below pointed out in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, the Lieutenant Governor in Council of P.E.I. enacted a regulation subsequent to the decision in Lowther to clarify that the negotiation provisions did not cover Provincial Court judges (Regulation EC631/94).

206 However, I doubt whether the enactment of that regulation was necessary. I arrive at this conclusion on the basis of both the plain wording of s. 12(1) and the structure of the Act. Section 12(1) is limited to negotiations "between a public sector employer and employees". The plain meaning of a public sector employee does not include members of the judiciary. This interpretation of s. 12(1) is reinforced by the organization of the Act. Public sector employees are governed by Part II of the Act; by contrast, judges of the P.E.I. Provincial Court are governed by Part III, which is entitled "Persons Paid from Public Funds". Given the attempt of the Act to draw a distinction between persons like judges on the one hand, and public sector employees on the other, I have little doubt that the negotiation provisions, which expressly refer to public sector employees, do not apply to judges.

(ii) Miscellaneous Provisions

207 The appellants also object to ss. 12(2) and 13 of the Provincial Court Act, which confer a discretion on the Lieutenant Governor in Council to grant leaves of absence due to illness and sabbatical leaves, respectively. It is unclear what the precise objection is to s. 13, other than making sabbatical leaves a matter for executive discretion. The objection to s. 12(2) is directed at the ability of the Lieutenant Governor in Council to grant leave "on such terms as he [sic] may consider appropriate". Both the objections to ss. 12(2) and 13 implicate individual financial security. However, they are without merit. To understand why, I return to Valente, where the question of discretionary benefits for judges was considered. A number of discretionary benefits were at issue: unpaid leave, permission to take on extra-judicial employment, special leave, and paid leave. The Court dismissed the concern that discretionary benefits undermined judicial independence, at p. 714:

> While it may well be desirable that such discretionary benefits or advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive... I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(d) of the Charter.... [I]t would not be reasonable to apprehend that a provincial court judge would be influenced by possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

To my mind, the same reasoning applies here.

(2) Alberta

(a) Jurisdiction of the Alberta Court of Appeal

208 Next, I turn to the salary reduction in Alberta. As a preliminary point, I will consider whether the Alberta Court of Appeal was correct in declaring that it was without jurisdiction to hear the Crown's appeals under s. 784(1) of the Criminal Code. I conclude that s. 784(1) was applicable in this instance, and that the court below should have considered the merits of these appeals. Notwithstanding this error, we can assume the jurisdiction that the Court

of Appeal had, and pronounce upon the merits ourselves, rather than send the matter back to be dealt with by the Alberta Court of Appeal. This Court would only be without jurisdiction to do so if the parties had appealed directly from the decision of the Alberta Court of Queen's Bench, which, through the operation of s. 784(1), was not the court of final resort in Alberta: Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Laba, [1994] 3 S.C.R. 965.

209 In order to understand why s. 784(1) is at issue, I must recapitulate some aspects of the proceedings below. The three respondents had been charged with offences under the Criminal Code, and all pled not guilty. The Crown elected to proceed summarily in all three cases. The three accused appeared, in separate proceedings, before the Alberta Provincial Court. They then sought recourse to the Alberta Court of Queen's Bench to advance their constitutional arguments, but at different stages in the proceedings before them.

210 Ekmecic and Campbell challenged the constitutionality of their trials in the Alberta Provincial Court before those trials had started. In their notices of motion, filed in the Alberta Court of Queen's Bench on May 5, 1994, the respondents Campbell and Ekmecic requested stays pursuant to s. 24(1) of the Charter, on the basis of an alleged violation of s. 11(d). These notices of motion were subsequently amended on May 11, 1994, during the proceedings before the Alberta Court of Queen's Bench, to include a request for an order in the nature of a prohibition as an alternative to the stay. The prohibition was sought to prevent Ekmecic and Campbell from being tried before the Alberta Provincial Court.

211 By contrast, Wickman brought his motion before the superior court after the Crown had completed its case and six witnesses had testified for the defence, including Wickman. On May 8, 1994, Wickman filed a notice of motion in the Alberta Court of Queen's Bench for an order in the nature of certiorari quashing the information and proceedings at trial, an order in the nature of a prohibition to prevent the Alberta Provincial Court from proceeding further with his trial, and a series of declarations for alleged violations of s. 11(d). On May 9, 1994, he filed an amended notice of motion, asking for such further and other relief that the court deemed fit.

212 The difficulty which we now face arises from the mixed results of the trial judgment of the Alberta Court of Queen's Bench. On the one hand, the Crown lost, and the respondents won, because McDonald J. found that the Alberta Provincial Court was not an independent and impartial tribunal for the purposes of s. 11(d), and made a series of declarations of invalidity against the provincial legislation and regulations which were the source of the alleged violation of s. 11(d). But on the other hand, the Crown won, and the respondents lost, because McDonald J. held that the declarations had the effect of removing the source of the s. 11(d) violations, and therefore rendered the Alberta Provincial Court independent. There was no need to prevent the trials against Campbell and Ekmecic from commencing, or to prevent the trial of Wickman from continuing.

213 The Crown appealed the trial judgment on the basis of s. 784(1) of the Criminal Code, which provides that:

> 784. (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of mandamus, certiorari or prohibition.

A majority of the Alberta Court of Appeal held that it did not have jurisdiction to hear the appeals because the Crown was "successful" at trial and therefore could not rely on s. 784(1) (per Harradence and O'Leary J.A.) and because declaratory relief is non-prohibitory, and is therefore beyond the ambit of s. 784(1) (per Harradence J.A.). Conrad J.A., dissenting, disagreed on both points, and held that s. 784(1) could be relied on by successful parties, and that the declaratory relief granted by McDonald J. was prohibitory in nature.

214 I find the arguments advanced in support of the view that s. 784(1) was unavailable to the Crown to be unconvincing. First, it is not clear to me that only unsuccessful parties can avail themselves of s. 784(1). But even if this limitation applies, the Court of Appeal had jurisdiction. Although the Crown may have been successful in its efforts to commence and continue the trials against the respondents, it lost on the underlying finding of unconstitutionality. A series of declarations was made which had the effect of striking down numerous provisions found in legislation and regulations. It was, at most, a Pyrrhic victory for the Crown.

215 Second, I agree with Conrad J.A. that this is a case where the declaratory relief was essentially prohibitory in nature, and so came within the scope of s. 784(1), because the trial judgment granted relief sought in proceedings by way of prohibition. As the Crown stated in its factum, the declaratory judgments "did, in substance, prohibit the commencement or continuation of the trials before a court subject to the impugned legislation". The prohibitory nature of declaratory relief has been recognized before: e.g., R. v. Paquette (1987), 38 C.C.C. (3d) 333 (Alta. C.A.); R. v. Yes Holdings Ltd. (1987), 40 C.C.C. (3d) 30 (Alta. C.A.). Indeed, Paquette is analogous to these appeals, because the accused sought a prohibition and declaration at trial, but was only granted a declaration. The Crown appealed. The Court of Appeal held that it had jurisdiction under s. 719(1) (now s. 784(1)) of the Criminal Code, because the declaration was "in effect and intent prohibitory" (pp. 337-38).

216 I therefore conclude that the Court of Appeal had jurisdiction to hear the appeals under s. 784(1). This Court can exercise the jurisdiction that the Court of Appeal had, and consider these appeals.

(b) The Salary Reduction

217 The salary reduction for judges of the Alberta Provincial Court is unconstitutional for the same reason as the impugned reduction in P.E.I. That is because there is no independent, effective, and objective commission in Alberta which recommends changes to judges' salaries.

218 The salaries and pensions of Provincial Court judges in Alberta are set down by regulations made by the Lieutenant Governor in Council. The source of this

regulation-making power is s. 17(1) of the Provincial Court Judges Act, which provides in part:

> 17(1) The Lieutenant Governor in Council may make regulations
>
> (a) fixing the salaries to be paid to judges;
>
> . . .
>
> (d) providing for the benefits to which judges are entitled, including,...
>
> (v) pension benefits for judges and their spouses or survivors;

According to the evidence before us, judges' remuneration was reduced by 5 percent from $113,964 in 1993 to $108,266 in 1994. This reduction was achieved through two different means. First, judges' salaries were directly reduced by 3.1 percent, by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94. This regulation set the salary of the Chief Judge at $124,245, the Assistant Chief Judge at $117,338, and other members of the Provincial Court at $110,431. These salaries had previously been set at $128,220, $121,092, and $113,964 by Payment to Provincial Judges Amendment Regulation, Alta. Reg. 171/91. Second, an additional 1.9 percent reduction was achieved through five unpaid days of leave (two unpaid statutory holidays and three unpaid work days). Unfortunately, we have not been pointed to the legal instrument through which those days of leave were imposed on members of the Provincial Court. I can only assume that these days of leave were achieved pursuant to s. 17(1)(d)(iii) of the Provincial Court Judges Act, which authorizes the Lieutenant Governor in Council to provide for leaves of absence.

219 The absence of an independent, effective, and objective procedure for reviewing a government proposal to reduce judicial salaries in Alberta, which is what s. 11(d)'s guarantee of judicial independence requires, means that the salary reduction in Alberta is unconstitutional. However, if in the future, after Alberta establishes a salary commission, that commission were to issue a report with recommendations which the provincial legislature declined to follow, a salary reduction such as the impugned one would probably be prima facie rational because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds.

220 The parties to this appeal engaged in a debate over how widespread and how uniform the salary reductions in the Alberta public sector were. To buttress their respective arguments, they attempted to adduce extrinsic evidence which had not been adduced in the courts below. We denied the motions to introduce this evidence, because the establishment of a factual record is a matter for trial courts, not courts of appeal. Moreover, nothing turns on this question, because we are not issuing judgment on the rationality of the salary reduction. For present purposes, it is sufficient to note that the trial judge

proceeded on the basis that the salary reductions did apply across the public sector. Accordingly, the salary reduction in Alberta would likely have been prima facie rational. However, in the absence of a complete factual record, for the purposes of this illustration, I would be unable to reach the ultimate conclusion that there was a reasonable factual foundation for the government's claim, and hence that the pay reduction was in fact rational.

(c) Miscellaneous Provisions

221 The respondents and interveners raised a number of objections to the scheme governing the remuneration of judges of the Alberta Provincial Court, which I shall now consider. Several of them centred on the permissive language in s. 17(1) of the Provincial Court Judges Act, which provides that the Lieutenant Governor in Council "may" set judicial salaries. The respondents submit that s. 17(1) violates s. 11(d) of the Charter because, on its plain language, it does not require the government to fix salaries and pensions. Applying the standard of the reasonable and informed person, the respondents argue that the permissive language of s. 17(1) creates a perception of a lack of judicial independence, because the independence of Provincial Court judges is not guaranteed by "objective conditions or guarantees" (Valente, supra, at p. 685).

222 What these arguments implicate are the requirements for individual financial security. As I stated above, Valente laid down two requirements: that salaries be established by law, and that they not be subject to arbitrary or discretionary interference by the executive. The appellant argues that both of these conditions are met by s. 1 of the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, which provides that judges "shall" be paid specified salaries. I agree that the regulation complies with the requirements for individual financial security. However, s. 17(1) of the Act does not. Its principal defect is the failure to lay down in mandatory terms that Provincial Court judges shall be provided with salaries.

223 The intervener Alberta Provincial Judges' Association raises a different issue -- the pension scheme for Alberta Provincial Court judges. Its submissions are somewhat unclear, but in the end, appear to assert that numerous changes to the operation of the pension plan demonstrate the "financial vulnerability of the judiciary". However, this analysis relies entirely on extrinsic evidence which was not accepted by this Court. As a result, I can do no more than agree with the trial judge, who found that there was insufficient evidence before him to properly consider whether the pension scheme complied with s. 11(d) of the Charter.

(3) Manitoba

(a) Bill 22 and the Salary Reduction

224 Finally, I turn to the salary reduction in Manitoba. I find that this salary reduction violates s. 11(d), because the salaries were reduced without the use of an independent, effective, and objective commission process for determining judicial salaries. Unlike in Alberta and P.E.I., where no such process existed, Manitoba had created a salary

commission, the Judicial Compensation Committee ("JCC"). The unconstitutionality of the salary reduction in that province arises from the fact that the government ignored the JCC process.

225 The remuneration of the judges of the Manitoba Provincial Court was reduced by Bill 22. Section 9(1) of Bill 22 provided that:

> 9(1) The amount that would otherwise be paid to every person who receives remuneration as a judge of The Provincial Court... shall be reduced
>
> (a) for the period commencing on April 1, 1993 and ending on March 31, 1994, by 3.8%; and
> (b) for the period commencing on April 1, 1994 and ending on March 31, 1995, by an amount that is generally equivalent to the amount by which the wages of employees under a collective agreement with Her Majesty in right of Manitoba are reduced in the same period as a result of a requirement to take days or portions of days of leave without pay in that period. [Emphasis added.]

On a plain reading of s. 9(1), it is clear that the pay reduction for Provincial Court judges was mandatory for the 1993-94 fiscal year, and perhaps for the 1994-95 year, depending on the outcome of public sector collective bargaining.

226 Bill 22 imposed a salary reduction on members of the Manitoba Provincial Court. It was therefore necessary for the government to have prior recourse to an independent salary commission, which would have reported on the proposed reduction, before that legislation was enacted. Such a body already existed in Manitoba -- the JCC. The JCC is a statutory body, created by s. 11.1 of The Provincial Court Act. As the trial judge noted, s. 11.1 was enacted in partial response to the recommendation of the Manitoba Law Reform Commission, supra, chapter 4. The Commission expressed its concern with the setting of judicial remuneration by order in council, because it created the perception of a dependent relationship between the executive and the judiciary. It recommended the creation of an independent committee for determining judicial remuneration, operating according to the negative resolution procedure I described earlier. The Manitoba legislation, however, only empowers the independent committee to make non-binding recommendations to the legislature.

227 Section 11.1 lays down the membership and powers of the JCC. There are three members, all appointed by the Lieutenant Governor in Council. Two members are designated by the responsible Minister, and the remaining member is designated by the judges of the Manitoba Provincial Court (s. 11.1(2)). The Lieutenant Governor in Council appoints one of these three to be the chair (s. 11.1(2)). The term of office is two years (s. 11.1(1)). Once appointed, the JCC is charged with the mandate of reviewing and issuing a report to the Minister on the salaries and benefits payable to judges, including pensions, vacations, sick leave, travel expenses and allowances (s. 11.1(1)). Once this report is

submitted, it must be tabled by the Minister before the provincial legislature within 30 days if the legislature is in session, or within 30 days of the legislature commencing a new session (s. 11.1(4)). Within 30 days of being tabled, the report must be referred to a standing committee of the legislature, which in turn must report back on the recommendations of the JCC within 60 days (s. 11.1(5)). It is then left to the legislature to determine whether it will accept the report of the standing committee (s. 11.1(6)). If the legislature adopts that report, all acts, regulations, and administrative practices are deemed to be amended as necessary to implement the report (s. 11.1(6)).

228 The evidence presented by the parties indicates that there have been two JCC's since s. 11.1 was added to The Provincial Court Act in 1990. In the same year, the first JCC was appointed by order in council (895/90). It held public hearings in January 1991, and issued its report in June 1991. That report was eventually laid before the legislature, which in turn referred it to a standing committee. The standing committee's report was adopted by the legislature on June 24, 1992. The report incorporated the recommendations of the JCC with respect to changes in judicial remuneration. It provided for a 3 percent increase for Manitoba Provincial Court judges effective April 3, 1993.

229 The first JCC seems to have operated in the manner envisioned by The Provincial Court Act -- changes were made to judicial remuneration after the JCC had issued its report, which was duly considered by a committee of the legislature. However, the problem in this appeal is that Bill 22 displaced the operation of the second JCC. As required by s. 11.1(1), a new JCC was appointed in October 1992, pursuant to an order in council (865/92). The second JCC received submissions from both the Provincial Court judges and the government in May 1993. However, before the JCC had convened or issued its report, the legislature enacted Bill 22 on July 27, 1993. The salaries of Manitoba Provincial Court judges were altered by s. 9 of the Bill, which I have cited above.

230 There was considerable debate among the parties over the interaction between s. 9 of Bill 22 and the JCC. The appellants argued that the JCC had constitutional status, and that Bill 22 violated s. 11(d) because it suspended the operation of the JCC and had therefore "effective[ly] repeal[ed] s. 11.1". In particular, they drew attention to the fact that Bill 22 changed salaries for a period of time (April 1, 1993 to March 31, 1994) which had been the object of a JCC report that had already been accepted by the legislature.

231 The respondent, in addition to rejecting the submission that the JCC had any constitutional status, placed a great deal of weight on the argument that there was in fact no conflict between Bill 22 and the continued operation of the JCC. Not only did Bill 22 not preclude the operation of the JCC; it in fact allowed for that process to continue. The respondent draws support for its submission from the wording of s. 9(1) of Bill 22, which provides that the 3.8 percent reduction is to apply to "[t]he amount that would otherwise be paid" (emphasis added). This language, it is said, was apparently intended to permit the continued operation of the JCC, which could have recommended increases to judges' salaries; these recommendations in turn, could have been accepted by the legislature.

232 I reject the submission of the respondent on this point. Bill 22 is constitutionally defective in two respects. First, s. 9(1)(a) reduced the salary for the 1993-94 financial year

which had been set by the legislature on the basis of the previous JCC's recommendation without further recourse to that body. Second, s. 9(1)(b) effectively precluded the future involvement of the JCC, at least for the 1994-95 financial year.

233 I first consider s. 9(1)(a). That provision reduced the salaries that the judges would have otherwise received commencing April 1, 1993 by 3.8 percent, for the 1993-94 year. The base salary to which the 3.8 percent reduction applied was the salary arrived at as a result of the report of the first JCC; this is the significance of the words "would otherwise be paid" in s. 9(1). What is important is that this reduction was imposed without the benefit of a report from the second JCC, which had been constituted at the time. In fact, the second JCC was left out of the process entirely. Section 11(d) of the Charter requires that that change only be made after the report of an independent salary commission. The circumvention of the JCC by the province therefore violated an essential procedural requirement of the collective or institutional guarantee of financial security.

234 Moreover, I do not accept that s. 9(1)(b) of Bill 22 accommodated the possibility of a report from another JCC for a further salary increase, which the legislature could then accept, for 1994-95. The respondent's argument has theoretical appeal. However, that appeal is just that -- theoretical. It ignores the simple political reality that s. 11.1 of The Provincial Court Act leaves the ultimate decision on judicial remuneration with the provincial legislature, the same body that enacted Bill 22. It is exceedingly unlikely that the same legislature which sought to reduce judges' salaries in 1994-95 by enacting s. 9(1)(b) would then turn around and approve a JCC report which would potentially recommend increases to judges' salaries.

235 Finally, I consider whether the economic circumstances facing Manitoba were sufficiently serious to warrant the reduction of judges' salaries without recourse to the JCC. Scollin J. held, at trial, that there was an economic emergency in Manitoba. However, he defined (at p. 77) an economic emergency in much broader terms than I have above, as a situation

> [w]here, in the judgment of the Government, fiscal demands on the public treasury can be met only by immediate but determinate restraints on the Government's own spending....

By contrast, I have defined an economic emergency as a dire and exceptional situation precipitated by unusual circumstances, for example, such as the outbreak of war or pending bankruptcy. Although Manitoba may have faced serious economic difficulties in the time period preceding the enactment of Bill 22, the evidence tendered by the government does not establish that Manitoba faced sufficiently dire and exceptional circumstances to warrant the suspension of the involvement of the JCC.

236 In conclusion, the salary reduction imposed by s. 9(1) of Bill 22 violated s. 11(d) of the Charter, because the government failed to respect the independent, effective, and objective process for setting judicial remuneration which was already operating in Manitoba. The appellants also submitted that Bill 22 was unconstitutional because it discriminated against members of the judiciary. The provisions governing salary reductions

for the judiciary, they note, are mandatory; s. 9 provides that judges' salaries "shall" be reduced. By contrast, s. 4, which governs persons employed in the broader public sector, is framed in permissive terms. It provides that public sector employers "may" require their employers to take up to 15 days of unpaid leave.

237 I decline to consider these submissions, because they go to the question of whether the government would have been justified in enacting legislation with terms identical to Bill 22 in rejection of the report of the JCC. Unlike cuts such as those in P.E.I. and Alberta, whose prima facie rationality is evident on their face because they apply across-the-board, the differential treatment of judges under Bill 22 is a matter better left, in its entirety, for future litigation, because the factual issues involved are by definition more complex. I note in passing, though, that s. 11(d) allows for differential treatment of judges, and hence does not require that mandatory salary reductions for judges be accompanied by salary reductions for absolutely every person who is paid from the public purse. It may be necessary to adopt different arrangements for different groups of persons, depending on the nature of the employment relationship they have with the government.

(b) The Conduct of the Executive in Manitoba

238 I now turn to the highly inappropriate conduct of the Manitoba provincial government, in the time period following the implementation of the salary reductions in that province. This conduct represents either an ignorance of, or a complete disrespect for judicial independence.

239 Earlier on in these reasons, I stated why it was improper for governments and the judiciary to engage in salary negotiations. The separation of powers demands that the relationship between the judiciary and the other branches be depoliticized. Moreover, remuneration from the public purse is an inherently political issue. It follows that judges should not negotiate changes in remuneration with executives and legislatures, because they would be engaging in political activity if they were to do so. Moreover, salary negotiations would undermine the appearance of independence, because those negotiations would bring with them a whole set of expectations about the behaviour of the parties to those negotiations which are inimical to judicial independence.

240 Salary negotiations between judges and the executive and legislature are clearly unacceptable. However, the record before this Court indicates that the Government of Manitoba initiated negotiations with the Manitoba Provincial Judges Association, and furthermore that those negotiations had the express purpose of setting salaries without recourse to the JCC. The first piece of documentary evidence is a letter from Chief Judge Webster to judges of the Manitoba Provincial Court, dated March 11, 1994. That letter describes an offer from the Minister of Justice for a salary increase of 2.3 percent. The letter also quotes the Minister as having made the offer "[o]n the condition that the Judicial Compensation Committee hearings do not proceed".

241 The President of the Manitoba Provincial Judges Association instructed counsel to accept the offer on March 31, 1994. This letter confirms that negotiations were to replace the JCC as the means whereby salaries were set. There seems to have been the

expectation that the JCC would merely rubber-stamp the salary increase negotiated by the parties:

> The judges agree that this acceptance of this offer requires a joint recommendation to the Judicial Compensation Committee which ought to proceed forthwith and really without any hearing. It is also expected that the Compensation Committee will recommend to the Legislature adoption of the joint recommendation without further comment.

Alternatively, the Association also seems to have thought that the JCC would not convene at all. In a letter dated March 31, 1994, counsel for the Association informed counsel for the government that the judges accepted the offer "[subject to] the condition that the Judicial Compensation Committee hearings do not proceed". A few days later, on April 6, 1994, counsel for the Association sent a draft of a joint recommendation to be submitted to the JCC to counsel for the government. It is clear that both parties intended a negotiated salary increase to be an alternative to proceeding through the JCC.

242 I must confess that I am somewhat disturbed by this course of events, because it creates the impression that the Manitoba Provincial Judges Association was a willing participant in these negotiations, and thus compromised its own independence. If the Association had acted in this manner, its conduct would have been highly problematic. However, the surrounding circumstances have led me to conclude that the Association was effectively coerced into these negotiations. The offer of March 11, 1994 must be viewed against the background of Bill 22. As I mentioned earlier, Bill 22 violated s. 11(d) because it changed judicial remuneration without first proceeding through the JCC, and because it effectively precluded the future operation of the JCC for the 1994-95 financial year. Faced with the prospect of a JCC which was destined to be completely ineffectual, if not inoperative, the Association had little choice but to enter into salary discussions. An indication of the Association's relatively weak position is the fact that they accepted the government's offer without requesting any modifications.

243 That negotiations occurred between the provincial government and the Association, no matter how one-sided, was bad enough. What happened next was even worse, and illustrates why the Constitution must be read to prohibit negotiations between the judiciary and the other branches of government. The government seems to have learned that the Association was considering a constitutional challenge to Bill 22. It then refused to agree to making a joint submission with the Association to the JCC until the Association clarified its intentions regarding potential litigation.

244 Thus, on May 3, 1994, counsel for the government wrote that in light of the Association's failure to give an assurance that it would not be challenging Bill 22, the government "had to reconsider the draft recommendation" in order to clarify that the 2.3 percent increase would be subject to Bill 22. The government then proposed that the Association accept one of two alternative changes to the proposed draft recommendation to address its concerns. The Association accepted one of these changes on May 4, 1994, but made it clear that it wished to treat the joint recommendation and a possible challenge to Bill 22 as separate issues. Counsel for the government then replied, on May 5, 1994,

that the government would not sign the joint recommendation unless it received "a clear and unequivocal statement" of the Association's intentions with regard to Bill 22. The clear implication of this letter, as of a letter sent by counsel for the government on May 19, 1994, was that the government would not proceed with the joint recommendation unless the Association agreed to forego litigation on Bill 22. No such assurance was given, and the joint recommendation was never made.

245 The overall picture which emerges is that the Government of Manitoba initiated negotiations with the Manitoba Provincial Judges Association, the purpose of which was to set salaries without recourse to the independent, effective, and objective process centred on the JCC. Moreover, when the judges would not grant the government an assurance that they would not launch a constitutional challenge to Bill 22, the government threatened to abandon the joint recommendation.

246 The facts of this appeal vividly illustrate why salary negotiations between the judiciary and the other branches of government are unconstitutional. Negotiations force the organs of government to engage in conduct which is inconsistent with the character of the relationship between them. For example, the Manitoba government relied on pressure tactics of the sort which are characteristic of salary negotiations. Those tactics created an atmosphere of acrimony and discord, and were intended to induce a concession from the judiciary. Alternatively, the judiciary may have responded with a pressure tactic of its own. The expectations of give and take, and of threat and counter-threat, are fundamentally at odds with judicial independence. They raise the prospect that the courts will be perceived as having altered the manner in which they adjudicate cases, and the extent to which they will protect and enforce the Constitution, as part of the process of securing the level of remuneration they consider appropriate. In this light, the conduct of the Manitoba government was unacceptable.

V. Other Issues Raised in These Appeals

247 As I mentioned earlier, the issue which unites these appeals is whether and how s. 11(d)'s guarantee of judicial independence restricts and manner and extent by and to which provincial governments and legislatures can reduce the salaries of provincial court judges. This is a question of financial security. However, each of these appeals also implicates the other two aspects of judicial independence, security of tenure and administrative independence, to which I will now turn.

A. Prince Edward Island

(1) Security of Tenure

248 The appellants direct their submissions at the alleged lack of security of tenure created by s. 10 of the Provincial Court Act, as it stood at the time of the reference to the court below. They argue that the provision is constitutionally deficient in two respects: first, it permits the executive to suspend a judge if it has reason to believe that a judge is guilty of misbehaviour, or is unable to perform his or her duties properly, without requiring

probable cause, and second, it is possible to remove judges without a prior inquiry. For these reasons, they submit that questions 1 and 2(c) of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island should be answered in the negative.

249 These arguments have been rendered moot by repeal and replacement of s. 10 by the Provincial Affairs and Attorney General (Miscellaneous Amendments) Act, S.P.E.I. 1995, c. 32. The amended legislation now requires that there be an inquiry in every case by a judge of the P.E.I. Supreme Court (s. 10(1)), that the judge whose conduct is being investigated be given notice of the hearing and a full opportunity to be heard (s. 10(3)), and that a finding of misbehaviour or inability to perform one's duties be a precondition to any recommendation for disciplinary measures. Because there will now always be a judicial inquiry before the removal of a judge, and because that removal must be based on actual cause, the new legislation meets the standard set down by Valente. It is unnecessary to consider the constitutionality of the former provisions.

250 Finally, I turn to question 2 of Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, which purports to raise a series of questions about security of tenure. Aside from question 2(c), which addresses the provisions I have just described, the rest of these questions raise issues which fall outside the ambit of security of tenure. Since the sole focus of question 2 is security of tenure, whatever other aspects of judicial independence those questions might touch on is irrelevant for the purpose of answering that question. However, to some extent, questions 2(a) and (f) (pensions), questions 2(b) and (g) (the remuneration of Provincial Court judges), and questions 2(d) and (e) (discretionary benefits), which all touch on financial security, are dealt with by the various parts of question 4.

(2) Administrative Independence

251 The administrative independence of the P.E.I. Provincial Court was the subject of question 3 of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island. The appellants also raised in question 5, the residual question, a concern about administrative independence which was not addressed by the specific parts of question 3. To frame the analysis which follows, I will begin by recalling the meaning given to administrative independence in Valente. The Court defined administrative independence in rather narrow terms, at p. 712, as "[t]he essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(d)". That essential minimum was defined (at p. 709) as control by the judiciary over

> assignment of judges, sittings of the court, and court lists -- as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions....

These matters "bear directly and immediately on the exercise of the judicial function" (p. 712). Le Dain J. took pains to contrast the scope of s. 11(d) with claims for an increased measure of autonomy for the courts over financial and personnel aspects of administration.

Although Le Dain J. may have been sympathetic to judicial control over these aspects of administration, he clearly held that they were not within the ambit of s. 11(d), because they were not essential for judicial independence, at pp. 711-12:

> Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it, may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(d) of the Charter.

It is against this background that I analyse these questions.

252 I first address question 3. Question 3(a) asks whether the location of the P.E.I. Provincial Court with respect to the offices, inter alia, of Legal Aid, Crown Attorneys and representatives of the Attorney General undermines the administrative independence of the Provincial Court. These entities and departments are part of the executive, from which the judiciary must remain independent, but are located in the same building as the Provincial Court. The concern underlying this question is that this physical proximity may somehow undermine judicial independence. The statement of facts appended to the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, however, shows that these fears are unfounded, because the Provincial Court's offices are "separate and apart" from the other offices in the building. I therefore find that the location of the P.E.I. Provincial Court does not violate s. 11(d).

253 Question 3(b) asks whether it is a violation of s. 11(d) for P.E.I. Provincial Court judges not to administer their own budget. It is clear from Valente that while it may be desirable for the judiciary to have control over the various aspects of financial administration, such as "budgetary preparation and presentation and allocation of expenditure" (pp. 709-10), these matters do not fall within the scope of administrative independence, because they do not bear directly and immediately on the exercise of the judicial function. I therefore conclude that it does not violate s. 11(d) for judges of the P.E.I. Provincial Court not to administer their own budget.

254 Question 3(c) asks whether "the designation of a place of residence of a particular Provincial Court Judge" undermines the administrative independence of the judiciary. Although the question does not refer to specific provisions of the Provincial Court Act, it seems that the relevant section is s. 4. Section 4(1)(b) authorizes the Chief Judge to "designate a particular geographical area in respect of which a particular judge shall act". Furthermore, under s. 4(2), "[w]here the residence of a judge has been established for the purpose of servicing a particular geographical area pursuant to clause (1)(b), that residence shall not be changed except with the consent of the judge".

255 Section 4 is constitutionally sound. Upon the appointment of a judge to the Provincial Court, it is necessary that he or she be assigned to a particular area. Furthermore, the stipulation that the residence of a sitting judge only be changed with that judge's consent is a sufficient protection against executive interference.

256 Question 3(d) asks if communications between a judge of the P.E.I. Provincial Court

and the executive on issues relating to the administration of justice undermine the administrative independence of the judiciary. I decline to answer this question, because it is too vague -- it does not offer sufficient detail on the subject-matter of the communication. However, I do wish to note that the separation of powers, which s. 11(d) protects, does not prevent the different branches of government from communicating with each other. This was acknowledged in the Court of Appeal's judgment in Valente, supra, at p. 433, in a passage which was cited with approval by Le Dain J. at p. 709:

> The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration.

257 Question 3(e) asks whether the vacancy in the position of the Chief Judge undermines the administrative independence of the P.E.I. Provincial Court. The statement of facts does not refer to a vacancy in this position, although it appears that Chief Judge Plamondon resigned on November 2, 1994, in connection with the dispute which led to this litigation. Nor does the statement of facts provide any detail on who was exercising the functions of the Chief Judge after he had resigned. The appellants contend that the Attorney General assumed the duties of the Chief Judge, whereas the respondent states that the duties of the Chief Judge were carried out by Provincial Court judges. In the absence of sufficient information, I decline to answer this question.

258 Question 3(f) asks whether the decision of the Attorney General both to decline to fund and to oppose an application to fund legal counsel for the Chief Judge and judges of the P.E.I. Provincial Court as interveners in the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island violated the administrative independence of the court. It did not. As I stated above, the administrative independence of the judiciary encompasses control over those matters which "bear directly and immediately on the exercise of the judicial function". I do not see how the receipt of legal aid funding for judges to intervene in a court case furthers this purpose.

259 In contrast to the specific issues raised in question 3, the argument advanced under question 5 is much more substantive. The appellants allege that s. 17 of the Provincial Court Act authorizes serious intrusions into the administrative independence of the P.E.I. Provincial Court. I set out that provision in full:

> 17. The Lieutenant Governor in Council may make regulations for the better carrying out of the intent and purpose of this Act, and without limiting the generality thereof, may make regulations
>
> (a) respecting inquiries and the form and content of reports under section 10;
> (b) respecting the duties and powers of the Chief Judge;
> (c) respecting rules of court governing the operation and conduct of a court presided over by a judge or by a justice of the peace; and
> (d) respecting the qualifications, duties, responsibilities and jurisdiction

of justices of the peace.

The appellants attack s. 17(b), (c), and (d). The first thing to note is that s. 17(d) is irrelevant to this appeal, because the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island is confined to the independence of judges of the P.E.I. Provincial Court, and does not touch on justices of the peace. However, that aside, parss. 17(b) and (c) of s. 17 do appear to give broad regulatory power to the executive with respect to matters that might fall within the ambit of administrative independence.

260 However, s. 17 has to be read subject to s. 4(1), which confers broad administrative powers on the Chief Judge:

> 4. (1) The Chief Judge has the power and duty to administer the provincial court, including the power and duty to
>
> (a) designate a particular case or other matter or class of cases or matters in respect of which a particular judge shall act;
> (b) designate a particular geographical area in respect of which a particular judge shall act;
> (c) designate which court facilities shall be used by particular judges;
> (d) assign duties to judges.

The matters over which the Chief Judge is given power by s. 4(1) are almost identical to the list of matters which Le Dain J. held, in Valente, to constitute administrative independence: the assignment of judges, sittings of the court and court lists, the allocation of courtrooms, and the direction of administrative staff carrying out these functions. Section 4(1) therefore vests with the P.E.I. Provincial Court, in the person of the Chief Judge, control over decisions which touch on its administrative independence. In light of the broad provisions of s. 4(1), I see no problem with s. 17.

261 I hasten to add that by regarding the powers of the Chief Judge under s. 4(1) as a guarantee of the collective or institutional administrative independence of the P.E.I. Provincial Court as a whole, I do not suggest that the Chief Judge can in all circumstances make administrative decisions for the entire court. For reasons that I develop below, there are limits to the Chief Judge's ability to make such decisions on behalf of his or her colleagues.

B. Alberta

(1) Security of Tenure

262 The trial judge found two sets of provisions of the Provincial Court Judges Act to violate s. 11(d) for failing to adequately protect security of tenure. He held that the presence of non-judges on the Judicial Council, the body with the power to receive and

investigate complaints against members of the Alberta Provincial Court, violated s. 11(d) because Valente had held that judges could only be removed after a "judicial inquiry". As a result, he declared ss. 11(1)(c) and 11(2) of the Act, which empower the Council to investigate complaints, make recommendations to the Minister of Justice and Attorney General, and refer complaints to the Chief Judge of the Court or a committee of the Judicial Council for inquiry and report, to be of no force or effect. As well, he held that use of "lack of competence" and "conduct" as grounds of removal in s. 11(1)(b) of the Act also violated s. 11(d) of the Charter, because those grounds were unconstitutionally broad, and declared that provision to be of no force or effect.

263 The parties made submissions on both of these sets of provisions before this Court. However, we need not consider the merits of their arguments, because the constitutionality of those provisions was not properly before the trial judge. The respondents did not raise the constitutionality of these provisions at trial. Rather, as the trial judge conceded, they only sought remedies against provisions in the Provincial Court Judges Act governing the removal of supernumerary judges. Nevertheless, without the benefit of submissions, and without giving the required notice to the Attorney General for Alberta under s. 25 of the Judicature Act, R.S.A. 1980, c. J-1, the trial judge held (at p. 160) that he was

> at liberty to decide generally (and not limited to supernumerary judges) whether the statutory removal procedure fails to satisfy the security of tenure condition which is guaranteed by s. 11(d).

264 With respect, I cannot agree. It was not appropriate for the trial judge to proceed on his own motion to consider the constitutionality of these provisions, let alone make declarations of invalidity. As I will indicate at the conclusion of this judgment, this part of his reasons cannot stand.

(2) Administrative Independence

265 However, I do agree with the trial judge's holdings that ss. 13(1)(a) and 13(1)(b) of the Provincial Court Judges Act are unconstitutional. Both of these provisions confer powers on the Attorney General and Minister of Justice (or a person authorized by him or her) to make decisions which infringe upon the administrative independence of the Alberta Provincial Court.

266 Section 13(1)(a) confers the power to "designate the place at which a judge shall have his residence". Counsel for the appellant rightly points out that it is reasonable (although not necessary) to vest responsibility for designating the residence of judges with the executive, because that decision concerns the proper allocation of court resources. However, my concern is that, as it is presently worded, s. 13(1)(a) creates the reasonable apprehension that it could be used to punish judges whose decisions do not favour the government, or alternatively, to favour judges whose decisions benefit the government. Section 13(1)(a)'s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. The appellant tried to demonstrate that s. 13(1)(a), when properly interpreted, was so confined. However, the words of the provision are not qualified in the manner in which the appellant suggests. Section 13(1)(a) authorizes the Minister of Justice

and the Attorney General to designate a judge's place of residence at any time, including his initial appointment or afterward. It therefore violates s. 11(d) of the Charter.

267 Section 13(1)(b) is also unconstitutional. It confers the power to "designate the day or days on which the Court shall hold sittings". This provision violates s. 11(d) because it flies in the face of explicit language in Valente, supra, at p. 709, which held that the administrative independence of the judiciary, encompasses, inter alia, "sittings of the court".

268 I do, however, wish to make one further comment in respect of this issue. The strongest argument made by the appellant in favour of the constitutionality of s. 13(1)(b) is that giving the executive control over sitting days enables the executive to give specific dates to defendants for their first appearance in criminal proceedings. The implication of this argument is that judicial control of the dates of court sittings would preclude the establishment of a system to inform defendants when they must first appear. This argument, however, is incorrect, because it ignores the fact that the courts can and should coordinate their sitting days with the relevant government authorities.

C. Manitoba: The Closing of the Provincial Court

269 One of the issues raised at trial in the Manitoba case, and pursued on appeal, is whether the Government of Manitoba infringed the administrative independence of the Manitoba Provincial Court by effectively shutting down those courts on a number of days known as "Filmon Fridays". The trial judge made a specific finding of fact that control over sitting days had remained with the judiciary, largely because the Chief Judge had been consulted on the withdrawal of court staff, and because the government had assured the Chief Judge that had she decided that the Provincial Court would remain open on those days, adequate staff would have been provided.

270 However, a careful perusal of the record has led me to conclude that Scollin J. made an overriding and palpable error in making this factual finding. The record shows that the government effectively shut down the Manitoba Provincial Court by ordering the withdrawal of court staff several days before the Chief Judge announced the closing of the Manitoba Provincial Court. As well, the government also shut down the courts by rescheduling trials involving accused persons who had already been remanded by the court. These acts constituted a violation of the administrative independence of the Manitoba Provincial Court. Moreover, even if Scollin J. were correct in finding that the Chief Judge had retained control throughout, I would nevertheless find that there had been a violation of s. 11(d), because it was not within her constitutional authority unilaterally to shut down the Manitoba Provincial Court.

271 The chronology of events illustrates how it was the executive, not the judiciary, that shut down the Manitoba Provincial Court. Bill 22 was enacted on July 27, 1993. Section 4 of the Bill conferred the power on public sector employers, including the province of Manitoba, to require employees to take days of leave without pay. It appears that the government used s. 4 to order its employees to take 10 unpaid days of leave in 1993, and on these days, the Provincial Court of Manitoba, with the exception of one adult custody

docket court and one youth custody docket court, was closed down.

272 However, the events which concern me here transpired in the spring of 1994. On March 1, 1994, letters were sent from the Manitoba Civil Service Commission to the Crown Attorneys of Manitoba Association, the Legal Aid Lawyers' Association, and the Manitoba Government Employees' Union. These letters gave these groups notice that they would be required to take 10 unpaid days of leave, pursuant to Bill 22. The dates for the unpaid days of leave were announced by the Assistant Deputy Minister, Marvin Bruce, on March 24, 1994:

> 2. Office closures will be on 7 Fridays in the summer months commencing July 8, 1994 to and including August 19, 1994 and 3 days during Christmas time, that is, December 28, 29 and 30th, 1994.

Almost two weeks passed before a memorandum was sent from Chief Judge Webster to all members of the Manitoba Provincial Court on April 6, 1994. Her memorandum states in full:

> Further to my memo of March 24th, the following 10 days have been designated as reduced work week days:
>
> July 8, 15, 22, 29; August 5, 12, 19; December 28, 29, 30.
>
> During the 10 days on which the government offices are closed ALL PROVINCIAL COURTS will be closed with the exception of the two custody courts:
>
> -One at 408 York
> -One at the Manitoba Youth Centre.
>
> (Signature)

The days on which the Provincial Court were closed was identical to the days on which the Manitoba government required its employees to take unpaid days of leave.

273 These facts clearly demonstrate that the decision to withdraw court staff was taken almost two weeks before the Chief Judge ordered the closure of the Manitoba Provincial Court. As well, the court was closed on the same days as the unpaid days of leave for court staff. Moreover, it is the uncontroverted evidence of Judge Linda Giesbrecht, which was presented at trial, that the Manitoba Provincial Court could not function "without the assistance and presence of Courts' staff including Court clerks, Crown Attorneys, Legal Aid lawyers and Sheriff's officers and other administrative personnel". The only conclusion I can draw is that the government, through its decision of March 24, 1994, effectively

forced Chief Judge Webster to close the Manitoba Provincial Court by her decision of April 6, 1994.

274 I reject the argument that the government would have provided the necessary staff to keep the Manitoba Provincial Court open if the Chief Judge had so requested. Although it had apparently made this offer in conversations with the Chief Judge before the closure was announced, the letter from Marvin Bruce announcing the dates of closure makes no reference to the possibility of staff being required on days designated as unpaid days of leave. Moreover, this conclusion is strengthened by the fact that Crown attorneys rescheduled trials that were set to be held on "Filmon Fridays" before Chief Judge Webster announced the closure of the Manitoba Provincial Court. In particular, the record indicates that on March 22, 1994, a trial scheduled for Friday, July 8, 1994, was moved to September 28, 1994, on the motion of a Crown attorney.

275 Even if the trial judge had been right to conclude that the Chief Judge retained control over the decision to close the Manitoba Provincial Court throughout, there would nevertheless have been a violation of s. 11(d), because the Chief Judge would have exceeded her constitutional authority when she made that decision. As this Court held in Valente, control over the sittings of the court falls within the administrative independence of the judiciary. And as I indicated above, administrative independence is a characteristic of judicial independence which normally has a collective or institutional dimension. It attaches to the court as a whole. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, it is important to remember that the Chief Judge is no more than "primus inter pares": Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267, at para. 59. Important decisions regarding administrative independence cannot be made by the Chief Judge alone. In my opinion, the decision to close the Manitoba Provincial Court is precisely this kind of decision.

276 In conclusion, the closure of the Manitoba Provincial Court on "Filmon Fridays" violated s. 11(d) of the Charter. Since s. 4 of Bill 22 authorized the withdrawal of court staff on "Filmon Fridays", and hence enabled the government to close the Manitoba Provincial Court on those days, that provision is therefore unconstitutional. It is worth emphasizing that s. 4 cannot be read down in such a precise way so as not to authorize conduct which violates the Charter. Although reading down the impugned legislation to the extent strictly necessary would be the normal solution in a case like this (Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038), this is very difficult in relation to violations of s. 11(d) because, unlike other Charter provisions, it requires that judicial independence be secured by "objective conditions or guarantees" (Valente, supra, at p. 685). Objective guarantees are the means by which the reasonable perception of independence is secured and, hence, any legislative provision which does not contain those objective guarantees is unconstitutional. In effect, then, to read down the legislation to its proper scope would amount to reading in those objective conditions and guarantees. This would result in a fundamental rewriting of the legislation. On the other hand, if the Court were to strike down the legislation in its entirety, the effect would be to prevent its application to all those employees of the Government of Manitoba who were required to take leave without pay. In the circumstances, the best solution would be to read down the legislation so that it would

simply not apply to government workers employed in the Manitoba Provincial Court. In other words, the provision should be read as exempting provincial court staff from it. This is the remedy that best upholds the Charter values involved and will occasion the lesser intrusion on the role of the legislature. See Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69, at p. 105. Accordingly, s. 4 should be read as follows:

> 4(1) Notwithstanding any Act, regulation, collective agreement, employment contract or arrangement, arbitral or other award or decision or any other agreement or arrangement of any kind, an employer may, subject to subsection (2) and the other provisions of this Part, require employees of the employer, except employees of the Provincial Court, to take days or portions of days as leave without pay at any point within a 12-month period authorized in subsection (2), provided that the combined total of days and portions of days required to be taken does not exceed 15 days in the 12-month period for any one employee.

VI. Section 1

277 I must now consider whether any of the violations of s. 11(d) can be justified under s. 1 of the Charter.

A. Prince Edward Island

278 The respondent, the Attorney General of P.E.I., has offered no submissions on the absence of an independent, effective, and objective process to determine judicial salaries. For this reason, I conclude that there are inadequate submissions upon which to base a s. 1 analysis. Since the onus is on the Crown to justify the infringement of Charter rights, the violation of s. 11(d) is not justified under s. 1.

B. Alberta

279 The appellant Attorney General for Alberta has made no submissions on s. 1. Since the onus rests with the Crown under s. 1, I must conclude that the violations of s. 11(d) are not justified.

C. Manitoba

280 The respondent Attorney General of Manitoba has offered brief submissions attempting to justify the infringements of s. 11(d) by Bill 22 under s. 1. However, the respondent has offered no justification whatsoever either for the circumvention of the independent, effective, and objective process for recommending judicial salaries that centres on the JCC before imposing the salary reduction on members of the Manitoba Provincial Court, or for the attempt to engage in salary negotiations with the Provincial Judges Association. Instead, its submissions focussed on the closure of the courts. I therefore have no choice but to conclude that the effective suspension of the operation of the JCC, and the attempted salary negotiations, are not justified under s. 1. Moreover,

since the attempted negotiations were not authorized by a legal rule, be it a statute, a regulation, or a rule of the common law (R. v. Thomsen, [1988] 1 S.C.R. 640, at pp. 650-51), they are incapable of being justified under s. 1 because they are not prescribed by law.

281 The respondent attempted to justify the closure of the Manitoba Provincial Court as a measure designed to reduce the provincial deficit. Thus, it has chosen to characterize this decision as a financial measure. However, this begs the prior question of whether measures whose sole purpose is budgetary can justifiably infringe Charter rights. This Court has already answered this question in the negative, because it has held on previous occasions that budgetary considerations do not count as a pressing and substantial objective for s. 1. In Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, at p. 218, Wilson J. speaking for the three members of the Court who addressed the Charter (including myself), doubted that "utilitarian consideration[s]... [could] constitute a justification for a limitation on the rights set out in the Charter" (emphasis added). The reason behind Wilson J.'s scepticism was that "the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so". I agree.

282 I expressed the same view in Schachter v. Canada, [1992] 2 S.C.R. 679, where I spoke for the Court on this point. In Schachter, I clarified that while financial considerations could not be used to justify the infringement of Charter rights, they could and should play a role in fashioning an appropriate remedy under s. 52 of the Constitution Act, 1982. As I said at p. 709:

> This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder. [Emphasis added.]

283 While purely financial considerations are not sufficient to justify the infringement of Charter rights, they are relevant to determining the standard of deference for the test of minimal impairment when reviewing legislation which is enacted for a purpose which is not financial. Thus, in Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 994, the Court stated that "the distribution of scarce government resources" was a reason to relax the strict approach to minimal impairment taken in R. v. Oakes, [1986] 1 S.C.R. 103; the impugned legislation was aimed at the protection of children. In McKinney v. University of Guelph, [1990] 3 S.C.R. 229, where the issue was the constitutionality of a provision in provincial human rights legislation, La Forest J. stated at p. 288 that "the proper distribution of scarce resources must be weighed in a s. 1 analysis". Finally, in Egan v. Canada, [1995] 2 S.C.R. 513, where a scheme for pension benefits was under attack, Sopinka J. stated at para. 104 that

> government must be accorded some flexibility in extending social benefits.... It is not realistic for the Court to assume that there are

unlimited funds to address the needs of all.

284 Three main principles emerge from this discussion. First, a measure whose sole purpose is financial, and which infringes Charter rights, can never be justified under s. 1 (Singh and Schachter). Second, financial considerations are relevant to tailoring the standard of review under minimal impairment (Irwin Toy, McKinney and Egan). Third, financial considerations are relevant to the exercise of the court's remedial discretion, when s. 52 is engaged (Schachter).

285 In this appeal, the Manitoba government has attempted to justify the closure of the Manitoba Provincial Court solely on the basis of financial considerations, and for that reason, the closure of the Provincial Court cannot be justified under s. 1. Given this conclusion, it is not necessary for me to consider the parties' submissions on rational connection, minimal impairment, and proportionate effect. Were I to do so, however, I would hold that the closure of the courts did not minimally impair the right to be tried by an impartial and independent tribunal, because it had the effect of absolutely denying access to the courts for the days on which they were closed.

VII. The Remarks of Premier Klein

286 On a final note, I have decided not to comment on the remarks made by Premier Klein in the time period following the implementation of the salary reduction in Alberta, except to say that they were unfortunate and reflect a misunderstanding of the theory and practice of judicial independence in Canada. If the Premier had concerns regarding the conduct of a Provincial Court judge, the proper course of action would have been for him to lodge a complaint with the Judicial Council, not to take up the matter himself during a radio interview. I note, and am comforted by the fact, that Premier Klein effectively distanced himself from those remarks later on in a letter he sent to Chief Judge Wachowich of the Alberta Provincial Court, in which he stated that he was "well aware" of the process established to deal with judicial conduct, and that he had "no intention or desire to interfere with that process".

VIII. Summary

287 Given the length and complexity of these reasons, I summarize the major principles governing the collective or institutional dimension of financial security:

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 remuneration 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 those 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 remuneration 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 representations to governments regarding judicial remuneration.

IX. Conclusion and Disposition

A. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

(1) Answers to Reference Questions (Appendices "A" and "B")

288 The answers to the reference questions are as follows:

(a) Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island

Question 1

(a): No. Without prior recourse to an independent, effective, and objective salary commission, the Legislature of P.E.I. cannot, even as part of an overall public economic measure, decrease, increase, or otherwise adjust the remuneration of Judges of the P.E.I. Provincial Court.

(b): Yes.

Question 2: No.

(b) Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

Question 1

(a): Yes.
(b): Yes.
(c): No.

Question 2

(a): No.
(b): No.
(c): Since this question has been rendered moot by the amendment of s. 10 of the Provincial Court Act, I decline to answer this question.

(d): No.
(e): No.
(f)
(I): No.
(ii): No.
(iii): No.
(iv): No.
(g): No.

Question 3

(a): No.
(b): No.
(c): No.
(d): This question is too vague to answer.
(e): There is insufficient information to answer this question.
(f): No.
(g): No.

Question 4

(a): Yes. The explanation for this answer is the same as for the answer to question 1(a) of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

(b): Yes. The explanation for this answer is the same as for the answer to question 1(a) of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

(c): No.
(d): No. Although salary negotiations are prohibited by s. 11(d), on the facts, no such negotiations took place, and so the independence of the judges of the P.E.I. Provincial Court was not undermined.

(e): Yes. The explanation for this answer is the same as for the answer to question 1(a) of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

(f): No.
(g): No.
(h)
(I): No.
(ii): No.
(iii): No.
(iv): No.
(I): Yes.
(j): No.
(k): No.
Question 5: No.
Question 6: No.
Question 7: Because I have answered question 6 in the negative, it is not necessary to answer this question.

Question 8: No.

(2) Disposition

289 I would allow the appeals in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, with respect to questions 1(a) and 2, and in Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, with respect to questions 1(c), 4(a), (b), (e) and (i), and 8. I would also allow the cross-appeal on question 1(a) of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island. I award costs to the appellants throughout.

B. R. v. Campbell, R. v. Ekmecic and R. v. Wickman

(1) Answers to Constitutional Questions (Appendix "C")

290 The answers to the constitutional questions are as follows:

Question 1: Question 2: Question 3:	Yes. Yes. The constitutionality of these provisions was not properly before the Court.
Question 4:	The constitutionality of these provisions was not properly before the Court.

Question 5: Yes.

Question 6: Yes.

Question 7: No.

(2) Disposition

291 I would allow the appeal by the Crown from the decision of the Alberta Court of Appeal that it was without jurisdiction to hear these appeals under s. 784(1) of the Criminal Code. I would also allow the appeal by the Crown from McDonald J.'s holding that ss. 11(1)(c), 11(2) and 11(1)(b) of the Provincial Court Judges Act were unconstitutional. However, I would dismiss the Crown's appeal from McDonald J.'s holdings that the 5 percent pay reduction imposed on members of the Alberta Provincial Court by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, and ss. 13(1)(a) and 13(1)(b) of the Provincial Court Judges Act, were unconstitutional. Finally, I would declare s. 17(1) of the Provincial Court Judges Act to be unconstitutional.

292 The Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, is therefore of no force or effect. However, given the institutional burdens that must be met by Alberta, I suspend this declaration of invalidity for a period of one year[2]. I also declare ss. 13(1)(a), 13(1)(b) and 17(1) of the Alberta Provincial Court Judges Act to be of no force or effect. As there were no submissions as to costs, none shall be awarded.

C. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

(1) Answers to Constitutional Questions (Appendix "D")

293 The answers to the constitutional questions are as follows:

Question 1
(a): Yes.
(b): No.
Question 2
(a): Yes.
(b): No.
Question 3
(a): Yes.
(b): No.

(2) Disposition

294 I would sever the phrase "as a judge of The Provincial Court or" from s. 9 of Bill 22, and would accordingly declare the salary reduction imposed on judges of the Manitoba Provincial Court to be of no force or effect. Even though Bill 22 is no longer in force, that does not affect the fully retroactive nature of this declaration of invalidity. I would also issue mandamus, directing the government to perform its statutory duty, pursuant to s. 11.1(6) of The Provincial Court Act, to implement the report of the standing committee of the provincial legislature which recommended a 3 percent increase to judges' salaries effective April 3, 1993, and which was approved by the provincial legislature on June 24, 1992. If the government wishes to persist in its decision to reduce the salaries of Manitoba Provincial Court judges for the 1993-94 year by 3.8 percent, and for the 1994-95 year by an amount generally equivalent to the amount by which the salaries of employees under a collective agreement with the Crown in right of Manitoba were reduced, it must remand the matter to the JCC. Only after the JCC has issued a report, and the statutory requirements laid down in s. 11.1 of The Provincial Court Act have been complied with, is it constitutionally permissible for the provincial legislature to reduce the salaries of Provincial Court judges as it sought to do through Bill 22. I also issue a declaration that the requirement that the staff of the Provincial Court take unpaid leave and the resulting closure of the Provincial Court during the summer of 1994 on "Filmon Fridays" violated the judicial independence of that court, and direct that s. 4(1) of Bill 22 be read in the way I have described above. Finally, I issue a declaration that the Manitoba government violated the judicial independence of the Provincial Court by attempting to engage in salary negotiations with the Manitoba Provincial Judges Association.

295 I would allow therefore the appeal in Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice), with respect to the salary reduction imposed on members of the Manitoba Provincial Court, the closure of the Manitoba Provincial Court, and the attempt by the provincial executive to engage in salary negotiations with the judges of the Provincial Court. Costs are awarded to the appellants throughout.

The following are the reasons delivered by

LA FOREST J. (dissenting in part):--

I. Introduction

296 The primary issue raised in these appeals is a narrow one: has the reduction of the salaries of provincial court judges, in the circumstances of each of these cases, so affected the independence of these judges that persons "charged with an offence" before them are deprived of their right to "an independent and impartial tribunal" within the meaning of s. 11(d) of the Canadian Charter of Rights and Freedoms? I have had the advantage of reading the reasons of the Chief Justice who sets forth the facts and history of the litigation. Although I agree with substantial portions of his reasons, I cannot concur with his conclusion that s. 11(d) forbids governments from changing judges' salaries without first having recourse to the "judicial compensation commissions" he describes. Furthermore, I do not believe that s. 11(d) prohibits salary discussions between governments and judges. In my view, reading these requirements into s. 11(d) represents both an unjustified departure from established precedents and a partial usurpation of the provinces' power to set the salaries of inferior court judges pursuant to ss. 92(4) and 92(14) of the Constitution Act, 1867. In addition to these issues, the Chief Justice deals with a number of other questions respecting the independence of provincial court judges that were raised by the parties to these appeals. I agree with his disposition of these issues.

297 But if the Chief Justice and I share a considerable measure of agreement on many of the issues raised by the parties, that cannot be said of his broad assertion concerning the protection provincially appointed judges exercising functions other than criminal jurisdiction are afforded by virtue of the preamble to the Constitution Act, 1867. Indeed I have grave reservations about the Court entering into a discussion of the matter in the present appeals. Only minimal reference was made to it by counsel who essentially argued the issues on the basis of s. 11(d) of the Charter which guarantees that anyone charged with an offence is entitled to a fair hearing by "an independent and impartial tribunal". I observe that this protection afforded in relation to criminal proceedings is expressly provided by the Charter.

298 I add that, in relation to prosecutions for an offence, there are compelling reasons for including this guarantee to supplement the specific constitutional protection for the federally appointed courts set out in ss. 96-100 of the Constitution Act, 1867. Being accused of a crime is one of the most momentous encounters an individual can have with the power of the state. Such persons are the sole beneficiaries of the rights set out in s. 11(d). No explanation is required as to why it is essential that the fate of accused persons be in the hands of independent and impartial adjudicators.

299 Whether, and to what extent, other persons appearing before inferior courts are entitled to such protection is a difficult and open question; one which may have significant implications for the administration of justice throughout the land. Before addressing such an important constitutional issue, it is, in my view, critical to have the benefit of full submissions from counsel.

300 My concern arises out of the nature of judicial power. As I see it, the judiciary derives its public acceptance and its strength from the fact that judges do not initiate recourse to the law. Rather, they respond to grievances raised by those who come before them seeking to have the law applied, listening fairly to the representations of all parties, always subject to the discipline provided by the facts of the case. This sustains their

impartiality and limits their powers. Unlike the other branches of the government, the judicial branch does not initiate matters and has no agenda of its own. Its sole duty is to hear and decide cases on the issues presented to it in accordance with the law and the Constitution. And so it was that Alexander Hamilton referred to the courts as "the least dangerous" branch of government: The Federalist, No. 78.

301 Indeed courts are generally reluctant to comment on matters that are not necessary to decide in order to dispose of the case at hand. This policy is especially apposite in constitutional cases, where the implications of abstract legal conclusions are often unpredictable and can, in retrospect, turn out to be undesirable. After adverting to a number of decisions of this Court endorsing this principle, Sopinka J. stated the following for the majority in Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97, at para. 9:

> The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Early in this century, Viscount Haldane in John Deere Plow Co. v. Wharton, [1915] A.C. 330, at p. 339, stated that the abstract logical definition of the scope of constitutional provisions is not only "impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases".

See also Attorney General of Quebec v. Cumming, [1978] 2 S.C.R. 605; The Queen in Right of Manitoba v. Air Canada, [1980] 2 S.C.R. 303; Winner v. S.M.T. (Eastern) Ltd., [1951] S.C.R. 887; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357. Notably, Sopinka J. uttered this admonition in a case in which the relevant legal issue was fully argued in both this Court and in the court below. The policy of forbearance with respect to extraneous legal issues applies, a fortiori, in a case where only the briefest of allusion to the issue was made by counsel.

302 I am, therefore, deeply concerned that the Court is entering into a debate on this issue without the benefit of substantial argument. I am all the more troubled since the question involves the proper relationship between the political branches of government and the judicial branch, an issue on which judges can hardly be seen to be indifferent, especially as it concerns their own remuneration. In such circumstances, it is absolutely critical for the Court to tread carefully and avoid making far-reaching conclusions that are not necessary to decide the case before it. If the Chief Justice's discussion was of a merely marginal character -- a side-wind so to speak -- I would abstain from commenting on it. After all, it is technically only obiter dicta. Nevertheless, in light of the importance that will necessarily be attached to his lengthy and sustained exegesis, I feel compelled to express my view.

II. The Effect of the Preamble to the Constitution Act, 1867

303 I emphasize at the outset that it is not my position that s. 11(d) of the Charter and ss. 96-100 of the Constitution Act, 1867 comprise an exhaustive code of judicial

independence. As I discuss briefly later, additional protection for judicial independence may inhere in other provisions of the Constitution. Nor do I deny that the Constitution embraces unwritten rules, including rules that find expression in the preamble of the Constitution Act, 1867; see New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319. I hasten to add that these rules really find their origin in specific provisions of the Constitution viewed in light of our constitutional heritage. In other words, what we are concerned with is the meaning to be attached to an expression used in a constitutional provision.

304 I take issue, however, with the Chief Justice's view that the preamble to the Constitution Act, 1867 is a source of constitutional limitations on the power of legislatures to interfere with judicial independence. In New Brunswick Broadcasting, supra, this Court held that the privileges of the Nova Scotia legislature had constitutional status by virtue of the statement in the preamble expressing the desire to have "a Constitution similar in Principle to that of the United Kingdom". In reaching this conclusion, the Court examined the historical basis for the privileges of the British Parliament. That analysis established that the power of Parliament to exclude strangers was absolute, constitutional and immune from regulation by the courts. The effect of the preamble, the Court held, is to recognize and confirm that this long-standing principle of British constitutional law was continued or established in post-Confederation Canada.

305 There is no similar historical basis, in contrast, for the idea that Parliament cannot interfere with judicial independence. At the time of Confederation (and indeed to this day), the British Constitution did not contemplate the notion that Parliament was limited in its ability to deal with judges. The principle of judicial independence developed very gradually in Great Britain; see generally W. R. Lederman, "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 769 and 1139. In the Norman era, judicial power was concentrated in the hands of the King and his immediate entourage (the Curia Regis). Subsequent centuries saw the emergence of specialized courts and a professional judiciary, and the king's participation in the judicial function had by the end of the fifteenth century effectively withered. Thus Blackstone in his Commentaries was able to state:

> ... at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depository of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain established rules, which the crown itself cannot now alter but by act of parliament.

(Sir William Blackstone, Commentaries on the Laws of England (4th ed. 1770), Book 1, at p. 267.)

306 Despite these advances, kings retained power to apply pressure on the judiciary to conform to their wishes through the exercise of the royal power of dismissal. Generally speaking, up to the seventeenth century, judges held office during the king's good pleasure (durante bene placito). This power to dismiss judges for political ends was wielded most liberally by the Stuart kings in the early seventeenth century as part of their

effort to assert the royal prerogative powers over the authority of Parliament and the common law. It was thus natural that protection against this kind of arbitrary, executive interference became a priority in the post-revolution settlement. Efforts to secure such protection in legislation were scuttled in the two decades following 1688, but at the turn of the century William III gave his assent to the Act of Settlement, 12 & 13 Will. 3, c. 2, which took effect with the accession of George I in 1714. Section 3, para. 7 of that statute mandated that "Judges Commissions be made Quandiu se bene gesserint [during good behaviour], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them". Further protection was provided by an Act of 1760 (Commissions and Salaries of Judges Act, 1 Geo. 3, c. 23), which ensured that the commissions of judges continued notwithstanding the demise of the king. Prior to this enactment, the governing rule provided that all royal appointees, including judges, vacated their offices upon the death of the king.

307 Various jurists have asserted that these statutes and their successors have come to be viewed as "constitutional" guarantees of an independent judiciary. Professor Lederman writes, for example, that it would be "unconstitutional" for the British Parliament to cut the salary of an individual superior court judge during his or her commission or to reduce the salaries of judges as a class to the extent that it threatened their independence (supra, at p. 795). It has thus been suggested that the preamble to the Constitution Act, 1867, which expresses a desire to have a Constitution "similar in Principle to that of the United Kingdom" is a source of judicial independence in Canada: Beauregard v. Canada, [1986] 2 S.C.R. 56, at p. 72.

308 Even if it is accepted that judicial independence had become a "constitutional" principle in Britain by 1867, it is important to understand the precise meaning of that term in British law. Unlike Canada, Great Britain does not have a written constitution. Under accepted British legal theory, Parliament is supreme. By this I mean that there are no limitations upon its legislative competence. As Dicey explains, Parliament has "under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" (A. V. Dicey, Introduction to the Study of the Law of the Constitution (10th ed. 1959), at pp. 39-40). This principle has been modified somewhat in recent decades to take into account the effect of Great Britain's membership in the European Community, but ultimately, the British Parliament remains supreme; see E. C. S. Wade and A. W. Bradley, Constitutional and Administrative Law (11th ed. 1993), by A. W. Bradley and K. D. Ewing, at pp. 68-87; Colin Turpin, British Government and the Constitution (3rd ed. 1995), at pp. 298-99.

309 The consequence of parliamentary supremacy is that judicial review of legislation is not possible. The courts have no power to hold an Act of Parliament invalid or unconstitutional. When it is said that a certain principle or convention is "constitutional", this does not mean that a statute violating that principle can be found to be ultra vires Parliament. As Lord Reid stated in Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645 (P.C.), at p. 723:

> It is often said that it would be unconstitutional for the United

> Kingdom Parliament to do certain things, meaning that the moral, political or other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

See also:

Manuel v. Attorney-General, [1983] Ch. 77 (C.A.).

310 This fundamental principle is illustrated by the debate that occurred when members of the English judiciary complained to the Prime Minister in the early 1930s about legislation which reduced the salaries of judges, along with those of civil servants, by 20 percent as an emergency response to a financial crisis. Viscount Buckmaster, who vigorously resisted the notion that judges' salaries could be diminished during their term of office, admitted that Parliament was supreme and could repeal the Act of Settlement if it chose to do so. He only objected that it was not permissible to effectively repeal the Act by order in council; see U.K., H.L. Parliamentary Debates, vol. 90, cols. 67-68 (November 23, 1933). It seems that the judges themselves also conceded this point; see R. F. V. Heuston, Lives of the Lord Chancellors 1885-1940 (1964), at p. 514.

311 The idea that there were enforceable limits on the power of the British Parliament to interfere with the judiciary at the time of Confederation, then, is an historical fallacy. By expressing a desire to have a Constitution "similar in Principle to that of the United Kingdom", the framers of the Constitution Act, 1867 did not give courts the power to strike down legislation violating the principle of judicial independence. The framers did, however, entrench the fundamental components of judicial independence set out in the Act of Settlement such that violations could be struck down by the courts. This was accomplished, however, by ss. 99-100 of the Constitution Act, 1867, not the preamble.

312 It might be asserted that the argument presented above is merely a technical quibble. After all, in Canada the Constitution is supreme, not the legislatures. Courts have had the power to invalidate unconstitutional legislation in this country since 1867. If judicial independence was a "constitutional" principle in the broad sense in nineteenth-century Britain, and that principle was continued or established in Canada as a result of the preamble to the Constitution Act, 1867, why should Canadian courts resile from enforcing this principle by striking down incompatible legislation?

313 One answer to this question is the ambit of the Act of Settlement. The protection it accorded was limited to superior courts, specifically the central courts of common law; see Lederman, supra, at p. 782. It did not apply to inferior courts. While subsequent legislation did provide limited protection for the independence of the judges of certain statutory courts, such as the county courts, the courts there were not regarded as within the ambit of the "constitutional" protection in the British sense. Generally the independence and impartiality of these courts were ensured to litigants through the superintendence exercised over them by the superior courts by way of prerogative writs and other extraordinary remedies. The

overall task of protection sought to be created for inferior courts in the present appeals seems to me to be made of insubstantial cloth, and certainly in no way similar to anything to be found in the United Kingdom.

314 A more general answer to the question lies in the nature of the power of judicial review. The ability to nullify the laws of democratically elected representatives derives its legitimacy from a super-legislative source: the text of the Constitution. This foundational document (in Canada, a series of documents) expresses the desire of the people to limit the power of legislatures in certain specified ways. Because our Constitution is entrenched, those limitations cannot be changed by recourse to the usual democratic process. They are not cast in stone, however, and can be modified in accordance with a further expression of democratic will: constitutional amendment.

315 Judicial review, therefore, is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument. In this sense, it is akin to statutory interpretation. In each case, the court's role is to divine the intent or purpose of the text as it has been expressed by the people through the mechanism of the democratic process. Of course, many (but not all) constitutional provisions are cast in broad and abstract language. Courts have the often arduous task of explicating the effect of this language in a myriad of factual circumstances, many of which may not have been contemplated by the framers of the Constitution. While there are inevitable disputes about the manner in which courts should perform this duty, for example by according more or less deference to legislative decisions, there is general agreement that the task itself is legitimate.

316 This legitimacy is imperiled, however, when courts attempt to limit the power of legislatures without recourse to express textual authority. From time to time, members of this Court have suggested that our Constitution comprehends implied rights that circumscribe legislative competence. On the theory that the efficacy of parliamentary democracy requires free political expression, it has been asserted that the curtailment of such expression is ultra vires both provincial legislatures and the federal Parliament: Switzman v. Elbling, [1957] S.C.R. 285, at p. 328 (per Abbott J.); OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57 (per Beetz J.); see also: Reference re Alberta Statutes, [1938] S.C.R. 100, at pp. 132-35 (per Duff C.J.), and at pp. 145-46 (per Cannon J.); Switzman, supra, at pp. 306-7 (per Rand J.); OPSEU, supra, at p. 25 (per Dickson C.J.); Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at pp. 462-63 (per Dickson C.J.); RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at p. 584 (per McIntyre J.).

317 This theory, which is not so much an "implied bill of rights", as it has so often been called, but rather a more limited guarantee of those communicative freedoms necessary for the existence of parliamentary democracy, is not without appeal. An argument can be made that, even under a constitutional structure that deems Parliament to be supreme, certain rights, including freedom of political speech, should be enforced by the courts in order to safeguard the democratic accountability of Parliament. Without this limitation of its powers, the argument runs, Parliament could subvert the very process by which it acquired its legitimacy as a representative, democratic institution; see F. R. Scott, Civil Liberties and

Canadian Federalism (1959), at pp. 18-21; Dale Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1966-67), 12 McGill L.J. 497. It should be noted, however, that the idea that the Constitution contemplates implied protection for democratic rights has been rejected by a number of eminent jurists as being incompatible with the structure and history of the Constitution; see Attorney General for Canada and Dupond v. Montreal, [1978] 2 S.C.R. 770, at p. 796 (per Beetz J.); Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959), 37 Can. Bar Rev. 77, at pp. 100-103; Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973), 23 U.T.L.J. 307, at p. 344; Peter W. Hogg, Constitutional Law of Canada (3rd ed. 1992 (loose-leaf)), vol. 2, at pp. 31-12 and 31-13.

318 Whatever attraction this theory may hold, and I do not wish to be understood as either endorsing or rejecting it, it is clear in my view that it may not be used to justify the notion that the preamble to the Constitution Act, 1867 contains implicit protection for judicial independence. Although it has been suggested that guarantees of political freedom flow from the preamble, as I have discussed in relation to judicial independence, this position is untenable. The better view is that if these guarantees exist, they are implicit in s. 17 of the Constitution Act, 1867, which provides for the establishment of Parliament; see Gibson, supra, at p. 498. More important, the justification for implied political freedoms is that they are supportive, and not subversive, of legislative supremacy. That doctrine holds that democratically constituted legislatures, and not the courts, are the ultimate guarantors of civil liberties, including the right to an independent judiciary. Implying protection for judicial independence from the preambular commitment to a British-style constitution, therefore, entirely misapprehends the fundamental nature of that constitution.

319 This brings us back to the central point: to the extent that courts in Canada have the power to enforce the principle of judicial independence, this power derives from the structure of Canadian, and not British, constitutionalism. Our Constitution expressly contemplates both the power of judicial review (in s. 52 of the Constitution Act, 1982) and guarantees of judicial independence (in ss. 96-100 of the Constitution Act, 1867 and s. 11(d) of the Charter). While these provisions have been interpreted to provide guarantees of independence that are not immediately manifest in their language, this has been accomplished through the usual mechanisms of constitutional interpretation, not through recourse to the preamble. The legitimacy of this interpretive exercise stems from its grounding in an expression of democratic will, not from a dubious theory of an implicit constitutional structure. The express provisions of the Constitution are not, as the Chief Justice contends, "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the Constitution Act, 1867" (para. 107). On the contrary, they are the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review.

320 In other words, the approach adopted by the Chief Justice, in my view, misapprehends the nature of the Constitution Act, 1867. The Act was not intended as an abstract document on the nature of government. The philosophical underpinnings of government in a British colony were a given, and find expression in the preamble. The Act

was intended to create governmental and judicial structures for the maintenance of a British system of government in a federation of former British colonies. Insofar as there were limits to legislative power in Canada, they flowed from the terms of the Act (it being a British statute) that created them and vis-à-vis Great Britain the condition of dependency that prevailed in 1867. In considering the nature of the structures created, it was relevant to look at the principles underlying their British counterparts as the preamble invites the courts to do.

321 In considering the nature of the Canadian judicial system in light of its British counterpart, one should observe that only the superior courts' independence and impartiality were regarded as "constitutional". The independence and impartiality of inferior courts were, in turn, protected through the superintending functions of the superior courts. They were not protected directly under the relevant British "constitutional" principles.

322 This was the judicial organization that was adopted for this country, with adaptations suitable to Canadian conditions, in the judicature provisions of the Constitution Act, 1867. In reviewing these provisions, it is worth observing that the courts given constitutional protection are expressly named. The existing provincial inferior courts are not mentioned, and, indeed, the Probate Courts of some provinces were expressly excluded. Given that the express provisions dealing with constitutional protection for judicial independence have specifically spelled out their application, it seems strained to extend the ambit of this protection by reference to a general preambular statement. As the majority stated in McVey (Re), [1992] 3 S.C.R. 475, at p. 525, "it would seem odd if general words in a preamble were to be given more weight than the specific provisions that deal with the matter".

323 This is a matter of no little significance for other reasons. If one is to give constitutional protection to courts generally, one must be able to determine with some precision what the term "court" encompasses. It is clear both under the Constitution Act, 1867 as well as under s. 11(d) of the Charter what courts are covered, those under the Constitution Act, 1867 arising under historic events in British constitutional history, those in s. 11(d) for the compelling reasons already given, namely protection for persons accused of an offence. But what are we to make of a general protection for courts such as that proposed by the Chief Justice? The word "court" is a broad term and can encompass a wide variety of tribunals. In the province of Quebec, for example, the term is legislatively used in respect of any number of administrative tribunals. Are we to include only those inferior courts applying ordinary jurisdiction in civil matters, or should we include all sorts of administrative tribunals, some of which are of far greater importance than ordinary civil courts? And if we do, is a distinction to be drawn between different tribunals and on the basis of what principles is this to be done?

324 These are some of the issues that have persuaded me that this Court should not precipitously, and without the benefit of argument of any real relevance to the case before us, venture forth on this uncharted sea. It is not as if the law as it stands is devoid of devices to ensure independent and impartial courts and tribunals. Quite the contrary, I would emphasize that the express protections for judicial independence set out in the Constitution are broad and powerful. They apply to all superior court and other judges

specified in s. 96 of the Constitution Act, 1867 as well as to inferior (provincial) courts exercising criminal jurisdiction. Nothing presented in these appeals suggests that these guarantees are not sufficient to ensure the independence of the judiciary as a whole. The superior courts have significant appellate and supervisory jurisdiction over inferior courts. If the impartiality of decisions from inferior courts is threatened by a lack of independence, any ensuing injustice may be rectified by the superior courts.

325 Should the foregoing provisions be found wanting, the Charter may conceivably be brought into play. Thus it is possible that protection for the independence for courts charged with determining the constitutionality of government action inheres in s. 24(1) of the Charter and s. 52 of the Constitution Act, 1982. It could be argued that the efficacy of those provisions, which empower courts to grant remedies for Charter violations and strike down unconstitutional laws, respectively, depends upon the existence of an independent and impartial adjudicator. The same may possibly be said in certain cases involving the applicability of the guarantees of liberty and security of the person arising in a non-penal setting. I add that these various possibilities may be seen to be abetted by the commitment to the rule of law expressed in the preamble to the Charter. These, however, are issues I would prefer to explore when they are brought before us for decision.

III. Financial Security

326 I turn now to the main issue in these appeals: whether the governments of Prince Edward Island, Alberta and Manitoba violated s. 11(d) of the Charter by compromising the financial security of provincial court judges. In Valente v. The Queen, [1985] 2 S.C.R. 673, this Court held that the guarantee of an independent judiciary set out in s. 11(d) requires that tribunals exercising criminal jurisdiction exhibit three "essential conditions" of independence: security of tenure, financial security and institutional independence. The Court also found that judicial independence involves both individual and institutional relationships. It requires, in other words, both the individual independence of a particular judge and the institutional or collective independence of the tribunal of which that judge is a member.

327 Building on Valente, the Chief Justice concludes in the present appeals that the financial security component of judicial independence has both individual and institutional dimensions. The institutional dimension, in his view, has three components. One of these -- the principle that reductions to judicial remuneration cannot diminish salaries to a point below a basic minimum level required for the office of a judge -- is unobjectionable. As there has been no suggestion in these appeals that the salaries of provincial court judges have been reduced to such a level, I need not comment further on this issue.

328 The Chief Justice also finds, as a general principle, that s. 11(d) of the Charter permits governments 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 persons paid from the public purse, or as part of a measure directed at judges as a class. I agree. He goes on to hold, however, that before such changes can be made, governments must consider and respond to the recommendations of an independent "judicial compensation commission". He further concludes that s. 11(d) forbids, under any circumstances,

discussions about remuneration between the judiciary and the government.

329 I am unable to agree with these conclusions. While both salary commissions and a concomitant policy to avoid discussing remuneration other than through the making of representations to commissions may be desirable as matters of legislative policy, they are not mandated by s. 11(d) of the Charter. I begin with an examination of the text of the Constitution. Section 11(d) of the Charter provides as follows:

> 11. Any person charged with an offence has the right
>
> . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; [Emphasis added.]

By its express terms, s. 11(d) grants the right to an independent tribunal to persons "charged with an offence". The guarantee of judicial independence inhering in s. 11(d) redounds to the benefit of the judged, not the judges; see Gratton v. Canadian Judicial Council, [1994] 2 F.C. 769 (T.D.), at p. 782; Philip B. Kurland, "The Constitution and the Tenure of Federal Judges: Some Notes from History" (1968-69), 36 U. Chi. L. Rev. 665, at p. 698. Section 11(d), therefore, does not grant judges a level of independence to which they feel they are entitled. Rather, it guarantees only that degree of independence necessary to ensure that accused persons receive fair trials.

330 This Court has confirmed that s. 11(d) does not guarantee an "ideal" level of judicial independence. After referring to a number of reports and studies on judicial independence calling for increased safeguards, Le Dain J. had this to say in Valente, supra, at pp. 692-93:

> These efforts, particularly by the legal profession and the judiciary, to strengthen the conditions of judicial independence in Canada may be expected to continue as a movement towards the ideal. It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence for purposes of s. 11(d) must bear some reasonable relationship to that variety. Moreover, it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(d) and not any particular legislative or constitutional formula by which it may be provided or guaranteed. [Emphasis added].

Similarly, in R. v. Lippé, [1991] 2 S.C.R. 114, at p. 142, Lamer C.J. concluded that while

the Quebec municipal court system, which allowed judges to continue to practice as lawyers was not "ideal", it was sufficient for the purposes of s. 11(d). He remarked:

> I admit that a system which allows for part-time judges is not the ideal system. However, the Constitution does not always guarantee the "ideal". Perhaps the ideal system would be to have a panel of three or five judges hearing every case; that may be the ideal, but it certainly cannot be said to be constitutionally guaranteed. [Emphasis in original.]

As Lamer C.J. stated in R. v. Kuldip, [1990] 3 S.C.R. 618, at p. 638, "[t]he Charter aims to guarantee that individuals benefit from a minimum standard of fundamental rights. If Parliament chooses to grant protection over and above that which is enshrined in our Charter, it is always at liberty to do so."

331 I also note that s. 11(d) expressly provides that accused persons have a right to a hearing that is both "independent" and "impartial". As the Court explained in Valente, supra, independence and impartiality are discrete concepts; see also R. v. Généreux, [1992] 1 S.C.R. 259, at p. 283. "Impartiality", Le Dain J. stated for the Court in Valente, at p. 685, "refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". Impartial adjudicators, in other words, base their decisions on the merits of the case, not the identity of the litigants. Independence, in contrast, "connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees" (p. 685).

332 That being said, it is important to remember that judicial independence is not an end in itself. Independence is required only insofar as it serves to ensure that cases are decided in an impartial manner. As Lamer C.J. wrote in Lippé, supra, at p. 139:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

333 From the foregoing, it can be stated that the "essential objective conditions" of judicial independence for the purposes of s. 11(d) consist of those minimum guarantees that are necessary to ensure that tribunals exercising criminal jurisdiction act, and are perceived to act, in an impartial manner. Section 11(d) does not empower this or any other court to compel governments to enact "model" legislation affording the utmost protection for judicial independence. This is a task for the legislatures, not the courts.

334 With this general principle in mind, I turn to the first question at hand: does s. 11(d) require governments to establish judicial compensation commissions and consider and respond to their recommendations before changing the salaries of provincial court judges?

As noted by the Chief Justice in his reasons, this Court held unanimously in Valente, supra, that such commissions were not required for the purposes of s. 11(d). This holding should be followed, in my opinion, not simply because it is authoritative, but because it is grounded in reason and common sense. As I have discussed, the Chief Justice asserts that the financial security component of judicial independence has both an individual and an institutional or collective dimension. In Valente, the Court focused solely on the individual dimension, holding at p. 706 that "the essential point" of financial security "is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge".

335 I agree that financial security has a collective dimension. Judicial independence must include protection against interference with the financial security of the court as an institution. It is not enough that the right to a salary is established by law and that individual judges are protected against arbitrary changes to their remuneration. The possibility of economic manipulation also arises from changes to the salaries of judges as a class.

336 The fact that the potential for such manipulation exists, however, does not justify the imposition of judicial compensation commissions as a constitutional imperative. As noted above, s. 11(d) does not mandate "any particular legislative or constitutional formula": Valente, supra, at p. 693; see also Généreux, supra, at pp. 284-85. This Court has repeatedly held that s. 11(d) requires only that courts exercising criminal jurisdiction be reasonably perceived as independent. In Valente, supra, Le Dain J. wrote the following for the Court at p. 689:

> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for the purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

See also: Lippé, supra, at p. 139; Généreux, supra, at p. 286.

337 In my view, it is abundantly clear that a reasonable, informed person would not perceive that, in the absence of a commission process, all changes to the remuneration of provincial court judges threaten their independence. I reach this conclusion by considering

the type of change to judicial salaries that is at issue in the present appeals. It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this.

338 Indeed, as support for his conclusion that s. 11(d) does not prohibit non-discriminatory reductions, the Chief Justice cites a number of commentators who argue that such reductions are constitutional; see Hogg, supra, vol. 1, at p. 7-6; Lederman, supra, at pp. 795, 1164; Wayne Renke, Invoking Independence: Judicial Independence as a No-cut Wage Guarantee (1994), at p. 30. As stated by Professor Renke, "[w]here economic measures apply equally to clerks, secretaries, managers, public sector workers of all grades and departments, as well as judges, how could judges be manipulated?" If this is the case, why is it necessary to require the intervention of an independent commission before the government imposes such reductions?

339 The Chief Justice addresses this question by expressing sympathy for the view that salary reductions that treat judges in the same manner as civil servants undermine judicial independence "precisely because they create the impression that judges are merely public employees and are not independent of the government" (para. 157 (emphasis in original)). Judicial independence, he concludes, "can be threatened by measures which treat judges either differently from, or identically to, other persons paid from the public purse" (para. 158). In order to guard against this threat, the argument goes, governments are required to have recourse to the commission process before any changes to remuneration are made.

340 With respect, I fail to see the logic in this position. In Valente, supra, this Court rejected the argument that the institutional independence of provincial court judges was compromised by the fact that they were treated as civil servants for the purposes of pension and other financial benefits and the executive exercised control over the conferring of such discretionary benefits as post-retirement reappointment, leaves of absence and the right to engage in extra-judicial appointments. The contention was that the government's control over these matters was calculated to make the court appear as a branch of the executive and the judges as civil servants. This impression, it was argued, was reinforced by the manner in which the court and its judges were associated with the Ministry of the Attorney General in printed material intended for public information.

341 In Valente, the Court held that none of these factors could reasonably be perceived to compromise the institutional independence of the judiciary. All that is required, Le Dain J. stated for the Court at p. 712, is that the judiciary retain control over "the administrative decisions that bear directly and immediately on the exercise of the judicial function". Similarly, the fact that changes to judicial salaries are linked, along with other persons paid from the public purse, to changes made to the remuneration of civil servants does not create the impression that judges are public employees who are not independent from government. It must be remembered that the test for judicial independence incorporates the perception of the reasonable, informed person. As noted by the Chief Justice in his reasons, the question is "whether a reasonable person, who was informed of the relevant

statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude (that the tribunal or court was independent)" (para. 113). In my view, such a person would not view the linking of judges' salaries to those of civil servants as compromising judicial independence.

342 The threat to judicial independence that arises from the government's power to set salaries consists in the prospect that judges will be influenced by the possibility that the government will punish or reward them financially for their decisions. Protection against this potentiality is the raison d'être of the financial security component of judicial independence. There is virtually no possibility that such economic manipulation will arise where the government makes equivalent changes to the remuneration of all persons paid from public funds. The fact that such a procedure might leave some members of the public with the impression that provincial court judges are public servants is thus irrelevant. A reasonable, informed person would not perceive any infringement of the judges' financial security.

343 In his reasons, the Chief Justice asserts that, where the government chooses to depart from the recommendations of the judicial compensation commission, it must justify its decision according to a standard of rationality. He goes on to state, however, that across-the-board measures affecting substantially every person who is paid from the public purse are prima facie rational because they are typically designed to further a larger public interest. If this is true, and I have no doubt that it is, little is gained by going through the commission process in these circumstances. Under the Chief Justice's approach, governments are free to reduce the salaries of judges, in concert with all other persons paid from public funds, so long as they set up a commission whose recommendations they are for all practical purposes free to ignore. In my view, this result represents a triumph of form over substance.

344 Although I have framed my argument in terms of reductions to judicial salaries that are part of across-the-board measures applying throughout the public sector, the same logic applies, a fortiori, to salary freezes and increases. In my view, furthermore, governments may make changes to judicial salaries that are not parallelled by equivalent changes to the salaries of other persons paid from public funds. As I will develop later, changes, and especially decreases, to judicial salaries that are not part of an overall public measure should be subject to greater scrutiny than those that are. Under the reasonable perception test, however, commissions are not a necessary condition of independence. Of course, the existence of such a process may go a long way toward showing that a given change to judges' salaries does not threaten their independence. Requiring commissions a priori, however, is tantamount to enacting a new constitutional provision to extend the protection provided by s. 11(d). Section 11(d) requires only that tribunals exercising criminal jurisdiction be independent and impartial. To that end, it prohibits governments from acting in ways that threaten that independence and impartiality. It does not require legislatures, however, to establish what in some respects is a virtual fourth branch of government to police the interaction between the political branches and the judiciary. Judges, in my opinion, are capable of ensuring their own independence by an appropriate application of the Constitution. By employing the reasonable perception test, judges are

able to distinguish between changes to their remuneration effected for a valid public purpose and those designed to influence their decisions.

345 As I have noted, although the reasonable perception test applies to all changes to judicial remuneration, different types of changes warrant different levels of scrutiny. Although each case must be judged on its own facts, some general guiding principles can be articulated. Changes to judicial salaries that apply equally to substantially all persons paid from public funds, for example, would almost inevitably be considered constitutional. Differential increases to judicial salaries warrant a greater degree of scrutiny, although in most cases it would be relatively easy to link the increase to a legitimate governmental purpose such as a desire to attract, or continue to attract, highly qualified lawyers to the bench. Differential decreases to judicial remuneration would invite the highest level of review. This approach receives support from the fact that the constitutions of many states and a number of international instruments contain provisions prohibiting reductions of judicial salaries.

346 Determining whether a differential change raises a perception of interference is, in my view, analogous to determining whether government action is discriminatory under s. 15 of the Charter. In its equality jurisprudence, this Court has emphasized that discrimination means more than simply different treatment; see Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143. To constitute discrimination, the impugned difference in treatment must implicate the purpose of the constitutional protection in question. It is not enough to say, in other words, that judges and non-judges are treated differently. What is important is that this disparate treatment has the potential to influence the adjudicative process.

347 In determining this question, regard must be had to both the purpose and the effect of the impugned salary change. The reasonable perception test contemplates the possibility that a court may be found to lack independence despite the fact that the government did not act with an improper motive; see Généreux, supra, at p. 307. Purpose is nevertheless relevant. As Dickson C.J. noted in Beauregard, supra, at p. 77, legislation dealing with judges' salaries will be suspect if there is "any hint that... [it] was enacted for an improper or colourable purpose". Conversely, he stated, legislation will be constitutional where it represents an attempt "to try to deal fairly with judges and with judicial salaries and pensions" (p. 78).

348 In considering the effect of differential changes on judicial independence, the question that must be asked is whether the distinction between judges and other persons paid from public funds amounts to a "substantial" difference in treatment. Trivial or insignificant differences are unlikely to threaten judicial independence. If the effect of the change on the financial position of judges and others is essentially similar, a reasonable person would not perceive it as potentially influencing judges to favour or disfavour the government's interests in litigation.

349 I now turn to the question of discussions between the judiciary and the government over salaries. In the absence of a commission process, the only manner in which judges may have a say in the setting of their salaries is through direct dialogue with the executive.

The Chief Justice terms these discussions "negotiations" and would prohibit them, in all circumstances, as violations of the financial security component of judicial independence. According to him, negotiations threaten independence because a "reasonable person might conclude that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive" (para. 187).

350 In my view, this position seriously mischaracterizes the manner in which judicial salaries are set. Valente establishes that the fixing of provincial court judges' remuneration is entirely within the discretion of the government, subject, of course, to the conditions that the right to a salary be established by law and that the government not change salaries in a manner that raises a reasonable apprehension of interference. There is no constitutional requirement that the executive discuss, consult or "negotiate" with provincial court judges. As stated by McDonald J. in the Alberta cases, the government "might exercise [this] discretion quite properly (i.e., without reliance upon constitutionally irrelevant considerations such as the performance of the judges) without ever soliciting or receiving the view of the Provincial Court judges" ((1994), 160 A.R. 81, at p. 144). Provincial judges associations are not unions, and the government and the judges are not involved in a statutorily compelled collective bargaining relationship. While judges are free to make recommendations regarding their salaries, and governments would be wise to seriously consider them, as a group they have no economic "bargaining power" vis-à-vis the government. The atmosphere of negotiation the Chief Justice describes, which fosters expectations of "give and take" and encourages "subtle accommodations", does not therefore apply to salary discussions between government and the judiciary. The danger that is alleged to arise from such discussions -- that judges will barter their independence for financial gain -- is thus illusory.

351 Of course, some persons may view direct consultations between the government and the judiciary over salaries to be unseemly or inappropriate. It may be that making representations to an independent commission better reflects the position of judges as independent from the political branches of government. A general prohibition against such consultations, however, is not required by s. 11(d) of the Charter. In most circumstances, a reasonable, informed person would not view them as imperiling judicial independence. As stated by McDonald J. (at p. 145):

> ... a reasonable, well-informed, right-minded person would not regard such a process as one that would impair the independence of the court. In the absence of evidence that the judges had improperly applied the law, no reasonable, right-minded person would have even a suspicion that the judges' independence had been bartered. It must be remembered that there is an appellate process in which either judges of the Court of Queen's Bench or of the Court of Appeal would soon become aware of any colourable use of judicial power, and correct it. Any reasonable, right-minded person would add that safeguard to his or her presumption that the integrity of the Provincial Court judges would prevail.

352 Although there is no general constitutional prohibition against salary discussions between the judiciary and the government, the possibility remains that governments may

use such discussions to attempt to influence or manipulate the judiciary. In such cases, the actions of the government will be reviewed according to the same reasonable perception test that applies to salary changes.

IV. Application to the Present Appeals

1. Prince Edward Island

353 The Chief Justice finds that the wage reduction in Prince Edward Island was unconstitutional on the basis that it was made without recourse having first been made to an independent salary commission. He states, however, that if such a commission had been established, and the legislature had decided to depart from its recommendations and enact the reduction that it did, the reduction would probably be prima facie rational, and hence justified, because it would be part of a broadly based deficit reduction measure reducing the salaries of all persons who are remunerated by public funds.

354 I agree with the Chief Justice's conclusion that the reduction to the salaries of Provincial Court judges in Prince Edward Island was part of an overall public economic measure. Because I would not require governments to have recourse to salary commissions, I find the reduction was consistent with s. 11(d) of the Charter. Based on the statement of facts appended to the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, there is no evidence that the reduction was introduced in order to influence or manipulate the judiciary. A reasonable person would not perceive it, therefore, as threatening judicial independence.

2. Alberta

355 The Chief Justice concludes that the wage reduction imposed on Provincial Court judges in Alberta violated s. 11(d) for the same reason that he finds the reduction in Prince Edward Island unconstitutional: it was effected without recourse to a salary commission process. Again, however, he opines that had such a process been followed, the reduction would likely be prima facie rational because it would be part of an overall economic measure that reduces the salaries of all persons remunerated by public funds. For the reasons already given, I do not think a reasonable person would perceive this reduction as compromising judicial independence. As a result, I find the reduction did not violate s. 11(d).

356 One of the interveners in these appeals, the Alberta Provincial Court Judges' Association, alleges that the wage reductions in Alberta were not as widespread and uniform as assumed in the Agreed Statement of Facts that forms the factual foundation of the litigation. Before this Court, the intervener sought to introduce extrinsic evidence to support this allegation. In response, the Attorney General for Alberta attempted to adduce evidence in rebuttal. As noted by the Chief Justice, the Court denied both these motions.

357 In my view, it is not necessary to consider this factual dispute. The conclusion I have reached is based entirely on the Agreed Statement of Facts reproduced in the reasons of McDonald J. In any future litigation involving this issue, the parties will be free

to adduce whatever evidence they feel is appropriate and a factual record will be developed accordingly.

3. Manitoba

358 The situation in Manitoba is more complicated. As noted by the Chief Justice, there the legislature had established a judicial compensation commission process, which had been in effect since 1990. In 1993, the government passed legislation reducing the salaries of Provincial Court judges in a manner I shall describe later. The government instituted this reduction before the commission had convened or issued its report. For this reason, the Chief Justice finds that the reduction violated s. 11(d) of the Charter.

359 Because I do not believe that commissions are constitutionally required, I find that the Manitoba government's avoidance of the commission process did not violate s. 11(d). Unlike the situations in Prince Edward Island and Alberta, however, the legislation in Manitoba treated judges differently from most other persons paid from public funds. The Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21 ("Bill 22"), permitted, but did not require, public sector employers to impose up to 15 days leave without pay upon their employees during the fiscal years 1993-94 and 1994-95. The definition of public sector "employer" was very broad, encompassing the government itself as well as Crown corporations, hospitals, personal care homes, child and family services agencies, municipalities, school boards, universities and colleges. In contrast, the remuneration of Provincial Court judges, along with members of Crown agencies, boards, commissions and committees appointed by the Lieutenant Governor in Council, was reduced by 3.8 percent for the fiscal year 1993-94, and for the next fiscal year, by an amount equivalent to the number of leave days imposed on unionized government employees. A provision of Bill 22 allowed this reduction to be effected by the taking of specific approved days of leave without pay. Members of the Legislative Assembly were treated in essentially the same manner as judges and other appointees.

360 Two aspects of the legislation are potentially problematic. First, the legislation permitted, but did not compel, government employers to mandate unpaid leaves for their employees. The salary reduction imposed on judges and other appointees, in contrast, was mandatory. In practice, the reduced work week was imposed on all civil servants and most other public sector employees. Some employers, including certain school divisions and health care facilities, dealt with funding reductions in other ways. Second, Bill 22 specified that reductions imposed by public employers were to be effected in the form of unpaid leave. In the case of judges and other appointees, salaries were reduced directly.

361 There is no evidence, however, that these differences evince an intention to interfere with judicial independence. As Philp J.A. stated for the Manitoba Court of Appeal, "differences in the classes of persons affected by Bill 22 necessitated differences in treatment" ((1995), 102 Man. R. (2d) 51, at p. 66). In the case of the permissive-mandatory distinction, the evidence establishes that it served a rational and legitimate purpose. Though all those affected by Bill 22 were in one form or another "paid" from public funds, their relationship to government differed markedly. A number of the "employers" under Bill 22, such as school boards, Crown corporations, municipalities,

universities and health care facilities, though ultimately dependent on government funding, have traditionally enjoyed a significant amount of financial autonomy. Generally speaking, the provincial government does not set the salaries of employees of these institutions. The legislation respects the autonomy of those bodies by permitting them to cope with reduced funding in alternative ways. Judges, though obviously required to be independent from government in specific, constitutionally guaranteed ways, are paid directly by the government. In this limited sense, they are analogous to civil servants and not to employees of other public institutions such as school boards, universities or hospitals. Notably, the provincial government, as an "employer" under Bill 22, required its civil servants to take unpaid leaves. Moreover, unlike many public employees, judges are not in a collective bargaining relationship with the government. The government may have felt that permitting judges to "negotiate" the manner in which they would absorb reductions to their remuneration would have been inappropriate.

362 The purpose of the unpaid leave-salary reduction distinction is also benign. The government may have considered the imposition of mandatory leave without pay to violate judicial independence. There are certainly weighty reasons for doing so. At all events, it is certainly less intrusive to simply reduce judges' salary than to require them to take specific days off without pay. Section 9(2) of Bill 22 permits, but does not require, judges to substitute unpaid leave on "specific approved days" for the salary reduction. Presumably, "specific approved days" refers to those days designated by the government for unpaid leave in the civil service (including employees of the courts and Crown prosecutors' offices). In my view, to the extent that this provision evinces any intention at all, it is to defer to judges' preferences on this matter and not, as the appellants suggest, to subject them to the discretion of the executive.

363 The effect of these distinctions on the financial status of judges vis-à-vis others paid from public monies, moreover, is essentially trivial. It is true that the salaries of some categories of public employees were not reduced or were reduced by a lesser amount than those of judges. However, as mentioned earlier, there are sufficient reasons to justify this distinction. What is important is that judges received the same reduction as civil servants. As conceded by the appellants, the 3.8 percent reduction in the first year parallelled the number of leave days the government had decided to impose on civil servants in anticipation of the Bill being passed. In the second year, the judges salaries were to be reduced by an amount equivalent to the reduction applied to employees under a collective agreement. This scheme, in my view, was a reasonable and practical method of ensuring that judges and other appointees were treated equally in comparison to civil servants. As the Manitoba Court of Appeal unanimously held, a reasonable person would not perceive this scheme as threatening the financial security of judges in any way.

364 In addition to the claim based on the reduction of their salaries, the Provincial Court judges in Manitoba also contended that their independence was violated by the conduct of the executive in refusing to sign a joint recommendation to the Judicial Compensation Committee unless the judges agreed to forego their legal challenge of Bill 22. As already noted, the fact that the government and judges discuss remuneration issues is not necessarily unconstitutional. Nevertheless, in my view, the government's actions in this

particular case constituted a violation of judicial independence.

365 The economic pressure placed on the judges was not intended to induce judges to favour the government's interests in litigation. Rather, it was designed to pressure them into conceding the constitutionality of the planned salary reduction. The judges, however, had bona fide concerns about the constitutionality of Bill 22. They had a right, if not a duty, to defend the principle of independence in the superior courts. The financial security component of judicial independence must include protection of judges' ability to challenge legislation implicating their own independence free from the reasonable perception that the government might penalize them financially for doing so. In my view, the executive's decision not to sign the joint recommendation was made for an improper purpose and constituted arbitrary interference with the process by which judges' salaries were established: Valente, supra, at p. 704.

V. Conclusion and Disposition

1. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

(a) Answers to Reference Questions

366 The answers to the relevant reference questions, which are appended to the reasons of the Chief Justice as Appendices "A" and "B" respectively, are as follows:

(i) Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island

Question 1

(a) and (b): Yes. Subject to the principles outlined in my reasons, the legislature of Prince Edward Island may increase, decrease or otherwise adjust the remuneration of Provincial Court Judges, whether or not such adjustment is part of an overall public economic measure.

Question 2: Yes.

(ii) Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

Question 1(c): Yes.

...

Question 4:

(a) and (b): No. The explanation for these answers is the same as for the answer to question 1 of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

...

(d): No.

(e): No. The explanation for this answer is the same as for the answer to question 1 of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

...

(l): No.

...

Question 8: Given my answers to the foregoing questions, it is not necessary to answer this question.

367 For all other questions, my answers are the same as those set out by the Chief Justice.

(b) Disposition

368 I would dismiss the appeals in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and in Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island. I would allow the cross-appeal on question 1(a) of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island.

2. R. v. Campbell, R. v. Ekmecic and R. v. Wickman

(a) Answers to Constitutional Questions

369 The answers to the relevant questions, which are appended to the reasons of the Chief Justice as Appendix "C," are as follows:

Question 1: No.

Question 2: No.

370 For all other questions, my answers are the same as those set out by the Chief Justice.

(b) Disposition

371 For the reasons given by the Chief Justice, I would allow the appeal by the Crown from the decision of the Alberta Court of Appeal that it was without jurisdiction to hear these appeals under s. 784(1) of the Criminal Code, R.S.C., 1985, c. C-46. I would also allow the appeal by the Crown from McDonald J.'s holding that ss. 11(1)(c), 11(2) and 11(1)(b) of the Provincial Court Judges Act were unconstitutional. I would also dismiss the Crown's appeal from McDonald J.'s holding that ss. 13(1)(a) and 13(1)(b) of the Provincial Court Judges Act were unconstitutional and declare these provisions to be of no force or effect. Unlike the Chief Justice, however, I would allow the Crown's appeal from McDonald J.'s holding that the 5 percent pay reduction imposed on members of the Alberta Provincial Court by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, was unconstitutional and declare s. 17(1) of the Provincial Court Judges Act to be constitutional.

3. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

(a) Answers to Constitutional Questions

372 The answers to the relevant questions, which are appended to the reasons of the Chief Justice as Appendix "D" are as follows:

Question 1:

(a): No.

(b): Given my response to Question 1(a), it is not necessary to answer this question.

Question 2:

(a): No.

(b): Given my response to Question 2(a), it is not necessary to answer this question.

373 For all other questions, my answers are the same as those set out by the Chief Justice.

(b) Disposition

374 For the reasons of the Chief Justice, I would issue a declaration that the closure of the Provincial Court during the summer of 1994 on "Filmon Fridays" violated the independence of the court. I would also issue a declaration that the Manitoba government violated the independence of the Provincial Court by refusing to sign a joint recommendation to the Judicial Compensation Committee unless the judges agreed to forego their legal challenge of Bill 22.

375 I would therefore allow the appeal in respect of the closure of the Manitoba Provincial Court and the attempt of the government to induce the judges to abstain from legal action. I would dismiss the appeal with respect to the wage reduction.

* * * * *

Appendix "A"

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, October 11, 1994

1. Can the Legislature of the Province of Prince Edward Island make laws such that the remuneration of Judges of the Provincial Court may be decreased, increased, or otherwise adjusted, either:

(a) as part of an overall public economic measure, or
(b) in certain circumstances established by law?

2. If the answer to 1(a) or (b) is yes, then do the Judges of the Provincial Court of Prince Edward Island currently enjoy a basic or sufficient degree of financial security or remuneration such that they constitute an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms and such other sections as

may be applicable?

* * * * *

Appendix "B"

Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, February 13, 1995

1. Having regard to the Statement of Facts, the original of which is on file with the Supreme Court of Prince Edward Island, can a Judge of the Provincial Court of Prince Edward Island (as appointed pursuant to the Provincial Court Act, R.S.P.E.I. 1988, Cap. P-25, as amended) be perceived as having a sufficient or basic degree of:

(a) security of tenure, or
(b) institutional independence with respect to matters of administration bearing on the exercise of the Judge's judicial function, or
(c) financial security,

such that the Judge is an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms?

2. Having regard to the said Statement of Facts, with respect to "security of tenure", is the independence and impartiality of a Judge of the Provincial Court of Prince Edward Island affected to the extent that he is no longer an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms by:

(a) the pension provision in section 8(1)(c) of the Provincial Court Act, supra?
(b) the fact that the Legislative Assembly of the Province of Prince Edward Island has increased, decreased or otherwise adjusted the remuneration of Provincial Court Judges in the Province of Prince Edward Island?
(c) the provision for possible suspension or removal of a Provincial Court Judge from office by the Lieutenant Governor in Council pursuant to section 10 of the Provincial Court Act, supra?
(d) section 12(2) of the Provincial Court Act, supra, which provides for a leave of absence to a Provincial Court Judge, due to illness, at the discretion of the Lieutenant Governor in Council?
(e) section 13 of the Provincial Court Act, supra, which provides for

sabbatical leave to a Provincial Court Judge at the discretion of the Lieutenant Governor in Council?

(f) alteration(s) to the pension provisions provided in section 8 of the Provincial Court Act, supra, which could result in:

(i) an increase or decrease in the pension benefits payable?
(ii) making the plan subject to no more than equal contributions by Provincial Court Judges and the Government of Prince Edward Island?
(iii) an increase or decrease in the years of service required for entitlement to the pension benefits?
(iv) an increase or decrease in the level of indexing of pension benefits, or the use of some alternative index?

(g) remuneration of Provincial Court Judges appointed on or after April 1, 1994, being determined for any year by calculating the average of the remuneration of Provincial Court Judges in the Provinces of Nova Scotia, New Brunswick and Newfoundland on April 1 of the immediately preceding year?

and, if so affected, specifically in what way?

3. Having regard to the said Statement of Facts, with respect to "institutional independence", is the independence and impartiality of a Judge of the Provincial Court of Prince Edward Island affected to the extent that he is no longer an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms by:

(a) the location of the Provincial Courts, the offices of the Judges of the Provincial Court, the staff and court clerks associated with the Provincial Court, in relation to the offices of other Judges of Superior Courts, Legal Aid offices, Crown Attorneys' offices, or the offices of representatives of the Attorney General?
(b) the fact that the Provincial Court Judges do not administer their own budget as provided to the Judicial Services Section of the Office of the Attorney General for the Province of Prince Edward Island?
(c) the designation of a place of residence of a particular Provincial Court Judge?
(d) communication between a Provincial Court Judge and the Director of Legal and Judicial Services in the Office of the Attorney General or the Attorney General for the Province of Prince Edward Island on issues relating to the administration of justice in the Province?
(e) the position of the Chief Judge being vacant?
(f) the fact that the Attorney General, via the Director of Legal and

Judicial Services, declined to fund, and opposed an application to fund, legal counsel for the Chief Judge of the Provincial Court or Provincial Court Judges, as intervenor(s) in Reference re Remuneration of Provincial Court Judges and the Jurisdiction of the Legislature and Related Matters dated October 11, 1994?

(g) Regulation No. EC631/94 enacted pursuant to the Public Sector Pay Reduction Act, S.P.E.I. 1994, Cap. 51?

and, if so affected, specifically in what way?

4. Having regard to the said Statement of Facts, with respect to "financial security", is the independence and impartiality of a Judge of the Provincial Court of Prince Edward Island affected to the extent that he is no longer an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms by:

(a) a general pay reduction for all public sector employees, and for all who hold public office, including Judges, which is enacted by the Legislative Assembly of Prince Edward Island?

(b) a remuneration freeze for all public sector employees, and for all who hold public office, including Judges, which is implemented by the Government of Prince Edward Island or is enacted by the Legislative Assembly of Prince Edward Island?

(c) the fact that Judges' salaries are not automatically adjusted annually to account for inflation?

(d) Provincial Court Judges having the ability to negotiate any aspect of their remuneration package?

(e) Provincial Court Judges' salaries being established directly by the Legislative Assembly for the Province of Prince Edward Island and per the Provincial Court Act, supra, indirectly by other legislative assemblies in Canada?

(f) section 12(2) of the Provincial Court Act, supra, which provides for a leave of absence to a Provincial Court Judge, due to illness, at the discretion of the Lieutenant Governor in Council?

(g) section 13 of the Provincial Court Act, supra, which provides for sabbatical leave to a Provincial Court Judge at the discretion of the Lieutenant Governor in Council?

(h) alteration(s) to the pension provisions provided in section 8 of the Provincial Court Act, supra, which could result in:

(i) an increase or decrease in the pension benefits payable?

(ii) making the plan subject to no more than equal contributions by Provincial Court Judges and the Government of Prince Edward Island?

(iii) an increase or decrease in the years of service required for

entitlement to the pension benefits?

(iv) an increase or decrease in the level of indexing of pension benefits, or the use of some alternative index?

(i) An Act to Amend the Provincial Court Act, assented to May 19, 1994, which provides, inter alia, that the remuneration of Provincial Court Judges appointed on or after April 1, 1994, shall be determined for any year by calculating the average of the remuneration of Provincial Court Judges in the Provinces of Nova Scotia, New Brunswick and Newfoundland on April 1 of the immediately preceding year?

(j) the fact that the Attorney General, via the Director of Legal and Judicial Services, declined to fund, and opposed an application to fund, legal counsel for the Chief Judge of the Provincial Court or Provincial Court Judges, as intervenor(s) in Reference re Remuneration of Provincial Court Judges and the Jurisdiction of the Legislature and Related Matters dated October 11, 1994?

(k) Regulation No. EC631/94 enacted pursuant to the Public Sector Pay Reduction Act, supra?

and, if so affected, specifically in what way?

5. Notwithstanding the individual answers to the foregoing questions, is there any other factor or combination of factors arising from the said Statement of Facts that affects the independence and impartiality of a Judge of the Provincial Court of Prince Edward Island to the extent that he is no longer an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms? If so affected, specifically in what way?
6. Is it necessary for a Judge of the Provincial Court of Prince Edward Island appointed pursuant to the Provincial Court Act, supra, to have the same level of remuneration as a Judge of the Supreme Court of Prince Edward Island appointed pursuant to the Judges Act, R.S.C. 1985, c. J-1, in order to be an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms?
7. If the answer to question 6 is yes, in what particular respect or respects is it so necessary?
8. If any of the foregoing questions are answered "yes", are any possible infringements or denials of any person's rights and freedoms as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms within reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of section 1 of the Canadian Charter of Rights and Freedoms?

* * * * *

Appendix "C"

Constitutional questions in R. v. Campbell, R. v. Ekmecic, and R. v. Wickman, June 26, 1996

1. Does the provision made in s. 17(1) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, for the remuneration of judges of the Provincial Court of Alberta, when read on its own or in conjunction with the regulations enacted thereunder (with the exception of the regulation referred to in question 2), fail to provide a sufficient degree of financial security to constitute that court an independent and impartial tribunal within the meaning of s. 11(d) of the Canadian Charter of Rights and Freedoms?
2. Does the 5% salary reduction imposed by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?
3. Do s. 11(1)(c) and s. 11(2) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, relating to the handling by the Judicial Council of complaints against judges of the Provincial Court of Alberta, when read in light of s. 10(1)(e) and s. 10(2) of the Act, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?
4. Does the inclusion of "lack of competence" and "conduct" in s. 11(1)(b) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?
5. Does s. 13(1)(a) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, authorizing the Minister of Justice to designate the place at which a judge shall have his residence, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?
6. Does s. 13(1)(b) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, authorizing the Minister of Justice to designate the Court's sitting days, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?
7. If any of the foregoing questions are answered "yes", are any of the provisions justified under s. 1 of the Canadian Charter of Rights and Freedoms?

* * * * *

Appendix "D"

Constitutional questions in Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice), June 18, 1996

1.

(a) Does s. 9 of The Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21 ("Bill 22"), relating to the remuneration of the judges of the Provincial Court of Manitoba, violate in whole or in part the rule of law and/or the requirement of an independent and impartial tribunal imposed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

(b) If so, can the provision be justified as a reasonable limit under s. 1 of the Canadian Charter of Rights and Freedoms?

2.

(a) To the extent that s. 9 of Bill 22 repeals or suspends the operation of s. 11.1 of The Provincial Court Act, R.S.M. 1987, c. C275, does it violate in whole or in part the rule of law and/or the requirement of an independent and impartial tribunal imposed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

(b) If so, can the provision be justified as a reasonable limit under s. 1 of the Canadian Charter of Rights and Freedoms?

3.

(a) To the extent that s. 4 of Bill 22 authorizes the withdrawal of court staff and personnel on days of leave, does that provision violate in whole or in part the rule of law and/or requirement of an independent and impartial tribunal imposed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

(b) If so, can the provision be justified as a reasonable limit under s. 1 of the Canadian Charter of Rights and Freedoms?

1 See [1998] 1 S.C.R. 3, para. 15.

2 See [1998] 1 S.C.R. 3, para. 15.

** Preliminary Version **

Case Name:

Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)

Provincial Court Judges' Association of New Brunswick, Honourable Judge Michael McKee and Honourable Judge Steven Hutchinson, appellants;

v.

Her Majesty The Queen in Right of the Province of New Brunswick, as represented by the Minister of Justice, respondent, and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Canadian Association of Provincial Court Judges, Ontario Conference of Judges and Federation of Law Societies of Canada, interveners.

And between

Ontario Judges' Association, Ontario Family Law Judges' Association and Ontario Provincial Court (Civil Division) Judges' Association, appellants;

v.

Her Majesty The Queen in Right of the Province of Ontario, as represented by the Chair of Management Board, respondent, and

Attorney General of Quebec, Attorney General of Alberta, Canadian Bar Association and Federation of Law Societies of Canada, interveners.

And between

Her Majesty The Queen in Right of Alberta and the Lieutenant Governor in Council, appellants;

v.

Chereda Bodner, Robert Philp, Timothy Stonehouse, William Martin, Waldo B. Ranson, Glenn Morrison, Q.C., Johnathan H.B. Moss, David M. Duggan, Mark W. Gruman,

Patrick McIlhargy, John R. Shaw and Gregory Francis, respondents, and
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General for Saskatchewan, Canadian Superior Court Judges Association, Ontario Conference of Judges, Conférence des juges du Québec, Canadian Association of Provincial Court Judges, Association of Justices of the Peace of Ontario, Judicial Justice of the Peace Association of British Columbia and Federation of Law Societies of Canada, interveners.
And between
Attorney General of Quebec and Minister of Justice of Quebec, appellants;
v.
Conférence des juges du Québec, Maurice Abud, Claude C. Boulanger, Marc Vanasse, Gilles Gagnon, Jacques R. Roy, Gérald Laforest, Jean-François Gosselin, Hubert Couture, Michael Sheehan, Yvan Mayrand, Dominique Slater, Guy Gagnon, Mireille Allaire, Anne Laberge, Armando Aznar, Jean-Pierre Lortie, Guy Lecompte, Huguette St-Louis, Rémi Bouchard, Michel Jasmin, Jacques Lachapelle, Louise Provost, Michèle Rivet, Paule Lafontaine, Rosaire Larouche, Réal R. Lapointe, Claude Chicoine, Céline Pelletier, René de la Sablonnière, Gabriel de Pokomandy, Jean R. Beaulieu, Michel Beauchemin, Jacques Trudel, Denis Bouchard, Ruth Veillet, Gilson Lachance, Claude Parent, Michel L. Auger, Lise Gaboury and Jean Alarie, respondents, and
Attorney General of New Brunswick and Federation of Law Societies of Canada, interveners.
And between
Attorney General of Quebec and Minister of Justice of Quebec, appellants;
v.
Morton S. Minc, Denis Boisvert, Antonio Discepola, Yves Fournier, Gilles Gaumond, Louise Baribeau, Jean-Pierre Bessette, Pierre D. Denault, René Déry, Gérard Duguay, Pierre Fontaine, Pierre Gaston, Denis Laliberté, Louis-Jacques Léger, Jean Massé, Evasio Massignani, Ronald Schachter, Bernard Caron, Jean Charbonneau and Raymonde Verreault, respondents, and
Attorney General of New Brunswick and Federation of Law Societies of Canada, interveners.
And between

Conférence des juges municipaux du Québec, appellant;
v.
Conférence des juges du Québec and Attorney General of Quebec, respondents, and
Attorney General of New Brunswick and Federation of Law Societies of Canada, interveners.

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[2005] A.C.S. no 47

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[2005] 2 S.C.R. 286

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85 O.R. (3d) 79

255 D.L.R. (4th) 513

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49 Alta. L.R. (4th) 211

367 A.R. 300

288 N.B.R. (2d) 202

201 O.A.C. 293

30 Admin. L.R. (4th) 1

14 C.P.C. (6th) 1

135 C.R.R. (2d) 55

141 A.C.W.S. (3d) 213

2005 CarswellNB 405

File Nos.: 30006, 30148, 29525, 30477.

Supreme Court of Canada

Heard: November 9, 10, 2004;
Judgment: July 22, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

(171 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Catchwords:

Constitutional law -- Judicial independence -- Judicial remuneration -- Nature of judicial compensation commissions and their recommendations -- Obligation of government to respond to recommendations -- Scope of judicial review of government's response -- Remedies.

Constitutional law -- Judicial independence -- Judicial remuneration -- Government departing from compensation commission's recommendations on salary and benefits -- Whether government's reasons for departing from recommendations satisfy rationality test -- Three-stage analysis for determining rationality of government's response.

Evidence -- Admissibility -- Judicial review of government's response to compensation commission's recommendations -- Government seeking to have affidavits admitted in evidence -- Whether affidavits admissible -- Whether affidavits introduce evidence and facts not contained in government's response.

Courts -- Judges -- Remuneration -- Compensation committee -- Mandate -- Committee recommending elimination salary parity between judges of Court of Québec and municipal court judges -- Whether committee had mandate to consider parity issue.

Civil procedure -- Application for leave to intervene in Court of Appeal -- Conférence des

juges municipaux du Québec not mounting a court challenge to government's response to compensation committee's recommendations on salary of municipal court judges outside Laval, Montreal and Quebec City -- Conférence unsuccessfully seeking leave to intervene in related cases at Court of Appeal -- Whether leave to intervene should have been granted.

Summary:

These appeals raise the question of judicial independence in the context of judicial remuneration, and the need to clarify the principles of the compensation commission process in order to avoid future conflicts.

In New Brunswick, a Commission established under the *Provincial Court Act* recommended increasing the salary of Provincial Court judges from $142,000 in 2000 to approximately $169,000 in 2003. The Government rejected this recommendation, arguing (1) that the Commission had misunderstood its mandate; (2) that it was inappropriate to link the Provincial Court judges' salary to that of federally appointed judges; and (3) that the judges' existing salary was adequate. The appellant Association applied for judicial review of the Government's response, and the Government successfully applied to have four affidavits admitted in evidence. On the salary issue, the reviewing judge found the Government's reasons for rejecting the Commission's recommendation to be rational. The Court of Appeal reversed the reviewing judge's decision on the admissibility of the affidavits, but upheld his decision on the salary issue.

In Ontario, the remuneration Commission made a binding recommendation that a salary increase of approximately 28 percent over three years be awarded and also made certain optional pension recommendations. Ontario retained an accounting firm to determine the cost of the pension options and subsequently refused to adopt any of the pension recommendations, listing several reasons, including: (1) that the 28 percent salary increase, which had automatically increased the value of the pension by 28 percent, was appropriate; (2) that no significant demographic changes had occurred since the 1991 review of the pension plan; and (3) that the Government's current fiscal responsibilities required a continued commitment to fiscal restraint. The judges applied for judicial review. In support of its position, Ontario filed affidavits from the accounting firm and they were held to be admissible. The Divisional Court dismissed the application, holding that Ontario's reasons for rejecting the pension recommendations were clear, logical and relevant. The Court of Appeal upheld the decision.

In Alberta, the compensation Commission issued a report recommending, among other things, a substantial increase in salary for Justices of the Peace. Although Alberta accepted that salaries and per diem rates ought to be increased, it rejected the specific increases recommended by the Commission and proposed a modified amount. Alberta's reasons stressed that it had a duty to manage public resources and act in a fiscally responsible manner, and that the overall level of increase recommended was greater than that of other publicly funded programs and significantly exceeded those of individuals in comparative groups. The Court of Queen's Bench allowed the respondents' application challenging the constitutionality of the changes, holding that Alberta's reasons for rejecting

the Commission's recommendations did not pass the test of simple rationality. The Court of Appeal upheld the decision.

In Quebec, the judicial compensation Committee established under the *Courts of Justice Act* recommended raising the salary of judges of the Court of Québec from $137,000 to $180,000 and adjusting their pension. The report also recommended eliminating the salary parity of municipal court judges in Laval, Montreal and Quebec City with judges of the Court of Quebec and suggested a lower pay scale. A second panel of the Committee addressed the compensation of judges of the municipal courts to which the *Act respecting municipal courts* applies -- namely, the judges of municipal courts outside Laval, Montreal and Quebec City -- and, on the assumption that parity should be abandoned, set the fee schedule at a scale reflecting responsibilities less onerous than those of full-time judges. In its response, the Government proposed that the most important recommendations be rejected. It limited the initial salary increase of judges of the Court of Quebec to 8 percent, with small additional increases in 2002 and 2003. The response accepted the elimination of parity for municipal judges, limited the raise in their salaries to 4 percent in 2001 and granted them the same adjustments as judges of the Court of Quebec in 2002 and 2003. It accordingly adjusted the fees payable to judges of municipal courts to which the *Act respecting municipal courts* applies rather than accepting the fee scales recommended by the Committee. The Conférence des juges du Québec, which represents the judges of the Court of Québec and the judges of the municipal courts of Laval, Montreal and Quebec City, challenged the Government's response in court. Both the Superior Court and the Court of Appeal held that the response did not meet the test of rationality. The Conférence des juges municipaux du Québec, which represents municipal court judges outside Laval, Montreal and Quebec City and which had not challenged the Government's response, was denied leave to intervene in the Court of Appeal.

Held: The appeals in the New Brunswick and Ontario cases should be dismissed.

Held: The appeal in the Alberta case should be allowed.

Held: The appeals of the Attorney General of Quebec and the Minister of Justice of Quebec should be dismissed. Those portions of the orders below which are not in accordance with these reasons must be set aside and the matter must be remitted to the government of Quebec and the National Assembly for reconsideration in accordance with these reasons.

Held: The appeal of the Conférence des juges municipaux du Québec should be allowed in part, and the application for leave to intervene should be granted.

General Principles

Judicial salaries can be maintained or changed only by recourse to a commission that is independent, objective and effective. Unless the legislature provides otherwise, a commission's report is consultative, not binding. Its recommendations must be given weight, but the government retains the power to depart from the recommendations as long as it justifies its decision with rational reasons in its response to the recommendations.

Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. The use of a particular comparator must also be explained. If it is called upon to justify its decision in a court of law, the government may not advance reasons other than those mentioned in its response, though it may provide more detailed information with regard to the factual foundation it has relied upon. [para. 8] [para. 21] [paras. 26-27]

The government's response is subject to a limited form of judicial review by the superior courts. The reviewing court is not asked to determine the adequacy of judicial remuneration but must focus on the government's response and on whether the purpose of the commission process has been achieved. A three-stage analysis for determining the rationality of the government's response should be followed: (1) Has the government articulated a legitimate reason for departing from the commission's recommendations? (2) Do the government's reasons rely upon a reasonable factual foundation? (3) Viewed globally, has the commission process been respected and have the purposes of the commission -- preserving judicial independence and depoliticizing the setting of judicial remuneration -- been achieved? [paras. 29-31]

If the reviewing court concludes that the commission process has not been effective, the appropriate remedy will generally be to return the matter to the government for reconsideration. If problems can be traced to the commission, the matter can be referred back to it. Courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option. [para. 44]

New Brunswick

Although the part of the Government's response questioning the Commission's mandate is not legitimate, the portion relating to the adequacy of the judges' existing salary and the excessiveness of the recommended raise meets the standard of rationality. First, the Government's reasons on these two points cannot be characterized as being purely political or as an attempt to avoid the process, and there is no suggestion that the Government has attempted to manipulate the judiciary. Second, the Government's response does not lack a reasonable factual foundation. While some parts of the response may appear dismissive, others have a rational basis. On the one hand, the Government's rejection of the recommended increase on the basis that it is excessive is amply supported by a reasonable factual foundation. On the other hand, the arguments in support of the adequacy of the current salary were not properly dealt with by the Commission. Consequently, the Government was justified in restating its position that the existing salary was sufficient to attract qualified candidates. The Government's reliance on this factual foundation was reasonable. Third, while the Government's justification for its departure from the recommendations is unsatisfactory in several respects, the response, viewed globally and with deference, shows that it took the process seriously. [para. 67-69] [para. 76] [para. 81] [para. 83]

The affidavits filed by the Government before the reviewing judge were admissible.

Although all the reasons upon which the Government relies in rejecting the Commission's recommendations must be stated in its public response, these affidavits do not advance arguments that were not previously raised. They simply go into the specifics of the factual foundation relied upon by the Government. [para. 62] [para. 64]

Ontario

The Ontario government's reasons rejecting the Commission's optional pension recommendations pass the rationality test. The reasons outlined in the Government's response do not reveal political or discriminatory motivations or any improper motive. They reveal a consideration of the judicial office and an intention to deal with it appropriately. Also, Ontario relied upon a reasonable factual foundation by alleging the need for fiscal restraint and suggesting that no significant demographic change had occurred warranting a change to the pension plan structure. Lastly, in its reasons, examined globally, Ontario has clearly respected the commission process, taken it seriously and given it a meaningful effect. Ontario's engagement of an accounting firm was not a distortion of the process but, rather, demonstrates Ontario's good faith and the serious consideration given to the Commission's recommendations. [paras. 95-101]

The admission of the accounting firm's affidavits was proper. These affidavits do not add a new position. They merely illustrate Ontario's commitment to taking the Commission's recommendations seriously. [para. 103]

Alberta

The judicial independence of Justices of the Peace warrants the same degree of constitutional protection that is provided by an independent, objective commission. Since Alberta has already provided an independent commission process through the *Justices of the Peace Compensation Commission Regulation*, this process must be followed. [para. 122]

Alberta's reasons for rejecting the specific level of salary increase satisfy the rationality test. The reasons do not reveal political or discriminatory motivations, and are therefore legitimate. They consider the overall level of increase recommended, comment upon the Government's responsibility to properly manage fiscal affairs, and examine various comparator groups. The reasons illustrate Alberta's desire to compensate its Justices of the Peace in a manner consistent with the nature of the office. They clearly state the reasons for variation and explain why Alberta attributed different weights to the comparator groups. Further, the factual basis upon which the Government sought to rely is indicated and its reliance is, for the most part, rational. In its reasons, Alberta discusses general fiscal policy, various comparator groups, and the roles and responsibilities of Justices of the Peace. Finally, viewed globally, it appears that the process of the Commission, as a consultative body created to depoliticize the issue of judicial remuneration, has been effective. [paras. 123-127] [para. 129] [para. 132]

Quebec

The Government's response does not meet the standard of rationality. While the response does not evidence any improper political purpose or intent to manipulate or influence the judiciary, it fails to address the Committee's most important recommendations and the justifications given for them. The Government appears to have been content to restate its original position before the Committee, and in particular the point that no substantial salary revision was warranted because the recommendations of the previous Committee, which led to a substantial increase in judges' salaries, had just been implemented. Once the Committee had decided to conduct a broad review of the judicial compensation of provincial judges, as it was entitled to do, the constitutional principles governing the response required the Government to give full and careful attention to the recommendations and to the justifications given for them. The failure to do so impacted on the validity of the essentials of the response. [paras. 159-160] [para. 163] [para. 165]

With respect to the issue of salary parity for municipal court judges, the Government did not have to state the reasons for its agreement with recommendations which were well explained. Moreover, the Committee did not exceed its mandate or breach any principle of natural justice in examining the issue of parity. [paras. 167-169]

The appeal and the application for leave to intervene of the Conférence des juges municipaux du Québec should be allowed for the sole purpose of declaring that the response is also void in respect of the compensation of the judges of municipal courts to which the *Act respecting municipal courts* applies. The recommendations concerning the three groups of judges are closely linked, and the complete constitutional challenge launched by the other two groups of judges benefits the members of the Conférence. [paras. 170-171]

Cases Cited

Applied: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3; Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373; referred to: Valente v. The Queen, [1985] 2 S.C.R. 673; Beauregard v. Canada, [1986] 2 S.C.R. 56; Ell v. Alberta, [2003] 1 S.C.R. 857, 2003 SCC 35; Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, 2002 SCC 13; Conférence des juges du Québec v. Québec (Procureur général), [2000] R.J.Q. 744; Conférence des juges du Québec v. Québec (Procureur général), [2000] R.J.Q. 2803.

Statutes and Regulations Cited

Alberta Order in Council, 174/2000, s. 2, Sch. 1, 6, 7.

Act respecting municipal courts, R.S.Q., c. C-72.01.

Canadian Charter of Rights and Freedoms, ss. 1, 11(d).

Constitution Act, 1867, Preamble.

Courts of Justice Act, R.S.O. 1990, c. C.43, Schedule (Appendix A of Framework

Agreement).

Courts of Justice Act, R.S.Q., c. T-16, ss. 246.29, 246.30, 246.31, 246.42, 246.43, 246.44.

Judicature Act, R.S.A. 1980, c. J-1 [am. S.A. 1998, c. 18].

Justices of the Peace Compensation Commission Regulation, Alta. Reg. 8/2000, ss. 3(1), 5(1), 16, 21(2).

Provincial Court Act, R.S.N.B. 1973, c. P-21, s. 22.03(1), (6).

History and Disposition:

APPEAL from a judgment of the New Brunswick Court of Appeal (Turnbull, Larlee and Robertson JJ.A.) (2003), 231 D.L.R. (4th) 38, 260 N.B.R. (2d) 201, 5 Admin. L.R. (4th) 45, 40 C.P.C. (5th) 207, [2003] N.B.J. No. 321 (QL), 2003 NBCA 54, affirming a decision of Boisvert J. (2002), 213 D.L.R. (4th) 329, 249 N.B.R. (2d) 275, 42 Admin. L.R. (3d) 275, [2002] N.B.J. No. 156 (QL), 2002 NBQB 156. Appeal dismissed.

APPEAL from a judgment of the Ontario Court of Appeal (O'Connor C.J. and Borins and MacPherson JJ.A.) (2003), 67 O.R. (3d) 641, 233 D.L.R. (4th) 711, 8 Admin. L.R. (4th) 222, 38 C.C.P.B. 118, 112 C.R.R. (2d) 58, [2003] O.J. No. 4155 (QL), affirming a decision of O'Driscoll, Then and Dunnet JJ. (2002), 58 O.R. (3d) 186, 157 O.A.C. 367, 33 C.C.P.B. 83, [2002] O.J. No. 533 (QL). Appeal dismissed.

APPEAL from a judgment of the Alberta Court of Appeal (Côté, Picard and Paperny JJ.A.) (2002), 222 D.L.R. (4th) 284, 16 Alta. L.R. (4th) 244, 317 A.R. 112, 36 C.P.C. (5th) 1, [2003] 9 W.W.R. 637, [2002] A.J. No. 1428 (QL), 2002 ABCA 274, affirming a decision of Clark J. (2001), 93 Alta. L.R. (3d) 358, 296 A.R. 22, 10 C.P.C. (5th) 157, [2001] 10 W.W.R. 444, [2001] A.J. No. 1033 (QL), 2001 ABQB 650, with supplementary reasons (2001), 3 Alta. L.R. (4th) 59, 300 A.R. 170, 19 C.P.C. (5th) 242, [2002] 8 W.W.R. 152, [2001] A.J. No. 1565 (QL), 2001 ABQB 960. Appeal allowed.

APPEAL from a judgment of the Quebec Court of Appeal (Robert C.J. and Brossard, Proulx, Rousseau-Houle and Morissette JJ.A.), [2004] R.J.Q. 1450, [2004] Q.J. No. 6622 (QL), affirming a decision of Guibault J., [2003] R.J.Q. 1488, [2003] Q.J. No. 3947 (QL). Appeal dismissed.

APPEALS from judgments of the Quebec Court of Appeal (Robert C.J. and Brossard, Proulx, Rousseau-Houle and Morissette JJ.A.), [2004] R.J.Q. 1475, [2004] Q.J. No. 6626 (QL) and [2004] Q.J. No. 6625 (QL), reversing a decision of Guibault J., [2003] R.J.Q. 1510, [2003] Q.J. No. 3948 (QL). Appeals dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Robert C.J. and Brossard, Proulx, Rousseau-Houle and Morissette JJ.A.), [2004] R.J.Q. 1450, [2004] Q.J. No. 6622 (QL), dismissing the intervention of the Conférence des juges municipaux du Québec. Appeal allowed in part.

Counsel:

Susan Dawes and Robb Tonn, for the appellants the Provincial Court Judges' Association of New Brunswick, the Honourable Judge Michael McKee and the Honourable Judge Steven Hutchinson.

Gaétan Migneault and Nancy Forbes, for the respondent Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Justice.

C. Michael Mitchell and Steven M. Barrett, for the appellants the Ontario Judges' Association, the Ontario Family Law Judges' Association and the Ontario Provincial Court (Civil Division) Judges' Association.

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Kurt Sandstrom, for the intervener the Attorney General of Alberta.

F. William Johnson, Q.C., for the intervener the Canadian Bar Association.

Louis Masson, Michel Paradis and Valerie Jordi, for the intervener the Federation of Law Societies of Canada.

Pierre Bienvenu, for the intervener the Canadian Superior Court Judges Association.

Steven M. Barrett and C. Michael Mitchell, for the intervener the Ontario Conference of Judges.

Paul B. Schabas and Catherine Beagan Flood, for the intervener the Association of Justices of the Peace of Ontario.

[Editor's note: A corrigendum was published by the Court July 29, 2005. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The following is the judgment delivered by

THE COURT:--

I. Introduction

1 These appeals again raise the important question of judicial independence and the need to maintain independence both in fact and in public perception. Litigants who engage our judicial system should be in no doubt that they are before a judge who is demonstrably independent and is motivated only by a search for a just and principled result.

2 The concept of judicial independence has evolved over time. Indeed, "[c]onceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence ... . Opinions differ on what is necessary or desirable, or feasible"; *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 692, *per* Le Dain J.

3 This evolution is evident in the context of judicial remuneration. In *Valente*, at p. 706, Le Dain J. held that what was essential was not that judges' remuneration be established by an independent committee, but that a provincial court judge's right to a salary be established by law. By 1997 this statement had proved to be incomplete and inadequate. In the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Reference*"), this Court held that independent commissions were required to improve the process designed to ensure judicial independence but that the commissions' recommendations need not be binding. These commissions were intended to remove the amount of judges' remuneration from the political sphere and to avoid confrontation between governments and the judiciary. The *Reference* has not provided the anticipated solution, and more is needed.

II. General Principles

A. *The Principle of Judicial Independence*

4 The basis for the principle of judicial independence can be found in both our common law and the Canadian Constitution; see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 70-73; *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at paras. 18-23. Judicial independence has been called "the lifeblood of constitutionalism in democratic societies" (*Beauregard*, at p. 70), and has been said to exist "for the benefit of the judged, not the judges" (*Ell*, at para. 29). Independence is necessary because of the judiciary's role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process; *Beauregard*, at p. 70.

5 There are two dimensions to judicial independence, one individual and the other institutional. The individual dimension relates to the independence of a particular judge. The institutional dimension relates to the independence of the court the judge sits on. Both dimensions depend upon objective standards that protect the judiciary's role; *Valente*, at p. 687; *Beauregard*, at p. 70; *Ell*, at para. 28.

6 The judiciary must both be and be seen to be independent. Public confidence depends on both these requirements being met; *Valente*, at p. 689. "Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice"; *Ell*, at para. 29.

7 The components of judicial independence are: security of tenure, administrative independence and financial security; see *Valente*, at pp. 694, 704 and 708; the *Reference*, at para. 115; *Ell*, at para. 28.

8 The *Reference*, at paras. 131-135, states that financial security embodies three requirements. First, judicial salaries can be maintained or changed only by recourse to an independent commission. Second, no negotiations are permitted between the judiciary and the government. Third, salaries may not fall below a minimum level.

9 The *Reference* arose when salaries of Provincial Court judges in Prince Edward Island were statutorily reduced as part of the government's budget deficit reduction plan. Following this reduction, numerous accused challenged the constitutionality of their proceedings in provincial court alleging that the court had lost its status as an independent and impartial tribunal. Similar cases involving provincial court judges in other provinces were joined in the *Reference*. Prior to the *Reference*, salary review was between provincial court judges, or their association, and the appropriate minister of the provincial Crown. Inevitably, disagreements arose.

10 The often spirited wage negotiations and the resulting public rhetoric had the potential to deleteriously affect the public perception of judicial independence. However independent judges were in fact, the danger existed that the public might think they could be influenced either for or against the government because of issues arising from salary

negotiations. The *Reference* reflected the goal of avoiding such confrontations. Lamer C.J.'s hope was to "depoliticize" the relationship by changing the methodology for determining judicial remuneration (para. 146).

11 Compensation commissions were expected to become the forum for discussion, review and recommendations on issues of judicial compensation. Although not binding, their recommendations, it was hoped, would lead to an effective resolution of salary and related issues. Courts would avoid setting the amount of judicial compensation, and provincial governments would avoid being accused of manipulating the courts for their own purposes.

12 Those were the hopes, but they remain unfulfilled. In some provinces and at the federal level, judicial commissions appear, so far, to be working satisfactorily. In other provinces, however, a pattern of routine dismissal of commission reports has resulted in litigation. Instead of diminishing friction between judges and governments, the result has been to exacerbate it. Direct negotiations no longer take place but have been replaced by litigation. These regrettable developments cast a dim light on all involved. In order to avoid future conflicts such as those at issue in the present case, the principles of the compensation commission process elaborated in the *Reference* must be clarified.

B. *The Fundamental Principles of the Commission Process*

13 The principles stated in the *Reference* remain valid. The *Reference* focussed on three themes: the nature of compensation commissions and their recommendations; the obligation of the government to respond; and the scope of judicial review of the government's response and the related remedies.

(1) The Nature of the Compensation Commission and its Recommendations

14 The *Reference* laid the groundwork to ensure that provincial court judges are independent from governments by precluding salary negotiations between them and avoiding any arbitrary interference with judges' remuneration. The commission process is an "institutional sieve" (*Reference*, at paras. 170, 185 and 189) - a structural separation between the government and the judiciary. The process is neither adjudicative interest arbitration nor judicial decision making. Its focus is on identifying the appropriate level of remuneration for the judicial office in question. All relevant issues may be addressed. The process is flexible and its purpose is not simply to "update" the previous commission's report. However, in the absence of reasons to the contrary, the starting point should be the date of the previous commission's report.

15 Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary.

If on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after a careful review, make its own recommendations on that basis.

16 It is a constitutional requirement that commissions be independent, objective and effective. One requirement for independence is that commission members serve for a fixed term which may vary in length. Appointments to a commission are not entrusted exclusively to any one of the branches of government. The appointment process itself should be flexible. The commission's composition is legislated but it must be representative of the parties.

17 The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position.

18 A number of criteria that must be met to ensure effectiveness are identified in the *Reference.* Once the process has started, the commission must meet promptly and regularly. As well there must be no change in remuneration until the commission has made its report public and sent it to the government. The commission's work must have a "meaningful effect"on the process of determining judicial remuneration (*Reference*, at para. 175).

19 What is a "meaningful effect"? Some of the appellants submit that "meaningful effect" means a binding effect on the government. A number of Attorneys General, by contrast, submit that "meaningful effect" requires a public and open process of recommendation and response. They urge that governments be permitted to depart from the report for a rational reason, but not to manipulate the judiciary. The essence of this appeal depends on whether "meaningful effect" means a binding effect or refers to an open process. For the reasons that follow, we conclude that it is the latter.

20 "Meaningful effect" does not mean binding effect. In the *Reference*, the Court addressed this question and stated that a recommendation could be effective without being binding. It held that the Constitution does not require that commission reports be binding, as decisions about the allocation of public resources belong to legislatures and to the executive (para. 176).

21 A commission's report is consultative. The government may turn it into something more. Unless the legislature provides that the report is binding, the government retains the power to depart from the commission's recommendations as long as it justifies its decision with rational reasons. These rational reasons must be included in the government's response to the commission's recommendations.

(2) The Government's Response to the Recommendations

22 If the government departs from the commission's recommendations, the *Reference* requires that it respond to the recommendations. Uncertainties about the nature and scope

of the governments' responses are the cause of this litigation. Absent statutory provisions to the contrary, the power to determine judicial compensation belongs to governments. That power, however, is not absolute.

23 The commission's recommendations must be given weight. They have to be considered by the judiciary and the government. The government's response must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission. The emphasis at this stage is on what the commission has recommended.

24 The response must be tailored to the commission's recommendations and must be "legitimate" (*Reference*, at paras. 180-83), which is what the law, fair dealing and respect for the process require. The government must respond to the commission's recommendations and give legitimate reasons for departing from or varying them.

25 The government can reject or vary the commission's recommendations, provided that legitimate reasons are given. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.

26 The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. Comparisons with public servants or with the private sector may be legitimate, but the use of a particular comparator must be explained. If a new fact or circumstance arises after the release of the commission's report, the government may rely on that fact or circumstance in its reasons for varying the commission's recommendations. It is also permissible for the government to analyse the impact of the recommendations and to verify the accuracy of information in the commission's report.

27 The government's reasons for departing from the commission's recommendations, and the factual foundations that underlie those reasons, must be clearly and fully stated in the government's response to the recommendations. If it is called upon to justify its decision in a court of law, the government may not advance reasons other than those mentioned in its response, though it may provide more detailed information with regard to the factual foundation it has relied upon, as will be explained below.

(3) The Scope and Nature of Judicial Review

28 Once the commission has made its recommendations and the government has responded, it is hoped that, with the guidance of these reasons for judgment, the courts will rarely be involved. Judicial review must nonetheless be envisaged.

29 The *Reference* states that the government's response is subject to a limited form of judicial review by the superior courts. The government's decision to depart from the commission's recommendations must be justified according to a standard of rationality. The standard of judicial review is described in the *Reference* as one of "simple rationality" (paras. 183-84). The adjective "simple" merely confirms that the standard is rationality alone.

30 The reviewing court is not asked to determine the adequacy of judicial remuneration. Instead, it must focus on the government's response and on whether the purpose of the commission process has been achieved. This is a deferential review which acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs.

31 In the *Reference*, at para. 183, a two-stage analysis for determining the rationality of the government's response is set out. We are now adding a third stage which requires the reviewing judge to view the matter globally and consider whether the overall purpose of the commission process has been met. The analysis should be as follows:

(1) Has the government articulated a legitimate reason for departing from the commission's recommendations?
(2) Do the government's reasons rely upon a reasonable factual foundation? and
(3) Viewed globally, has the commission process been respected and have the purposes of the commission - preserving judicial independence and depoliticizing the setting of judicial remuneration - been achieved?

32 The first stage of the process described in the *Reference* is a screening mechanism. It requires the government to provide a "legitimate" reason for any departure from the commission's recommendation. What constitutes a "legitimate" reason is discussed above (paras. 23-27).

33 The second stage of the review consists of an inquiry into the reasonableness and sufficiency of the factual foundation relied upon by the government in rejecting or varying the commission's recommendations. The *Reference* states that this inquiry is to be conducted in a manner similar to the Court's assessment of the "economic emergency" in *Reference re Anti-Inflation* Act, [1976] 2 S.C.R. 373 ("*Anti-Inflation Reference*").

34 Lamer C.J.'s mention of the *Anti-Inflation Reference* must be read in context. His statement was not meant to incorporate the circumstances of that case (i.e. an emergency) and, hence, does not require that the legislature or the executive establish the existence of "exceptional circumstances" in order to justify a departure from the recommendations. What Lamer C.J. intended was that a reviewing court is to assess the

factual foundation relied upon by the government in a manner similar to how this Court, in the *Anti-Inflation Reference*, assessed whether there were "exceptional circumstances" that provided a rational basis for the government's legislation under the "peace, order and good government" head of power.

35 In the *Anti-Inflation Reference*, the analysis focussed on two factors: first, whether the government had indicated that this was the factual basis upon which it was enacting the legislation and, second, whether on the face of the evidence before the Court, it was rational for the government to rely on such facts. The analysis required a deferential standard; see p. 423, *per* Laskin C.J.:

> In considering such material and assessing its weight, the Court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgment. It may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it. Where this is not so evident, the extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity.

36 In analysing these two factors as part of the second stage of the judicial review process, the reviewing court must determine whether the government has explained the factual foundation of its reasons in its response. Absent new facts or circumstances, as a general rule, it is too late to remedy that foundation in the government's response before the reviewing court. Nevertheless, the government may be permitted to expand on the factual foundation contained in its response by providing details, in the form of affidavits, relating to economic and actuarial data and calculations. Furthermore, affidavits containing evidence of good faith and commitment to the process, such as information relating to the government's study of the impact of the commission's recommendations, may also be admissible.

37 The reviewing court should also, following the *Anti-Inflation Reference*, determine whether it is rational for the government to rely on the stated facts or circumstances to justify its response. This is done by looking at the soundness of the facts in relation to the position the government has adopted in its response.

38 At the third stage, the court must consider the response from a global perspective. Beyond the specific issues, it must weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations. Although it may find fault with certain aspects of the process followed by the government or with some particular responses or lack of answer, the court must weigh and assess the government's participation in the process and its response in order to determine whether the response, viewed in its entirety, is impermissibly flawed even after the proper degree of deference is shown to the government's opinion on the issues.

The focus shifts to the totality of the process and of the response.

39 It is obvious that, on the basis of the test elaborated above, a bald expression of disagreement with a recommendation of the commission, or a mere assertion that judges' current salaries are "adequate", would be insufficient. It is impossible to draft a complete code for governments, and reliance has to be placed on their good faith. However, a careful application of the rationality standard dispenses with many of the rules that have dominated the discourse about the standard since the *Reference*. The test also dispenses with the "rules" against other methods for rejecting a commission's recommendations, such as prohibiting the reweighing of factors previously considered by the commission. The response can reweigh factors the commission has already considered as long as legitimate reasons are given for doing so. The focus is on whether the government has responded to the commission's recommendations with legitimate reasons that have a reasonable factual foundation.

40 In a judicial review context, the court must bear in mind that the commission process is flexible and that, while the commission's recommendations can be rejected only for legitimate reasons, deference must be shown to the government's response since the recommendations are not binding. If, in the end, the reviewing court concludes that the response does not meet the standard, a violation of the principles of judicial independence will have been made out.

41 In the *Reference*, Lamer C.J. briefly commented in passing on the justification under s. 1 of the *Canadian Charter of Rights and Freedoms* (paras. 277-85). Since the parties have not raised this issue in the case at bar, consideration of it, if it is indeed applicable, should await the proper case. We will now consider the remedies that are available in cases in which the constitutional standard is not met.

(4) Remedies

42 The limited nature of judicial review dictates the choice of remedies. The remedies must be consistent with the role of the reviewing court and the purpose of the commission process. The court must not encroach upon the commission's role of reviewing the facts and making recommendations. Nor may it encroach upon the provincial legislature's exclusive jurisdiction to allocate funds from the public purse and set judicial salaries unless that jurisdiction is delegated to the commission.

43 A court should not intervene every time a particular reason is questionable, especially when others are rational and correct. To do so would invite litigation, conflict and delay. This is antithetical to the object of the commission process. If, viewed globally, it appears that the commission process has been effective and that the setting of judicial remuneration has been "depoliticized", then the government's choice should stand.

44 In light of these principles, if the commission process has not been effective, and the setting of judicial remuneration has not been "depoliticized", then the appropriate remedy will generally be to return the matter to the government for reconsideration. If problems can be traced to the commission, the matter can be referred back to it. Should the commission

no longer be active, the government would be obliged to appoint a new one to resolve the problems. Courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option. This reflects the conclusion in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, that it is "not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers" (para. 77).

III. Application of the Principles to the Cases

45 Provincial Court judges in New Brunswick, Ontario and Quebec, justices of the peace in Alberta and municipal court judges in Quebec have sought judicial review of their provincial governments' decisions to reject certain compensation commission recommendations relating to their salaries and benefits. We will apply the principles set out above to the facts of each of these cases.

A. *New Brunswick*

46 Before the *Reference*, the New Brunswick government ("Government") negotiated directly with Provincial Court judges. Although these negotiations led to salary changes in some years, the judges' salary was usually treated on the same basis as the salaries of non-bargaining civil service employees, notably those of senior civil servants. After the *Reference*, the New Brunswick legislature amended the province's *Provincial Court Act*, R.S.N.B. 1973, c. P-21, in order to establish the process recommended by our Court (ss. 22.03(1)). The new legislation sets out the factors to be considered by the Commission in making its recommendations:

> **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.

These factors now provide the basis for the assessment that is to be conducted by New Brunswick's judicial remuneration commissions.

47 When the first commission was appointed in 1998, the salary of New Brunswick's provincial court judges was $100,000. In its representations to the 1998 Commission, the Provincial Court Judges' Association of New Brunswick ("Association") submitted that an increase was justified in view of its members' increased workload resulting from a number of legislative changes. It maintained that their work was as important as the work of judges of the Court of Queen's Bench and consequently asked that they receive the same remuneration. The 1998 Commission recommended salary increases to $125,000 as of April 1, 1998 and to approximately $142,000 in 2000. It relied on two principal factors: "both the nature of the work and the workload of Provincial Court judges have changed dramatically" and "the current salary and benefits paid to a Provincial Court judge in New Brunswick is insufficient to attract the number and quality of candidates which is appropriate for the Court". The Commission mentioned the salary of federally appointed judges, but only for purposes of comparison with the salary of Provincial Court judges.

48 In its response to the 1998 Commission's report, the Government accepted only the $25,000 increase. However, the salary was further increased to the recommended level on October 27, 2000, just a few months before the appointment of the 2001 Commission.

49 By an Order in Council published on February 14, 2001, the Government appointed the members of a commission whose term would end on December 31, 2003. The Association renewed the argument based on a comparison with other provincial court judges and a link with federally appointed judges. It again relied on the increase in the number, length and complexity of the cases its members decide. The Government took the position that the remuneration of Provincial Court judges was fair and that it was sufficient to attract qualified candidates. It asserted that since the last increase, there had been no changes that would justify another increase of the judges' compensation. The Government provided the Commission with indexes, information on economic factors in New Brunswick and salary trends in the public sector, and comparisons with others judges in Canada. It specifically rejected parity with federally appointed judges.

50 In its report, the 2001 Commission mentioned the judges' increased workload. It noted that the Government had not given any indication of being in financial difficulty and highlighted increases granted to public service employees in excess of the wage restraint policy. It dealt expressly with the parity argument. The following extract from the report reflects the gist of the justification for the recommendation on salary:

> 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.

...

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 that 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.

...

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 Supreme Court ruling.

...

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:

2001 - $154,018

2002 - $161,709
2003 - $169,805

> In addition, the Commission recommends that the Province apply to these annual salary amounts, the New Brunswick Industrial Aggregate Index... .
>
> 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.

51 The Commission also made a number of recommendations with respect to pensions, vacations, health care and life insurance.

52 The Government rejected all the Commission's recommendations with regard to remuneration except for the increase based on the province's Industrial Aggregate Index. The Government's response took the form of recitals, which are reproduced in the appendix and will be dealt with at greater length below. These 29 recitals can be condensed into three main reasons: in the Government's view, (1) the Commission misunderstood its mandate, (2) it is inappropriate to link the Provincial Court judges' salary to that of federally appointed judges, and (3) the judges' existing salary is adequate.

(1) Judicial History

53 The reviewing judge found the Government's reasons for rejecting the Commission's salary recommendations to be rational, but held that its reasons for rejecting the recommendations relating to pensions and benefits were not ((2002), 249 N.B.R. (2d) 275). The recommendations relating to vacations, pensions and health benefits were declared to be binding upon the Government.

54 The reviewing judge stressed that the review process should focus on the reasons set out in the Government's response rather than on the adequacy of the Commission's recommendations: "I note parenthetically that this court is not called upon to determine whether or not the recommendations of the 2001 Commission are adequate, insufficient or over generous. Rather, the role of this court is simply to determine if the Government has justified its decision according to the criterion which was set by the Supreme Court of Canada in the *P.E.I. Reference*" (para. 20). He considered that the question he had to answer was whether judicial independence had been preserved despite the Government's rejection of the recommended raise: "... would a reasonable person, appearing before the Provincial Court, fear that he or she is not being heard by an independent tribunal because the Government of this Province declined to raise the presiding judge's salary from $141,206 to $169,805 by this time next year? I would have to answer 'no' to the question" (para. 52).

55 In considering whether judicial independence had been preserved, the judge looked at the proposed increases through the lens of the reasonable person standard. This led him to focus on a quantitative evaluation to determine whether judicial independence was threatened. The Provincial Court judges appealed to the Court of Appeal. The Government did not appeal the order relating to pensions and benefits.

56 The Court of Appeal stated that the Commission's mandate was to insulate the process from political interference and to depoliticize the determination of changes to remuneration (para. 60). It stressed that the Commission's responsibility was to make recommendations as to the appropriate compensation for judges based on the relevant factors (para. 69). The court distanced itself from a standard of deference to the Commission. It instead referred to a need to defer to the Government's response: "In conclusion, the simple rationality test requires deference to the Government's factual justification for its rejection decision" (para. 113). The court criticized the Government for relying in its response on economic constraints that had not been raised in its submissions to the Commission. It also faulted the Government for insisting that the salary was adequate but said that this failing could be explained by a weakness in the Commission's report:

> 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. [para. 138]

57 The Court of Appeal then identified major problems in the Commission's report, and in particular its conclusion that to deny an increase would be in violation of the *Reference*. The court stressed that the Government could have identified the Commission's errors in law in its response (para. 141). It noted that such errors might have been avoided had the Commission been provided with independent legal counsel to assist the lay tribunal in its deliberations. The Court of Appeal also addressed the Government's contention that the recommended salary increase is excessive, particularly when compared with the increases received by civil servants. It concluded that the comparison was inappropriate and that the response, in this regard, failed to meet the standard of rationality. It then reviewed the argument based on parity with federally appointed judges and found that the Government was right to reject the link between the salary of federally appointed judges and that of Provincial Court judges. At this point, the court conducted its own analysis to determine whether the salary was sufficient to attract qualified candidates. It concluded that the Government's position met the rationality standard and that it could be reasserted in the response because the Commission had not dealt with it properly.

58 Having concluded that two cogent reasons had been advanced for refusing to implement the Commission's report, namely the rejection of parity and the ability to attract

qualified candidates, the Court of Appeal found that the reasons met the rationality standard and dismissed the appeal. The Association appealed to this Court.

59 For the reasons that follow, the appeal should be dismissed. The justifications for rejecting the 2001 Commission's recommendations given by the Government in its response to the Commission's report meet the rationality standard. To explain this conclusion, the Government's response will be reviewed in light of the principles set out above. The questions are: first, whether the response contains legitimate reasons based on the public interest; second, whether it is based on a sufficient factual foundation; and finally, whether the Government's reasons, viewed globally, show that the purposes of the commission process have been achieved. But before turning to the analysis of the Government's response, a preliminary issue must be addressed - namely the admissibility of affidavits submitted by the Government at the trial level in support of its response to the Commission's report.

(2) Admissibility of Affidavits

60 In the Court of Queen's Bench, the Government sought to have four affidavits admitted. In one, Bryan Whitfield, the Senior Policy Advisor in the Department of Justice's Research and Planning Branch, detailed his estimate of the costs arising from the implementation of the Commission's recommendations. In a second affidavit, Conrad Ferguson, an actuary in private practice, provided the annual cost of the judges' salary and benefits at various salary levels. Next, James Turgeon, the Executive Director of the Department of Finance's Economic and Fiscal Policy Division, outlined the economic conditions in the province. Finally, Lori Anne McCracken, an employee of the Government's office of Human Resources, addressed salary increases granted within the civil service.

61 The appellants contested the admissibility of the Government's four affidavits, arguing that they advanced additional evidence and new reasons for rejecting the Commission's salary recommendations. The reviewing judge admitted the affidavits in the record. The Court of Appeal reversed the lower court's decision and held that the affidavits were not admissible on the basis that they introduced evidence and facts not contained in the Government's response.

62 In the *Reference*, this Court stated that the government's response must be complete. In other words, all the reasons upon which the government relies in rejecting the commission's recommendations must be stated in its public response. As a result, once the matter is before the reviewing court, it is too late for the government to bolster its response by including justifications and reasons not previously mentioned in the response.

63 This is not to say that the government's response must set out and refer to all the particulars upon which its stated reasons are based. The objective of an open and transparent public process would not be furthered if governments were required to answer commission recommendations by, for example, producing volumes of economic and actuarial data. It is enough that the government's reasons provide a response to the commission's recommendations that is sufficient to inform the public, members of the

legislature and the reviewing court of the facts on which the government's decision is based and to show them that the process has been taken seriously.

64 In the present case, the affidavits do not advance arguments that were not previously raised by the Government in its submissions to the Commission; nor do they add to the reasons given in the Government's response. They simply go into the specifics of the factual foundation relied upon by the Government. They show how calculations were made and what data were available. They contribute to showing the consideration given to the recommendation. This is permissible, and the documents are admissible.

(3) Application of the Principles

65 As has already been mentioned, the Government's response points to three reasons for rejecting the recommendations. Those reasons will now be analysed through the prism of the test elaborated above. The first reason given by the Government is that the Commission misunderstood its mandate. The Government takes the position that, when making salary recommendations, the Commission's primary purpose is to ensure that compensation levels do not fall below the adequate minimum required to guarantee judicial independence. Second, the Government considers the recommended raise to be excessive because it fails to take account of economic conditions in New Brunswick and is instead based on a desire to maintain partial parity with federally appointed judges. Third, the Government states that the judges' existing salary is adequate. In making this assertion, it relies on indexes and economic data and on the ability to attract qualified candidates with the existing salary. It takes the position that an increase based on inflation would be sufficient to maintain the adequacy of the judges' remuneration.

66 The first stage of the analysis consists of screening the government's reasons to determine if they are legitimate. This is done by ascertaining whether the reasons are simply bald rejections or whether they are guided by the public interest, and by ensuring that they are not based on purely political considerations.

67 The Government's questioning and reformulation of the Commission's mandate are inadequate. As we have already mentioned and as the Court of Appeal correctly pointed out, the Commission's purpose is to depoliticize the remuneration process and to avoid direct confrontation between the government and the judiciary. Therefore, the Commission's mandate cannot, as the Government asserts, be viewed as being to protect against a reduction of judges' salaries below the adequate minimum required to guarantee judicial independence. The Commission's aim is neither to determine the minimum remuneration nor to achieve maximal conditions. Its role is to recommend an appropriate level of remuneration. The Government's questioning of the Commission's mandate is misguided and its assertion regarding the Commission's role is incorrect. The part of the response in which the Government questions the Commission's mandate is not legitimate. It does nothing to further the public interest and accordingly fails at the first stage of the analysis.

68 However, the Government's reasons relating to the adequacy of the judges' existing salary and the excessiveness of the recommended raise cannot be characterized, at the

first stage of the analysis, as being purely political or as an attempt to avoid the process. Furthermore, there is no suggestion that the Government has attempted to manipulate the judiciary. As for the reasons relating to the appropriateness of the salary recommendations, although some of the recitals may seem dismissive of the process, the reviewing judge was on the whole right to conclude at the first stage (at para. 58):

> By declining to accept the 2001 Commission's salary recommendation, there is no evidence that the executive intended to manipulate the bench or politically interfere with it. There is no indication that the government's policy of fiscal restraints constituted measures directed at judges alone. There is no suggestion that the refusal to grant a salary increase amounts to unscrupulous measures whereby the provincial government utilized "its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication" (*P.E.I. Reference*, at para. 145).

69 Since the portion of the Government's response relating to the adequacy of the judges' existing salary and the excessiveness of the recommended raise is legitimate, the reasons given must be examined further to determine if they rely upon a sufficient factual foundation. This second stage of the rationality test requires the court to determine, first, whether the government has set out sufficient facts to support its reasons for rejecting the recommendations on remuneration and, second, whether it is rational for the government to rely on the stated facts to justify its response.

70 The two justifications raised by the Government must be addressed separately -- after all, the excessiveness of a recommended salary increase is not necessarily commensurate with the appropriateness of the judges' existing salary. However, the facts relied upon by the Government in support of both these justifications can be examined together insofar as the evidence adduced by the Government to show that the recommended increase is excessive supports, to some extent at least, its contention that the remuneration is adequate.

71 The Government objected to the salary increase because it believed that in granting an increase of this magnitude, the Commission was in fact giving effect to the Provincial Court judges' argument that they should be granted parity or partial parity. Even though the Commission explicitly stated that it did not accept the parity argument, there is, in reality, an obvious connection between the recommended increase and the salary of federally appointed judges that transcends the report: the recommended increase would result in the judges' salary equalling 85 percent of the salary of federally appointed judges. This figure corresponds to the Government's submission, mentioned by the Commission in its report, that the average per capita income in New Brunswick is equal to 85 percent of the Canadian average. This would account for the figure, not otherwise explained, chosen by the Commission for the recommended increase. The Court of Appeal correctly highlighted the facts relied on by the Government and the weakness of the Commission's report in this regard (at para. 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.

72 The role of the reviewing court is not to second-guess the appropriateness of the increase recommended by the Commission. It can, however, consider the fact that the salaries of federally appointed judges are based on economic conditions and lawyers' earnings in major Canadian cities, which differ from those in New Brunswick. As a result, while the Commission can consider the remuneration of federally appointed judges as a factor when making its recommendations, this factor alone cannot be determinative. In fact, s. 22.03(6)(*a.1*) of the *Provincial Court Act* requires the Commission to consider factors which may justify the existence of differences between the remuneration of Provincial Court judges and that of other members of the judiciary in Canada, yet the Commission chose not to address this. Moreover, it is inappropriate to determine the remuneration of Provincial Court judges in New Brunswick by applying the percentage ratio of average incomes in New Brunswick to those in Canada to the salary of federally appointed judges, because the salary of federally appointed judges is based on lawyers' earnings in major Canadian cities, not the average Canadian income.

73 The Government also asserts that economic conditions in the province do not support the salary increase of 49.24 percent between 1990 and 2000, which rises to 68.16 percent when combined with the recommended increase for 2001. In its view this increase far exceeds changes in economic indicators in New Brunswick. The Government compares the increase to the 18.93 percent increase granted to senior civil servants between 1990 and 2000. It relies on the fact that the recommendation would give New Brunswick's judges the third highest salary among provincial court judges in the country after their counterparts in Ontario and Alberta, while the average earner in New Brunswick is ranked eighth out of ten. The economic data on which the Government relies were set out in its representations to the Commission, but the Commission did not discuss them. The calculation of the value of the recommended increase was included in the affidavits that it sought to have admitted.

74 Except for the reason relating to the Commission's failure to cost its recommendations, the arguments raised in the Government's response may at first glance appear to be a restatement of its position before the Commission. However, as a result of two particular circumstances, the Government can rely on them. First, the Commission did

not discuss the data set out in the Government's representations and, second, the report did not explain how economic fairness and economic conditions in the province had been taken into consideration, even though these are two important factors that the *Provincial Court Act* requires the Commission to consider. The deficiencies of the Commission's report are such that the Government cannot be prevented from relying on a relevant factual foundation, not even one that was included in the representations it made to the Commission.

75 In its response, the Government correctly points to several facts that legitimately support its position that the increase is excessive, namely, the fact that the recommendations are not based on economic conditions in New Brunswick but correspond to a percentage of the salary of federally appointed judges; the fact that such a raise would constitute preferential treatment in comparison with the raises received by senior civil servants in New Brunswick and most other provincial court judges in Canada; and finally, the fact that the increase would far exceed changes in economic indicators since the 1998 recommendations were implemented. Accordingly, the Government can legitimately refuse to implement the recommended salary increase on the ground that it is excessive.

76 In rejecting the Commission's salary recommendations, the Government also relies on its assessment that the judges' existing salary is adequate. This argument also formed part of the Government's submissions to the 2001 Commission. In its report, however, the Commission dismissed this argument on the ground that to accept it would lead to a salary freeze in violation of the principles stated in the *Reference*. In taking this position, the Commission committed an error of law. The *Reference* did not make salary increases mandatory. Consequently, the Government was justified in restating its position that the existing salary was adequate insofar as it relied on a reasonable factual foundation.

77 In its response, the Government relies on three facts in support of this assertion: that nothing has changed since the recommendations of the 1998 Commission that would warrant a further increase, that the existing remuneration is sufficient to attract qualified candidates, and that judges are currently in the top 5 percent of wage earners in New Brunswick. We will deal with each of these facts in turn.

78 The 2001 Commission rejected the Government's argument that nothing had occurred since the salary increase granted a few months before the Commission was appointed. It faulted the Government for having delayed implementation of the previous commission's salary recommendations. In these circumstances, if the Government's stance on the adequacy of remuneration can be said to have a reasonable factual foundation, it is not because of its reliance upon the fact that nothing has changed since the last increase.

79 The Government also states in its response that the judges' existing salary is adequate because it is sufficient to attract a number of qualified candidates for appointment to the bench. The Commission did not assess this argument or the facts in support of it, except to say that provincial court judges are chosen from the same pool of lawyers as Court of Queen's Bench judges. The figure of 50 qualified candidates advanced by the Government was questioned at one point, but the Court of Appeal found that there

were at least 30, thus showing that the salary, in combination with the pension plan, was sufficient to attract qualified candidates. The Court of Appeal correctly found that the Commission's report did not adequately address the Government's position. The Government's reliance on this factual foundation is reasonable.

80 Finally, the Government's argument that the salary increase should be rejected because judges are currently among the top 5 percent of the province's wage earners bears little weight in itself. This information is meaningless because salaries in the group in question may vary widely. The reference to the top 5 percent of the province's wage earners can be traced to the Government's submissions to the 2001 Commission, in which it stated that the average salary in this category is approximately $92,000. That amount is less than the salary earned by the judges even before the 1998 Commission started its process. As the Court of Appeal stated, now is not the time to rewind the clock.

81 In conclusion, the Government's response cannot be struck down for lack of a reasonable factual foundation. While some parts of the Government's response may appear dismissive, others have a rational basis. On the one hand, the Government's rejection of the recommended increase on the basis that it is excessive is amply supported by a reasonable factual foundation. On the other hand, the arguments in support of the *status quo* were not properly dealt with by the Commission. The Commission also failed to adequately address the Association's submissions in support of a reasonable increase, namely those relating to the judges' increased workload and to the salaries of provincial court judges in other jurisdictions. These omissions may have occurred because the parity argument advanced by the Association had blurred the Commission's focus.

82 This being said, a reviewing court cannot substitute itself for the Commission and cannot proceed to determine the appropriate salary where the Commission has neglected to do so. However, deference should not undermine the process. Whereas a commission's report can normally be relied upon by a subsequent commission to have set an appropriate level of compensation, in certain circumstances, such as where the earlier commission neglected to consider all the criteria enumerated in the *Provincial Court Act* or where it encountered constraints preventing it from giving full effect to one or more criteria, the subsequent commission may reconsider the earlier commission's findings or recommendations when conducting its own review. This may be one such case in which a future commission will have greater latitude than it would otherwise have had.

83 At the third stage of the rationality analysis, the government's reasons must be examined globally in order to determine whether the purposes of the commission process have been achieved. The Government's justification for its departure from the Commission's recommendations is unsatisfactory in several respects. However, at this stage, the response must be viewed globally and with deference. From this perspective, the response shows that the Government took the process seriously. In some respects, it had to rely on the representations it had made to the Commission, since the Commission had failed to deal with them properly. Thus, the Government has participated actively in the process and it must be shown greater deference than if it had ignored the process.

84 Overall, the analysis shows that the principles of the *Reference* have been respected

and that the criticisms of the Government's response were properly dismissed.

85 For these reasons, the appeal is dismissed with disbursement costs to the respondent, as requested by the latter.

B. *Ontario*

86 The Ontario Judges' Association, the Ontario Family Law Judges' Association and the Ontario Provincial Court (Civil Division) Judges' Association (together "Judges") are the appellants in this appeal. Her Majesty the Queen in Right of the Province of Ontario, as represented by the Chair of Management Board ("Ontario"), is the respondent.

87 Under the statutory regime in Ontario, a commission's salary recommendations are binding on the government. However, the commission's pension recommendations are not. This case involves pension recommendations. For the reasons that follow, the appeal is dismissed.

(1) Background

88 The Fourth Triennial Provincial Judges Remuneration Commission (1998-2001) ("Commission") was established by Appendix A of the Framework Agreement set out in the Schedule to the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The Framework Agreement sets out the jurisdiction and terms of reference of each triennial commission. Before the Commission, the Judges sought higher salaries and a better pension. In particular, they sought to reduce the disparity between federally and provincially appointed judges. Ontario submitted before the Commission that salary and benefits should not be increased. It also argued that the Judges' salaries, pensions and benefits were at a fair and appropriate level.

89 The Commission recommended a salary increase of approximately 28 percent over three years. This recommendation was binding in Ontario by virtue of the Framework Agreement. The majority of the Commission also set out three optional pension recommendations. These were (1) to increase the provincial Judges' pension plan to the level of the federal judges' plan; (2) to change to a 20-year accrual rate of 3.3 percent so that after 20 years of service a provincial judge could retire at 65 years of age with a pension of 66 2/3 percent of his salary at the date of retirement; or (3) to provide an across-the-board pension benefit increase of 10 percent. The majority also recommended that Ontario consider either (1) adopting a "Rule of 80" that would entitle a judge to retire with a full pension any time after his or her age plus years of service equalled 80; or (2) reducing the early retirement penalties.

90 The Commission did not retain actuaries to cost out its pension recommendations in light of the 28 percent salary increase. The only costings referred to in the Commission's report involved the estimated costs of the pension enhancements and were done before the salary increase was taken into account. The minority of the Commission did not support the pension recommendations.

91 In order to consider the Commission's optional pension recommendations, Ontario retained PricewaterhouseCoopers ("PwC") to determine the cost. Ontario ultimately concluded that the 28 percent salary increase, which in turn automatically increased the value of the pension by 28 percent, was sufficient. It refused to adopt any of the pension recommendations. On February 1, 2000, Ontario sent its response to the chair of the Commission. It listed seven reasons why it was not implementing the pension recommendations, including the fact that the current pension entitlements were appropriate and their value had already increased as a result of the salary increase awarded by the Commission (i.e. 28 percent). However, Ontario's reasons for rejecting the Commission's recommendations made no reference to it having retained PwC or to any alleged error or incompleteness in costings made by the Commission.

92 The Judges applied for judicial review. In support of its position, Ontario filed affidavits from Owen M. O'Neil of PwC detailing PwC's work for the Government. The Judges objected to Ontario's retention of PwC. They also objected to the admissibility of the affidavits. They accused Ontario of engaging in a "Unilateral and Secretive Post-Commission Process". They argued that this rendered the commission process ineffective. Evidently, the parties disagreed on the real purpose of the PwC retainer.

(2) Judicial History

(a) *Ontario Superior Court of Justice (Divisional Court)* ((2002), 58 O.R. (3d) 186)

93 The Ontario Divisional Court dismissed the Judges' application. It held that the affidavit evidence respecting the PwC costing was admissible because, according to the *Reference*, a government is entitled to "justify its decision in a court of law". The court considered the *Reference* and concluded that Ontario's reasons for rejecting the pension recommendations were clear, logical, relevant and consistent with the position taken before the Commission. There was no evidence that the decision was purely political, was discriminatory or lacked a rational basis. Paragraph 28 of the Framework Agreement contemplates a return to the Commission if the Commission had failed to deal with any matter properly arising from the inquiry or if an error is apparent in the report. However, this is merely permissive. In any event, the Divisional Court was not persuaded that the Commission erred in either of these regards.

(b) *Court of Appeal* ((2003), 67 O.R. (3d) 641)

94 The Ontario Court of Appeal upheld the dismissal of the Judges' application. MacPherson J.A. explained that the Divisional Court did not err by concluding that Ontario's engagement of PwC did not undermine the effectiveness of the commission process. Instead, it showed that Ontario intended to conduct a serious analysis with respect to those recommendations. The court considered each of Ontario's seven reasons for rejecting the pension recommendations. It concluded that the reasons were clear, logical, relevant and consistent with Ontario's position taken before the Commission.

(3) Analysis

(a) *Do Ontario's Reasons Satisfy the "Rationality" Test?*

95 As outlined above, Ontario rejected all the Commission's optional pension recommendations. Its reasons for doing so are set out in the letter from the Honourable Chris Hodgson, Chair of the Management Board, to Mr. Stanley M. Beck, Q.C., Chair of the Commission ("Letter"). These seven reasons are essentially (1) the automatic 28 percent increase is appropriate; (2) the Judges' pensions will not erode over time due to the benefit formula; (3) the increase in the Judges' salary (which, in turn, automatically increased the pension) has narrowed the gap between provincial and federal judges' salaries; (4) no significant demographic changes have occurred since the 1991 independent Commission reviewed the structure of the Judges' pension plan and presented a design which was accepted; (5) a 75 percent replacement ratio is achieved under the current pension arrangement when the likely pre-appointment savings of the Judges are considered; (6) the Ontario Judges' pension plan is superior to the pensions provided in all other provinces and territories; and (7) the Government's current fiscal responsibilities and competing demands for limited resources require a continued commitment to fiscal restraint to strengthen Ontario's economy.

96 Do these reasons pass the test of "rationality"? To pass the test of rationality, the reasons must be legitimate. The Letter sets out seven reasons for rejecting the optional pension recommendations. The reasons outlined in the Letter do not reveal political or discriminatory motivations. They note the fact that the 28 percent salary increase automatically increases the value of the pension. They also note that no demographic changes have occurred since the pension structure was reviewed by the Second Triennial Commission in 1991. They explain that Ontario is in a period of fiscal restraint and that many areas are facing reduction. In this regard, the Judges are getting a 28 percent increase in salary and pension, and it implicitly appears that they are being treated fairly. The reasons are not political or discriminatory.

97 Ontario's reasons do not reveal any improper motive. They are not bald expressions of rejection or disapproval. They reveal a consideration of the judicial office and an intention to deal with it appropriately. The reasons reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence. Therefore, this branch of the "rationality" test is satisfied.

98 Next, it must be determined whether the reasons rely upon a reasonable factual foundation. In determining whether the reasons rely upon a reasonable factual foundation, the test is one of a deferential standard to the government. It does not require the government to demonstrate exceptional circumstances. It simply asks: (1) Did the government indicate the factual basis upon which it sought to rely? (2) On the face of the evidence, was this reliance rational? In this case, Ontario's reasons allege the need for fiscal restraint and point to reductions in other expenditures. The rejection of the recommended additional pension benefits for the Judges is consistent with this reasonable

factual foundation. Likewise, in its reasons, Ontario suggests that no significant demographic changes have occurred warranting a change to the pension plan structure. This is also a reasonable factual foundation upon which a government can base its reasons for rejecting the Commission's recommendations.

99 We conclude that Ontario's reasons rely upon a reasonable factual foundation.

100 Finally, the government's reasons must be examined globally to ensure that the objectives of the commission process have been achieved. Here, a reviewing court also plays a limited role. In this case, it appears that the commission process has been effective. Under the Framework Agreement, the Commission's salary recommendations are binding. The pension recommendations are not. Through the binding salary recommendations, the value of the Judges' pension has increased by 28 percent. In its reasons, Ontario has clearly respected the commission process, taken it seriously and given it a meaningful effect.

101 We also agree with the Ontario Divisional Court and the Court of Appeal that Ontario's engagement of PwC was not a distortion of the process. To the contrary, it is the opposite. It demonstrates Ontario's good faith and the serious consideration given to the Commission's recommendations.

102 Ontario's reasons, viewed globally, meet the "rationality" test.

(b) *Admissibility of the PwC Affidavits*

103 In addition to their objection to the engagement of PwC, the Judges objected to the admissibility of the PwC affidavits. We agree with the Ontario Divisional Court and the Court of Appeal that the admission of the affidavits was proper. The Judges called upon Ontario to justify its reasons "in a court of law". This was done. The affidavits do not add a new position. They merely illustrate Ontario's good faith and its commitment to taking the Commission's recommendations seriously. The fact that the Letter does not refer to Ontario's engagement of PwC is irrelevant. The PwC retainer is not advanced as a key reason for rejecting the Commission's pension recommendations. The reasons which are relevant are those contained within the Letter itself. These reasons met the "rationality" test.

104 The appeal is dismissed with costs.

C. *Alberta*

105 The respondents in this appeal are Justices of the Peace in Alberta. Her Majesty the Queen in Right of Alberta and the Lieutenant Governor in Council (together "Alberta") are the appellants. The issue is whether Alberta's partial departure from the Justices of the Peace Compensation Commission's ("Commission") recommended salary increase violates the principle of judicial independence. The respondents say it does. Alberta disagrees. For the reasons which follow, we conclude that it does not.

(1) Background

106 On April 30, 1998 amendments to the *Judicature Act*, R.S.A. 1980, c. J-1 (am. S.A. 1998, c. 18) came into force which provided for, among other things, the establishment of an independent compensation commission for Justices of the Peace. Section 3(1) of the *Justices of the Peace Compensation Commission Regulation*, Alta. Reg. 8/2000, provides that the Commission's task is to review remuneration and benefits paid to Alberta's Justices of the Peace. Section 16 sets out the relevant criteria to be considered. The Commission's recommendations are non-binding (see ss. 5(1) and 21(2) of the Regulation).

107 In this case, the Commission received submissions for the period of April 1,1998 to March 31, 2003. On February 29, 2000, it issued a report recommending, among other things, a substantial increase in salary (*The Justices of the Peace Compensation Commission: Commission Report* (2000)). In its opinion, the compensation for Justices of the Peace should be approximately two thirds of the amount given to Provincial Court judges.

108 When the Commission made its recommendations, the salary of full time sitting Justices of the Peace was approximately $55,008 per annum. Per diem rates for part time sitting and presiding Justices of the Peace were $250 and $220 respectively. These amounts have not changed since 1991. In its report, the Commission noted that it did not consider the current levels of compensation to be helpful. They were out of line with the comparator groups and not the product of any type of independent inquiry process. The Commission made the following recommendations:

> Full Time Sitting or Presiding Justices of the Peace
>
> April 1, 1998 -- $95 000 per annum April 1, 1999 -- $95 000 per annum
> April 1, 2000 -- $100 000 per annum April 1, 2001 -- $100 000 per annum
> April 1, 2002 -- $105 000 per annum
>
> together, in each year, with a continuation of the current benefits and an amount equal to an additional 10% in lieu of pension and an increase in vacation entitlement from 3 to 4 weeks.
>
> Part time Sitting and Part time Presiding Justices of the Peace
>
> April 1, 1998 -- $600 per diem
> April 1, 1999 -- $600 per diem
> April 1, 2000 -- $650 per diem
> April 1, 2001 -- $650 per diem
> April 1, 2002 -- $670 per diem

109 Alberta accepted the bulk of the Commission's recommendations. On May 17, 2000, Order in Council 174/2000 ("Order") was issued. In it, Alberta accepted that salaries and per diem rates ought to be increased (subject to the proposed modifications) (s. 2(a)); that current benefits for full-time Justices of the Peace ought to be continued (s. 2(b)); that vacation entitlement for full-time Justices of the Peace ought to be increased from three weeks to four weeks (s. 2(c)); that full-time Justices of the Peace ought to be paid an additional sum equal to 10 percent of annual salary in lieu of pension benefits (s. 2(d)); and that compensation for sitting and presiding Justices of the Peace ought to be determined on the same basis (s. 2(e)). While the Order recognized that some increase in salary was needed, it rejected the specific increases recommended by the Commission (s. 2(f)). Instead, it proposed a modified amount (s. 2(g)). The respondents challenge the constitutionality of ss. 2(a), 2(f) and 2(g).

110 Schedule 6 of the Order sets out Alberta's reasons for rejecting the specific increases recommended by the Commission. These reasons are contained under the following headings:

> **1 General comment** [raising the fact that the executive and legislative branches have the constitutional and political responsibility to properly manage fiscal affairs]
>
> **2 Overall level of the Increase** [comparing the overall level of increase with the current compensation and increases in other publicly funded programs]
>
> **3 Qualifications for eligibility and the determination of compensation as compared to Crown Counsel** [arguing that Crown counsel is an appropriate comparator for Justices of the Peace]
>
> **4 Lawyer compensation generally** [cautioning against using lawyers in private practice as a comparator, given the difference in working conditions, hours of work, client pressures and problems respecting the collection of legal fees that are not applicable to the office of Justice of the Peace]
>
> **5 Comparisons to legal aid tariff and ad hoc Crown Counsel** [agreeing that these are acceptable indicators but objecting to the amounts used by the commission as not reflecting the actual tariffs]
>
> **6 Comparison to compensation paid to senior Government employees** [cautioning against using senior government employees as a comparator group given the different responsibilities]

> **7 Comparison to Compensation Paid to Justices of the Peace in Other Jurisdictions in Canada** [comparing Justices of the Peace in Alberta and Justices of the Peace in other jurisdictions]
>
> **8 Comparison to Provincial Court Judges** [disagreeing with the Commission's conclusion that a 2/3 relationship with Provincial Court Judges is appropriate]

111 Alberta's reasons stress that it has a duty to manage public resources and act in a fiscally responsible manner. The reasons point out that the overall level of increase recommended is greater than that of other publicly funded programs and significantly exceeds those of individuals in comparative groups. The groups to which Alberta said Justices of the Peace were comparable included Crown counsel, lawyers paid according to the legal aid tariff and *ad hoc* Crown counsel, senior government employees and Justices of the Peace in other jurisdictions in Canada. Lawyers in private practice, it thought, should be distinguished. The reasons relating to the appropriateness of these comparator groups are consistent with Alberta's position before the Commission.

112 Section 2(g) of the Order establishes the modified annual increases which Alberta ultimately decided to implement after considering the Commission's recommendations. The increases for full-time sitting and presiding Justices of the Peace are as follows:

> Full Time Sitting [or Presiding] Justices of the Peace
>
> April 1, 1998 -- $75 000 per annum
>
> April 1, 1999 -- $80 000 per annum
>
> April 1, 2000 -- $80 000 per annum
>
> April 1, 2001 -- $85 000 per annum
>
> April 1, 2002 -- $85 000 per annum
>
> together, in each year, with a continuation of the current benefits and an amount equal to an additional 10% in lieu of pension and an increase in vacation entitlement from 3 to 4 weeks.

113 These increases are approximately $15,000 greater than what Alberta proposed in its submissions before the Commission. The reasons given for selecting these levels of increase are set out in Sch. 7 of the Order under the following headings:

1 Accounts for inflationary erosion

2 Recognizes the disadvantages of the 10-year term

3 Recognizes the roles and responsibilities of Justices of the Peace

4 Overall increase is significant

5 Phase in of the increase and certainty

114 Alberta also increased the per diem rate for part-time sitting and part-time presiding Justices of the Peace as follows:

> Part Time Sitting and Part Time Presiding Justices of the Peace
>
> April 1, 1998 -- $460 per diem
> April 1, 1999 -- $490 per diem
> April 1, 2000 -- $490 per diem
> April 1, 2001 -- $515 per diem
> April 1, 2002 -- $515 per diem

115 These increases are approximately $202 to $214 greater than what Alberta proposed in its submissions before the Commission. The reasons given for adopting these amounts are set out in Sch. 7.

116 Alberta's reasons for this increase in the per diem rate state that it is based upon a calculation derived from a base salary for full-time sitting Justices of the Peace, plus additional considerations set out in Sch. 7 of the Order. The reasons state that this level of increase accounts for inflationary erosion, recognizes the roles and responsibilities of Justices of the Peace, and represents a major increase in the allocation of public resources to part-time Justices of the Peace.

> (2) Judicial History
>
> (a) *Court of Queen's Bench* ((2001), 93 Alta. L.R. (3d) 358, 2001 ABQB 650; (2001), 3 Alta. L.R. (4th) 59, 2001 ABQB 960)

117 The respondents challenged the constitutionality of ss. 2(a), 2(f) and 2(g) of the Order. They claimed these sections violate the judicial independence of Alberta's Justices of the Peace. The trial judge allowed their application. He rejected Alberta's argument that some lesser standard of protection is required for Justices of the Peace. He then examined Alberta's reasons for rejecting the Commission's recommendations and found that they did not pass the test of simple rationality. He found that, apart from the alleged errors made by the Commission, there were no rational reasons for the rejection. The trial judge declared ss. 2(a), 2(f) and 2(g) of the Order to be unconstitutional. As a remedy, it was ordered that the Commission's report be binding and that solicitor-client costs be paid to the respondents.

(b) *Court of Appeal* ((2002), 16 Alta. L.R. (4th) 244, 2002 ABCA 274)

(i) Majority (Paperny and Picard JJ.A.)

118 The majority of the Alberta Court of Appeal agreed with the trial judge and dismissed Alberta's appeal. Paperny J.A. emphasized the constitutional nature of the commission process. She held that the reasons did not withstand scrutiny under the "constitutional microscope" (para. 81). On her interpretation of the *Reference*, the standard of simple rationality is a high standard. It demands "a thorough and searching examination of the reasons proffered" (para. 108). Her interpretation of the principles set out in the *Reference* is at paras. 111-15. Paperny J.A. found (at para. 149) that Alberta failed to demonstrate the "extraordinary circumstances" she thought were required to justify the rejection of any portion of the Commission's report. She held that Alberta's reasons did not meet the test of simple rationality. The appeal was dismissed with solicitor-client costs throughout.

(ii) Côté J.A. (Dissenting in Part)

119 Côté J.A., dissenting in part, stated that the standard of review is a fairly lax one, i.e. that of simple rationality. He examined each of the Government's reasons for rejecting the recommended salary increase and identified (a) Government reasons for rejection which recognize demonstrable errors made by the Commission; (b) Government reasons for rejection which, although not alleging demonstrable error by the Commission, pass the test of simple rationality; and (c) Government reasons for rejection which fail the test of simple rationality. He concluded that while some of the reasons were sufficient, others were not. This did not pass muster.

120 As a remedy, Côté J.A. would have ordered the Lieutenant Governor in Council to reconsider the matter in light of the court's special directions. He would not have awarded solicitor-client costs.

(3) Application

(a) *Do Alberta's Justices of the Peace Require Some Lesser Degree of Judicial Independence in the Commission Context?*

121 It was submitted by Alberta that the judicial independence of Justices of the Peace does not warrant the same degree of constitutional protection that is provided by an independent, objective commission. We disagree. As recognized in the Commission's report, at pp. 7-18, Justices of the Peace in Alberta exercise an important judicial role. Their function has expanded over the years and requires constitutional protection. See *Ell*, at paras. 17-27, *per* Major J. In any event, Alberta has already provided an independent commission process through the *Justices of the Peace Compensation Commission Regulation*. This process must be followed.

(b) *Do Alberta's Reasons Satisfy the "Rationality" Test?*

122 As outlined above, Alberta accepted the bulk of the Commission's recommendations. However, it rejected the specific level of increase and substituted a modified amount. Its reasons for doing so are set out in Schs. 6 and 7 of the Order. Do these reasons pass the test of "rationality"?

123 To pass the test of rationality, the reasons must be legitimate. At this stage, the role of the reviewing court is to ensure that the reasons for rejecting a commission's recommendations are not political or discriminatory. Schedule 6 of the Order sets out eight reasons for rejecting the specific level of increase recommended by the Commission. The reasons do not reveal political or discriminatory motivations. They consider the overall level of increase recommended, comment upon the Government's responsibility to properly manage fiscal affairs, and examine various comparator groups such as 5-year Crown counsel, directors and chief Crown prosecutors, *ad hoc* Crown counsel, lawyers paid according to the legal aid tariff, senior government employees, Justices of the Peace in other jurisdictions, and provincial court judges. In its reasons, Alberta disagreed with the two-thirds ratio of comparison which the Commission gave to provincial court judges. It gave reasons for its disagreement. These reasons included the differing nature of the judicial offices and the fact that many Justices of the Peace are not full time and carry on their law practices while continuing to hold office. The reasons in Sch. 6, when viewed as a whole, reveal neither political or discriminatory motivations.

124 Alberta's reasons are legitimate. They reflect the public interest in having a commission process, i.e. the depoliticization of the remuneration process and the need to preserve judicial independence. Alberta points to its duty to allocate public resources, but still accepts the Commission's recommendation that an increase in compensation is needed; see s. 2(a) of the Order and the reasons set out in Sch. 1.

125 The reasons given for rejecting the specific levels of compensation illustrate Alberta's desire to compensate its Justices of the Peace in a manner consistent with the nature of the office. They address the Commission's recommendations. They are not bald expressions of rejection or disapproval. They clearly state the reasons for variation and explain why Alberta attributed different weights to the comparator groups. They explain why these comparator groups are relevant.

126 Schedule 7 explains why Alberta chose the level of compensation it did. The reasons recognize the role and responsibilities of Justices of the Peace and reveal a genuine attempt to identify appropriate comparators for this judicial office. These reasons are in good faith and relate to the public interest. As a result, they satisfy this branch of the "rationality" test.

127 Next, it must be determined whether the reasons rely upon a reasonable factual foundation. In determining whether the reasons rely upon a reasonable factual foundation, the test is one of a deferential standard to the government. In this regard, the majority of the Court of Appeal erred. The test does not require the government to demonstrate exceptional circumstances. It simply asks: (1) Did the government indicate the factual basis upon which it sought to rely? (2) On the face of the evidence, was this reliance rational?

128 In its reasons, Alberta discusses general fiscal policy, various comparator groups, inflation and the roles and responsibilities of Justices of the Peace. The factual basis upon which the Government sought to rely is indicated, and its reliance is, for the most part, rational.

129 However, there is a questionable aspect. Specifically, reason 2 in Sch. 6 and reasons 3 to 5 in Sch. 7 compare the new level of compensation with the level at which compensation was frozen in 1991. The figures it is being compared with were not the product of an independent commission process. Since the 1991 amounts were not the product of an independent commission process, their utility as a guide is limited. However, these amounts do provide a general background for the context in which the commission was operating. To the extent that the 1991 compensation levels are used as a basis for comparison, the reasons lack a reasonable factual foundation. To the extent that the reasons are simply providing general background information, they are acceptable. It is difficult to determine precisely what effect this alleged error had on Alberta's decision to depart from the Commission's recommendation.

130 Finally, the government's reasons must be examined globally to ensure that the objective of the commission process has been achieved. Here, a reviewing court also plays a limited role.

131 It appears that the commission process in this case has been effective. Alberta accepted the bulk of the Commission's recommendations. The process was taken seriously. The reasons for variation are legitimate. Viewed globally, it appears that the process of the Commission, as a consultative body created to depoliticize the issue of judicial remuneration, has been effective.

(c) *Are Solicitor-Client Costs Appropriate?*

132 Both courts below awarded solicitor-client costs against Alberta. This was not warranted. Neither party has displayed reprehensible, scandalous or outrageous conduct. While the protection of judicial independence is a noble objective, it is not by itself sufficient to warrant an award of solicitor-client costs in the case at bar; see *Mackin*, at paras. 86-87, *per* Gonthier J.

(4) Remedy

133 Although the bulk of Alberta's reasons pass the test of "rationality", those which compare the new salary with the 1991 salary do not rely upon a reasonable factual foundation. This was objected to by the respondents, but without a compelling argument to support the objection. A court should not intervene every time a single reason is questionable, particularly when the others are rational. To do so would invite litigation, conflict and delay in implementing the individual salaries. This is antithetical to the object of the commission process. When viewed globally, the commission process appears to have been effective and the setting of judicial remuneration has been "depoliticized". As a result, the appeal is allowed with costs throughout.

D. *Quebec*

134 Three of the appeals that the Court heard together originate from the province of Quebec. In two of them, the Attorney General of Quebec seeks the reversal of judgments in which the Quebec Court of Appeal held that the responses of the Quebec government and National Assembly to a report of a compensation committee on the salaries and benefits of provincially appointed judges of the Court of Québec and the municipal courts of the cities of Laval, Montreal and Quebec City had not met the constitutional standard; the Court of Appeal ordered the Government and the Minister of Justice to follow and implement the compensation committee's first 11 recommendations (*Quebec (Attorney General) v. Conférence des juges du Québec*, [2004] R.J.Q. 1450, [2004] Q.J. No. 6622; *Minc v. Québec (Procureur général)*, [2004] R.J.Q. 1475). In a third appeal, the Conférence des juges municipaux du Québec, which represents municipal court judges outside Laval, Montreal and Quebec City, contests the dismissal by the Court of Appeal of its motion for leave to intervene in the Attorney General's appeal in respect of the municipal court judges of Laval, Montreal and Quebec City. These three appeals were joined.

135 The disposition of these Quebec appeals will require the Court to consider and apply the general principles set out above in respect of the nature and process of the judicial compensation committee within the legal framework established by the *Courts of Justice Act*, R.S.Q., c. T-16. In addition, in the appeal of the Conférence des juges municipaux, we will need to address specific issues concerning aspects of the civil procedure of Quebec which are raised in its motion for leave to intervene.

(1) Background

136 The cases under consideration are the latest episodes in a long-running history of difficulties and tension between the Government of Quebec and provincially appointed judges, both before and after our Court's ruling in the *Reference.* Although judicial compensation committees were set up as far back as 1984 and although they duly reported, their reports were mostly shelved or ignored, at least in respect of their key recommendations. Since the *Reference*, the responses to the successive reports of the Bisson and O'Donnell Committees have led to litigation. The litigation now before the Court results from the reports of the O'Donnell Committee (*Rapport du Comité de rémunération des juges de la Cour du Québec et des cours municipales* (2001)). In order to clarify the nature of this litigation and of the problems that it raises, we will briefly review the legal framework of the judicial compensation commissions in Quebec. We will then need to consider the work of the two committees that have been set up since the *Courts of Justice Act* was amended in response to the *Reference.*

(a) *The Courts of Justice Act and the Legal Framework of the Judicial Compensation Committees*

137 Amendments made to the *Courts of Justice Act* in 1997 (S.Q., c. 84) put in place the legal framework for setting up judicial compensation committees. They provide for the appointment, every three years, of a judicial compensation committee to consider issues

relating to salary, pension plan and other social benefits of judges of the Court of Quebec and the municipal courts of Laval, Montreal and Quebec City and of judges of other municipalities' courts which fall under the *Act respecting municipal courts*, R.S.Q., c. C-72.01. Judges appointed under the latter Act may continue to practise law and may remain members of the Bar. They often work part-time and are paid on a per-sitting basis. The compensation committee has four members who sit on two three-member panels. One of the panels reports on the judges of the Court of Quebec and the municipal courts of Laval, Montreal and Quebec City. The second one considers issues relating to the compensation of judges of municipal courts to which the *Act respecting municipal courts* applies (*Courts of Justice Act*, ss. 246.29, 246.30 and 246.31).

138 The committee must consider a number of factors in preparing its report:

> **246.42.** The committee shall consider the following factors:
>
> (1) the particularities of judges' functions;
> (2) the need to offer judges adequate remuneration;
> (3) the need to attract outstanding candidates for the office of the judge;
> (4) the cost of living index;
>
> (5) the economic situation prevailing in Québec and the general state of the Québec economy;
>
> (6) trends in real per capita income in Québec;
>
> (7) the state of public finances and of public municipal finances, according to the jurisdiction of each panel;
>
> (8) the level and prevailing trend of the remuneration received by the judges concerned, as compared to that received by other persons receiving remuneration out of public funds;
>
> (9) the remuneration paid to other judges exercising a similar jurisdiction in Canada;
>
> (10) any other factor considered relevant by the committee.
>
> The panel having jurisdiction with regard to the judges of the municipal courts to which the Act respecting municipal courts [c. C-72.01]

applies shall also take into consideration the fact that municipal judges exercise their functions mainly on a part-time basis.

139 The committee must report within six months. The Minister of Justice must then table the report in the National Assembly within ten days, if it is sitting. If the National Assembly is not sitting, this must be done within ten days of the resumption of its sittings (s. 246.43). The National Assembly may approve, reject or amend some or all of the committee's recommendations by way of a resolution, which must state the reasons for its decision. Should the National Assembly fail to adopt a resolution, the government must take the necessary measures to implement the report's recommendations (s. 246.44).

(b) *The Judicial Compensation Committee Process After 1997*

140 The judicial compensation committees which have reported since 1997 were created pursuant to the *Courts of Justice Act.* The first one was appointed late in 1997. Its chair was the Honourable Claude Bisson, a former Chief Justice of Quebec. The Bisson Committee reported in August 1998 (*Rapport du Comité de la rémunération des juges de la Cour du Québec et des cours municipales* (1998)). Its report recommended significant adjustments to judicial salaries and benefits. The initial response of the Quebec government was to reject the recommendations on salaries. Litigation ensued. The Superior Court of Quebec held that the response did not meet constitutional standards and remitted the matter to the National Assembly for reconsideration (*Conférence des juges du Québec v. Québec (Procureur général)*, [2000] R.J.Q. 744). The Government implemented this first report only after the Quebec Court of Appeal had held that it had a legal obligation to implement it, retroactively to July 1, 1998, in respect of judicial salaries (*Conférence des juges du Québec v. Québec (Procureur général)*, [2000] R.J.Q. 2803).

141 In September 1999, the Bisson Committee filed a second report, on the judges' pension plan and benefits, which lead to a new round of litigation (*Rapport du Comité de la rémunération des juges de la Cour du Québec et des cours municipales (Régime de retraite et avantages sociaux reliés à ce régime et aux régimes collectifs d'assurances)* (1999)). At first, the Government rejected the recommendations. After a constitutional challenge, it reversed its stand and stated its intention to implement the recommendations. Nevertheless, litigation in respect of this second report continued in the Superior Court and in the Court of Appeal until 2003; this litigation related to delays in implementation and to remedies.

142 In the meantime, in March 2001, as required by the *Courts of Justice Act*, the Quebec government appointed a second committee, chaired by Mr. J. Vincent O'Donnell, Q.C. The Committee was split into two panels, both chaired by Mr. O'Donnell. The first one was to report on the salaries and benefits of judges of the Court of Quebec and the municipal courts of Laval, Montreal and Quebec City. The mandate of the second one was limited to the compensation and benefits of the municipal judges to whom the *Act respecting municipal courts* applies. The two panels reported. The National Assembly responded. Litigation ensued. It has now reached our Court.

(c) *The Reports of the O'Donnell Committee's Panels*

143 The key part of the O'Donnell Committee report was drafted by the first panel. It dealt first with the salary and benefits of judges of the Court of Quebec. It then moved on to consider the remuneration of judges of the municipal courts of Laval, Montreal and Quebec City. The second part, drafted by the second panel, considered the particular aspects of the compensation of municipal court judges paid on a per-sitting basis.

144 The work of these panels appears to have been closely coordinated. The main recommendations concerned the salary of judges of the Court of Quebec. The recommendations specific to municipal court judges seem to have been based on a comparative analysis of the proposals in respect of judges of the Court of Quebec and the positions and responsibilities of the different categories of municipal court judges.

145 The government of Quebec had objected to any significant revision of the salaries recommended by the Bisson Committee. In its opinion, as it explained in its written representations, acceptance of the Bisson Committee's recommendations had led to a substantial increase in judges' salaries. It considered the role of the O'Donnell Committee to be to propose minor, incremental revisions and based on changes which might have taken place since the Bisson report. No in-depth review of judicial compensation was warranted. The Government's position paper recommended a 4 to 8 percent increase in the first year and minor cost-of-living adjustments in the next two years. The Government advocated maintaining a rough parity with a class of senior civil servants ("*administrateur d'État I, niveau 1*") that had existed since at least 1992. It expressed concerns about the impact of more substantial increases on its public sector compensation policy. It also argued that the precarious situation of the provinces's finances, which remained in a fragile and unstable condition even though the budget had recently been balanced, should be taken into account.

146 The report of the first O'Donnell panel expressed substantial disagreement with the position of the government of Quebec. In the panel's opinion, its legal mandate required it to consider issues relating to judicial compensation on their own merits, based on a proper consideration of all the relevant factors under s. 246.42 of the *Courts of Justice Act.* It gave considerable weight to the importance of the civil and criminal jurisdictions of the Court of Quebec. It noted that these jurisdictions were significantly broader than those of other provincial courts in Canada and that the compensation of provincially appointed judges was nevertheless substantially lower in Quebec than in most other provinces. The panel commented that the constraints arising out of the precarious state of the provinces's finances and of the provincial economy at the time of the Bisson Committee were no longer so compelling. It considered, in addition, that the need to increase the pool of potential candidates for vacant positions in the judiciary had to be addressed. In the end, it recommended raising the salary of judges of the Court of Quebec from $137,333 to $180,000, with further, but smaller increases in the next two years. It also recommended a number of adjustments to other aspects of the judges' compensation and benefits, and more particularly to their pension plan.

147 On the basis of its findings and opinions regarding the nature of the jurisdiction of judges of the Court of Quebec, the panel then considered the position of municipal court judges of Laval, Montreal and Quebec City. Based on a long-standing tradition, which had

been confirmed by legislative provisions, these municipal court judges received the same salary and benefits as their colleagues of the Court of Quebec. In the course of its review of judicial compensation, however, the O'Donnell Committee decided to raise the issue of parity and notified interested groups and parties that it intended to consider this issue. It called for submissions and representations on the question. It received a limited number of representations, and they recommended that parity be maintained. Some of them objected to any consideration of the issue whatsoever and took the position that it lay outside the Committee's remit. In the end, the report recommended eliminating parity and suggested a lower pay scale for municipal judges. In its authors' opinion, the jurisdiction of the municipal courts of the three cities was significantly narrower than the jurisdiction of the Court of Quebec, and this fact should be reflected in their salary and benefits.

148 The second O'Donnell Committee panel reported in September 2001 on the compensation of judges of the municipal courts to which the *Act respecting municipal courts* applies. These judges are paid on a per-sitting basis, with a yearly cap. They remain members of the Quebec Bar and may retain private practices. The panel considered their jurisdiction and the nature of their work. It found that their jurisdiction was narrower and their work usually less complex than those of judges of the Court of Quebec and full-time municipal judges. The report based its recommendation on the assumption that parity should be abandoned and the fee schedule set at a scale that would reflect responsibilities less onerous than those of full-time judges.

(d) *The Response of the National Assembly of Quebec*

149 On October 18, 2001, the Minister of Justice of Quebec tabled the report in the National Assembly. He abstained from any comment at the time. On December 13, 2001 he tabled a document in response to the two reports of the O'Donnell panels; it was entitled "*Réponse du gouvernement au Comité de la rémunération des juges de la Cour du Québec et des cours municipales*" (the "Response"). The Response stated the Government's position on the panels' recommendations. In it, the government proposed that the most important recommendations be rejected and attempted to explain its decision regarding the proposals in respect of judicial compensation. On December 18, 2001 after a debate, the National Assembly, by way of a resolution, adopted the Response without any changes.

150 The Response focussed on the recommended increase in judicial salaries. The government decided to limit the raise of judges of the Court of Quebec to 8 percent. Their salary would be fixed at $148,320, instead of $180,000 as of July 1, 2001, with further yearly increments of 2.5 percent and 2 percent in 2002 and 2003. The Response accepted the elimination of parity for municipal judges in Laval, Montreal and Quebec City, but limited the raise in their salary to 4 percent in 2001 and granted them the same adjustments as Court of Quebec judges in 2002 and 2003. It accordingly adjusted the fees payable to judges of municipal courts to which the *Act respecting municipal courts* applies rather than accepting the fee scales recommended by the O'Donnell Committee. The Response also rejected the recommendations in respect of the provincial judges' pension plan. It also dealt with several minor matters, in respect of which it accepted a number of recommendations of the O'Donnell Committee panels. The most important issues raised

by the Response were clearly salaries, pensions, and parity between judges of the Court of Quebec, full-time municipal judges and municipal judges paid on a per-sitting basis. The conclusion of the Response summarized the position of the government of Quebec as follows (at p. 24):

> [TRANSLATION] Although the government is adopting several of the O'Donnell Committee's recommendations, it is departing from them significantly in respect of salary.
>
> The Committee's recommendations are based to a large extent on the criteria of the *Courts of Justice Act* relating to the judicial function. The government considers that the previous compensation committee already took those criteria into account in 1998 and finds it hard to understand how the O'Donnell Committee, barely three years later, can recommend a 31% increase for 2001 after the judges obtained increases totalling 21% for the period from 1998 to 2001.
>
> The government also takes a different and more comprehensive view of the criteria set out in the *Courts of Justice Act*. It attaches the importance they merit under that Act to the criteria relating to the collective wealth of Quebeckers and to fairness considered in a broader sense than that applicable to only the legal community and the private practice of law. Finally, the government disputes the Committee's assessment of the criterion relating to the need to attract outstanding candidates and notes that the O'Donnell Committee committed certain errors in this respect that distorted its assessment.
>
> When all is said and done, the government is of the opinion that its position regarding the O'Donnell Committee's recommendations takes account, on the one hand, of the right of litigants to independent courts and, on the other hand, of the general interest of the Quebec community, of which it remains the guardian, and of that community's collective wealth.

(2) Judicial Challenges to the Response and their Outcome

151 The Response was quickly challenged in court. The Conférence des juges du Québec, which represents the judges of the Court of Quebec and the judges of the municipal courts of Laval, Montreal and Quebec City, filed two separate applications for judicial review of the Response in the Superior Court of Quebec. Both applications raised the issue of the rationality of the Response in respect of salaries, asserting that the Response did not meet the test of rationality established by the *Reference.* The application of the municipal court judges raised the additional issue of parity. In this respect, it was

more in the nature of an attack on the process and on the O'Donnell Committee's report than on the Response itself. It alleged that the question of parity had not been part of the mandate of the Committee, which had raised it *proprio motu*, and that there had been breaches of the principles of natural justice. The application thus faulted the rationality of the Response on the ground that it had failed to reject this particular recommendation. The judges of the other municipal courts did not apply for judicial review. As their counsel acknowledged at the hearing before our Court, they attempted to find solutions to their difficulties by other means, given the number of problems they were facing at the time and their limited resources.

152 The outcome of the litigation in the Quebec courts was that the Response was quashed. The Superior Court and the Court of Appeal held in their judgments that the Response did not meet the test of rationality. The Government would have been required to implement the O'Donnell Committee's first 11 recommendations if the judgments had not been appealed to our Court.

153 Despite disagreements on certain aspects of these cases, the Superior Court and the Court of Appeal agreed that the government of Quebec had failed to establish a rational basis for rejecting the O'Donnell Committee's recommendations in respect of judicial compensation and pensions. In their opinion, the Response had addressed neither the recommendations nor the basis for them. The Superior Court went further and would have imposed an additional burden on the appellants. It asserted that the Response should have demonstrated that the recommendations of the compensation Commission were unreasonable. The Court of Appeal disagreed on this point. Nevertheless, applying the simple rationality test, it held that the Government had not stated and demonstrated proper grounds for rejecting the recommendations. In its view, the Response came down to an expression of disagreement with the recommendations and a restatement of the positions advanced by the Government during the Committee's deliberations.

154 The Quebec courts also faulted the Response for failing to reject the recommendations on parity between judges of the Court of Quebec and judges of the municipal courts of Laval, Montreal and Quebec City. Their reasons for judgment targeted the process of the O'Donnell Committee. In their opinion, the Committee had no mandate even to consider the issue. Moreover, the way it had raised and reviewed the issue breached fundamental principles of natural justice. The courts below found that insufficient notice had been given and that interested parties had not been given a sufficient opportunity to make representations.

155 In its judgment, the Court of Appeal rejected a late attempt by the Conférence des juges municipaux du Québec to challenge the Response to the recommendations of the second O'Donnell Committee panel. The Conférence des juges municipaux had sought leave to intervene in the two appeals then pending before the court in order to bring before the court the concerns of its members about the validity of the Response and the Committee's process. The Court of Appeal refused to grant leave to intervene. It held that the application was an inadmissible attempt to challenge the constitutional validity of the Response after the normal time had expired, and in breach of all relevant rules of Quebec civil procedure.

(3) Analysis and Disposition of the Issues in the Quebec Appeals

(a) *The Issues*

156 The issues raised in these appeals are mostly related to the issues in the other cases that were joined with them for hearing by this Court. The main question remains whether the Response meets the rationality test we described above, within the framework set out in the *Courts of Justice Act*. We will consider this question first, before moving on to the narrower issues concerning municipal judges, parity and the fate of the application for leave to intervene of the Conférence des juges municipaux du Québec.

(b) *The Response in Respect of Judicial Compensation and Pensions*

157 The question of the rationality of the Response is critical to the fate of these appeals, subject to the particular procedural difficulties raised in the appeal of the Conférence des juges municipaux du Québec. The Attorney General of Quebec takes the position that the Government met the rationality test, because it gave legitimate reasons for rejecting the recommendations. He asserts that the Response addressed objectives which were in the public interest and were not discriminatory in respect of the judiciary. The Government's main disagreement, from which all the others flowed, was with what it viewed as an unreasonable and excessive salary increase.

158 According to the Attorney General, several factors justified rejecting the recommendations on judicial salaries. First, no substantial revision was warranted. The recommendations of the Bisson Committee had just been implemented and the judges had already had the benefit of substantial increases. In the absence of important changes in their duties and of evidence of difficulties in filling vacant positions, and given the prevailing economic conditions in Quebec, the limited 8 percent adjustment recommended in the Response was, in the Government's opinion, justified. Second, the Attorney General emphasizes that the Government was not bound by the weight given to relevant factors by the Committee. It could rely on its own assessment of the relative importance of these factors at the time. The judicial compensation committee process remained consultative. Responsibility for the determination of judicial remuneration rested with the Government and the National Assembly.

159 In our comments above, we emphasized the limited nature of judicial review of the Response. Courts must stand back and refrain from intervening when they find that legitimate reasons have been given. We recognize at this stage of our inquiry that the Response does not evidence any improper political purpose or intent to manipulate or influence the judiciary. Nevertheless, on the core issue of judicial salaries, the Response does not meet the standard of rationality. In part at least, the Response fails to address the O'Donnell Committee's most important recommendations and the justifications given for them. Rather than responding, the Government appears to have been content to restate its original position without answering certain key justifications for the recommendations.

160 The Government originally submitted that the Committee should not engage in a full review of judicial salaries, because one had recently been conducted by the Bisson

Committee. It also stressed the need to retain a linkage with the salaries paid to certain classes of senior civil servants. It underlined its concerns about the impact of the recommendations on its overall labour relations policy in Quebec's public sector. The submissions seemed to be focussed more on concerns about the impact of the judicial compensation committee process than on the objective of the process: a review on their merits of the issues relating to judicial compensation in the province. After the Committee submitted its report, the Government's perspective and focus remained the same. Its position is tainted by a refusal to consider the issues relating to judicial compensation on their merits and a desire to keep them within the general parameters of its public sector labour relations policy. The Government did not seek to consider what should be the appropriate level of compensation for judges, as its primary concerns were to avoid raising expectations in other parts of the public sector and to safeguard the traditional structure of its pay scales.

161 The O'Donnell Committee had carefully reviewed the factors governing judicial compensation. It was of the view that its role was not merely to update the Bisson Committee's recommendations and that the law gave it a broader mandate.

162 As we have seen, each committee must make its assessment in its context. In this respect, nothing in the *Courts of Justice Act* restricted the mandate of the O'Donnell Committee when it decided to conduct a broad review of the judicial compensation of provincial judges. The recommendations of the Bisson Committee appear to indicate that it had reached the opinion that the severe constraints resulting from the fiscal and economic situation of the province of Quebec at that time prevented it from recommending what would have been the appropriate level of compensation and benefits in light of all relevant factors. Because those economic and fiscal constraints were no longer so severe, the O'Donnell Committee came to the view that it should make its own complete assessment of judicial compensation in the province of Quebec. This was a proper and legitimate exercise of its constitutional and legal mandate. Once the O'Donnell Committee had decided to carry out its full mandate, the constitutional principles governing the Response required the Government to give full and careful attention to the recommendations and to the justifications given for them.

163 The O'Donnell Committee thus recommended a substantial readjustment of judicial salaries in addition to the Bisson Committee's recommendations. It is fair to say that the O'Donnell Committee's report considered all the factors enumerated in s. 246.42 of the *Courts of Justice Act.* It put particular emphasis on some of them, namely, the nature of the jurisdiction of the Court of Quebec, the comparison with federally appointed judges and provincial judges in other provinces, and the need to broaden the pool of applicants whenever there are vacancies to be filled. The Committee stressed that in its opinion, the Court of Quebec had a substantially broader jurisdiction in civil and criminal matters than provincial courts elsewhere in Canada. In fact, its jurisdiction had become closer to that of the superior courts. However, owing to the constraints placed on the Bisson Committee by the economic conditions of the period, there remained a considerable differential in comparison with the salary of Superior Court judges. In addition, the salary of Quebec's provincially appointed judges were found to be lower than in most other provinces. On that

basis, the O'Donnell Committee recommended the substantial adjustment that the Government rejected.

164 The Response failed to articulate rational reasons for rejecting the recommendations on judicial salaries. In particular, one is hard put to find any articulate argument about the scope of the civil and criminal jurisdictions of the Court of Quebec and the impact of that scope on its work. The only response was that the situation had not substantially changed since the time of the Bisson report. The issue was not only change, but whether the Government had properly answered the O'Donnell Committee's recommendations, thereby meeting constitutional standards in this respect. In the end, the Response failed to respond in a legitimate manner to the critical concerns which underpinned the main recommendations of the O'Donnell Committee. This failure went to the heart of the process. It impacted on the validity of the essentials of the Response, which meant that it did not meet constitutional standards, although it must be acknowledged that it was not wholly defective.

165 In some respects, we would not go as far as the Court of Appeal went in its criticism of the Response. We would not deny the Government's right to assign different weights to a number of factors, provided a reasoned response is given to the recommendations. This was the case for example with the criteria and comparators adopted to create and assess a pool of applicants. This was also the case with the rejection of the recommendations in respect of the pension plans. The Government set out the basis of its position and addressed the Committee's recommendations head-on. Nevertheless, an adequate answer on a number of more peripheral issues will not save a response which is flawed in respect of certain central questions. Thus, the overall assessment of the Response confirms that it does not meet the constitutional standard of rationality. The focus of our analysis must now shift to specific issues which are of interest only to municipal judges of the province of Quebec.

(c) *The Parity Issue*

166 We discussed the issue of salary parity for municipal court judges of Laval, Montreal and Quebec City above. In its Response, the Government accepted that this principle would be eliminated. Given the importance of this question for the future consideration and determination of judicial salaries, it must be addressed even if the Response is quashed. With respect for the views of the Court of Appeal, to accept the recommendation in the reports of the O'Donnell Committee's panels in this respect would not breach constitutional standards. The municipal court judges of Laval, Montreal and Quebec City contested the validity of the O'Donnell Committee's report through the narrow procedure of judicial review of the Response. In this respect the Response was rational. The Government did not have to state the reasons for its agreement with recommendations which were well explained. Disagreement and disappointment with the recommendations of a report on certain issues is not a ground for contesting a Response which accepts them.

167 In our opinion, this indirect challenge to the Committee's mandate and process was devoid of merit. Under the law, the Committee was given the task of reviewing all aspects

of judicial compensation. The Committee put considerable emphasis on the workload of the Court of Quebec. Although the issue had not been specifically mentioned, it was logical for the Committee to decide whether the same considerations should apply to municipal court judges. It was part of the review even though it might lead to the abandonment of a cherished tradition. Statutory recognition of the principle was not a bar to this review. After all, implementation of the judicial compensation committee's recommendations has often required amendments to a number of laws and regulations.

168 The respondents' other arguments regarding a breach of natural justice fails too. First, we observed above that the committees are not courts of law or adjudicative bodies. Their process is flexible and they have considerable latitude for initiative in conducting their investigations and deliberations. In any event, the Committee gave notice of its intention to consider the issue, called for submissions and heard those who wanted to appear before it. We find no fault with the Committee's process and no breach of any relevant principle of natural justice.

(d) *Procedural Issues in the Appeal of the Conférence des juges municipaux du Québec*

169 The municipal judges represented by the Conférence des juges municipaux du Québec were as dissatisfied as their colleagues on the municipal courts of Laval, Montreal and Quebec City with the Response to the reports of the O'Donnell Committee's panels. Nevertheless, they decided not to apply for judicial review. When their colleagues' applications reached the Court of Appeal, they tried to join the fray. They hit a procedural roadblock when they were denied leave to intervene in the litigation.

170 This outcome gives rise to an impossible situation given the result of the judicial review applications launched by the other parties. The recommendations concerning the three groups of judges are closely linked. The recommendations concerning compensation levels for full-time municipal judges are based on a comparative analysis with judges of the Court of Quebec. The situation of the Conférence's members is then compared with that of full-time municipal judges. Moreover, the Response is a comprehensive one. Those parts which deal with the compensation of this class of municipal judges are tainted by the flaws we discussed above. The relevant sections form but a part of a Response we have found to be constitutionally invalid. These specific parts do not stand on their own. They are no more valid than the rest of the Response. In this respect, the complete constitutional challenge launched by the other two groups of judges benefits the members of the Conférence. For this reason, their appeal and intervention should be allowed for the sole purpose of declaring that the Response is also void in respect of the compensation of judges of municipal courts to which the *Act respecting municipal courts* applies.

IV. Remedies and Disposition

171 For these reasons, we would dismiss the Attorney General's appeals with costs. However, those portions of the orders below which are not in accordance with these reasons must be set aside and the matter must be remitted to the Government and the National Assembly for reconsideration in accordance with these reasons. We would allow

the appeal of the Conférence des juges municipaux du Québec in part and grant its application for leave to intervene, with costs, for the sole purpose of declaring that the invalidity of the Response extends to those parts of it which affect judges of the municipal courts to which the *Act respecting municipal courts* applies.

* * * * *

Appendix

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.

Solicitors:

Solicitors for the appellants the Provincial Court Judges' Association of New Brunswick, the Honourable Judge Michael McKee and the Honourable Judge Steven Hutchinson: Myers Weinberg, Winnipeg.

Solicitor for the respondent Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Justice: Attorney General of New Brunswick, Fredericton.

Solicitors for the appellants the Ontario Judges' Association, the Ontario Family Law Judges' Association and the Ontario Provincial Court (Civil Division) Judges' Association: Sack Goldblatt Mitchell, Toronto.

Solicitor for the respondent Her Majesty the Queen in Right of the Province of Ontario, as represented by the Chair of Management Board: Attorney General of Ontario, Toronto.

Solicitors for the appellants Her Majesty the Queen in Right of Alberta and the Lieutenant Governor in Council: Emery Jamieson, Edmonton.

Solicitors for the respondents Chereda Bodner et al.: Code Hunter, Calgary.

Solicitors for the appellant/respondent/intervener the Attorney General of Quebec and the appellant the Minister of Justice of Quebec: Robinson Sheppard Shapiro, Montreal.

Solicitors for the respondent/intervener Conférence des juges du Québec, the respondents Maurice Abud et al., and the intervener the Canadian Association of Provincial Court Judges: Langlois Kronstrom Desjardins, Montreal.

Solicitors for the respondents Morton S. Minc et al.: McCarthy Tétrault, Montreal.

Solicitors for the appellant Conférence des juges municipaux du Québec: Cain Lamarre Casgrain Wells, Montreal.

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Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Bar Association: Gerrand Rath Johnson, Regina.

Solicitors for the intervener the Federation of Law Societies of Canada: Joli-Coeur, Lacasse, Geoffrion, Jetté, Saint-Pierre, Sillery.

Solicitors for the intervener the Canadian Superior Court Judges Association: Ogilvy Renault, Montreal.

Solicitors for the intervener the Ontario Conference of Judges: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Association of Justices of the Peace of Ontario: Blake Cassels & Graydon, Toronto.

Solicitors for the intervener the Judicial Justice of the Peace Association of British Columbia: Berardino & Harris, Vancouver.

Written submissions only by W.S. Berardino, Q.C., for the intervener the Judicial Justice of the Peace Association of British Columbia.

* * * * *

Corrigendum, released July 29, 2005

In *Conférence des juges du Québec v. Quebec (Attorney General)*, 2005 SCC 44, released on July 22, 2005, the Court issued an Order on July 28, 2005 amending the reasons for judgment as follows:

1. The second sentence of paragraph 134 of the English version of the reasons should read as follows:

> In two of them, the Attorney General of Quebec seeks the reversal of judgments in which the Quebec Court of Appeal held that the responses of the Quebec government and National Assembly to a report of a compensation committee on the salaries and benefits of provincially appointed judges of the Court of Québec and the municipal courts of the cities of Laval, Montreal and Quebec City had not met the constitutional standard; the Court of Appeal ordered the Government and the Minister of Justice to follow and implement the compensation committee's first 11 recommendations (*Quebec (Attorney General) v. Conférence des juges du Québec*, [2004] R.J.Q. 1450, [2004] Q.J. No. 6622; *Minc v. Québec (Procureur général)*, [2004] R.J.Q. 1475).

2. The third sentence of paragraph 152 of the English version of the reasons should read as follows:

> The Government would have been required to implement the O'Donnell Committee's first 11 recommendations if the judgments had not been appealed to our Court.

4. The first sentence of paragraph 171 of the English version of the reasons is replaced with the following:

> For these reasons, we would dismiss the Attorney General's appeals with costs. However, those portions of the orders below which are not in accordance with these reasons must be set aside and the matter must be remitted to the Government and the

> National Assembly for reconsideration in accordance with these reasons.

The headnote is accordingly modified:

> The English version of the disposition relating to the Quebec appeal should read as follows:
>
> > *Held:* The appeals of the Attorney General of Quebec and the Minister of Justice of Quebec should be dismissed. Those portions of the orders below which are not in accordance with these reasons must be set aside and the matter must be remitted to the government of Quebec and the National Assembly for reconsideration in accordance with these reasons.

2016 YUKON JUDICIAL COMPENSATION COMMISSION

Government of Yukon

And

Territorial Court of Yukon

REPORT OF THE COMMISSION

Timothy S. Preston, Q.C.

Commissioner

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Yukon Judicial Compensation Commission 2016

1. Composition of the Commission

This Commission was established pursuant to Order-in–Council (OIC) 2017/90 dated May 11, 2017. Under s.13 of the Territorial Court Act, RSY 2002, c.217, as amended (TCA), a commission is to be appointed every third year.

The commission is to consist of either one commissioner or three commissioners to be appointed by the Commissioner-in-Executive Council in accordance with Part 3 of the TCA. Under s.21 of the TCA, the Minister and the Chief Judge are mandated to endeavor to agree and to make every effort to recommend the appointment of a single commissioner.

The parties represented at the proceedings before this Commission entered into a document entitled “Letter of Understanding” (LOU) dated January 2005, wherein they agreed to a process with a view of agreeing on the appointment of a single commissioner for JCC proceedings. The LOU is attached at Tab 3 of the Supporting Materials. That LOU remains in effect. Pursuant to the TCA and the LOU, a single commissioner, Tim Preston, was appointed to the 2016 JCC.

It should be stated that a prior OIC 2016/22 had established the 2016 JCC, however, due to health issues of the commissioner that had been appointed, it was necessary to abolish that commission and re-establish a new commission under the first mentioned OIC. This process, as a matter of course, caused significant delay in the proceeding and the filing of the report and recommendations of the 2016 JCC.

However, the parties agreed that no detriment or benefit would accrue to any party as a result of delay in the proceedings, and in particular, all judges and justices of the peace would be duly compensated or remunerated with respect to any loss that may arise from delay in the proceedings. The Commission has been advised by the parties that a formula or process has been established in order to implement that agreement.

2. Parties to the Proceedings

The parties and their respective counsel or representative to this proceeding are as follows:

- Counsel for the Territorial Court Judges and Deputy Judges:
  - Joseph J. Arvay, O.C., Q.C.
  - Alison M. Latimer

- Counsel for the Yukon Government:
  - Gary L. Bainbridge, Q.C.

- Representative for Justices of the Peace:
  - Gary Burgess, President of Yukon Justices of the Peace Association

3. Applications to the Commission

On November 9, 2018, two applications were made by the parties to the Commission to approve two joint submissions, one with respect to the Judges and Deputy Judges ("Judges"), and a second one with respect to the hourly-rated Justices of the Peace ("Submissions").

The Submissions reference the Commission's jurisdiction to make recommendations concerning remuneration to Government pursuant to s. 14 of the TCA with respect to the Judges, and s. 58 of the TCA with respect to the Justices of the Peace.

The period of concern for this Commission is April 1, 2016 to March 31, 2019.

All of the parties attended the hearing of the application by way of telephone conference.

In support of the joint application, the parties provided the Commission the following materials:

1. Written memorandum entitled “Joint Submission of the Territorial Court Judiciary and the Yukon Government to the 2016 Judicial Compensation Commission” dated November 5, 2018 and signed by respective counsel for those parties (“Joint Submission”).

2. Written memorandum entitled “Submission of the Government of Yukon In Relation to the Territorial Court Judges And In Relation to the Hourly-Rated Justices of The Peace” dated November 6, 2018 and signed by counsel for the Government.

3. Written memorandum entitled “Written Submissions of The Territorial Court Judiciary In Relation To The Territorial Court Judges” dated November 8, 2018 and signed by the solicitors for the Territorial Court Judges and Deputy Judges.

4. Written memorandum entitled “Joint Submission of The Yukon Justices of The Peace Association And The Yukon Government to the 2016 Judicial Compensation Commission” dated November 5, 2018 and signed by counsel for the Government and the representative of the Association.

5. Two volumes of Supporting Materials.

Oral submissions in support of the Submissions were also made at the hearing by all the parties to the effect that the recommendations of the Commission would be binding on the Government pursuant to s. 17 of the TCA subject to certain “strings” or

conditions as setout in the TCA and the caselaw; and, the joint submissions are, so the parties submit, “justified” based on the facts, the legislation and the caselaw.

Counsel referenced s. 19 of the TCA and the caselaw, particularly the 2011 decision of the Supreme Court of Yukon of *Cameron v. Yukon*, [2011] Y.J. No. 37, a decision of V.A. Schuler J.

That case was an application for judicial review of recommendations of the 2007 Yukon Judicial Compensation Commission in which the commission accepted and incorporated into its recommendations to Government, a joint submission of the Judges and the Government on an appropriate increase in remuneration of the Judges and a separate submission of the salaried justice of the peace.

The parties did not present a joint submission as to the salary of the petitioner who was the Senior Presiding Justice of the Peace.

Of particular interest with respect to the application before this Commission, is the criteria that the *Cameron* case applies to Yukon judicial review commissions when presented with a joint submission. Further comment will follow concerning this case.

The Joint Submission with respect to the Judges submits salary increases and effective dates thereof, for the Judges as follows:

April 1, 2016:	$273,374.04	[2% increase]
April 1, 2017:	$280,208.39	[2.5% increase]
April 1, 2018:	$287,213.60	[2.5% increase]

With respect to Deputy Judges the Joint Submission submits *per diem* increases and effective dates thereof, as follows:

April 1, 2016:	$1,094.04	[2% increase]
April 1, 2017:	$1,121.39	[2.5% increase]

The Joint Submission with respect to Deputy Judges' *per diem* effective April 1, 2018, submits that the formula for calculating the rate should be changed by dividing the salary of the Judges at the time of sitting, by 235. The *per diem* rate effective April 1, 2018 would be:

April 1, 2018: $1,222.19 [effectively a 9% increase]

Certain "housekeeping" amendments to the *Territorial Court Pension Plan Act, 2003* have been agreed to by the parties.

- First, that the Act be amended to remove the notion of "actuarial reduction" and to instead provide for a 3% reduction per year.

- Second, that subsection 10(3) of Schedule 3 of the Act be amended to clarify that the 5 year guarantee applies to all pensions payable.

- Third, that Schedule 3 of the Act be amended that additional pension amounts in respect of children are payable under both the registered and supplemental plans.

It is submitted by the parties that all other benefits with respect to the Judges remain unchanged.

With respect to the Justices of the Peace, the parties (the Government and the Justices of the Peace Association) jointly submit that effective April 1, 2016, the pay rate for Justices of the Peace be increased $10.00 per hour as follows:

JP 1: from $35.00 per hour to $45.00 per hour
JP 2: from $40.00 per hour to $50.00 per hour
JP 3: from $60.00 per hour to $70.00 per hour

Secondly, the parties submit that the Order-in-Council expressing rate of pay where hourly-rated Justices of the Peace work on designated paid holidays, should express that rate of pay as time and one half of their regular hourly rate.

Thirdly, the parties submit that the "Commission should recommend that the Government compensate any hourly-rated Justice of the Peace who was underpaid for working on a designated paid holiday, due to the incorrect rate of pay being used at the relevant time".

Fourthly, the parties submit that all other benefits remain unchanged.

4. Mandate of the Commission and legislative framework

Judicial compensations commissions were established across the country as a result of the 1997 decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3 ("PEI Reference").* The necessity for judicial independence in the Canadian form of liberal democratic government was the paramount issue in that case. Schuler, J. in the *Cameron* case reviewed the principle of judicial independence and wrote follows:

> [12] Judicial independence is protected by the common law and by the Canadian Constitution in the *Charter of Rights and Freedoms*, s. 11(d). Independence is necessary because the judiciary's role is to protect the Constitution and the values embodied in it. Judicial independence has an individual dimension relating to the independence of a particular judge and an institutional dimension relating to the independence of the court the judge sits on. Public confidence depends on the judiciary both being and being seen to be independent: *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice),* [2005] S.C.J. No. 27, 2005 SCC 44 (CanLII) ("*New Brunswick*").
>
> [13] The components of judicial independence include financial security. The *PEI Reference* states that financial security entails three requirements: (i) judicial salaries can be maintained or changed only by recourse to an independent commission; (ii) no negotiations are permitted between the judiciary and the government; (iii) judicial salaries may not fall below a minimum level. Prior to the *PEI Reference*, in some provinces salary negotiations took place between provincial court judges or their associations and the government, sometimes resulting in public rhetoric and the danger

> that the public might think that judges, no matter how independent they were in fact, could be influenced either for or against the government because of issues arising from the salary negotiations: *New Brunswick*.
>
> [14] The *PEI Reference* declared that compensation commissions were to be the forum for discussion, review and recommendations to the government on judicial compensation issues. It was hoped and expected that this would avoid confrontations between the judiciary and the government and depoliticize the relationship between the two by creating a new way and a new forum for setting judicial remuneration: *New Brunswick*.
>
> [15] The judicial compensation commissions are required to be independent, objective and effective. Their work must have a meaningful effect on the process of determining judicial remuneration, although their recommendations need not be binding on governments.

In August 1998 a report by The Honourable E.N. Hughes made recommendations to Government as to steps that should be taken to ensure compliance with *PEI Reference*. The TCA was amended wherein Part 3 of the Act provide for the establishment of a judicial compensation commission process for the Judges. Section 13 of the Act requires that a commission be established every three years. Section 14 states that the mandate of the commission is to inquire into and make recommendations respecting all matters relating to judicial remuneration of judges and respecting other matters as the Minister and the Chief Judge agree to submit to the commission. The Act was amended by R.S.Y. 2002, c. 217 to include salaried Justices of the Peace in the judicial compensation process established by Part 3 of the TCA.

It is apparent that the legislative framework of the TCA encourages, and in some cases mandates, the parties to work towards reaching agreement or consensus on issues that may arise between them. The legislative framework or intent is significant in circumstances of a joint application or submission because it influences the scope of review, or the standard of review, that the commission should apply in such applications.

The commission has a role or a duty to ensure that a joint submission complies with the legislation, as well as the principles enunciated in the caselaw. The caselaw describes that the role of the commission is to act as a filter or sieve between the parties to assist in fostering judicial independence in the area of financial security for the court. The joint

submissions make reference to the sections of the TCA that contemplate the use of mediation to encourage the parties to reach agreement on issues between the judges and the Government:

- Section 23 states that if practicable at least one of the commissioners should be skilled in mediation or other consensus process to resolve differences.

- Subsection 24(2) states that the commission shall make every effort to use mediation and other consensus processes to resolve differences.

- Subsection 25(4)(a) makes reference to the parties identifying “unresolved issues”.

- Subsection 25(4)(b) directs the commission to employ consensus processes to assist the government and judiciary in resolving their differences.

- Other provisions of the TCA not only encourage the parties to seek agreement or consensus but, indeed, subject certain legislative provisions to the consensus process.

- Section 20 lists certain categories of persons ineligible for appointment as a commissioner “Unless otherwise agreed to by the Minister and the chief judge….”.

- Under section 21, the selection and appointment of commissioners directs the Minster and the chief judge to endeavor to reach agreement.

It is clear that the scheme of the legislation is to implement a consensus model with respect to s. 14 issues (remuneration and other related matters). That does not necessarily mean that the commission does not have a role in the circumstances where the parties have reached consensus on all issues, however, it does suggest that the

role of the commission is circumscribed by the consensus model. Indeed, the jurisprudence would indicate that the commission's role or duty varies in such circumstances.

It is instructive in considering the legislative scheme of Part 3 of the TCA with respect to the issue of mediation and dispute resolution processes by and between the parties, that S. 19 does not specifically enumerate consensus of the parties as a mandatory matter to be addressed in the commission report. The section requires the commission to address in its report "…submissions presented to it regarding…" the mandated issues. It specifically mandates "…any submissions by the public filed under section 26".
It should be stated that no submissions were received from the public under s. 26, or otherwise, with respect to any of the matters before this Commission despite public advertisement inviting submissions.

The preamble to s. 19 states that the commission shall address in the report "any matter it considers relevant". Obviously, the commission would consider relevant any agreement the parties reached on s.14 issues.

And, Part 3 of the TCA must be interpreted in the context of the principles established by the caselaw, particularly *PEI Reference* case. That case addresses the constitutional imperative of establishing an "institutional sieve" or filter in the negotiation process between the government and the courts in fixing remuneration for the judges to ensure that the negotiating process does not involve traditional "horse-trading" that is typical in industrial labour relations. The rationale for preventing that style of negotiations is explained in the *PEI Reference* case.

5. *Cameron* Case

In *Cameron*, Madame Justice Schuler considered the role of the commission in circumstances where the parties reached consensus with respect to remuneration issues.

The court cited the Supreme Court of Canada decision in *New Brunswick* and referenced the mandate of the commission as set out in s. 14 of the TCA.

At paragraph 100 of *Cameron* the court writes:

> [100] In *New Brunswick*, the Supreme Court referred to the judicial compensation commission process as neither adjudicative interest arbitration nor judicial decision making. Instead, its focus is to be on identifying the appropriate remuneration for the judicial office in question (paragraph 14). Section 14 of the *Territorial Court Act* provides that the mandate of the JCC is to "inquire into and make recommendations respecting all matters relating to judicial remuneration of judges". Agreement by the parties as to what is appropriate is clearly relevant and if the JCC also considers it appropriate based on the evidence and information provided, there is no reason why a joint submission should not be adopted by the JCC if it is not unreasonable, illogical or otherwise questionable. The JCC clearly is not obliged to adopt a joint submission, but considering, as I have said, that what the JCC is dealing with is not an exact science, there is no reason why it should not do so.

In *Cameron*, the court also refers to the *PEI Reference* case with respect to agreements made between the government and the judges. The court in the *PEI Reference* case stated that such agreements promote the objective or principle of judicial independence:

> [102] In the *PEI Reference*, the Supreme Court declined to set in stone the form that a judicial compensation commission can take. I will refer to this in more detail in considering the Petitioner's submissions about the 2007 JCC being a single commissioner. In discussing that issue, the Supreme Court considered the Schedule to Ontario's *Courts of Justice Act*, which embodies an agreement between the government and the provincial court judges to establish, among other things, a binding process for determination of the judges' compensation. The Court said that agreements of this sort promote, rather than diminish, judicial independence. Although it did not comment specifically on it, the agreement includes clause 18, which states, "The parties agree that representatives of the Judges and the Lieutenant Governor in Council may confer prior to, during or following the conduct of an inquiry and may file such agreements with the Commission as they may be advised". That the Supreme Court did not comment

> adversely on this clause suggests that it did not view the making of agreements by the parties to be contrary to the judicial compensation commission process.

With respect to the duty of the commission in circumstances in which the parties present to the commission a joint submission on all of the issues between the parties, the court in *Cameron* stated that "it is preferable that reasonably detailed reasons be given for a commission's recommendation, even when it has accepted a joint submission, in part because the reasons may be of assistance to the work of the future commissions." (para 104).

Those comments, in this Commission's view, are consistent with sections 14 and 19 of the TCA. Section 19 states that "the commission shall, in addition to considering any matter it considers relevant, address in its report submissions presented to it regarding" the enumerated or mandated matters.

This Commission is of the view that s. 19 should not be interpreted to apply only to "unresolved issues" (as that phrase is used in s. 25) that are submitted to the Commission. It is a fair interpretation of the section that it makes the assumption that the submissions from the parties do address the enumerated matters even in circumstances, as is the current case, where the submissions are joint; that is, where there is no disagreement or dispute or joinder of the issues between the parties.

In the case before this Commission, the Joint Submission references the sections of the TCA that encourage mediation and dispute resolution to attempt to achieve consensus. It states that it is not uncommon in JCC proceedings where agreement has been reached that a joint submission "be placed before the Commission for approval, if considered appropriate."

The Joint Submission with respect to the Judges then sets out the agreement with respect to salary for the court Judges, Deputy Judges, pension benefits and submits that all other benefits are to remain unchanged.

The joint submission with respect to the Justices of the Peace sets out the pay rate, holiday rate, retroactive holiday pay, and states that all other benefits are to remain unchanged.

The written joint submissions were supplemented with oral submissions at the hearing. These joint submissions are similar, in terms of process, to those considered in *Cameron* (para 96).

Reference was also made to para 89 of *Cameron* in which the petitioner in that case asserted that in determining whether a joint submission is appropriate, the commission must be independent, effective and objective, in the sense that the commission must make an independent inquiry as to the appropriateness of the joint submission. The court wrote that the *PEI Reference* case does not prohibit agreement so long as it is not arrived at by negotiation of the give and take sort. It should be said that there is no evidence before this Commission that such prohibited negotiations occurred. And, indeed, the parties represented that no such prohibited negotiations occurred. Those representations are accepted by this Commission. This Commission is not in a position to conduct an independent inquiry into the facts surrounding the negotiations that occurred between the parties, nor does the legislative mandate give this Commission the powers to do so. Section 19 of the TCA requires the commission to "address the submissions presented to it". The Commission must rely upon the submissions and representations of the parties, and the documents and evidence the parties present to it, when considering the process, as well as the substance, of any agreement that the parties have reached.

6. Issues before the Commission

Applying the *Cameron* test when considering or reviewing the subject joint submissions, the issues before this Commission can be described as follows:

1. Based on the evidence and information provided, are the recommendations concerning remuneration appropriate, and if so;

2. Are the recommendations, or any of them, unreasonable, illogical or otherwise questionable.

The Commission is of the opinion that it should not be substituting its opinion for that of the parties, nor should it be second guessing the recommendations contained in the joint submissions, if those recommendations meet the test, or criteria, as above stated.

There is no right or wrong answer to these matters; what may considered to be "appropriate" would normally fall within a scope or range. Just as what may be considered to be "reasonable" would normally fall within a scope or range. As Schuler J. stated, "what the JCC is dealing with is not an exact science". A recommendation that would be considered to be unreasonable, would usually be one that falls outside the boundaries of a range or scope. For example, if the joint submissions contained a recommendation that included a salary increase of, say 2.5%, but the commission was of the opinion that a 2% increase would be better or more appropriate, the commission should not necessarily substitute its view for that of the parties, unless it considered the 2.5% to be unreasonable or not appropriate; that is, unreasonable in the sense that 2.5% would fall outside the range of reasonableness, or not appropriate in the sense that it would fall outside the range of being appropriate. Both of the words "appropriate" and "reasonable" are somewhat elastic words that do not imply a precise or exact measure.

It must be remembered that the Government and the Judges in this case are represented by experienced, skillful and knowledgeable counsel. And the parties they represent are highly sophisticated in matters of law and procedure. The Commission should be cautious in substituting its opinion for that of the parties with respect to issues of remuneration and benefits. It should not do so unless it is convinced that same are unreasonable, illogical or otherwise questionable, as stated by the court in *Cameron*.

Cameron is the only case that counsel has referenced that has judicially considered Part 3 the TCA, and the duties and obligations of commissions established thereunder.

7. Consideration of Joint Submissions and Evidence

The joint submissions state that the parties reached agreement pursuant to the process set out in the LOU found at Tab 3 to the Supporting Materials. The process established by the LOU, and the constitutionality thereof, was considered and approved by Schuler J. in *Cameron*. As stated earlier, there is no evidence of any impropriety in the manner in which the agreement was reached or the negotiations conducted.

I. Submissions re Judges

The salary for Judges as of 2015 was $268,014. The Joint Submissions agree to an increase of 2% for 2016, a further 2.5% increase for 2017, and a 2.5% increase for 2018. The actually salaries would then be:

For 2016: $273,374.03
For 2017: $280,208.39
For 2018: $287,213.60

The table below for Territorial Court Judges salaries and for comparator jurisdictions has been set out at paragraph 85 of the brief of Government:

PROVINCIAL AND TERRITORIAL COURT JUDGES'

Salaries for Comparator Jurisdictions	2012	2013	2014	2015	2016	2017	2018
Yukon	$250,103	$257,606	$262,759	$268,014	$273,374.03 *Proposed (2%)*	$280,208.39 *Proposed (2.5%)*	$287,213.60 *Proposed (2.5%)*
NWT	$249,582	$252,414	$256,055	$260,302	$272,000	2016 salary + 1.5% + CPI	2017 salary + 1.5% + CPI
Alta.	$263,731	$273,000	$279,825	$286,821	$293,991	*[TBD]*	*[TBD]*
Sask.	$248,090	2012 salary + Sask. CPI + 1%	$260,819	$272,295	2015 salary + 2% + Sask CPI of 2015	$290,848 (=2016 salary + 2% + Sask CPI of 2016)	2017 salary + Sask CPI of 2017
BC19	$231,138	$242,464	$236,950	$240,504	$244,112	$273,000	$277,095

The table shows that the agreed salary rates are neither the highest nor the lowest in the comparator jurisdictions. Paragraph 86 of the brief of Government shows the salary rates for provincial court judges in non-comparable provinces for 2015/2016 as follows:

- Manitoba: $249,277 (April 1, 2015)
- Ontario: $287,345 (April 1, 2015)
- Quebec: $241,955 (July 1, 2015)
- NB: $246,880 (April 1, 2015)
- PEI: $250,049.90 (April 1, 2015)
- NS: $240,297 (April 1, 2015)
- Nfld/Lab: $247,545.88 (2016)

The brief of the Judges states as follows:

1. The parties are in agreement that the Commission should recommend the following salaries for a Territorial Court Judge, effective the following dates:

a. April 1, 2016: $273,374.04 [2% increase];
b. April 1, 2017: $280,208.39 [2.5% increase]; and
c. April 1, 2018: $287,213.60 [2.5% increase].

2. The proposed increases in salary, it would amount to a 7% increase over three years.

3. The Yukon *Territorial Court Act*, R.S.Y. 2002, c. 217 requires this Commission to have regard to the so-called "comparator jurisdictions" - in the words of the *Act*, "to judges in the Northwest Territories and British Columbia, Alberta, and Saskatchewan". The proposed increase would position the salary of Yukon Territorial Judges closer to the range of their two most salient comparators, being the Northwest Territories ("**NWT**") and Saskatchewan, although still behind those jurisdictions. Although not set out in the Chart at paragraph 85 of the submission of the Government of Yukon ("**YG**"), as of April 1, 2018 the salary of puisne judges in Saskatchewan is $295,792, and in NWT it is $289,732.93. As set out in the Chart, the salary in Alberta as of two years ago is $293,991.

A number of points are made in the briefs of the parties in support of the proposed increases:

- over the past 16 years Judges in Yukon have enjoyed a 97% increase in income;

- the proposed increase of 7% over three years ensures the level of compensation remains above the level required to maintain judicial independence;

- the proposed increases will suffice to attract and keep qualified applicants;

- the current financial stability of Government is sufficient to absorb the proposed increases;

- the proposed increases fall within a range of compensation that would ensure public confidence in the independence of the judiciary and, accordingly, would satisfy that portion of the PEI Reference case criteria;

- the proposed increases are generally consistent with what other public employees have received over the subject years. Management and legal officers of Government received wage increases of 2.00%, 2.00%, and 1.75% for the period January 2013 to January 2015;

- the judicial pension plan is considered more beneficial than similar plans for territorial and federal employees;

- there is little risk that qualified candidates would be deterred from applying for a position of a Judge on the basis that the proposed compensation was inadequate;

- it is acknowledged that because Whitehorse is a smaller community, social isolation for members of the judiciary is a reality that plays a factor in assessing remuneration;

- Judges face restraints on their ability to earn income from other sources or endeavors that are not faced by lawyers in private practice;

- an appointment to the bench is viewed as a long-term commitment and generally impedes other income earning opportunities;

- lawyers likely to be appointed are usually entering their most lucrative years of practice and this opportunity must be foregone;

- judicial remuneration must be sufficient to not only attract the best-qualified candidates, but also to retain and motivate those candidates;

- given the smaller population of the Yukon, a greater proportion of cases are reported by the media, and hence are more frequent comment by the media,

public and political. This can result in social isolation, restriction on their freedom of expression, and their community activity and relationships;

- Government policy of community and restorative justice can place additional demands on the judiciary including attending community meetings and developing alternative court procedures to accommodate the interests of the community;

II. Submissions re Deputy Judges

With respect to the Deputy Judges, the table at paragraph 87 of the brief of the Government sets out the *per diem* for the Yukon and the comparable jurisdictions, except B.C. which does not seem to have relief judges and *per diem* rates:

PROVINCIAL AND TERRITORIAL COURT PER DIEM

RATES FOR DEPUTY OR RELIEF JUDGES and PROPORTION OF ANNUAL JUDICIAL SALARY PER DAY	**2015**	**2016**	**2017**	**2018**
Yukon – Currently 1/250 of annual salary	$1072.59	$1094.04 (proposed)	$1,121.39 (proposed)	$1222.19 (proposed move to 1/235 of annual salary)
NWT – Currently 1/210 of annual salary			$1,239.53	$1,295.24
Alberta – Currently 1/207.5 of annual salary	$1,382.27	$1,416.82	*TBD*	*TBD*
Saskatchewan – Currently 1/220 of annual salary			$1,237.70	$1,322.04
BC	No	-	-	-

The brief of the Judges starting at paragraph 26 with respect to the *per diem* rates of the Deputy Judges states:

> 26. Deputy Judges are paid a *per diem* sitting rate based on the following formula: the salary of a Territorial Court Judge (at the time of sitting) divided by 250. The parties are in agreement that the Commission should recommend, firstly, that the *per diem* sitting rate for Deputy Judges (currently $1,072.06) be increased annually by the same percentage increases applicable to Territorial Court Judges per #1 above, and therefore the *per diem* sitting rates over the next two years will be as follows:
>
> d. April 1, 2016: $1,093.50 [2% increase];

e. April 1, 2017: $1,120.84 [2.5% increase].

27. Secondly, the parties are in agreement that the Commission should recommend that effective April 1, 2018, the formula for calculating a Deputy Judge's *per diem* sitting rate will change, such that their *per diem* sitting rate from and after April 1, 2018 will be based on the following formula: the salary of a Territorial Court Judge (at the time of sitting) divided by **235**. Therefore, the *per diem* sitting rate effective April 1, 2018 will be as follows: April 1, 2018: $1,222.19 [effectively a 9.04% increase].

28. In other appropriate comparator jurisdictions, the denominator is lower - 209 days in NWT, 220 days in Saskatchewan, and 207 days in Alberta – which results in higher daily rates.

The brief of Government states that the proposed *per diem* increases are sufficient to keep pace with inflation (para 130).

III. Submissions re Pension Changes for Territorial Court Judiciary Pension Plan

The changes to the pension plan for the Judges has been characterized as "housekeeping" changes. These changes are seen by the Commission as more technical than substantive in nature. They are summarized in the brief of the Judges as follows:

Pension Benefits

29. The parties are agreed that the Commission should recommend three areas of change to the *Territorial Court Judiciary Pension Plan Act, 2003*, S.Y 2003, c. 29.

30. First, that Schedule 3 of the *Act* be amended to remove the notion of an "actuarial reduction" and to instead provide for a 3% reduction per year for the shorter of: (a) the period to age 60; (b) the period to 30 years of service; or (c) the period to age plus years of service is 80. The rationale for this change is consistency and simplicity. With respect to early retirement, the registered plan sets out a 3% penalty per year (0.25% per month). In contrast, the supplemental plan speaks to the early retirement pension amount being determined on an actuarially equivalent basis (Schedule 3, s. 9(1)). The intent was that both registered and supplemental pensions be the same. In almost all cases, Judges will be entitled to the maximum pension amounts reduced by 3% per year from the earlier of age 60 and the date on which age plus service would have reached 80 years. The single exception, which is unlikely to arise, is for an individual who retires before age 52 with

pensionable service between 16 and 24 years of service. That individual's pension entitlement would be based on the formula pension and the reduction would be 5% per year to age 60.

31. Second, that subsection 10(5) of Schedule 3 of the *Act* be amended to clarify that the 5 year guarantee applies to all pensions payable, including for joint and survivor pensions for a Judge with a spouse. The rationale for this change is that while a strict interpretation of subsection 10(5) of Schedule 3 is that the 5 year guarantee applies to all pensions payable, there is some uncertainty based on other language in Schedule 3. The parties therefore seek confirmation that the 5 year guarantee applies to all pensions payable, including for joint and survivor pensions for a Judge with a spouse.

32. Third, that Schedule 3 of the *Act* be amended to clarify that additional pension amounts in respect of children (child benefits) are payable under both plans (registered and supplemental).

33. We note that Section 11 of Schedule 2 provides that any pension payable under the Judiciary Retirement Compensation Arrangement (which includes supplementary pensions) is payable "in the same form as that payable to them under the judiciary registered pension plan."

IV. Submissions re Justices of the Peace

The submissions in this regard state that both the Government and the Justices of the Peace Association believe that the proposed increases are warranted to keep pace with the cost of living increases since the last increase as recommended by the 2013 JCC. The proposed increased is $10.00 per hour across the board. It amounts to an increase of between approximately 16.7% and 28.6% for the three JP classes described above.

The second matter arising concerning the Justices of the Peace is the for working on designated holidays. It is submitted that such work "should be remunerated at the equivalent of time-and-a–half (1.5x) at the then-contemporary hourly rate of pay." Rather than expressing a multiple of 1.5 of the hourly rate, the previous JCC expressed dollar values of the hourly rate of pay on designated paid holidays. Because of this, the recent Orders in Council specify an hourly rate instead of a multiplier for those holidays. To rectify this matter, the parties recommend a 1.5x multiplier for the designated paid holidays.

The third matter concerning the Justices of the Peace arises from the second. They submit that there should be a rectification of the underpayment for working on a designated holiday due to the incorrect rate of pay being used at the relevant time.

All other terms, benefits, allowances, stipends in effect for the hourly-rated Justices of the Peace, it is submitted, should remain unchanged.

The parties submit that the increases and changes proposed for the Justices of the Peace are "justified on an objective basis and bear an appropriate relationship to compensation in the comparator jurisdictions given the cost of living and the economic growth rates in Yukon compared to those jurisdictions."(para 142 Submission of Government)

It should be stated that no submissions were received form the public under s. 26 or otherwise with respect to any of the matters before this commission despite public advertisement inviting submissions.

8. Conclusions and Recommendations

The Commission has carefully reviewed and considered the materials and submissions presented by the parties. Applying the test or criteria setout in the *Cameron* case, the Commission is of the opinion and concludes that the joint submissions of the parties are appropriate.

With respect to the process in reaching the terms of the proposed remuneration, the Commission concludes that there is no evidence that the process was questionable or inappropriate or contrary to the applicable principles regarding process.

With respect to the substance or quantum of the proposed remuneration, the Commission concludes that there is no evidence to suggest that same is unreasonable,

illegal or otherwise questionable. Indeed, the Commission concludes that the proposed remuneration is appropriate and reasonable.

Accordingly, the Commission approves the terms of the two joint submissions and makes the following recommendations:

1. Salary for Territorial Court Judges be as follows, effective the following dates:

April 1, 2016:	$273,374.04
April 1, 2017:	$280,208.39
April 1, 2018:	$287,213.60

2. The *per diem* sitting rates for Deputy Judges be as follows, effective the following dates:

April 1, 2016:	$1,094.04
April 1, 2017:	$1,121.39

3. Effective April 1, 2018, the formula for calculating a Deputy Judge's *per diem* sitting rate be changed such that their *per diem* sitting rate from and after April 1, 2018 will be based on the following formula: the salary of a Territorial Court Judge (at the time of sitting) divided by 235.

4. The *Territorial Court Judicial Pension Plan Act, 2003* be changed as follows:

    - First, that Schedule 3 of the Act be amended to remove the notion of an "actuarial reduction" and to instead provide for a 3% reduction per year (0.25% per month) for the shorter of: (a) the period to age 60; (b) the period to 30 years of service; or (c) the period to age plus years of service is 80.

- Second, that subsection 10(5) of Schedule 3 of the Act be amended to clarify that the 5 year guarantee applies to all pensions payable, including for joint and survivor pensions for a judge with a spouse.

- Third, that Schedule 3 of the Act be amended to clarify that additional pension amounts in respect of children (child benefits) are payable under both plans (registered and supplemental).

5. All other terms, benefits, allowances, stipends and related remuneration in effect for members of the Yukon Territorial Court remain unchanged.

6. Effective April 1, 2016, the pay rate for hourly-rated Justices of the Peace be increased ten ($10) dollars per hour, as follows:

   JP 1: from $35.00 per hour to $45.00 per hour
   JP 2: from $40.00 per hour to $50.00 per hour
   JP 3: from $60.00 per hour to $70.00 per hour

7. The Order-in-Council expressing rate of pay where hourly-rated Justices of the Peace work on designated paid holidays, should express that rate of pay as time and one half of their regular hourly rate.

8. Government should compensate any hourly-rated Justice of the Peace who was underpaid for working on a designated paid holiday since April 1, 2013, to correct an incorrect rate of pay being used since that time.

9. All other terms, benefits, allowances, stipends and related remuneration in effect for hourly-rated Justices of the Peace remain unchanged.

Because this is a joint submission and the parties have put before the Commission proposed recommendations, the Commission intends to have the parties, through their

respective counsel and representative, consent to and approve the wording of the above recommendations. The Commission views these recommendations in the nature of a consent court order and adopts the practice applicable thereto.

9. Concluding Remarks

The Commission wishes to thank and commend counsel and Mr. Burgess for their professionalism, courtesy and efficiency. The submissions and the materials delivered to the Commission were thorough, organized, pertinent, and of great assistance.

The Commission would also like to thank the staff of the Department of Justice who provided excellent assistance and support to the Commission.

ALL OF WHICH IS RESPCETFULLY SUBMITTED

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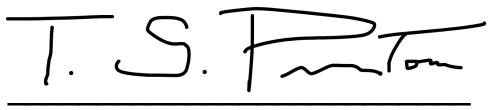

Timothy S. Preston, Q.C.
Commissioner

This 18th day of January, 2019

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The Conference Board of Canada

Solid Foundations

Yukon's Outlook to 2045

Issue briefing | April 30, 2024

Contents

Key findings

- Yukon's economic outlook is healthy, supported by rising production of silver and gold, a busy construction sector, and a rebounding tourism industry.
- Weaker hiring activity will temporarily weigh on employment growth. The next couple of years will see a modest rise in the unemployment rate, though conditions in the labour market are expected to remain relatively tight.
- Household spending has shown resilience in the face of higher interest rates, but consumption growth will slow in 2024. We anticipate interest rate cuts this year, supporting gains in consumer and business spending from 2025 onward.
- An aging population and low fertility rate make Yukon increasingly dependent on migration for population growth. The lack of affordable housing creates a barrier to would-be migrants and exacerbates labour supply challenges.
- The territory's tourism sector is emerging from the long shadow cast by the pandemic. A recovery in international visitors is key for Yukon and will help total visits reach pre-pandemic levels by 2025.

Overview

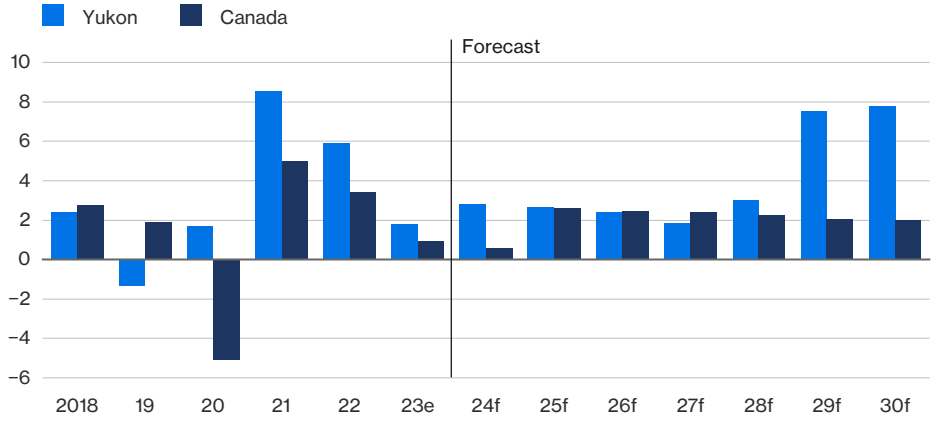
Yukon's economic outlook is healthy. Despite recent turbulence in the mining sector, the territory's economy is benefiting from a resilient labour market and resurgent tourism sector.

After real GDP growth hit 5.9 per cent in 2022, we estimate it slowed in 2023, falling to 1.8 per cent. The deceleration reflects fading tailwinds from the pandemic reopening as well as the unexpected closure of one of Yukon's three mines.

This year, Canada's economic outlook remains decidedly muted, as high interest rates are weighing on several areas of the economy. While Yukon is by no means immune to the weight of inflation-reduction measures, rising mineral production and favourable mineral prices will support economic growth of 2.8 per cent this year. Other industries including construction and tourism-related services are also expected to post robust growth in 2024.

Between 2025 and 2028, real GDP growth will average 2.5 per cent annually, aligning closely with our growth forecast for Canada during the same period. The arrival of two additional mines expected around the end of the decade sees the growth forecast strengthen notably in 2029 and 2030. (See Chart 1.)

Chart 1
Real GDP Growth in Yukon and Canada
(percentage change)



e = estimate; f = forecast
Sources: The Conference Board of Canada; Statistics Canada.

International migration to Canada has risen significantly in recent years, fuelled by high levels of immigration as well as strong inflows of temporary residents. Yukon's population growth is increasingly dependent on migration, given the territory's aging population and low fertility rate. Attracting newcomers to the territory is vital for labour force and tax revenue growth.

The latent effects of higher interest rates are today weighing on the labour market. Firms are responding by reducing hiring, and the job vacancy rate has fallen following a surge in 2022. A migration-fuelled expansion in labour supply, together with lower labour demand, is helping to restore a degree of balance to Yukon's labour market.

In the years ahead, a rising median age will continue to fuel retirements and keep conditions in the job market tight. Despite the slowdown under way, Yukon's unemployment rate remains one of the lowest in the country and will continue to be in the years ahead.

Wage growth accelerated in 2023, offering a partial restoration of purchasing power to households. Households are also benefiting from lower inflation, which in Whitehorse is now below the national average and within the Bank of Canada's target range. As inflation expectations normalize, wage growth is expected to moderate. Over the forecast period, a strong labour market will sustain demand for workers and help to buoy wage growth—a positive signal for household income growth.

The economic outlook is subject to several risks. Environmental risk is growing as the climate changes. In Yukon, temperatures are rising faster than elsewhere in Canada, and precipitation patterns are becoming less predictable. The environmental impacts of these changes include permafrost thawing, more frequent extreme weather events, glacier melt, and increased severity of forest fires. Such impacts pose a threat to infrastructure, livelihoods, and both traditional and industrial economic activities.

Given the risk posed by a changing climate, the government has laid out four key climate goals: reducing carbon emissions, adapting to climate change impacts, building a green economy, and ensuring access to reliable, affordable, and renewable energy. Yukon plans to reach net-zero emissions by 2050. Meeting these goals will create economic opportunities as well as new regulatory constraints within which industries will need to operate.

Mining

Precious metals ramping up

Mining is a core component of Yukon's economy. Inevitably, the abandonment of the Minto mine in 2023 will have a multi-year economic cost. Nevertheless, operations are ramping up at the Keno Hill silver mine following a temporary suspension of production. Production is also rising at the Eagle Gold mine. After declining in 2023, output in the mining sector is expected to post strong growth in 2024.

Current mining operations

Eagle Gold

The Eagle Gold mine produced just over 166,700 ounces of gold in 2023, marking an 11 per cent increase on the previous year. Production is expected to rise further in 2024 and 2025. This year, the mine is expected to achieve gold production guidance of 165,000 to 185,000 ounces. Our present outlook assumes that production at the mine will continue until 2034.

Keno Hill

After restarting production in the second half of 2023, the Keno Hill mine produced 1.5 million ounces of silver. As production ramps up in 2024, we expect silver production to rise significantly. The owners, Hecla Mining Company, recently published a technical report detailing 55 million ounces of silver reserves. This represents a 45 per cent increase in reserves since the firm took ownership of the mine at the end of 2022.

Placer mining

Placer mining—the recovery of deposits in the rocks and gravel of streams and riverbeds—is a long-standing contributor to gold production in Yukon. Our outlook assumes a total of 58,000 fine ounces of gold in 2024. Over the forecast period, we have tempered our production assumption for placer mining to reflect updated regulation. New legislation will see changes to the rules affecting land use and water permitting, reshaping the regulatory environment within which placer miners operate. On the upside, strong gold prices are driving up activity in the sector. In 2023, the number of claims staked was more than double the number in 2022. Placer mining plays an important role in the Dawson City regional economy providing a source of employment and business revenue.

Developing projects

Kudz Ze Kayah

The Kudz Ze Kayah project to develop a zinc-copper-lead mine appears to have overcome long-running legal challenges and is poised to advance toward the permitting stage. A recent government decision, following consultation with Indigenous authorities, recommends the project go forward, albeit with some additional conditions. Theses conditions include consulting with the Kaska Nation over rights, mine closure, land use, environmental monitoring, and financial security. While the resolution marks a positive step for the project, hurdles remain. Accordingly, the anticipated start date for commercial production at Kudz Ze Kayah has been delayed until 2029.

Casino

While hurdles remain, the Casino mine, if realized, would be substantially larger than any mine now operating in the territory. Mine owner Western Copper and Gold plans to submit a socio-economic effects statement for the copper, gold, molybdenum, and silver project in the second half of 2024. A key piece of infrastructure, the Carmacks Bypass, was recently completed. The mine will receive a second investment by Rio Tinto, totalling $6 million, adding to an initial investment of $25.6 million. While the Casino mine is included in our forecast assumptions, the risk of setbacks to the project's development confers considerable downside risk to our long-term outlook.

Coffee

Newmont Corporation's Coffee gold project is not included in our forecast. The owners of the mine recently expressed plans to sell it. Although the project received permission to proceed following a recommendation by the Yukon Environmental and Socio-economic Assessment Board, hurdles remain, including the acquisition of a quartz and water licence. If the open-pit gold mine is developed, a two-and-a-half-year construction phase would be followed by 10 years of production, yielding in the region of 2 million ounces of gold. The Coffee project constitutes an upside risk to our long-term outlook.

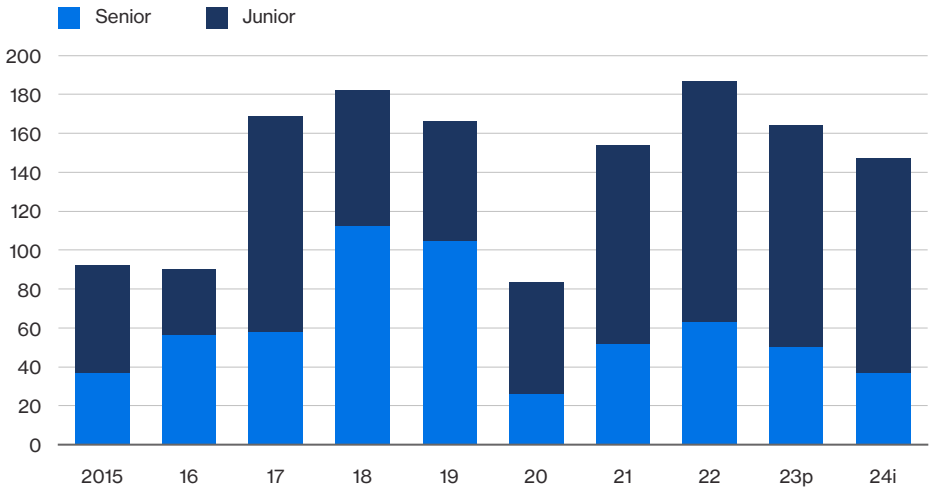
Exploration

Data on spending intentions for 2024, collected by Natural Resources Canada, suggest that exploration spending will dip for a second consecutive year in Yukon, falling from $164.3 million in 2023 to $143.7 million. Exploration spending declined in 2023 as work was hampered by high temperatures and wildfires.

Spending intentions for 2024 are roughly in line with the 10-year average, with three quarters of the spending expected to be from junior mining companies. (See Chart 2.) Exploration by junior mining companies typically focuses on early-stage development of mineral deposits. While this kind of exploration is inherently riskier than exploration of known deposits, it suggests positive sentiment in the sector and confidence in the prospects for commodity prices. In Yukon, exploration targeting precious metals accounted roughly 60 per cent of expenditures in 2023 and is expected to account for a similar share of overall spending this year. Yukon's share of total exploration spending nationwide fell from 7 to 4 per cent in 2020 and has since held steady.

Exploration is incentivized by the territorial government's Yukon Mineral Exploration Program, which in 2022–23 invested $1.4 million across 42 exploration projects. Gold remains the principle mineral target sought, spurred by buoyant prices. Interest in critical and strategic minerals, several of which are present in Yukon, is growing. The federal government, like the U.S. government, is seeking to develop Canada's position as a supplier of these minerals, which will play an important role in the clean-energy shift.

Chart 2
Exploration spending remains stable
($ millions, by company type)



p = preliminary estimates; i = spending intentions
Source: Natural Resources Canada; The Conference Board of Canada.

Tourism Revival: Risks and Rewards

Yukon's tourism sector is strengthening as the long shadow of the pandemic recedes. Increased cruise ship stops and international visitors to the territory helped to boost spending and overnight visits in 2023. Data published by CBRE show hotel occupancy rates hit a peak of almost 90 per cent last summer, a sign of resurgent demand. Yet some tourism activity was disrupted by wildfires, a risk that will loom large over the industry in the years ahead. Our recent Travel Markets Outlook to 2027 estimates total visits to Yukon will grow by 11.7 per cent in 2024, 9.9 per cent in 2025, and 2.8 per cent in 2026.

Yukon's tourism market typically relies heavily on international visitors. Travellers originating in the U.S. may access the territory by land, and these arrivals are rising. However, direct air capacity from other places to Yukon remains below pre-pandemic levels, a clear obstacle to attracting overseas visitors.

Looking ahead, a muted near-term economic outlook in several tourism source markets, including Germany, is likely to temporarily dampen overseas visits. Nevertheless, our latest travel outlook estimates this segment will grow by 18.3 per cent in 2024 and surpass 2019 pre-pandemic levels by 2026.

To further realize its significant potential, the tourism sector must work to overcome labour and housing supply challenges. In 2023, the Tourism Industry Association of the Yukon's Recruitment and Retention Action Plan set out three goals to improve labour market conditions in the territorial tourism sector: improve Yukon businesses' capacity and competitiveness, increase connectivity between industry and educational institutions, and increase capacity to recruit nationally and internationally.

Construction

Output in Yukon's construction sector grew by an impressive 34 per cent in 2022, spurred by a significant increase in transport engineering construction. We estimate construction output increased by a further 5.7 per cent in 2023. Investment in building construction (seasonally adjusted in constant dollars) increased by 6.5 per cent last year, reaching an all-time high.

Under the weight of higher interest rates, the resilience of Yukon's residential sector is being tested. The number of residential building permits fell by 25 per cent in 2023, an indicator that home building has slowed. In the housing market, would-be homebuyers are facing higher borrowing costs. Accordingly, activity in the real estate market cooled in 2023, with fewer retail transactions and a lower average resale price for single-detached houses relative than in 2022.

In 2024, real business investment in residential structures is forecast to decrease by 3.4 per cent as home builders respond to subdued demand. But the slowdown in the residential sector is expected to be relatively short-lived. A strong economic outlook over the next few years will spur labour demand and draw migrants to Yukon, in turn, incentivizing home building. Over the next five years, we forecast average annual growth of 2.6 per cent in real residential business investment

As in many other parts of the country, low housing affordability is a key challenge in Yukon. The Canada Mortgage and Housing Corporation estimates 20 per cent of families in Whitehorse are unable to afford market housing. Overcoming the housing crisis is arguably one of the greatest national economic challenges. In Yukon, homelessness in Whitehorse has risen, according to local charities. The territory's ability to attract domestic and international migrants, critical in meeting future labour demand, will hinge on the availability and affordability of housing.

Non-residential construction, which accounts for a smaller share of the construction industry, performed well in 2023, spurred by a surge in commercial investment as well as publicly funded infrastructure projects. Our outlook tracks large ongoing and planned construction projects in Yukon.

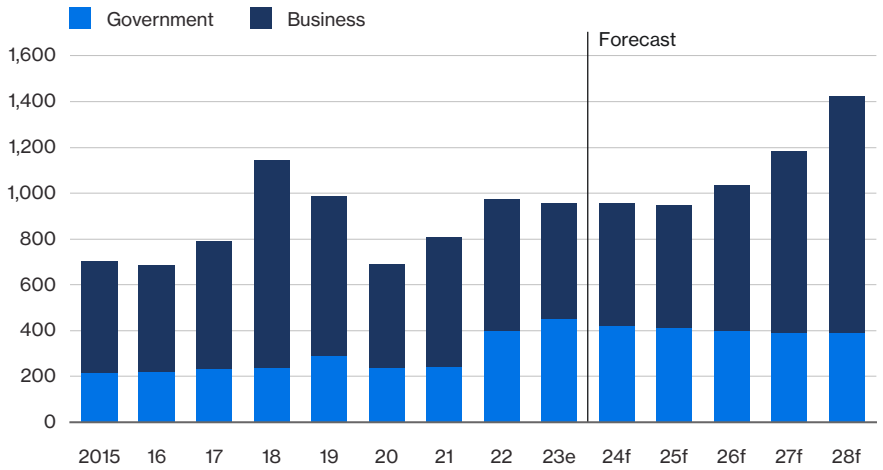
Construction of the Nisutlin Bay Bridge is ongoing, with an expected completion date of 2026. The bridge's cost has risen to $184 million in part due to a change order stemming from new regulations to protect fish.

The Yukon Resource Gateway Program is a portfolio of infrastructure upgrades to existing roads aimed in part at improving access to areas of high mineral potential. Several of the projects have agreements in place with Yukon First Nations, including upgrades to the Nahanni Range Road, Silver Trail, North Canol Road, Robert Campbell Highway, and Freegold Road.

The territorial and federal governments recently announced $14 million in funding for two transportation projects, the Takhini River Bridge and North Klondike Highway. The upgrade to the Takhini Bridge will see the bridge widened to better accommodate cyclists and pedestrians. Other projects included in the outlook are an 800-kilometres fibre optic line along the Dempster Highway and construction work at Erik Nielsen Whitehorse International Airport.

The government of Yukon's five-year capital plan includes almost $2.1 billion in investment over the next five fiscal years spread across key priority areas. Government investment as a share of total investment has risen in recent years and will remain strong in the years ahead. In the latter half of the decade, construction of the Kudz Ze Kayah and Casino mine will contribute to non-residential investment and drive up the share of business-led investment in Yukon. (See Chart 3.)

Chart 3
Recent investment gains supported by increased government spending
(investment spending, 2017 $ millions)

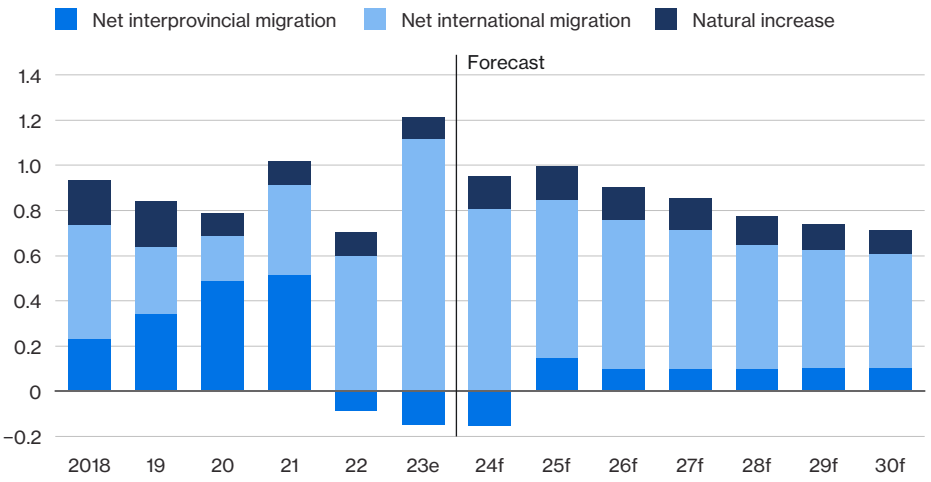


e = estimate; f = forecast
Sources: The Conference Board of Canada; Statistics Canada.

Demographics

Population growth in Yukon accelerated to 2.3 per cent in 2023, the highest rate since 2017, allowing total population in the territory to end the year at just above 45,000. Population growth in Yukon is underpinned by international migration. (See Chart 4.) In 2024, population growth is forecast to slow marginally to 2.2 per cent. Amid a declining natural rate and moderating international migration, population growth will average 1.7 per cent between 2025 and 2030. By 2045, we see the territory's population surpassing 60,000 residents.

Chart 4
International migration drives Yukon's population growth
(contribution to population growth, 000s)



e = estimate; f = forecast
Sources: The Conference Board of Canada; Statistics Canada.

The median age of Yukon's population is rising, and the fertility rate is below the replace rate of 2.1 children per woman. Together, these forces mean that the natural rate of increase is falling and the territory is increasingly dependent on migration for population growth.

The territory is experiencing a rise in immigration supported by historically high federal immigration targets. In addition, inflows of non-permanent residents, a group that includes international students, temporary foreign workers, and asylum seekers, have also strengthened. While immigration is expected to remain strong in the coming years, we anticipate a moderation in temporary resident inflows. Financial requirements for students have been tightened, while the federal government is tightening the rules for firms wishing to hiring temporary workers, which were relaxed in the immediate wake of the pandemic.

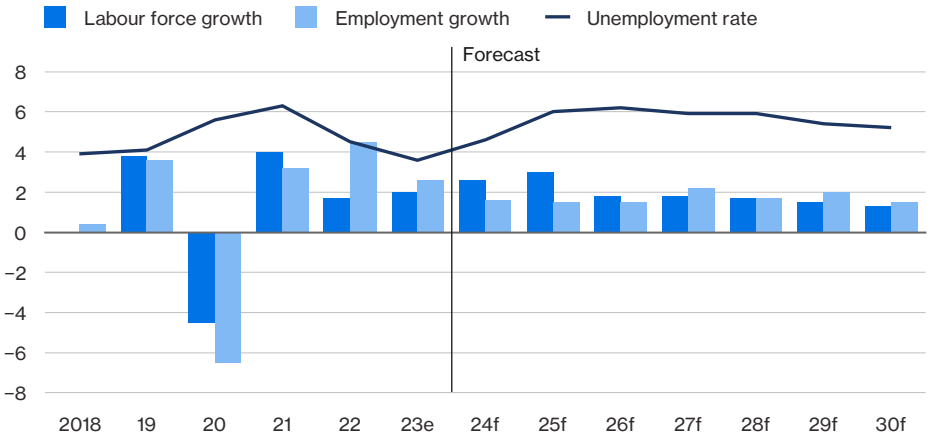
Meanwhile, net interprovincial migration in Yukon fell into negative territory in 2022 but is forecast to rise above zero again by 2025. Beyond 2025, Yukon's strong labour market will draw migrants from other parts of the country. The erosion of affordability in housing markets in several areas of the country is increasingly shaping patterns of interprovincial migration. Notably poor housing affordability in Ontario and British Colombia has driven outflows of migrants to other regions in search of more affordable housing. While Yukon remains an attractive destination, the territory's ability to attract interprovincial migrants, particularly those of young and core-working age (25–54), will depend on housing availability and affordability.

Labour market and households

Yukon's labour market remained resilient in the face of rising economic headwinds in 2023. Employment rose by 600 jobs, a smaller increase than 2022. As employment gains outpaced labour force gains, the unemployment rate decreased to 3.6 per cent.

The latent effects of higher interest rates are now being felt in the labour market, subduing labour demand. Meanwhile, high levels of international migration are supporting labour force growth. In 2024, 2025, and 2026, our forecast is that labour force growth will outpace job growth, resulting in a rising unemployment rate. (See Chart 5.)

Chart 5
Unemployment rate rising as migration-fuelled labour force growth outpaces job growth
(per cent)



e = estimate; f = forecast
Sources: The Conference Board of Canada; Statistics Canada.

While international migration and downward cyclical factors may offer a partial reprieve from labour supply pressures, the underlying force of population aging will see firms confront increasingly tight labour market conditions in the latter half of the decade. After 2026, Yukon's unemployment rate is expected to trend downward as an aging population pushes down participation rates.

Households in Yukon are benefiting from the gradual easing in inflation that is helping to restore price stability. Retail sales grew by 7.7 per cent in 2023, outpacing 4.9 per cent inflation. The resilience of consumer spending across the country in the face of tightening financial conditions has been notable, and Yukon is no exception. Factors such as residual pent-up demand, expanded savings, a strong labour market, and accelerated wage growth all contributed to buoyant consumer spending in 2023. We expect this momentum to moderate in 2024 as labour market conditions soften and wage growth cools. Retail sales are forecast to slow to 3.1 per cent growth in 2024, then average a healthy 3.4 per cent between 2025 and 2030.

Download forecast tables

This report examines the long-term economic outlook for Yukon. The outlook is based on detailed analysis of local and regional conditions, combined with The Conference Board of Canada's proprietary macroeconometric model of the territorial economies. The model contains over 1,200 variables and equations structured uniquely to each of the territories. Inputs and outputs include components of gross domestic product, the interaction of industry sectors, detailed population and labour force conditions by age group, interprovincial trade, and pricing and investment activity.

The forecast was completed on January 31, 2023.

Acknowledgements

Yukon's Outlook to 2045 was prepared by Liam Daly, Senior Economist, under the general direction of Ted Mallet, Director of Economic Forecasting. The territorial outlooks are funded by the Centre for the North.

Solid Foundations: Yukon's Outlook to 2045
The Conference Board of Canada

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April 19, 2002

REPORT AND RECOMMENDATIONS OF THE

JUDICIAL COMPENSATION COMMITTEE

Submitted to: The Minister of Justice and Attorney General
for the Province of Manitoba

COMMITTEE:

Martin H. Freedman, Q.C., Chair
Harold G. Piercy, Nominee of The Manitoba Provincial Judges' Association
Victor H. Schroeder, Q.C., Nominee of the Province of Manitoba

COUNSEL:

Robb Tonn and Susan Dawes, for The Manitoba Provincial Judges' Association
E. William Olson, Q.C., for the Province of Manitoba
John M. Scurfield, Q.C., for the Masters of the Court of Queen's Bench

This argument noted salary differentials between judges in the Supreme Court of Canada and other courts, between judges on the trial courts in each province and provincial court judges and between justices of the peace and commissioners and judges at various levels. Many of these arguments, said the commissioners, were "compelling". The Commission decided that a more in-depth review and evaluation of information was needed than it had received and, accordingly, it made no decision on that particular issue.

The Manitoba legislature has, by Bill 46, linked the Judges with the Masters in terms of compensation from June 6, 2001 onwards. As the Province correctly argued, the Masters have never been "regarded as being at a level of 'relative parity' with Queen's Bench Judges", thus re-enforcing the appropriateness of no direct linkage between Provincial Court Judges and Queen's Bench Judges.

The Judges argued that the federal judicial salaries should be among the most important factors we consider. We regard the federal salaries as relevant, and as one of a number of factors, but do not single them out as being of paramount importance.

(c) **Deputy Ministers**

The Province suggested that compensation of senior Deputy Ministers within the Manitoba civil service was a relevant factor in determining Judges' compensation. It focused on the position of Deputy Attorney General, responsible for a large department with a large number of staff and argued that the Deputy Attorney General's compensation ought to exceed that of the Chief Judge. At the top of the scale in 2000/01, the Deputy Attorney General received $123,599. In the next two years the salary will be $126,396 and $129,309. The Province also pointed out that the Judges have a more attractive pension arrangement than the Deputy Attorney General and other civil servants which was a factor, it said, that we should take into account. Further, the Judges enjoy significant security of tenure. They keep office during good behaviour and are not required to retire at any particular age. The Deputy Attorney General, on the other hand, holds office at the pleasure of the Lieutenant Governor in Council and is inherently subject to less security of tenure.

In recent years the Chief Judge's salary as a percent of the Deputy Attorney General's salary has been as follows:

1995/96	88.9%
1996/97	88.9%
1997/98	95.5%
1998/99	103.0%
1999/2000	101.0% (Chief Judge at 1998/99 level)
2000/2001	98.7% (Chief Judge at 1998/99 level)

The Province noted that the Chief Judge's salary has risen to approximate parity with that of the Deputy Attorney General as a result of the JCC process and that when pension improvements are taken into account the total compensation

received by the Chief Judge is "significantly in excess" of that of the Deputy Attorney General.

The Ontario JCC chaired by Dean Beck said (page 44) that salaries paid to the senior civil servants in Ontario were a "relevant factor" to take into account. The federal Commission in its recent report devoted some considerable space to comparisons with senior Deputy Ministers, taking the view that compensation of senior Deputy Ministers was relevant in considering judicial compensation. It said that the Deputy Minister 3 level should not be determinative, but was nevertheless an appropriate and useful comparator because of the relevance of (page 31) "the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the judiciary".

It must be borne in mind that at the federal level there are no possible Canadian judicial comparators except provincial judges, whose salary levels are historically lower than the federally appointed judges, and who are not regarded as appropriate comparators. For that reason the federal Commission considers salary levels of, for example, judges in other countries and incomes of private practitioners. The salary of a Deputy Minister has far greater relevance federally than it might in Manitoba.

The Judges firmly rejected the validity of any comparison with salaries of Deputy Ministers. They argued that this was simply "a relic from another era" and was based on the notion of absolute government control over the compensation of the persons it pays. The Judges pointed out that a number of judicial compensation tribunals had rejected the validity of the comparison. For example, in Ontario in

1988 (Judges, page 56), the Commission noted:

> "**Wholly different imperatives govern the salaries appropriate to each. Deputy Ministers are primarily managers . . . in paying them it is appropriate to provide wide salary ranges and payment based on performance. The function of a provincial court judge, however, is neither administrative nor managerial; thus, it is not truly comparable to that of a Deputy Minister . . .**"

In Manitoba, all previous JCCs have been presented with and have considered the Province's approach attempting to tie the Judges' salaries to those of Deputy Ministers. When JCC1 issued its report in June, 1991, salaries for Judges had been linked to senior civil service salaries for a dozen years. JCC1 said (page 10):

> "**Obviously we must determine what other occupations can be considered comparable for purposes of establishing appropriate compensation. . . the most compelling comparison is with their counterparts in other jurisdictions.**
>
> **Senior Civil Servants are often one group that is used as a comparison . . . This comparison draws criticism for a number of reasons . . . the fact is that the functions, duties and responsibilities of the two positions are very different . . .**
>
> **Ultimately, the unique nature of Judging makes comparisons with other positions of little value; it is other judicial salaries that are really the most relevant guide . . ."**

JCC2 (December, 1995) said (page 6):

> "**. . . the [JCC1] logic with respect to salaries is difficult to refute. The work of a Judge is really unique . . .**"

Later (page 9) after indicating where a certain judicial salary would relate to a Deputy Minister's salary, JCC2 said:

> "**This is not to suggest that the work of a judge can be compared to that of the . . . Deputy Minister of Justice. It cannot . . . The position and functions of a judge are not comparable to a senior executive management position in . . . the public sector . . . The only valid comparison between Judges and Deputy Ministers is that both are paid by the taxpayer.**"

JCC3 agreed that a comparison of the job functions was not possible, and said that the rate of pay of senior civil servants reflects a government's ability to pay as well as the marketplace for senior professionals. We will observe that, as noted below, it reflects also a government's willingness to pay in a situation where negotiating for pay is permissible, unlike with the Judges.

We also note that, when the legislature expressed its will in Bill 46, it mandated for future JCCs a comparison, not with the compensation of senior civil servants, but only with other "judicial compensation packages". This is a compelling statement of Provincial public policy.

Although we are not engaged in an interest arbitration, as we observed earlier, certain elements considered by interest arbitrators have some pertinence here. In this context the type of work performed by the persons under consideration must be taken into account and, where possible, compared to the type of work done by other persons in comparable positions. For that reason, we think that comparison

of Judges' compensation with the compensation of other judges, whether provincially or federally appointed, is of far more relevance than a comparison of compensation paid to civil servants. We share the view, which we think is applicable when considering judicial compensation, of Professor Weiler (1988) that:

> "**The relevant comparison . . . is with earnings of people who have essentially the same training and responsibilities but who happen to work in other settings.**"

In other words, the best comparators for judges are other judges. The New Brunswick Commission put it bluntly in 1998 when it said (page 12) that "the only true comparison is with other judges".

There is another factor which strikes us as pertinent. The compensation of senior Deputy Ministers is fixed, essentially unilaterally, by the Province. There is no element of third party review, such as this process nor, we suspect, is there usually very much in the way of negotiation between the senior Deputy Ministers and the Province. This reality was noted by the Quebec Court of Appeal in a decision provided to us by the Judges **(Quebec Judges Conference v Quebec, Attorney General** (2000), 196 DLR (4th) 533 at 540):

> "**To base the remuneration of judges necessarily on the remuneration of level 1 government managers would be to upset the constitutional process, because the government completely controls the remuneration of higher level public servants which remuneration is in no manner determined by a constitutional rule . . .**"

The historical relationship between the salary of a Judge and a Deputy Minister has limitations as a guide to setting judicial compensation. There is no obvious reason why a Judge's earnings should be linked to a Deputy Minister's. It is not disputed that the work of one is completely different from the work of the other. The pool of possible candidates for the two positions is almost completely different. Judges must be lawyers of at least five years standing. Deputies come from government, industry, academia and the professions. The marketplace for senior administrators may be, and probably is, a relevant factor when a government decides what it will pay its Deputies. However, that marketplace is irrelevant to what a Judge should be paid. Ultimately, a Deputy Minister's salary is a reflection of what the government of the day unilaterally determines to pay to its senior administrators. There is no constitutional rule or context that governs, as there is with the Judges.

We have taken into account the Deputy Ministers' salary levels because, like the Judges, they are paid by the provincial government and their salaries are a possible indicator of a government's "ability" to pay. We have, however, concluded that their compensation is not as helpful, as a comparator, as the compensation levels of other judges, including both provincially and federally appointed judges.

Newfoundland Provincial Court Judges Salaries and Benefits Tribunal

Tribunal Report
September 14th, 2001

Lois R. Hoegg, Q.C., Chair

John G. Abbott, Member

David Day, Q.C., Member

The Association's position is that there has been no increase in judges' salaries since 1994 and that the Consumer Price Index has increased 13.7% since that time.

On April 1, 1994, Provincial Judges' salaries were effectively frozen at $112,000. There have been no increases or adjustments since that time. The Tribunal accepts that when inflation is considered, an effective decrease in judges' salaries has resulted. Government is relying on payment of retroactive salary increases recommended by the Whalen Report for the years 1992 to 1994 to cancel the effects of inflation to date. The comparison with provincial government employees serves only to illustrate that their salaries have also not kept pace with inflation, and to an even greater degree than the judges.

In essence, the issue for the Tribunal in considering this factor is to what extent judges' salaries should be increased to account for the effects of inflation.

(c) **How the salaries of Provincial Court judges compare with those of other relevant groups in society**

The parties presented very different positions in their submissions on this issue. In summary, Government's position is that the salaries of senior provincial executives are valid and useful comparators for determining provincial judicial compensation. It rejects using an Atlantic or national Provincial Court bench salary average as a comparison base for the Newfoundland Provincial Court for these averages disregard the fiscal realities of our province. It rejects comparison with compensation for federally appointed judges primarily for the same reason, as well as for the reason that the nature of the work performed by the two groups of judges is different.

The Association put forward the position that the only relevant comparator for determining the compensation of the Newfoundland Provincial Court judges is the compensation of other judges, both federal and provincial. Further, the Association seeks parity in compensation with federally appointed judges. It argues that there is no longer justification for the wide discrepancy in salary levels between the two groups. It bases its position on the Provincial Court's continually expanding jurisdiction and workload, its post 1991 professionalization, and the fact that it draws from the same talent pool as that drawn on by courts served by federally appointed judges.

The Tribunal acknowledges that there are many useful comparators in determining appropriate compensation for the Provincial Court judges. These include the compensation provided to federally appointed judges, the salaries paid to other provinces' provincial judges, the payment of Newfoundland's senior executives (on the basis that these are individuals regarded as possessing the same characteristics and attributes often looked for in judges, ie. integrity and ability), and the incomes generated by lawyers in both public and private practices (on the basis that these are the people who must be attracted to the Provincial Court bench). However, in the Tribunal's view, these comparators are not necessarily of equal weight.

From the Tribunal's perspective, it is time, at ten years post the new *Act*, to put the magisterial tradition and historically direct linkage of Provincial Court salaries to those of deputy ministers firmly behind us. While we would not go so far as to say that the compensation paid to members of the executive should not be considered, we are of the view that Provincial Court judges' compensation should not be formally linked to that of the government executive.

The Tribunal is of the view that other judicial compensation is a weighty factor. We have not engaged in an analytical comparison of the differences between the Provincial Court and the Supreme Court. It is accepted that there are differences between them, aside from the fact that there are different paymasters, which justify differences in compensation between these groups of judges. The Tribunal recognizes, however, that there have been many developments in the evolution of the Provincial Court in the last decade, eg. the requirement for legally trained and experienced judges and its continually expanding jurisdiction due to new and amended federal laws, the diminishment of exclusive Supreme Court jurisdiction over some offences and the proliferation of provincial statute law governing quasi-criminal and civil behaviour over which the Provincial Court has largely exclusive jurisdiction. These changes have narrowed some of the differences between the courts, and the trend may continue.

(f) **The fiscal capacity of government in light of current economic conditions**

This is a critical consideration. As Green J.A. (as he then was) said in *Her Majesty v. The Judges of the Provincial Court of Newfoundland et.al.* at paragraph 147, "As a starting proposition, it must be recognized that judges cannot claim to be immune from the impact of economic measures deemed necessary by the government of the day to properly discharge their governmental responsibilities relative to fiscal and economic matters."

This statement is an endorsement of former Chief Justice Lamer's reasoning in *P.E.I. Reference* wherein he concludes that judges must contribute to efforts to deal with economic crises and management of the country's economies.

IN THE MATTER OF THE COURTS OF JUSTICE ACT

AND

IN THE MATTER OF AN INQUIRY BY THE 9th & 10th PROVINCIAL JUDGES

REMUNERATION COMMISSIONS (2014-2018, 2018-2022)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

("the Government")

And

THE ONTARIO CONFERENCE OF JUDGES

("the Judges")

Before:	William Kaplan, Chair Roy Filion, Nominee for the Government Chris Paliare, Nominee for the Judges
Appearances	
For the Government:	Sunil Kapur Kate McNeill-Keller McCarthys Barristers & Solicitors
For the Judges	Steven Barrett Goldblatt Partners Barristers & Solicitors Colleen Bauman Goldblatt Partners Barristers & Solicitors

A hearing in this matter was held in Toronto on November 8, 2017 and April 5, 2018.

Introduction

This is the report of the 9th and 10th Provincial Judges Remuneration Commissions. It is being filed with the Chair of Management Board of Cabinet in accordance with section 51.13 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 as amended and section 16 of *Appendix A of Framework Agreement* ("the Framework Agreement") set out as the schedule to that Act. This report contains the recommendations of the Commission contemplated by section 15 of the Framework Agreement for the Ontario Court of Justice for the period April 1, 2014 to March 31, 2018 and April 1, 2018 to March 31, 2022.

The purpose of the Framework Agreement is set out in section 2:

> The purpose of this agreement is to establish a framework for the regulation of certain aspects of the relationship between the executive branch of government and the Judges, including a binding process for the determination of Judges' compensation. It is intended that both the process of decision-making and the decision made by the Commission shall contribute to securing and maintaining the independence of Provincial Judges. Further, the agreement is intended to promote co-operation between the executive branch of government and the judiciary and the efforts of both to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice.

The Framework Agreement continues the Provincial Judges Remuneration Commission on a quadrennial basis. The mandate of, and criteria to be used by, the Commission in recommending appropriate salary levels, benefits, allowances, and pension are set out in sections 13 and 25 of the Framework Agreement (and are set out below). Further to sections 27 and 30 of the Framework Agreement, the Commission's recommendations with respect to salary, benefits, and allowances are binding on the Government. Recommendations with respect to pension are non-binding.

Governing criteria are as follows:

a) the laws of Ontario;

b) the need to provide fair and reasonable compensation for judges in light of the prevailing economic conditions in the province and the overall state of the provincial economy;
c) the growth or decline in real per capita income;
d) the parameters set by any joint working committees established by the parties;
e) that the Government may not reduce the salaries, pensions or benefits of judges individually or collectively, without infringing the principle of judicial independence; and
f) any other factor which it considers relevant to the matters in issue.

Without doubt, the Commission has a critical constitutional role in safeguarding the independence of the judiciary. Maintaining judicial independence is *the* overriding factor in the consideration of judicial compensation. That is why an independent, effective, and objective judicial compensation commission is interposed between the Judges and the Government. The Commission plays an important public policy role as a guardian of the independence of the judiciary. Needless to say, the public interest in an independent judiciary is paramount.

It should be noted that no Judges participated in the discussions with the Government save for their participation in the technical work of the Joint Pension Working Group. Stated somewhat differently, while substantive discussions on a number of complex issues did take place, notably pensions – for example, there was a Joint Pension Working Group on which representatives of the government and representatives of the Judges, and their counsel sat – we are fully satisfied that nothing occurred that would, in any way, compromise judicial independence.

Under section 18 of the Framework Agreement, "the parties agree that the representatives of the Judges and the Lieutenant Governor in Council may confer prior to, during or following the conduct of an inquiry and may file such agreements with the Commission as they may be advised." As already noted, the representatives of the Government and the Judges did confer. They have agreed on certain recommendations to be made by the Commission provided that the Commission is in agreement with them. Those recommendations proceeded to a hearing held in Toronto on November 8, 2017 and April 5, 2018. It should be noted that pursuant to the Framework Agreement, neither party is precluded, before future Commissions, from pursuing different positions or indeed pursuing any matter within the jurisdiction of the Commission.

The Commission has now had the opportunity to consider the agreed-upon recommendations of the Government and the Judges. Our job, summarily stated, is to arrive at an objective and fair set of recommendations dictated by the overriding public interest in ensuring an independent judiciary. Having carefully considered the applicable criteria, and the joint recommendation in this principled fashion, the Commission fully and unequivocally endorses the proposed recommendations of the Government and the Judges and recommends the following:

***Salary*:**

1. As per paragraph 27 of Appendix A of the Framework Agreement, which is a Schedule to the *Courts of Justice Act*, salary recommendations of the Commission come into effect on the first of April in the year in which the Commission began its inquiry;

2. For the period of April 1, 2014 to March 31, 2018, salaries of Provincial Judges, Regional Senior Justices, Associate Chief Justices and the Chief Justice of the Ontario Court of Justice (appointed before November 12, 2013) are increased annually in an amount equivalent to the IAI (Canada) indexing, as follows:

	April 1, 2014 (1.9%)	April 1, 2015 (2.7%)	April 1, 2016 (1.2%)	April 1, 2017 (0.7%)
Provincial Judge:	$279,791	$287,345	$290,793	$292,829
Regional Senior Justice:	$300,800	$308,600	$314,100	$315,300
Associate Chief Justice:	$308,300	$316,100	$321,600	$322,800
Chief Justice:	$313,300	$321,100	$326,600	$327,800

Note: The salary provisions for judges appointed to administrative positions prior to November 12, 2013, are determined as follows and as set out in O.I.C 225/2016:

- The rate for Regional Senior Justices is to be 9.65% above the rate for Provincial Judges, subject to not exceeding the salary rate for federally appointed puisne judges of the Superior Court of Justice on April 1 of that year.
- The rate for Associate Chief Justices is $7,500 above the rate for Regional Senior Justices.
- The rate for the Chief Justice is $12,500 above the rate for Regional Senior Justices.

3. For the period of April 1, 2014 to March 31, 2018, salaries of Provincial Judge, Regional Senior Justices, the Senior Advisory Family Judge, Associate Chief Justices and the Chief Justice of the Ontario Court of Justice (appointed on or after November 12, 2013) are increased annually in an amount equivalent to the IAI (Canada) indexing, as follows:

	April 1, 2014 (1.9%)	April 1, 2015 (2.7%)	April 1, 2016 (1.2%)	April 1, 2017 (0.7%)
Provincial Judge:	$279,791	$287,345	$290,793	$292,829
Regional Senior Justice/Senior Advisory Family Judge:	$287,291	$294,845	$298,293	$300,329
Associate Chief Justice:	$294,791	$302,345	$305,793	$307,829
Chief Justice:	$299,791	$307,345	$310,793	$312,829

Note: The salary provisions for judges appointed to administrative positions on or after November 12, 2013, are determined as follows and as set out in O.I.C 225/2016.:

- The rate for the Regional Senior Justices and the Senior Advisory Family Judge is to be $7,500 above the rate for Provincial Judges, subject to not

exceeding the salary rate for puisne judges of the federal Superior Court of Justice on April 1 of that year.

- The rates for Associate Chief Justices are $7,500 above the rate for Regional Senior Justices.
- The rate for the Chief Justice is $12,500 above the rate for Regional Senior Justices.

4. Commencing on April 1, 2018, the salaries of Provincial Judges will be increased over the four year term of the 10th Provincial Judges Remuneration Commission to align with a percentage of the salary rate of a puisne judges of the federal Superior Court of Justice ("Federally Appointed Judge") on a phased-in approach to 95.27% of a Federally Appointed Judge's salary by April 1, 2021, as follows:

Year	Provincial Judge Salary Rate Percentage Link to Federally Appointed Judge's Salary Rate
April 1, 2018	Provincial Judge April 1, 2017 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial Judges salaries to 93.47% of the Federally Appointed Judge's current year's salary rate
April 1, 2019	Provincial Judge April 1, 2018 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial Judges salaries to 94.07% of the Federally Appointed Judge's current year's salary rate
April 1, 2020	Provincial Judge April 1, 2019 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial Judges salaries to 94.67% of the Federally Appointed Judge's current year's salary rate
April 1, 2021	Provincial Judge April 1, 2020 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial Judges salaries to 95.27% of the Federally Appointed Judge's current year's salary rate

5. For clarity, the term "Federally Appointed Judge's current year's salary rate" in paragraphs 6 and 9 includes the annual adjustment to a Federally Appointed Judge's salary as of April 1 of the current year as per s. 25 of the *Judges Act*, R.S.C., 1985, c. J-1, after implementation of any IAI increase to the Federally appointed Judge's salary, and implementation of any increases, including retroactive increases, to the 2020 and 2021 the salary rate that may be awarded as a result of the 6th Judicial Compensation Commission for federal judges.

6. The salaries of Regional Senior Justices, the Senior Advisory Family Judge, Associate Chief Justices and the Chief Justice of the Ontario Court of Justice would continue to be increased annually to preserve the differential with the salary of a Provincial Judge as described in paragraphs 4 and 5 of this submission and as set out in O.I.C 225/2016.

7. The parties agree that providing Provincial Judges with the above noted salaries ending with an amount that is 95.27% of the Federally Appointed Judge's current year's salary rate as of April 1, 2021 reflects an appropriate level of remuneration for the term of the ninth and tenth Commissions in light of the criteria the Commission is mandated to consider.

Benefits:

Insured Benefits

8. Effective April 1, 2018, insured benefits for all active and retired Provincial Judges and their eligible dependents and survivors will be changed as follows:

    (a) Restructure benefits related to psychological/MSW services to $40 per half hour of service with an annual cap of $1,400

    (b) Increase the paramedical entitlement to $35 per visit per practitioner

    (c) Provide a laser eye surgery entitlement of up to $1,000 max per insured (Lifetime Max), in addition to the existing routine eye exam coverage and $450 vision care max in any consecutive 24 month period;

9. The Government confirms that any clause in any insurance contract applicable to judges and or their dependents precluding group insurance coverage in the event of attempted suicide or physician assisted death does not apply.

Judicial Allowance:

10. Effective April 1, 2018, a Provincial Judge is not entitled to claim or be reimbursed under section 32 (1) Order in Council O.C. 225/2016, or its successor Order-in-Council, for more than $3,750 for expenses in respect of the twelve-month period commencing on the 1st day of April in each year.

11. The Ontario Government and the Association of Judges agree to meet and discuss the judicial allowance for per diem Provincial Judges.

Housekeeping:

12. The Government will take steps to amend Schedule B of O.I.C. 225/2016 to reflect the $3,000 coverage for Dentures and Orthodontic, which is already provided and currently set out in the Great West Life policy.

13. Confirmation of the application of dental assignment of benefits, which is a payment arrangement between an active or retired Provincial Judge or their eligible dependents or survivors and their dentist which allows the insured to authorize Great West Life to pay the dentist directly for the eligible claims expense. For clarity, the dentist must agree to the assignment of dental benefits in order for the insured to participate in this payment arrangement.

Joint Benefits Committee:

14. Establish a joint committee consisting of Ontario Government and Provincial Judge Representatives to discuss a number of benefit related concerns. The items to be addressed may include the following:

    (a) Setting out of benefits in OIC rather than only in GWL policies;

(b) Addressing discrepancies and inconsistencies between GWL policies and OIC (i.e. paramedical services, drug coverage);

(c) Setting out in OIC cap on premiums for Catastrophic Drug Coverage as per 8th Commission ($10.44 single/$21.24 family);

(d) Judges' concerns about changes to GWL policies, no matter how minor, without Judges' knowledge or approval or without going through the Commission;

(e) The process for determining increases to premiums for Judges and retired Judges;

(f) Provision of up-to-date and historic copies of GWL policies to Association;

(g) Provision of accurate information for judges (i.e. Judges request for dedicated person at GWL to deal with judicial benefits, up-to-date and more detailed benefit guide);

(h) Inclusion of Benefit Coverage for Retirees in the judges' benefit plan;

(i) Dependent definition in s. 1 of Schedule B of O.I.C. 225/2016 to address Association's concerns re: maximum age and disabled dependent children; and

(j) Judges' concerns regarding Long Term Income Protection coverage and pension entitlement for judges who do not meet the basic service requirement at age 65.

15. The list of benefit issues to be discussed by the joint committee can be expanded upon mutual agreement of the parties;

16. The Committee will address any matters before it in a manner that is consistent with the role and jurisdiction of the Commission in relation to the determination of Judges' remuneration. The Commission may hear submissions on any items not resolved within the Committee, which are within the jurisdiction of the Commission. The parties agree that the establishment of this Committee neither expands nor narrows the jurisdiction of the Commission. Either party will have the ability to argue whether or not the above listed issues fall within the Commission's jurisdiction.

***Pensions*:**

17. See Appendix A

***Other*:**

18. Upon a referral by the Association and the Government during the term of the Commission under paragraph 14 of the Framework Agreement set out as a Schedule to the *Courts of Justice Act,* the Commission may conduct an inquiry and make recommendations regarding the pension benefits of Provincial Judges

arising out of any expansion of the Family Branch of the Superior Court of Justice (i.e., the Unified Family Court).

19. Upon a referral by the Association and the Government during the term of the Commission under paragraph 14 of the Framework Agreement set out as a Schedule to the *Courts of Justice Act,* the Commission may make recommendations regarding the issue of representation costs to be paid, if any, associated with the implementation of the Commission's recommendations, including matters related to the joint pension committee and joint benefits committee.

20. If the Association wishes to make a referral pursuant to paragraphs 20 or 21 above, the Government shall consent to make the referral jointly.

21. Representation Costs of the Association for the 9th and10th Commission will be paid as follows [within 30 days of the issuance of the recommendations of the Commission]:

    (i) Disbursements (including actuarial fees and disbursements, other expert advice, and lawyers disbursements plus HST on all the fees and disbursements);

    (ii) Legal fees plus HST.

DATED at Toronto this 18th day of April 2018.

"William Kaplan"

_____

William Kaplan, Chair

"Roy Filion"

_____

Roy Filion, Nominee for the Government

"Chris Paliare"

_____

Chris Paliare, Nominee for the Judges

APPENDIX A – JOINT SUBMISSION ON PENSIONS

Objective:

The pension benefits (both lifetime benefits and ancillary benefits) provided to provincial judges and their survivors/dependents and the associated contribution levels and other requirements will remain unchanged from what is currently provided by Ontario Regulation 290/13 to the *Courts of Justice Act*. The vehicles used to provide these benefits will change to the three instruments set out below. This will change the tax treatment of the contributions to and benefits received from the Provincial Judges Pension Plan.

1. Registered Pension Plan (RPP)
2. Retirement Compensation Arrangement (RCA)
3. Supplemental Pension Plan (SUP)

RPP:

- The RPP shall be registered under the *Income Tax Act (Canada) and Regulations* (ITAR) with the Canada Revenue Agency but shall not be registered under the Ontario *Pension Benefits Act* (PBA).
- The RPP will provide a pension of 2% of final three-year average indexed salary multiplied by service up to the pension benefit maximums as determined under Regulation 8504 of ITAR. For 2017, the maximum pension under the ITA is reached at an average salary of $147,222. Salary in excess of that will receive a pension from the RCA.
- Ancillary benefits currently provided by Ontario Regulation 290/13 will also be provided under the RPP up to the maximum permitted by ITAR.
- Provided they do not have a material negative impact on the Ontario Government's accounts and that the necessary data is available with reasonable effort, the Ontario Government will take what steps are permitted under ITAR to maximize the value of the benefits payable from the RPP
- Funding for the RPP will be through the use of a trust (established through a trust agreement and if necessary as approved or authorized by legislation).
- The Trustees will be one or more entities as agreed to by the Ontario Government and the Association of Ontario Judges, which could include the Provincial Judges Pension Board and/or the Ontario Pension Board.
- Contributions by the Provincial Judges and the Ontario Government will be made to the RPP trust to the extent permitted by ITAR.
- Ontario Government contributions will be based on an actuarial report that is not more than four (4) years old.
- Any surplus that may arise in the RPP trust is the property of the trust unless and until it can be transferred to the Ontario Government under the terms of the trust for the following purposes:
    - Payment of required Government contributions in accordance with the regulation that provides for judicial pensions and survivor allowances under the *Courts of Justice Act* (currently provided by Ontario Regulation 290/13);
    - Any surplus shall revert to the Ontario Government provided the obligations in respect of pension benefits as set out in the regulation that

provides for judicial pensions and survivor allowances under the *Courts of Justice Act* (currently provided by Ontario Regulation 290/13) are satisfied, in the unlikely event of plan wind-up.

- For clarity the Provincial Judges are not entitled to any surplus that may arise from the RPP trust.
- The Ontario Government will transfer assets to the RPP trust to fully fund the obligations under the RPP calculated as of the applicable valuation date using a discount rate equal to the OFA's 25-year borrowing rate (the current basis for setting the discount rate under the PJPP). The balance of the assets allocated to the PJPP in the CRF will remain in the CRF. Once the asset mix for the RPP is established, the discount rate to be used for actuarial valuations will be based on the expected return on assets with the appropriate margin. This is expected to create a funding excess in the RPP which, in the Government's sole discretion, may be maintained as a reserve to address asset volatility and/or to reallocate current service contributions to the RCA that would otherwise be made to the RPP.

RCA:

- The RCA will provide a pension of 2% of final three-year average indexed salary multiplied by service minus the amount paid from RPP.
- Ancillary benefits currently provided by Ontario Regulation 290/13 will also be provided under the RCA minus what is provided under the RPP.
- Funding for the RCA will be through the use of a trust (established through a trust agreement and if necessary as approved or authorized by legislation).
- The Trustees will be one or more entities as agreed to by the Ontario Government and the Association of Ontario Judges, which could include the Provincial Judges Pension Board and/or the Ontario Pension Board.
- The RCA will be partially funded to a level sufficient to pay three (3) to five (5) years' worth of benefit payments (lifetime benefits and ancillary benefits), in accordance with advice from the Plan's actuary. The funding will be established gradually through three types of contributions:
    - contributions by the Provincial Judges that are not permitted to go to the RPP due to ITAR contribution maximums will be made to the RCA; and
    - The Government of Ontario will match these contributions by the Provincial Judges to the RCA trust.
    - Additional annual contributions by the Ontario Government to the RCA trust based on the current service cost of the benefits provided by the RCA and, at least initially, on the current service cost of the benefits provided by the SUP, both to be calculated on a going concern basis until the partially funded target level is reached.
- Once the three (3) to five (5) years' worth of funding has been established in the RCA trust, the annual government contributions shall be expensed to a Special Purpose Account (SPA) in the Consolidated Revenue Fund (CRF) which is used to fund the Provincial Judges' RCA and SUP benefits. The government, however, will continue to match the contributions of judges into the RCA trust.
- Funding requirements for the RCA, including amounts payable to the SPA, shall be based on an actuarial report that is not more than four (4) years old.

- Any surplus shall revert to the Ontario Government provided the obligations in respect of pension benefits as set out in the regulation that provides for judicial pensions and survivor allowances under the *Courts of Justice Act* (currently provided by Ontario Regulation 290/13) are satisfied, in the unlikely event of plan wind-up.
- Funds that are remitted to and held by CRA in a refundable tax account are deemed to be property of the RCA trust.

SUP:

- The SUP will provide a pension equal to what is currently provided by Ontario Regulation 290/13 minus the amounts paid from the RPP and RCA.
- Ancillary benefits currently provided by Ontario Regulation 290/13 will also be provided under the SUP minus what is provided under the RPP and RCA.
- Funding for the SUP will be through the use of a SPA under the *Financial Administration Act*. For clarity, no trust shall be established in respect of the SUP.
- Funding requirements for the SUP shall be based on an actuarial report that is not more than four (4) years old.
- Funds for the SUP shall be expensed to the SPA at least annually by the Ontario Government.
- The Ontario Government shall credit the amount recorded in the SPA with the market rate of return as set out below.

Investment Account:

For the purpose of determining the market rate of return used for the SPA as described above, the Ontario Government will establish a Proxy Investment Account (PIA). For clarity, the PIA does not form part of the Provincial Judges Pension Plan (consisting of the RPP, RCA, and the SUP).

The PIA would hold funds equal to the amount held in the SPA. Provincial Judges would have no entitlement to the funds held in the PIA.

The PIA would remain part of the CRF, available for the Ontario Government's use.

Funds in the PIA would be invested in the market in a manner appropriate for investments of a pension plan in order to determine what the market rate of return would be on the SPA funds if they were directly invested in the market. The rate of return would be calculated annually based on the performance of the PIA.

In order to maintain the appropriateness of the PIA as a proxy for the SPA, the PIA must maintain the same amount of funds as the SPA. The PIA will, therefore, need to be periodically rebalanced by having funds added or subtracted. The frequency of this rebalancing will be at the discretion of the Ontario Government but will be at least annually.

The PIA is expected to operate in the following manner:

- The PIA is under the control of the Minister of Finance, as CRF funds normally are.
- The PIA would be invested by the Minister of Finance through a service level agreement with investment professionals. This may be the Investment Management Corporation of Ontario or another third party investment manager.
- As the PIA is a proxy for a pension fund, Treasury Board Secretariat is responsible for determining the investment policy of the PIA.
- Returns on the PIA would remain in the PIA and not be transferred to other accounts in the CRF.

Other:

The Ontario Government and the Association of Ontario Judges make these submissions on a without prejudice basis with regard to the position of either party as to whether the revisions made to O. Reg. 290/13 to comply with the *Income Tax Act (Canada)* did or did not require prior review by the Provincial Judges Remuneration Commission.

The pension benefits (lifetime benefits and ancillary benefits) of provincial judges and their survivors/dependents shall not be subject to the PBA.

Funds held in the RPP and RCA shall be invested in a manner consistent with the fiduciary obligations to the plan members.

Preliminary List of Implementation Instruments

A number of implementation instruments would be required as set out below, including the following to be developed by the Ontario Government, with prior disclosure to the AOJ:

- Legislative amendment to the Financial Administration Act (FAA) to authorize the Ministry to invest the PJPP Supplemental Plan assets separately from the CRF in a proxy Investment Account in the kinds of investments that would be appropriate for a pension plan and to allow the interest earned on that investment to be put back to that Investment Account.
- An appropriation for the registered PJPP, RCA and proxy investment account to be set up by a cash transfer out of the CRF either via statutory amendment or by a voted appropriation obtained through the Government business planning cycle or as an in-year submission.
- A new order in council under Section 7(2) of the FAA that indicates the interest attributed to the SPA shall be the same as the rate of return of the proxy Investment Account.
- Amended service level agreements with OPB and PJPB for the running of the RCA and the registered PJPP.
- Amendments to the MOU with the PJPB.
- Funding protocols for government funding to the three vehicles.

The Ontario Government will engage in meaningful consultation with the AOJ in the development of the following preliminary list of potential instruments:

- Regulatory amendments to the PJPP to reflect the three separate components of the pension plan and the associated funding arrangements.
- The trust agreement and service level agreement with the third party trustee and/or investment manager.

- RPP and RCA documentation – custodial agreement and any other forms required by CRA.
- Communication materials for the judges to explain the changes.

The parties agree to return to the Commission which will remain seized, in order to address or resolve implementation issues if that should become necessary.

TAB 32

REPORT OF THE NORTHWEST TERRITORIES JUDICIAL REMUNERATION COMMISSION

2024

MEMBERS:

DAVID GILDAY – Chairperson

GILLIAN LEE

PETER VICIAN

Counsel for the Minister of Justice of the Government of the Northwest Territories
Trisha Paradis
Darren Proctor

Counsel for the Judges of the Territorial Court of the Northwest Territories
Susan Dawes
Kristen Worbanski

Counsel for the Judicial Remuneration Commission
Sheldon Toner

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Introduction

[1] The *Territorial Court Act*[1] establishes the process through which territorial judges' salaries and benefits are set. The Judicial Remuneration Commission (Commission) conducts an inquiry and, based on submissions received at a hearing of the inquiry from territorial judges or their representatives, the Minister of Justice (the Minister), and any other interested person or body, makes recommendations which are binding on the Minister to implement.[2]

[2] The Commission is mandated to complete an inquiry and deliver its report within 120 days of January 1 in every fourth year after January 1, 2008.[3] The current Commission will establish territorial judges' salaries for the fiscal years 2024/25, 2025/26, 2026/27 and 2027/28. The Commission's recommendations take effect on April 1 of the year the Commission holds its hearing. This reflects the beginning of the government's fiscal year, with each fiscal year running April 1 to March 31.

[3] The scope of issues to be addressed by the Commission is set out in subsection 12.5. Legislation requires the Commission to inquire into and deliver a report with recommendations regarding the salaries paid to territorial judges, and the pension, vacation leave and other benefits to be provided to territorial judges. Section 12.9 of the *Territorial Court Act* sets out the factors the Commission must consider in making its recommendations.[4]

[4] The Minister and the territorial judges addressed the current Commission on two specific issues, namely the salaries of territorial judges and the differential to be paid to the Chief Judge of the Territorial Court. The parties did not identify pension, vacation leave, and other benefits, as matters requiring determination in the current inquiry.

[5] This report therefore focuses on evaluating the parties' presentations regarding salary and the Chief Judges' differential. The Commission is satisfied, with respect to all other issues, that recommendations from its most recent previous inquiries should continue to bind the Minister prospectively until the next inquiry in 2028. This specifically includes recommendations regarding extended health benefits for full-time judges and retired judges.

[6] The last inquiry to consider salary concluded its proceeding at the onset of the Covid-19 pandemic in 2020. There was considerable uncertainty at that time regarding the future impact of the pandemic on economic conditions and factors affecting relative incomes and cost of living. In the context of the current inquiry, new uncertainties with respect to inflation and other issues present themselves.

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[1] *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2
[2] *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, section 12.1 to 12.95
[3] *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, section 12.8
[4] *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, section 12.9

[7] In the current inquiry, the Commission is aided by the considerable evidence and argument provided by the Minister and territorial judges, including expert opinion evidence from Dr. Trevor Tombe. The Commission wishes to thank counsel for their capable presentations regarding the application of the factors in section 12.9 to determine the salary of territorial judges and the Chief Judge differential.

Issues

[8] The following is a summary of the issues the Commission has been asked to consider in making recommendations for territorial judges for the fiscal years 2024/25, 2025/26, 2026/27 and 2027/28:

1. What should the Commission recommend territorial judges receive for salary over the next four years?

2. What should the Commission recommend the Chief Judge receive as a differential in addition to the salary of territorial judges?

Background

[9] The Commission conducted its inquiry through written submissions followed by a public hearing held in Yellowknife, Northwest Territories, on January 17, 2024.

[10] Notices of the hearing were posted on the Northwest Territories Courts' website and in multiple editions of News/North and The Yellowknifer, newspapers serving the Northwest Territories.

[11] The Commission received information directly from counsel, in the form of asserted or uncontested evidence combined with argument. The Commission presented interrogatories and received written responses from the parties before the hearing.

[12] Dr. Tombe was the sole witness to testify at the public hearing and be subject to questioning by the Minister and the Commission. The Commission accepted him as an expert qualified to give opinion evidence in economics.

Salary of Territorial Judges

[13] The parties have both advanced positions and rationales in support of increasing territorial judges' salaries over the next four years.

[14] The territorial judges' position is that they should receive an increase of salary to $360,000 per annum effective April 1, 2024, followed by annual increases on April 1,

2025, 2026 and 2027, based on the percentage increase in the Consumer Price Index (CPI) for Yellowknife, Northwest Territories, over the preceding calendar year.

[15] The Minister's position is that territorial judges should receive an increase of 1.0% effective April 1, 2024; followed by additional annual increases of 1.0% on April 1, 2025; 1.5% on April 1, 2026; and an increase of 1.5% on April 1, 2027.

Evidence and Submissions

Nature and Extent of Legal Jurisdiction – Subsection 12.9(a)

[16] The following is a summary of the evidence presented to the Commission on the nature and extent of the legal jurisdiction of territorial judges:

[17] Territorial judges deal with all aspects of the Territorial Court's jurisdiction, which includes criminal, civil and family law, as well as child protection, regulatory and traffic prosecution, and specialized courts. Some provincial and territorial court judges outside the Northwest Territories have jurisdiction over child protection but not family law. In other jurisdictions, judges may be able to specialize in criminal or family law.

[18] Criminal cases form the mainstay of Territorial Court's workload. This includes trials of summary conviction offences, hybrid offences, and indictable offences. Territorial judges also conduct preliminary inquiries, sentencing hearings, motions, and case management conferences.

[19] The nature of the court's criminal work has changed since the 2020 Commission. The federal government passed amendments to the *Criminal Code* in June 2019, further to Bill C-75. The amendments made pursuant to Bill C-75 reclassified numerous offences, resulting in a reduction in the number of offences eligible for preliminary inquires under the Criminal Code. The Territorial Court has adapted to these changes since the last inquiry.

[20] In addition to hearing matters under the Criminal Code, territorial judges hear cases prosecuted under the *Controlled Drugs and Substances Act*, plus a variety of federal and territorial legislation establishing offenses in areas which include environmental protection, fisheries and wildlife, workplace health and safety, and municipal bylaws.

[21] Territorial judges hear most Youth Justice Court cases, and deal with matters relating to young offenders including applications relating to custody orders and community supervision orders. They also preside over sentencing conferences and bail conferences in complex cases.

[22] The Territorial Court has jurisdiction over small claims civil matters of amounts up to and including $35,000. Some but not all provincial and territorial courts elsewhere in Canada have small claims jurisdiction, and the monetary threshold varies. The Territorial

Court frequently deals with unrepresented litigants in these proceedings. Civil claims are subject to mandatory mediation and acting as mediator requires a unique set of skills of territorial judges.

[23] The volume of small claims matters heard in the Northwest Territories constitutes less than 1% of the total matters heard by the Territorial Court, according to information provided by the Minister. Data from the Territorial Court registry shows that between 2013 and 2023, up to the date of the Minister's reply submission, 33 civil claims were filed in the Territorial Court, which is less than 1% of the total matters before the Territorial Court.[5]

[24] The Territorial Court has jurisdiction over family law matters including issues of custody, child and spousal support, maintenance, child protection, legitimacy, paternity and adoption. Territorial judges receive jurisdiction from an array of legislation which includes the *Family Law Act*, the *Childrens' Law Act*, the *Interjurisdictional Support Orders Act*, the *Protection Against Family Law Act*.

[25] The Territorial Court also has jurisdiction in the areas of child protection, under the *Child and Family Services Act*. Territorial judges also deal with temporary and permanent child apprehensions in the Northwest Territories.

[26] Territorial judges also consider *ex parte* applications for general warrants, DNA warrants, production orders, sealing orders, and applications to vary the conditions of court orders. Other out-of-court work includes the development and delivery of training and education programs to lawyers, other judges, justices of the peace, and others.

[27] The Territorial Court hears applications for psychiatric assessments, and applications to determine whether an accused person is unfit to stand trial. The jurisdiction to address these applications arises under the *Criminal Code*, the *Youth Criminal Justice Act*, and the *Mental Health Act*. Territorial judges are involved in various ways with specialized courts, namely the Intimate Partner Violence Treatment Options Court (IPVTO), Wellness Court and Drug Treatment Court.

[28] Matters involving minor offences may be diverted from the court system to Community Justice Committees, and territorial judges may meet with local committees while on circuit. In addition, they participate directly on other territorial and national committees related to various aspects of the administration of justice.

[29] The Minister has provided the Commission with tables illustrating the relative volumes of case heard by the Territorial Court in the various areas of law falling under the court's jurisdiction. The data shows that in 2023, up to the date of the Minister's reply submission, there had been 10 new child protection matters, 43 maintenance enforcement matters, and no new family matters filed with the Territorial Court.[6]

[5] Minister's Book of Documents, Tab 1: FACTS Court Information System: Summary of all court cases filed 2013-2023 (as of November, 2023)
[6] Minister's Book of Documents, Tab 1: FACTS Court Information System: Summary of all court cases filed 2013-2023 (as of November, 2023)

[30] The information provided to the Commission from the Minister shows that the territorial judges' overall caseload consists mostly of adult criminal, youth criminal and Summary Offence Ticket Information (SOTI) matters, which have comprised 97.35% to 97.8% of the Territorial Court's caseload from 2020 to 2023.[7]

Judges' Submissions:

[31] The following is a summary of the territorial judges' submissions on the nature and extent of territorial judges' legal jurisdiction:

- The Territorial Court exercises significantly broader jurisdiction than other provincial and territorial courts, compounded by the increasing complexity of criminal matters coming before the court.
- The Northwest Territories is one of a limited group of jurisdictions in Canada where provincial or territorial judges exercise criminal, civil and family jurisdiction.
- Territorial judges must deal with all areas of the court's jurisdiction, and do not exercise solely criminal or civil jurisdiction as some judges may do, for example, in Alberta.
- Territorial judges have the third highest civil claims limit, exceeded only by Alberta and Quebec. Civil claims are subject to a mandatory mediation session with a judge, unless otherwise directed, which requires a unique set of skills.
- The passage of Bill C-75 has resulted in the Territorial Court hearing less preliminary hearings and more trials, resulting in a notable increase in longer and more complex trials in the Territorial Court. Where the matter arises outside Yellowknife, this gives rise to the need for special circuits.
- Reinvigoration of the IPVTO and Wellness Courts has increased the number of accused availing themselves of these alternatives to regular criminal court.
- The broad and varied jurisdiction of territorial judges supports compensation that is among the highest paid to judges in provincial and territorial jurisdictions.

Minister's Submissions:

[32] The following is a summary of the Minister's submissions on the nature and extent of territorial judges' legal jurisdiction:

- The jurisdiction exercised by the territorial judges is similar to the jurisdiction exercised by other territorial and provincial court judges across Canada and has changed very little over the last 25 years.
- While individual judges are not able to specialize, this is likely true of most territorial and provincial judges in Canada.

[7] Minister's Book of Documents, Tab 2: FACTS Court Information System: Charges Filed between 2013-01-01 and 2023-12-31

- Territorial judges also hear small claims matters of a limited dollar amount. The Territorial Court's civil claims limit of $35,000 is typical and within the range for provincial and territorial courts across Canada, which is between $25,000 to $100,000.
- Territorial judges hear mostly criminal and regulatory matters in the Northwest Territories, as well as family law matters, being mainly child protection matters and applications for child support.
- The Territorial Court does not have jurisdiction in areas including divorce, adoption, guardianship and Public Trustee matters, foreclosures, defamation, issues regarding title to land, estates, appeals from administrative tribunals, and civil matters where damages claimed exceed $35,000.
- Territorial Judges have an important and significant role to play in the administration of justice in the Northwest Territories, as reflected in their current salary and benefits.

Adequacy of Salaries having regard to Cost of Living – Subsection 12.9(b)

[33] The Commission received evidence regarding cost of living changes in the Northwest Territories as well as economic reports to assist in forecasting increases over the next four years including recent reports from the Conference Board of Canada[8] and the Northwest Territories Economic Review for 2023-2024.[9]

[34] Dr. Tombe also delivered a written report and testimony to the Commission in which he addressed economic and cost of living conditions in the Northwest Territories.[10] The key conclusions of his report pertaining to the cost of living, in the context of recent inflationary developments, follow.

[35] The 2020 Commission recommended cost of living increases to territorial judges' salaries based on CPI statistics published by Statistics Canda. The CPI tracks changes in the cost of a fixed basket of consumer goods, calculated for areas across Canada, including the cost of a fixed basket of goods in Yellowknife, Northwest Territories, where the territorial judges reside.

[36] In late 2021, inflation surged in many jurisdictions worldwide. The period 2019 to 2022 marked the highest acceleration of consumer prices in over half a century. The

[8] Minister's Book of Documents, Tab 12: Conference Board of Canada, "Charting New Paths – The Northwest Territories' Outlook to 2045" and Tab 13: Conference Board of Canada, "A Rocky Road Ahead – The Northwest Territories' Outlook to 2045"
[9] Minister's Book of Documents, Tab 14: Economic Review 2023-2024
[10] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT"

average CPI increase for the years 2019 to 2022, for Yellowknife, Northwest Territories, was 1.6% for 2019, 0.1% for 2020, 2.2% for 2021 and 7% for 2022.[11]

[37] Between February 2020 and September 2023, CPI in Yellowknife rose by 11.9% compared to 15.3% across Canada. Inflation then declined quickly with consumer price growth returning to 1.8% in September 2023, close to the bank of Canada's target rate of 2%. The only significant inflationary pressure left in Yellowknife is from food, which contributes 1.5% more to the current inflation rate compared to February 2020.

[38] The future pace of consumer prices in the Northwest Territories may stabilize around the Bank of Canada's target range of 2% to 3% with the likely end of the most severe inflationary period. Consumer prices are nonetheless an estimated 4.6% higher than they would have been with normal inflation, representing a potentially permanent and material reduction in individuals' purchasing power.

[39] In order to compensate for this erosion, average wage growth in recent quarters has risen to 3.5% per year, as opposed to the average annual adjustment of 3% per year seen in new contracts prior to the pandemic.

[40] Dr. Tombe includes in his report CPI forecasts for the years 2023 through 2027. In 2023, the Conference Board of Canada forecasts a CPI increase of 3.1% whereas Dr. Tombe forecasts 3.4%. In 2024, the Conference Board of Canada forecasts a CPI increase of 2.3% whereas Dr. Tombe forecasts 2.1%. In 2025, the Conference Board of Canada forecasts a CPI increase of 2.1% whereas Dr. Tombe forecasts 2.0%. In 2025 and 2026, forecasts converge. Both the Conference Board of Canada and Dr. Tombe predict CPI increases of 2.0% for each of the last two years of this Commission's mandate for recommendations.

[41] Weekly earnings and median incomes are higher in the Northwest Territories than in other parts of Canada. In terms of relative purchasing power, $1.40 in the Northwest Territories has the same purchasing power as $1.00 in the broader Canadian context. In other words, $1.00 earned in the Northwest Territories equates to $0.71 in the rest of Canada in terms of purchasing power.

Judges' Submissions:

[42] The following is a summary of the territorial judges' submissions on the adequacy of judicial salaries having regard to the cost of living in the Northwest Territories:

- The territorial judges' proposal to increase salaries to $360,000 for 2024/25 would be an 8% increase.

[11] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 3

- CPI is expected to have increased upwards of 3.4% over 2023, which amounts to a real increase of 4.6% beyond what is required to protect the 2023 salary from erosion due to increased cost of living.
- The territorial judges further submit there is a significant difference between "adequate" compensation, which ensures salaries do not fall below a minimum level, and "appropriate" compensation which reflects a consideration of all the relevant factors.
- A salary increase in 2024/25 based solely on CPI would result in territorial judges' salaries falling significantly behind judicial salaries at the top tier nationally.
- In subsequent years, territorial judges' salaries would be increased based on the change in the percentage CPI for Yellowknife over the preceding calendar year.
- The Minister's argument that current salaries are adequate does not take into account cost of living changes anticipated over the next years.

Minister's Submissions:

[43] The following is a summary of the Minister's submissions on the adequacy of territorial judges' salaries having regard to the cost of living in the Northwest Territories:

- The territorial judges' 2023/24 salary of $333,456 plus benefits is clearly adequate to ensure judicial independence and protect judges from financial pressure.
- Territorial judges' salaries have coincided with or outpaced recent increases in the cost of living, most recently through a 6.9% salary increase from 2022/23 to 2023/24.
- Territorial judges are already compensated at a level that maintains judicial independence and preserves them from any perception of vulnerability to pressure or manipulation.
- The Minister's proposed salary increases would ensure territorial judges' salaries are not eroded by inflation over the next four years.

Salaries of Judges in Other Jurisdictions – Subsection 12.9(c)

[44] The parties introduced a Joint Book of Exhibits including a table setting out the salaries of provincial and territorial judges from jurisdictions across Canada. [12] The table is very useful for comparative purposes and is therefore attached to this report as Appendix A.

[45] In addition to salary, territorial judges currently receive a northern allowance of $3,700 per annum. There is no proposal to increase this amount, but the Commission requested information regarding comparable remote or northern supplements paid to

[12] Joint Book of Documents, Tab 13: Puisne Judges' Salaries Across Canada, as at November 2023

judges in other territories and provinces. The following is a summary of the information provided by the parties:

[46] In the Yukon, judges receive a northern allowance of $2,042 per year. Some judges in Manitoba receive an amount equal to 5% of salary as a northern allowance, which would be $15,067 per year based on the 2022/23 Manitoba salary. In Newfoundland and Labrador, judges can be eligible for a northern allowance of $2,150 per individual or $4,300 per family.

Judges' Submissions:

[47] The following is a summary of the territorial judges' submissions on the salaries of provincial and territorial judges elsewhere in Canada:

- A comparison of salaries of judges in other jurisdictions is helpful because the judiciary is unique in constitutional status and job function, making comparison with other jobs difficult.
- The work of a judge is uniquely stressful, involving matters where the stakes are high for participants in the court process, and territorial judges are exposed to tense and emotional circumstances as well as disturbing and traumatic subject matter.
- The 2012 Commission recommended salaries be amongst the highest for provincial and territorial judges in Canada; the 2016 Commission recommended salaries in the fourth position nationally; and the 2020 Commission recommended salaries in the upper end and within the top quartile for provincial and territorial judges nationally.
- Previous Commissions' comparisons of judicial salaries have taken into account the more onerous working conditions of territorial judges in the Northwest Territories.
- The Commission is urged to consider what other judges will be making in the next four years, not just the 2023/24 salaries highlighted in the Minister's submissions.
- Judges in other provinces and territories receive northern allowances comparable to the $3,700 allowance received by territorial judges in the Northwest Territories.

Minister's Submissions:

[48] The following is a summary of the Minister's submissions on the salaries of provincial and territorial judges elsewhere in Canada:

- The Commission should consider this factor equal amongst other factors and not as establishing a "ranking system" in which territorial judges must maintain their previous rank.

- It is difficult to ascertain the salaries and benefits of provincial and territorial judges across Canada for several reasons:
    - In Alberta, judicial compensation commissions have issued recommendations that have not been accepted by the respective governments, and judicial review (litigation) is likely.
    - In Manitoba and Quebec, hearings are pending, and in the Yukon, a hearing has been held but the commission has not yet issued its report and recommendations.
    - In Saskatchewan, New Brunswick and Nova Scotia, provincial court judges' salaries have been fixed as a percentage of federally-appointed judges' salaries; and the federal judicial compensation committee report is not due until 2025.
    - Prince Edward Island bases judicial salaries off a national average and Newfoundland & Labrador bases them off a maritime average leaving it unclear how information from other provinces is used to calculate salaries.

Working Conditions of Territorial Judges – Subsection 12.9(d)

[49] The following is a summary of the working conditions of territorial judges, while working in Yellowknife and elsewhere while on circuit, as outlined in material submitted by the territorial judges and the Minister.

[50] The Northwest Territories covers a large area and territorial judges must travel frequently to communities outside Yellowknife for circuit courts. The twenty circuit destinations in the Northwest Territories require territorial judges to be away from their homes for periods that can exceed five days a week.

[51] Travel is subject to weather which can sometimes result in delays. In winter, travel takes place in cold and dark conditions. Most circuit travel is by small plane, in unpressurized cabins not equipped with washrooms.

[52] On some circuits, suitable accommodation is not available in the community and territorial judges must commute to and from a larger centre. Circuit courts are held in arenas, community centres, gymnasiums, community halls, council chambers, and hotels, lacking the amenities of a courthouse. There is often no private area for judges to use between court sittings, increasing the possibility of an accused person or member of the public approaching a judge.

[53] Communities where circuit courts are held can also lack restaurants or may have restaurants with limited hours. Territorial judges generally sit over five hours a day while on circuit, and often longer to accommodate witnesses and accused who may have travelled long distances to appear.

[54] There are no scheduled chambers days for territorial judges while on circuit. In addition, the Territorial Court deals with clients with difficult backgrounds and addiction

issues or cognitive challenges, without the level of support available to the court in Yellowknife. The Territorial Court also deals regularly with witnesses and accused persons through an interpreter.

[55] In terms of the volume of crime, Statistics Canada reports that a total of 24,256 *Criminal Code* violations (excluding traffic offences) were reported to police in the Northwest Territories by a population of 44,678. Statistics Canada also calculates a crime severity index (CSI) which assigns a weight to each violation relative to the average sentence, and the index for Northwest Territories for 2022 was 436.8 on a standard of 100. From 2012 to 2022, the total number of Criminal Code violations in the Northwest Territories increased by 12% and the CSI increased by 29% over the decade.[13]

[56] Territorial judges supervise and train justices of the peace in addition to their regular court duties, which includes four regular sessions per year plus meetings and refresher courses in the communities. Due to retirements in recent years, there is currently a more junior roster of justices of the peace who require training before they can perform more than administrative duties.

Judges' Submissions:

[57] The following is a summary of the territorial judges' submissions on working conditions:

- The 2016 Commission concluded that "the circuit work done by territorial judges is more challenging than anywhere else in the country" and "the working conditions of the Judges are in fact more onerous than those of judges in the rest of the country."
- The working conditions of territorial judges continue to be particularly onerous, primarily due to the rigorous conditions of the North including the challenges associated with circuit courts.
- The challenges of circuit work have increased due to additional special sittings being required outside Yellowknife since the passage of Bill C-75.
- High rates of crime and the limited jurisdiction of justices of the peace contributes to a complex workload for the judiciary.
- Territorial judges disagree with the Minister's submission that videoconferencing has materially alleviated working conditions or reduced the volume of circuit work.

Minister's Submissions:

[58] The following is a summary of the Minister's submissions on working conditions:

[13] Judges' Book of Documents, Tab 11: Police-reported Crime Statistics in Canada, 2022

- The 2012 Commission found that "the working conditions of territorial judges are certainly no worse than in the past and in fact have probably improved somewhat in recent years."
- Circuit work is not unique, and provincial and territorial judges across Canada are required to travel and hold court in numerous circuit points outside major centres.
- Travelling on circuit by air, as territorial judges do in the Northwest Territories, may be preferrable to travelling by car as some judges do in other provinces and territories.
- Territorial judges live in Yellowknife, which has a range of amenities, and none are required to permanently live in remote locations.
- Bill C-75 has not impacted the jurisdiction of the court, but rather the formation of how certain matters are heard, and the reduction in preliminary inquiries is a procedural issue.
- Past Commissions have distinguished workload from working conditions. Higher crime rates or workloads do not necessarily mean harsher working conditions.
- Increased use of videoconferencing during the Covid-19 pandemic improved access to justice and has had a positive impact on territorial judges' working conditions.
- Working conditions are challenging, but they have not gotten worse over the past four years and remain similar to those considered by the 2020 Commission.

Economic Fairness – Subsection 12.9(e)

[59] The Commission received evidence from the report and testimony of Dr. Tombe regarding professional incomes in the Northwest Territories, as well as from the Minister regarding the salaries of senior officials in the territorial government. The following is a summary of relevant evidence on this factor:

[60] Public sector employment in the Northwest Territories occupies a large share of the total population and labour force, and accounts for a substantially larger share of total labour compensation. In the Northwest Territories, approximately 29% of the population was employed in the public sector, and this represented 50% of total labour compensation in 2022.[14]

[61] Dr. Tombe further reports that average hourly compensation was higher for public servants in the Northwest Territories than for public servants nationally. Pay rates for public sector employees have generally increased over time at a rate that often surpasses the overall inflation rate of the Northwest Territories. Before the Covid-19 pandemic, for example, between 2001 and 2019, the average hourly wage for government sector

[14] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 27

employees rose on average 3.5% per year, which was 1.5% higher than the average rate of consumer prices increases in the Northwest Territories.

[62] The incomes of professionals in the Northwest Territories are also higher than the national average, ranking slightly below the Yukon, but ahead of Alberta and Saskatchewan. Since 2019, the average growth of public sector employees' hourly pay has been 1.2% while professional, scientific, and technical services employees have had an average growth rate of 6.1% per year.[15]

[63] Median incomes and disposable incomes are higher in the Northwest Territories than in other parts of the country. Real household disposable incomes in the Northwest Territories, for example, have increased since 2019, from $90,000 to over $113,000 in 2022. For Canada overall, the comparable level of household disposable income was $80,000.[16]

[64] The Government of the Northwest Territories latest economic review of 2023 predicted a 2.8% increase in average weekly earnings.[17] The Conference Board of Canada forecasts continued increases in disposable household incomes, at 2.6% in 2024, 3.5% in 2025, 3.8% in 2026 and 2.6% in 2027.[18] The labour market in the Northwest Territories is competitive, and Dr. Tombe opines that any increase in labour demand is likely to result in higher wages.

[65] The Minister argues the Commission should use Deputy Minister's salaries as means of achieving economic fairness. Deputy Ministers' salaries in the Government of the Northwest Territories, effective April 1, 2022, range between $193,038 and $294,921. The Minister also notes that the Premier of the Northwest Territories, the most senior member of the executive branch of government, receives indemnities totalling approximately $207,721 per year.

Judges' Submissions:

[66] The following is a summary of the territorial judges' submissions on economic fairness:

- The high incomes of Northwest Territories residents, relative to residents of other jurisdictions, support territorial judges being paid a salary among the highest in Canada.

[15] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 30
[16] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 26
[17] Minister's Book of Documents, Tab 14: Economic Review 2023-2024 at page A6
[18] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 11

- The earnings of public sector and professional groups in the Northwest Territories compare favourably with their counterparts in other jurisdictions.
- Employees in the Northwest Territories consistently rank amongst the highest in various measures of compensation, even adjusting for higher prices in Yellowknife, and increases for other groups have exceeded the rate of inflation.
- The territorial judges contest the Minister's emphasis on Deputy Ministers' salaries for comparative purposes in evaluating economic fairness. There are more highly paid public servants as comparators, for example, physicians.
- The CPI increase of 6.9% which territorial judges received in 2023/24 simply maintained the real relative purchasing power, even while judicial salaries fell behind salaries in Ontario, Alberta, Saskatchewan, and British Columbia.
- Various measures of compensation all support the territorial judges' request for compensation that is among the highest compensation paid to judges across the country.

Minister's Submissions:

[67] The following is a summary of the Minister's submissions on economic fairness:

- Deputy Ministers' salaries are one of the longest-standing comparators for territorial judges' salaries.
- When benefits were considered, it was common ground that territorial judges' benefits were to be equivalent to those of Deputy Ministers in the territorial government.
- Territorial judges are amongst the highest paid public officials from the public purse in the Northwest Territories.
- Territorial judges bring a wealth of education and experience to their role, as do Deputy Ministers and other senior managers in the territorial government.
- Given that territorial judges receive benefits like those of Deputy Ministers, while enjoying superior job security, it is reasonable that judicial salaries should not deviate too far from Deputy Ministers' salaries.
- Territorial judges' salaries have grown at a higher rate than average Deputy Minister salary over the same period, such that the disparity has increased from $45,000 in 2012 to $70,000 in 2022, representing a disparity increase of 59%.
- The Minister contends it is arguably fair, economically, that salaries paid to the different branches of government be considered in setting territorial judges' compensation.

Economic Conditions of the Northwest Territories – Subsection 12.9(f)

[68] The economic conditions of the Northwest Territories are addressed in reports from the Conference Board of Canada[19] and the Northwest Territories Economic Review for 2023-2024.[20] They were also addressed at the hearing through Dr. Tombe's written report and testimony. The following is a summary of the relevant economic observations and forecasts presented to the Commission:

[69] The Conference Board of Canada reports that the economic outlook for the Northwest Territories is "modest" and that "Falling diamond production will undermine GDP growth in the years ahead."[21]

[70] The Northwest Territories Economic Review indicates the economy had been contracting before the Covid-19 pandemic and has not fully rebounded.[22] Diamond mines are scheduled to close in 2025, 2029 and 2030. All currently producing diamond mines are expected to cease production by 2030.[23] Economic risks to the Northwest Territories continue, including a lack of diversification.[24]

[71] Dr. Tombe concludes that "conditions in the Northwest Territories are generally strong relative to other jurisdictions and are projected to remain so in the coming years."[25] In his opinion, prospects for the Northwest Territories appear favourable for the coming years based on the considerations outlined below.

[72] Inflation is expected to stabilize and wage growth is set to rise at a rate exceeding consumer price growth from 2024 onwards. On a per capita basis, the Northwest Territories' gross domestic product (GDP) is higher than any region except Nunavut. Dr. Tombe's view is that real and nominal GDP growth is also expected to be strong in the future, with the potential for large-scale projects to have a considerable effect on long-term growth.[26]

[73] Dr. Tombe expected that employment and real income would decline in 2023 primarily due to rising consumer prices. This temporary economic weakness is not

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[19] Minister's Book of Documents, Tab 12: Conference Board of Canada, "Charting New Paths – The Northwest Territories' Outlook to 2045" and Tab 13: Conference Board of Canada, "A Rocky Road Ahead – The Northwest Territories' Outlook to 2045"
[20] Minister's Book of Documents, Tab 14: Economic Review 2023-2024
[21] Minister's Book of Documents, Tab 13: Conference Board of Canada, "A Rocky Road Ahead – The Northwest Territories' Outlook to 2045" at Key Findings
[22] Minister's Book of Documents, Tab 14: Economic Review 2023-2024 at page A4
[23] Minister's Book of Documents, Tab 14: Economic Review 2023-2024 at page A12
[24] Minister's Book of Documents, Tab 14: Economic Review 2023-2024 at page A14
[25] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at pages 2-3
[26] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at pages 12-14

attributed to fundamental challenges but to the withdrawal of government support programs following the pandemic, lower capital expenditures, and lower exports.[27]

[74] During the four-year mandate of the Commission, one of the three producing diamond mines in the Northwest Territories is expected to close, which is expected to lower diamond production in that year. Mining activities that could begin in 2026 may ensure that this effect is short lived.[28]

[75] Dr. Tombe acknowledges that the Northwest Territories economy is marginally less diversified than Alberta and Saskatchewan and more diverse than Newfoundland and Labrador, with mining activities accounting for 22% of the economy, public administration accounting for 19% and health and educational services accounting for 16%. This economy is susceptible to unpredictable shifts in commodity prices, given that mining dominates economic activity, in common with many Canadian regions.[29]

[76] The mining sector in the Northwest Territories, however, features a high share of employees who reside outside the territories. In Dr. Tombe's opinion, this feature of the economy somewhat buffers the Northwest Territories from downturns since job losses in the sector are felt more in employees' home jurisdictions than in the Northwest Territories.[30]

[77] In terms of capital investment, the Northwest Territories is among the most capital-intensive regions in Canada on a per capita basis. In addition, Dr. Tombe expects employment growth to continue to be robust in the coming years. Since 2018, economic growth has been strong in sectors including construction, healthcare, and public administration.[31]

[78] The overall labour market in the Northwest Territories is also strong relative to other jurisdictions, with the unemployment rate below 6% as of September 2023, the employment rate just under 70%, and the labour force participation rate at approximately 73%. Statistics Canada predicts the Northwest Territories' population will expand from 2022 to 2028, with a young and growing population being an important source of future growth.[32]

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[27] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 11-12
[28] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 17
[29] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 14
[30] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 17
[31] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at pages 14-15
[32] Judges' Book of Documents, Tab 3: Dr. Trevor Tombe, "An Analysis of Current and Medium-Term Economic and Cost-of-Living Conditions in NWT" at page 21

Judges' Submissions:

[79] The following is a summary of the territorial judges' submissions on economic conditions in the Northwest Territories:

- The Commission should follow the approach of past Commissions in not considering the government's financial position or ability to pay in its consideration of economic conditions.
- The territorial judges submit the Commission should prefer the expert opinions of Dr. Tombe where those opinions conflict with unqualified assertions made by the Minister regarding the economic conditions of the Northwest Territories.
- The territorial judges submit that Dr. Tombe's opinions do not support conclusions that mining is in a steady decline, that the economy is more dependant on the territorial government than ever before, that there is limited room to increase government expenditures because the government is approaching its debt ceiling, or that unknown costs for responding to flood and fire emergencies will greatly impact the government's financial position.

Minister's Submissions:

[80] The following is a summary of the Minister's submissions on economic conditions in the Northwest Territories:

- The past four years have been difficult for the Northwest Territories, with the Covid-19 pandemic, flooding in Hay River and wildfires across the Northwest Territories in 2023. The economic impact of these events is still unfolding and will be hard to fully calculate.
- The economic conditions of the Northwest Territories, and the economic state of the Government of the Northwest Territories, are closely intertwined.
- The government is approaching its debt ceiling, with expenses related to the pandemic and natural disasters, and there is no indication a turnaround is imminent.
- Dr. Tombe's predictions are overly optimistic, and do not adequately consider certain factors, for example, falling diamond production and set-backs to a tourism industry still struggling to recover from the pandemic.
- The declining mining industry and the lack of economic diversification affects other areas of the economy and will result in increasing reliance on public sector investments for employment and capital spending.

Any other Factor the Commission considers Relevant – Subsection 12.9(g)

[81] The Minister submits that the Commission should consider the financial situation of the territorial government in determining territorial judges' salaries. This has already

been noted above in the summary of submissions under economic conditions, subsection 12.9(f).

[82] The arguments concerning how that financial situation should affect judicial salaries can be addressed more fully in under subsection 12.9(g). The Commission prefers this approach since the correlation between the government's financial situation and economic conditions posited by the Minister has not been firmly established. The approach may be different in future inquiries, depending on the evidence and argument presented.

[83] The Commission heard from the Minister that the territorial government receives approximately 70% of its total annual revenue through "Territorial Formula Financing" (TFF). TFF grows at the rate of government spending multiplied by territorial population growth relative to national population, and the federal rate of population growth has exceeded the Northwest Territories rate for 18 of the past 20 years.

[84] The Government of the Northwest Territories (GNWT) has a total borrowing limit of $1.8 billion, set by a federal Order in Council, which the government uses to borrow capital while half the government's capital budget must be funded from cash from an operating surplus. The GNWT maintains a $120 million cushion below the borrowing limit to ensure a severe expenditure shock does not take the GNWT over the borrowing limit.

[85] The Finance Minister's Fiscal Update, dated September 28, 2023, indicates that spending on natural disasters would reduce the territorial government's projected operating surplus in 2023-2024 from $178 million to approximately $5 million.[33] The Minister also advises that Moody's Investor Services, a credit rating agency, has cut the territorial government's rating to Aa2 in March 2022, citing risks from debt financing, and borrowing costs.

[86] In response to the Minister's submissions on this factor, Dr. Tombe gave evidence that territorial government operations are generally balanced, and government's finances are often in surplus. There is an anticipated operational surplus of over $179 million, for example, projected over the period 2023/24 to 2026/27.

[87] Regarding the unknown final cost of natural disasters, Dr. Tombe's evidence was that most disaster expenses can be shifted to the federal government through the Disaster Financial Arrangements program, which is intended to shift up to 90% of disaster-related expenses.

[88] Dr. Tombe also described how the GNWT Fiscal Responsibility Policy requires the territorial government to incorporate financial prudence into its planning, for example, by observing a requirement to maintain debt service payments within a policy limit of 5% of GNWT revenues.

[33] Minster's Book of Documents, Tab 15: The Honourable Caroline Wawzonek, Minister of Finance, Northwest Territories Fiscal Update

[89] With respect to the TFF, Dr. Tombe also notes that the territorial government's gross expenditure base, which is incorporated in the federal TFF accounting for roughly two-thirds of government revenues, has grown on pace with per capita growth for all provincial and local governments.

[90] Dr. Tombe commented on how the TFF arrangement effectively insulates the territorial government from financial adversity, since the gross expenditure base of the territorial government would not change in the event of a negative shock to fiscal capacity. It would continue to grow at rates tied to the Parliamentary Budget Office's expectations of provincial and local expenditure growth and eventually compensate for the shock.

Judges' Submissions:

[91] The following is a summary of the territorial judges' submissions on other factors the Commission may consider relevant:

- Legislators in the Northwest Territories chose not to make the financial condition of the government a factor to be considered in determining territorial judges' salary and benefits.
- The Commission should prefer the expert evidence provided to the inquiry by Dr. Tombe where they differ from the unqualified submissions of counsel concerning the government's financial position.

Minister's Submissions:

[92] The following is a summary of the Minister's submissions on other factors the Commission may consider relevant:

- The Commission should consider, as a matter of context, that judicial compensation legislation requires commissions elsewhere in Canada to consider the financial position of their provincial or territorial governments.
- The territorial government faces increasing expenses, with increasing demands on the government to serve as the main investment driver in the context of sinking private investment with no new resource projects being built.
- The territorial government faces declining revenues from the TFF, noting that the Canadian population growth rate has exceeded the Northwest Territories' rate for 18 of the past 20 years.
- The territorial government also faces borrowing costs that present a further challenge to the GNWT's financial position, due to the downgrading of the government's credit rating.
- A fairly paid judiciary ranks high in terms of government priorities but recent challenges to the government's financial position, and the state of the economy, do not support the level of increase being sought by territorial judges.

Reasons for Decision – Salary

[93] The Commission is required to consider the factors outlined in section 12.9 of the *Territorial Court Act.* The Commission must make its own independent assessment of these factors, based on the evidence and argument presented.[34]

Nature and Extent of Legal Jurisdiction

[94] Territorial judges exercise a scope of jurisdiction that encompasses a wide range of work, including criminal and quasi-criminal matters, youth matters, civil claims, family matters, child protection matters, *ex parte* applications and other duties, psychiatric assessments, and mental health applications. Territorial judges also participate in specialized courts, and work with justices of the peace.

[95] This Commission echoes the acknowledgement of previous Commissions of the broad, varied, and extensive jurisdiction of the Territorial Court. Consideration of this factor has consistently supported recommendations to pay territorial judges in the upper range compared with other jurisdictions. In this year's inquiry, the Commission heard argument from the territorial judges that the scope of jurisdiction has expanded whereas the Minister contends it has not greatly changed in 25 years.

[96] The territorial judges have provided a summary of some of the differences between the jurisdiction of the territorial court and other provincial and territorial courts. The Territorial Court requires judges in the Northwest Territories to be versed in multiple areas of the law. This is not uncommon amongst provincial and territorial courts elsewhere, and the territorial judges' submissions do not highlight any particular or unique changes to the scope of territorial judges' jurisdiction in relation to other jurisdictions.

[97] The territorial judges contend that Bill C-75 has had a major impact on their jurisdiction, resulting in less preliminary hearings and more trials, requiring more special circuits in communities outside Yellowknife. This change to the *Criminal Code* is one that will have impacted all provincial and territorial courts across Canada. The change is essentially an internal change within the criminal jurisdiction traditionally exercised by those courts. The shift from preliminary hearings to trials may result in higher stakes in terms of the outcomes; but territorial judges will be using similar skills in exercising their jurisdiction in either type of proceeding. The more material concern for territorial judges would appear to be the purported effect of this change on working conditions, which has arguably impacted them more than counterparts in the provinces. This is addressed under working conditions.

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[34] *Provincial Court Judges' Association of New Brunswick* v. *New Brunswick (Minister of Justice)*; *Ontario Judges' Assn.* v. *Ontario (Management Board)*; *Bodner* v. *Alberta*; *Conférence des juges du Québec* v. *Québec (Attorney General)*; *Minc* v. *Quebec (Attorney General)*, [2005] 2 S.C.R. 286, at para. 15

[98] The Minister's submission identifies numerous areas in which territorial judges do not have jurisdiction. The areas identified are divorce, adoption, guardianship and Public Trustee matters, foreclosures, defamation, issues regarding title to land, estates, appeals from administrative tribunals, and civil matters where damages exceed $35,000. These areas are within the jurisdiction of federally-appointed judges, and the submission does not highlight any change or diminution of territorial judges' jurisdiction.

[99] Basically, the Territorial Court has similar but not identical jurisdiction to other provincial and territorial courts in Canada. It is a court created under territorial legislation comprised of territorially-appointed judges and, as such, it is not a federally-appointed court and does not have the powers of a superior court.

[100] The nature and jurisdiction of the Territorial Court aligns in all important respects with the jurisdiction of other provincial and territorial courts. These are the courts which deal primarily with adult and youth criminal matters, drug offences and regulatory offences excepting matters which fall to superior courts.

[101] These types of matters are the predominant caseload of the Territorial Court, as illustrated by evidence from the Minister showing that approximately 97% percent of cases heard in the Territorial Court fall into these categories.

[102] Jurisdictional similarities between the Territorial Court and other provincial and territorial courts provides a rationale for comparing judicial salaries from other jurisdictions, in addition to the fact that subsection 12.9(c) of the legislation already requires such comparison. Evidence from other provinces and territories also provides examples of how to award salaries reflective of statutory courts' jurisdiction as compared with superior courts' jurisdiction.

[103] There are differences in salary between provinces and territories, which will result from the considerations of all factors by judicial compensation commissions, including but not limited to the nature and extent of jurisdiction. The theme that traverses the country and makes other provinces and territories valid comparators, is the level of knowledge and expertise required of a provincial or territorial court judge.

[104] The Commission recognizes, however, that territorial judges in the Northwest Territories have a broader scope of jurisdiction than some of their counterparts in provinces and territories. We are unable conclude they have the broadest jurisdiction in the country, but it is certainly broad, and the requirement to be capable across the full range of the Territorial Court mandate applies to all of its judges.

[105] Territorial judges must be able to act as mediators of civil claims, serve as trainers for justices of the peace, and engage alternative approaches to the resolution of criminal charges in Wellness Court and Drug Treatment Court. Territorial judges must be highly skilled, and highly adaptable to fulfill the responsibilities required of them.

[106] The size of the Territorial Court is small and so all its judges must be able to work comfortably in criminal law, regulatory matters, family law and child protection, and civil

claims. The volume of matters, other than criminal and quasi-criminal matters, may be small; but territorial judges must be competent in those areas whenever they exercise their jurisdiction.

[107] As a result, this factor supports continuing to pay territorial judges in the upper range compared with other jurisdictions.

Adequacy of Salaries having regard to Cost of Living

[108] The Commission took particular interest in this factor in this inquiry, recognizing that the cost of living was affected by economic consequences of the Covid-19 pandemic. The prior Commission issued its report at the outset of the pandemic in the spring of 2020. The recommendations on territorial judges' salaries made in that report took effect in the context of considerable uncertainty as to what the next four years would hold.

[109] The Commission acknowledges the evidence of Dr. Tombe in explaining what has happened with respect to the cost of living in recent years, and for his forecasts for inflation. It is relevant to this inquiry that in late 2021, inflation surged in many jurisdictions, including the Northwest Territories, with the period between 2019 and 2022 marking the highest period of increases in consumer prices in over half a century.

[110] The surge in inflation is reflected in the 6.9% salary increase received by territorial judges in 2023/24. This increase was based on the 2020 Commission's recommendation that territorial judges should receive, for each year of the Commission's mandate, an amount equal to the average percentage increase in CPI for Yellowknife over the preceding calendar year.

[111] Statistics Canada tracks changes in the cost of a fixed basket of consumer goods on a monthly basis to determine changes to CPI. The CPI is a useful tool to align salary increases with statistically established cost of living increases, and the yearly average for Yellowknife has been used as the metric to calculate territorial judges' salary increases since 2017/18.

[112] Applying this metric, territorial judges received salary increases in the respective amounts of 1.6% for 2020/21, 0.1% for 2021/22, 2.0% for 2022/23 and 6.9% for 2023/24. Territorial judges also received salary increases using the same methodology, going back to the second, third and fourth years of the 2016 Commission's mandate.

[113] All other factors being equal, the easiest way to maintain the relative spending power of territorial judges' salaries might appear to be to simply adjust the salaries every year based on actual CPI increases. This is an appropriate time, however, to re-evaluate this premise, due to the extraordinary inflationary situation of the past years. The percentage increase for 2023/24 was a considerably higher increase than territorial judges have seen in previous years. This raises questions as to whether the average CPI is still a useful methodology.

[114] It is in this context that the Commission asked the parties to the 2024 inquiry to explain their approach or methodology for arriving at their proposals. The territorial judges' submission is that the Commission should increase territorial judges' salaries to $360,000 in the first year of the mandate and then revert to the approach of increasing salaries in an amount equal to the average percentage increase in CPI for Yellowknife over the preceding calendar year, for each of the subsequent remaining three years. The Minister's submission is the Commission should award fixed percentage increases for all four years of the Commission's mandate.

[115] The fixed increases proposed by the Minister for each of next four years are all lower than the predicted CPI increases for those years, regardless of whether the percentages forecast by the Conference Board of Canada or Dr. Tombe are used. In response to the interrogatory posed by the Commission, the Minister acknowledged that the GNWT proposal was not based on a specific methodology and was simply an attempt to suggest a modest increase considering all the factors in section 12.9.

[116] The cost of living is the one factor in section 12.9 which can be addressed empirically, with reference to statistically-based predictions that are validated by Statistics Canada on a regular basis. It is therefore difficult to accept that this factor can be addressed by applying an arbitrarily set increase that does not in some way factor in anticipated cost of living increases.

[117] In the current environment, inflation is still unpredictable although Dr. Tombe anticipates some easing of the consumer price volatility that has characterized recent years. This anticipated stabilization does not support the conclusion that territorial judges should receive only modest increases for the next four years, since it is hard to envision how this would not erode the value of their overall package in terms purchasing power and ensuring judicial independence.

[118] The territorial judges endeavoured to rationalize a large increase, amounting to 8% or $360,000 in 2024/25, relying on Dr. Tombe's opinion that average wage growth has occurred at approximately 1.5% higher than inflation. Pre-pandemic, inflation averaged approximately 2% per year, while average wage inflation hovered at 3.5% per year. This suggests that the judges' salaries did not reflect the additional 1.5% per year as their increases from 2017/18 to 2023/24 were limited to only CPI increases.

[119] As a result of the recommendations of the 2020 Commission, territorial judges received relatively small increases in the first three years followed by an increase of 6.9% in 2023/24 based on the CPI. This does not mean the larger increase in 2023/24 was excessive, however, as it kept salaries on pace with changing prices.

[120] There has been no rationale offered by the Minister to support awarding the lesser percentages they proposed of 1.0% for 2024/25, 1.0% for 2025/26, 1.5% for 2026/27, and 1.5% for 2027/28. Nor did the Commission hear any evidence that inflation is likely to reverse as opposed to simply levelling off.

[121] That being said, the territorial judges' proposed increase to $360,000 for 2024/25 would represent a second large increase on a year-to-year basis. This does not make it inherently wrong, and the Commission is prepared to recommend increases that are not strictly tied to CPI. For reasons related to the trend in salaries received by other provincial and territorial judges (addressed below), the Commission accepts that territorial judges should be moving towards the $360,000 salary to maintain their standing in the upper tier amongst their peers nationally.

[122] The Commission recommends, however, that this increase be phased in over a period of two years, with respective increases of 5.0% for 2024/25, and 4.5% for 2025/26. The graduated increase of judicial salaries provides for compensation that protects against erosion, in a manner that is evenly distributed over time and can be integrated into government financial planning over the coming years. This graduated increase aligns with the pattern noted by Dr. Tombe whereby wages generally grow faster than consumer prices.

[123] The Commission is satisfied, for the remaining two years of its mandate, to continue increasing territorial judges' salaries based on an amount equal to the average percentage increase in CPI for Yellowknife over the preceding calendar year. The Commission accepts the CPI as a methodologically sound indexation factor to adjust earnings over the last two years of the Commission's mandate.

Salaries of Judges in Other Jurisdictions

[124] The salaries provided to provincial and territorial judges elsewhere in Canada are a factor that enables the Commission to best evaluate salary based on an effective and accurate comparison. Judges across the country require homogenous education, skills, ethics, and expertise, applying the same and similar laws.

[125] Commissions in the Northwest Territories have consistently concluded that this factor, along with other factors in the *Territorial Court Act*, warrants territorial judges' salaries at the upper end of salaries for provincial and territorial judges. This is also the conclusion of the current Commission, based on all the evidence and argument presented to the inquiry in 2024, for reasons outlined throughout this report.

[126] The parties included in the Joint Book of Documents a table entitled, "Puisne Judges Salaries Across Canada from 2013, as at November 2023." Counsel provided updates subsequent to November 2023 at the hearing held on January 17, 2024. The table is attached to this report as Appendix A.[35]

[127] The Commission's task of attempting to situate territorial judges' salaries in the upper end of the salary range requires interpretation of various factors and forecasting based on available information. Some judicial salaries in other jurisdictions remain to be

[35] Joint Book of Documents, Tab 13: Puisne Judges' Salaries Across Canada, as at November 2023

determined, or subject to judicial review, in the current year. Looking forward to the four years for which the Commission must make its recommendations, there are even more unknowns.

[128] The parties can expect that territorial judges' relative position, compared with other judges, may change over the four year mandate of the Commission. The Commission therefore prefers to frame its conclusion in terms of placing territorial judges in the upper end, as opposed to assigning a specific ranking or percentile range within which salaries should land.

[129] The Commission notes the upper range of judicial compensation for provincial and territorial judges appears to be converging towards the $360,000 range, consistent with the salary proposed by the territorial judges for 2024/25. This conclusion is premised on certain forecasts being realized.

[130] In Ontario, provincial judges' salaries are already within this higher range at $361,000 for 2023/24. The methodology for future increases will see their salaries aligned to increases in the Industrial Aggregate Index (IAI) with possible further recommended increases to maintain salaries at approximately 95% of federally-appointed judges' salaries. Increases are to be determined and will likely keep Ontario judges in the upper end nationally.[36]

[131] In Saskatchewan, the figure for provincial judges' salaries in 2024/25 is $365,515, applying the statutory presumption of maintaining salaries at 95% of the previous year's salary for federally-appointed judges.[37]

[132] The Commission notes that legislation introduced this presumption through amendments in 2022. The resulting salary moves Saskatchewan judges to the top end for this year, but the Northwest Territories' legislation has not been changed and this must be recognized when using Saskatchewan as a comparator jurisdiction.

[133] In British Columbia, the provincial government's acceptance of commission recommendations places provincial judges' salaries at $360,000 for 2024/25. This result makes British Columbia a relevant comparator in the upper tier. The Commission notes the British Columbia judges' salary increase for 2025/26 will be based on CPI increases, consistent with the methodology for increases that has been used in the Northwest Territories.[38]

[134] In Alberta, the provincial government has set salaries at $348,102 for 2024/25, notwithstanding a commission recommendation that would pay provincial judges $372,500 in 2024/25. In the absence of a judicial review, which may yet happen, provincial

[36] Joint Book of Documents, Tab 13: Puisne Judges' Salaries Across Canada, as at November 2023
[37] Joint Book of Documents, Tab 13: Puisne Judges' Salaries Across Canada, as at November 2023
[38] Joint Book of Documents, Tab 13: Puisne Judges' Salaries Across Canada, as at November 2023

judges' salaries in Alberta are still in the upper end without attaining the $360,000 range. This rate remains higher than salaries in the maritime provinces and Manitoba.[39]

[135] The Minister's salary proposals are not within the upper end, as the above review of the nation's highest judicial salaries demonstrates. The Commission accepts the Minister's submission, however, that consideration of this factor should take into account any salary increments received by territorial judges, such as the northern allowance of $3,700 per annum paid to territorial judges. The full salary package should be considered for an accurate comparison.

[136] Based on the evidence provided to the Commission, the territorial judges' northern allowance is not so great as to elevate salaries into the top end when added to the increases proposed by the Minister. Provincial and territorial judges in other jurisdictions also receive northern allowances in addition to the salaries described above.

[137] The Commission is satisfied that territorial judges' salaries now require a percentage increase that exceeds the cost of living increases they have received since 2020/21. This is necessary to maintain territorial judges in the upper end of provincial and territorial judges across the country, recognizing all the other factors addressed in this report.

[138] The territorial judges' position relative to judges elsewhere does not need to be achieved by an immediate increase to $360,000 as the territorial judges propose. While the upper salary range appears to be converging towards that number, other upper-end jurisdictions like Alberta and the Yukon are not yet at that level, and many jurisdictions pay far less.

[139] The Commission's preferred approach to maintaining territorial judges at the upper end is to pace increases through two fixed percentage increases of 5.0% in 2024/25 and 4.5% in 2025/26. The approach of applying an amount equal to the average percentage increase in CPI for Yellowknife over the preceding calendar year, for increases in 2026/27 and 2027/28, is expected to maintain salaries consistent with the cost of living increases until the next Commission in 2028.

Working Conditions of Territorial Judges

[140] The working conditions of territorial judges are a significant factor in support of paying salaries that are in the upper range relative to judges' salaries in other provinces and territories. This has always been the case.

[141] The Territorial Court operates north of the 60th parallel and across an expansive and remote territory. The challenges of circuit work include improvised facilities, uncertain travel schedules and harsh working environments. Past Commissions have consistently

[39] Joint Book of Documents, Tab 13: Puisne Judges' Salaries Across Canada, as at November 2023

recognized that these conditions warrant higher than average salaries for territorial judges.

[142] It is not necessary to find that territorial judges endure the most challenging conditions amongst their counterparts to conclude that higher wages are in order. The Minister has correctly noted that territorial judges are not alone in performing challenging work on circuits. Judges in other provinces and territories also hold court in remote locations where it is difficult to ensure adequate supports and amenities.

[143] The Commission does not have sufficient evidence to determine whether circuits are more or less challenging in the Yukon or the northern parts of provinces, for example, where judges may be able to drive as opposed to flying into a community. The parties' submissions on this factor contain numerous impressionistic statements as to whether these differences make conditions worse or better than elsewhere; but this is not a factor that lends itself to an empirical ranking of the various jurisdictions. Nor is this necessary.

[144] What is known and undisputed is that the Territorial Court is small. It operates in a remote jurisdiction where the largest community, Yellowknife, is itself small by provincial standards. The territorial judges are all required to carry their share of circuit courts outside Yellowknife, which means lengthy days and weeks of travel, presiding over long hours, staying in hotels with limited facilities, isolating themselves socially to maintain the fact and appearance of independence, and conducting court in gymnasiums and community centres with limited or no private space and unpredictable climate control.

[145] Challenging conditions are part and parcel of the work of the Territorial Court as with other courts, or branches of courts, that operate in remote northern locations in Canada. Those conditions are the norm, not the exception for territorial judges, and continue to warrant pay in the upper tier.

[146] The territorial judges submit that conditions have worsened for various reasons. Foremost among these reasons is the passage of Bill C-75 which, the territorial judges submit, increased the number of trials and the need to schedule special circuits outside Yellowknife.

[147] The Commission accepts that changes to the *Criminal Code* led to changes in the way cases proceed through the courts. The impact of these changes on working conditions is more challenging, however, to calibrate. Territorial judges may now have more trials than preliminary inquiries, but the work in either proceeding involves presiding over a matter and receiving evidence and argument. In terms of additional circuit time being required, the Commission does not have sufficient evidence before it to establish a quantifiable difference from before and after the coming into force of Bill C-75.

[148] The territorial judges further submit that they have had increasing demands on their time, for example, to train and supervise justices of the peace and to reinvigorate alternative courts like the IPVTO. The Commission is unable to draw from these submissions a definitive conclusion to the effect that working conditions have worsened.

The working demands of territorial judges will necessarily change from time to time. The Commission expects judges, like all professionals, must constantly prioritize tasks within the time available to perform their duties.

[149] The Minister also plays a role ensuring there are sufficient judges appointed to the bench to complete the necessary work of the court, recognizing that the demands of the job may periodically require more time on areas like training justices of the peace, for example. The organization of the territorial judges' time and scheduling has been described as an administrative issue by past Commissions, and not solely a working conditions issue.

[150] The Commission received information in response to interrogatories that shows the use of deputy judges by the Territorial Court, presumably to alleviate the workload of the resident judges for reasons including, but not limited to, territorial judges being on leave. This illustrates that administrative solutions to the workload of the territorial judges exist and are being used to address this workload. The Commission does not have empirical evidence, however, showing that territorial judges' working hours have changed, and in these circumstances, cannot conclude that working conditions have suffered from the lack of administrative management of workloads.

[151] The Minister submits that the Covid-19 pandemic led to creative solutions to improve access to justice through the greater availability of videoconferencing, and that these changes should improve working conditions for territorial judges going forward.

[152] It may be reasonable to infer technological solutions used during the pandemic may be adopted going forward. The territorial judges do not accept as a given, however, that changes will improve conditions. Without evidence to support either of these conflicting perspectives, the Commission does not propose to speculate on how potential technological changes will emerge, or the impact they may have.

[153] Working conditions have always been a factor supporting higher salaries for territorial judges in the Northwest Territories. Territorial judges have a wide and varied jurisdiction, which requires adaptability to physical changes, legislative changes, and occasional workload re-alignments. This continues to be the case even if we cannot conclude that conditions have markedly worsened or improved.

Economic Fairness

[154] The parties' submissions on this factor present differing views on the relative merits of assessing fairness against the salaries of other provincial and territorial judges, other professionals in the Northwest Territories and Canada, as well as senior members of the public service.

[155] The *Territorial Court Act* specifically requires the Commission to look at salaries paid to other provincial and territorial judges, under subsection 12.9(c). This comparison,

outlined above, is particularly useful in that it looks at judges who perform the same or very similar functions, and who possess the same or similar qualifications and highly skilled and experience lawyers prior to appointment to the bench. This factor is not the sole means of determining judicial salaries, and the inclusion of subsection 12.9(c) in the legislation directs the Commission to take a wider view and to include further information in evaluating economic fairness.

[156] Both the territorial judges and the Minister address economic fairness in relation to the nature of employment and salaries in the Northwest Territories. The economic evidence, outlined in Dr. Tombe's report, is that public sector employment comprises a particularly large share of total employment in the Northwest Territories and that public sector jobs pay higher in the Northwest Territories than in other jurisdictions, even when the higher cost of living is considered. In addition, professional scientific and technical jobs in the Northwest Territories have seen even greater growth than public sector jobs, experiencing an average salary growth rate of 6.1% per year since 2019.

[157] The evidence does not appear to be contested by either party, but the Commission must determine what these facts mean in terms of economic fairness. The territorial judges' argument is effectively that judges who live in an environment characterized by high salaries should, in fairness, have high salaries. There is merit to this proposition, since judicial compensation aims to maintain judicial independence by providing a level of compensation that ensures judges are not perceived to be susceptible to interference.

[158] In the interests of maintaining judicial independence, territorial judges' salaries should provide a measure of economic fairness in relation to other professionals who have enjoyed high average salary growth since 2019.

[159] The Minister argues that territorial judges' salaries should not deviate too far from Deputy Ministers' salaries. There are historical examples for this approach, but territorial judges' salaries have not been closely tied to Deputy Ministers' salaries since the judicial compensation inquiry model was implemented in the *Territorial Court Act*.

[160] There is no statutory reason to focus a comparison of territorial judges' salaries on Deputy Ministers' salaries. There is likewise no compelling reason to focus on the salaries of other high earning professionals compensated by the territorial government, such as physicians. In evaluating fairness, the Commission can consider comparators holistically, but it would not be rational to directly align salaries between positions that are distinguishable.

[161] The Minister submits that territorial judges and Deputy Ministers are paid from the public purse, and that there should be some relative alignment of salaries at the top levels of the different branches of government. This argument may be intuitively attractive, but the Commission accepts that differentials in pay exist amongst officials paid from the public purse, for many legitimate reasons including the level of education and expertise required, as well as expectations around working hours and conditions.

[162] The fact that territorial judges' salaries may have grown faster than Deputy Ministers' is not a stand-alone reason for limiting territorial judges' salary increases during the mandate of the Commission. With respect to every judicial appointment to the Territorial Court, the requirement is that the appointee will come with post-secondary education in law and years of experience as a skilled and respected lawyer. Amongst Deputy Ministers, the job requirements are far more variable, appointments are often political, and the wide range in Deputy Ministers' salary bands reflects this variability.

[163] Even if the Commission accepted that Deputy Ministers' salaries were a particularly valuable comparator, the Commission did not receive evidence of their gross remuneration packages including bonuses. In addition, territorial judges received a 6.9% salary increase in 2023/24, but the Deputy Ministers' increment for this same period is linked to the public service increase and remains to be determined. It is also too early to tell if Deputy Ministers will achieve a greater or lesser retroactive raise for 2023/24.

[164] In assessing economic fairness, the Commission questions the value of relying on comparator positions such as those of Deputy Ministers. The comparisons are always inadequate, not least because the requirement of judicial independence is the key distinguishing aspect of judicial remuneration that does not apply to other professions, whether they be doctors, engineers, accountants, or Deputy Ministers. The only comparator of direct relevance is the salaries of provincial and territorial judges in other jurisdictions in Canada. The analysis of economic fairness should be broad and not be reduced to forced and specific comparisons with occupations which are not judicial in nature.

[165] On this factor, the Commission is therefore satisfied that economic fairness favours territorial judges being paid at the upper end of judicial salaries relative to other provinces and territories, having considered the economic evidence the inquiry received respecting employment and salaries in the Northwest Territories.

Economic Conditions of the Northwest Territories

[166] The economic conditions factor requires the Commission to consider what is happening with the economy in the Northwest Territories and how this should affect judicial compensation. The evaluation of this factor will always involve an assessment of the current economic situation, as well as economic forecasts which come with an element of uncertainty. The Commission may be guided in determining appropriate salaries for territorial judges by whether the economy is doing well or poorly, as this could affect the fairness of their compensation as compared to others earning wages in the same economy.

[167] The Commission appreciates expert opinion regarding the economic conditions of the Northwest Territories. Dr. Tombe's evidence was helpful in interpreting material the

parties provided from the Conference Board of Canada as well as from the Minister of Finance.

[168] The Commission accepts Dr. Tombe's conclusion that conditions in the Northwest Territories are "generally strong relative to other jurisdictions and are predicted to remain so in the coming years." He was able to explain this conclusion with information showing that GDP in the Northwest Territories is amongst the highest amongst provinces and territories. The labour market is also tight with near full employment, and median household incomes in Yellowknife are amongst the highest in the country. This economic strength is maintained even after higher costs of living are considered.

[169] The current economic condition of the Northwest Territories reflects an economy that rewards residents with high paying employment opportunities, particularly in the mining and public sectors. In this context, the Commission maintains that territorial judges should be able to partake in the healthy economy as do other residents of the Northwest Territories. Allowing them to do so is not only fair but also promotes judicial independence by eliminating suspicion of underpaid judges being susceptible to political interference. Paying territorial judges competitively also contributes to making the bench attractive to quality candidates from the local legal community.

[170] There are certainly challenges and risks to the Northwest Territories economy, as pointed out by the Minister in their submissions, and Dr. Tombe was able to address these items during his testimony at the inquiry.

[171] The economy will be confronted with a decline in diamond production in the future, and there is a concern that new mines will not begin production quickly enough, or with sufficient production, to offset losses in the mining sector. Dr. Tombe accepted that timelines for new mining ventures and approvals can be difficult to predict, but he made the point that projects are slated to begin in 2026 and current mines may extend operations. The process of project initiation and approval is ongoing. He also explained how the Northwest Territories is partially insulated from the impact of job losses in the mining industry because of the concentration of workers from outside the territories, whose home jurisdictions will bear much of the impact.

[172] Dr. Tombe also addressed concerns raised by the Minister about the lack of diversification in the Northwest Territories economy, pointing out that the Northwest Territories is not alone in having mining as a primary sector or in relying heavily on the public sector. In this context, he pointed out that the economy benefits from a high level of capital investment, the Northwest Territories being among the most capital intensive regions in Canada on a per capita basis. He also points out that increased activity is predicted in areas including construction, health care and public administration.

[173] In considering the challenges and risks outlined above, the Commission notes that its recommendations will determine territorial judges' salaries for the next four years. The Commission's focus is therefore on economic conditions in the short-term. The Conference Board of Canada may deem the economic outlook for the Northwest

Territories modest, but this does not translate to a poor economy in rapid decline. How the economy will emerge beyond the four-year mandate of the Commission is subject to multiple unknowns and uncertainties. The Commission accepts Dr. Tombe's opinion that the economy is robust in the relevant forecast period.

[174] The economic situation of the Northwest Territories suggests a continuity of conditions that make the GNWT a high wage environment in which it is appropriate for territorial judges to receive compensation at the upper end of judicial salaries.

Any Other Factor the Commission considers Relevant

[175] The territorial judges and the Minister dispute whether the fiscal position of the GNWT is relevant to the Commission's inquiry and deliberations on judges' salaries and benefits.

[176] In some jurisdictions, judicial compensation legislation specifically includes the fiscal position of the government as a factor to be considered by the Commission responsible for making recommendations on judges' salaries and benefits. The *Territorial Court Act* does require the Commission to consider economic conditions under subsection 12.9(f) and "any other factor that the Commission may consider relevant" under subsection 12.9(g).

[177] The Minister has asked the Commission to consider the fiscal position of the territorial government. The Commission does not view the legislation as prohibiting consideration of the factor, although as noted the *Territorial Court Act* does not enumerate the government's finances as an item the Commission is required to consider. In other jurisdictions, legislation enacted to fulfill the Supreme Court of Canada's expectations for an independent Commission process does include government finances as a factor.

[178] The Commission could perhaps consider the fiscal position of the government under subsection 12.9(f), but this would require tangible evidence to show a correlation between the government's finances and the economic conditions of the Northwest Territories. There is arguably even greater latitude for the Commission to consider the government's fiscal position under subsection 12.9(g). This subsection is discretionary, and the Commission needs to consider whether the government's fiscal position is relevant.

[179] The Commission need not resolve the interpretive question as to whether it can or cannot consider the government's fiscal position. The evidence does not establish that the economic conditions of the Northwest Territories threaten the government's financial situation, or specifically its ability to deliver adequate compensation to territorial judges over the next four years. The Commission is not satisfied the government's fiscal position is highly relevant in this inquiry.

[180] Dr. Tombe addressed the GNWT's major concerns regarding its fiscal position. One concern is a decline in revenues obtained through the TFF due to declining populations relative to overall population growth in Canada. This does not appear to pose an immediate threat to government finances since, as Dr. Tombe explained, the TFF formula also uses multipliers based on spending needs and increases regularly over time. In his opinion, the TFF insulates the Northwest Territories from large economic shocks, since it provides the majority of GNWT revenue using a formula that is not dependent on resource or other economic activity.

[181] Another concern is the unknown cost of natural disasters, and in particular, costs associated with the wildfires that affected the Northwest Territories and resulted in mass evacuations of territorial residents in the summer of 2023. Dr. Tombe pointed out that most of these costs can be shifted to the federal government through the Disaster Financial Arrangements program, which is intended to shift up to 90% of disaster-related expenses. The Commission appreciates this may not happen immediately, and reimbursement may not be complete, but the evidence does not point to an impact that will unduly affect the economic outlook over the next four years.

[182] The Minister also poses a concern that the GNWT is approaching its borrowing limit. Dr. Tombe explained for the Commission how this concern is alleviated by the fact the GNWT maintains a $120 million cushion below the borrowing limit to ensure a severe expenditure shock does not take the government beyond its mandated limit. The Commission accepts this explanation.

[183] The overall conclusion to be drawn is that the GNWT has systems in place to manage its financial situation, which are capable of withstanding challenges through conservative and prudent application of sound fiscal policy.

[184] In addition, the Commission has not heard evidence to suggest the overall cost of judicial salaries for territorial judges, even at the highest level proposed to the Commission by the judges, cannot be borne by the government. Based on this lack of evidence, the government's fiscal position has not been established as a relevant factor for the Commission to consider in this inquiry.

Conclusions

[185] Territorial judges' salaries should remain in the upper range amongst their peers in other provincial and territorial courts. The jurisdiction of the Territorial Court is broad, and the working conditions in which territorial judges exercise their jurisdiction continues to be very challenging in the northern context.

[186] Territorial judges also live and work in the Northwest Territories where goods cost more, and decreased purchasing power can and should be offset by higher salaries. The Northwest Territories is not only an expensive place to live but is also not immune from

inflationary pressures which have affected all provinces and territories in the post Covid-19 economic environment.

[187] Since the Commission last issued recommendations on salary in 2020, territorial judges were protected from inflationary shock by receiving increases equal to CPI increases for Yellowknife over the preceding calendar year. This resulted in a notable 6.9% increase in salary as of April 1, 2023, following exceptionally high inflation in 2022.

[188] The Commission therefore is not prepared to recommend an even larger percentage increase of 8%, effective April 1, 2024, as proposed by the territorial judges. This proposal exceeds the Conference Board of Canada's forecast increase in CPI by 4.9%. Conversely, the Commission is unable to accept the Minister's proposed increase of 1.0% for April 1, 2024. This is well below predicted increases in CPI.

[189] In determining a percentage increase that is appropriate to maintain and promote judicial independence, inflation is a significant, but not an exclusive, consideration. The Commission notes that judges in other jurisdictions have seen significant salary adjustments, in addition to cost of living increases, while territorial judges have received cost of living increases since April 1, 2017.

[190] The Commission therefore accepts that wage adjustments are now necessary, in keeping with the trend across Canada to bring judicial salaries (including various northern incentives) into the range of approximately $360,000 per annum.

[191] Rather than recommending a single large percentage increase in 2024, the Commission has resolved to achieve appropriate compensation by means of fixed percentage increases in 2024/25 and 2025/26. This will be followed by further increases, in an amount equal to the average percentage increase in CPI for Yellowknife over the preceding calendar year, for 2026/27 and 2027/28.

[192] The fixed increases for 2024/25 and 2025/26 are premised on forecast increases in CPI for the preceding years, plus approximately 1.5% representing the average wage adjustment in new contracts in the decade leading up to the Covid-19 pandemic. Increases over the first two years are graduated and prevent the erosion of judicial salaries by keeping them on pace with provincial and territorial judges in the upper end across Canada.

[193] The Commission's recommendation is that territorial judges' salaries increase by 5.0% for 2024/25; by 4.5% for 2025/26; and by an amount equal to the average percentage increase in CPI for Yellowknife over the preceding calendar year, for each of 2026/27 and 2027/28.

Chief Judge Differential

[194] The parties agree that the Chief Judge's differential should change from the current fixed amount of $15,000 per year, to 7.5% of the territorial judge salary. The Commission is prepared to accept this recommendation and appreciates the opportunity to apply a methodological approach to the Chief Judge differential.

[195] There is consensus that the Chief Judge should receive additional pay in consideration for the added responsibilities that come with the role. In accepting the parties' joint position on the Chief Judge differential, the Commission has considered the same factors that are used to determine territorial judges' salaries. Justification for additional salary arises as a matter of jurisdiction and working conditions and is affirmed by differentials paid in other provinces and territories.

[196] The Chief Judge of the Territorial Court has administrative responsibility with respect to policy decision and court directives, as well as supervision and direction over the assignment of the territorial judges' sittings and hearings.

[197] Many of the Chief Judge's additional responsibilities flow directly from the *Territorial Court Act*. These include, for example, supervising justices of the peace, establishing and maintaining a plan for the continuing education of territorial judges, addressing allegations of misconduct of a territorial judge, and participating on the Judicial Appointments Committee which makes recommendations for the appointment of new territorial judges.

[198] The territorial judges have provided evidence of the amounts Chief Judges receive in other provinces and territories across Canada. In virtually every jurisdiction, the Chief Judge differential is determined as a percentage increase over and above the standard judicial salary. The range for the differential is between 6% and 12%.

[199] The percentage approach presents a rational way of determining the Chief Judge differential, since it means the differential will increase proportionately as salaries increase. It is therefore an appropriate way of recognizing the Chief Judge's additional responsibilities over time. Applying this approach, the 7.5% differential agreed upon by the parties is reasonable and falls within the range in other jurisdictions.

Pension, Leave and Benefits

[200] This report has focussed exclusively on the issues identified by the territorial judges and the Minister as requiring determination in the inquiry held on January 17, 2024. The Commission feels obliged, however, to address all issues within their statutory mandate under section 12.9 of the *Territorial Court Act*. Items other than salary are set out in subsection 12.5(1)(b).

[201] The 2022 Commission only recently made recommendations with respect to extended health benefits for full-time judges and retired judges. This was a special

Commission held outside the regular four year cycle at the request of the Chief Judge. The Commission relies on and affirms the recommendations of the 2022 Commission.

[202] The same conclusion also applies to the most recent recommendations of past Commissions concerning the other items listed in subsection 12.5(1)(b), namely pension, vacation, leave, sick leave, and other benefits.

Summary of Recommendations

[203] The following is a summary of the Commission's recommendations:

1. The Minister will adjust territorial judges' salaries by 5.0% for 2024/25; by 4.5% for 2025/26; and by an amount equal to the average percentage increase in CPI for Yellowknife over the preceding calendar year, for each of 2026/27 and 2027/28.

2. The Minister will adjust the Chief Judge's differential to award the Chief Judge of the Territorial Court an additional 7.5% of territorial judges' salary, effective April 1, 2024.

3. The Minister will continue to provide territorial judges with the previously established pension, vacation leave, sick leave, and other benefits.

Dated this 19th day of April 2024 at the City of Yellowknife, Northwest Territories.

"David Gilday"

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(Original Signed by)

David Gilday, Chairperson

APPENDIX A

Puisne Judges Salaries Across Canada
from 2013, as at November 2023

Jurisdiction	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23	2023/24	2024/25	2025/26	2026/27
Federal [1]	288,100	295,500	300,800	308,600	314,100	315,300	321,600	329,900	338,800	361,100	372,200	383,700	IAI & 2024 JCC	IAI & 2024 JCC	IAI & 2024 JCC
British Columbia [2]	231,138	242,464	244,889	248,562	252,290	262,000	266,000	270,000	287,000	297,000	307,000	343,000	360,000	CPI	2026 JCC
Alberta [3]	263,731	273,000	279,825	286,821	293,991	293,392	302,304	309,500	318,500	*321,685*	*328,119*	*337,963*	*348,102*	2025 JCC	2025 JCC
Saskatchewan [4]	248,010	254,458	260,819	272,295	282,184	290,848	295,792	304,074	312,286	316,970	343,045	353,590	364,515	95% of 2024 federal salary	95% of 2025 federal
Manitoba [5]	224,104	230,155	239,000	249,277	254,263	259,000	265,475	272,908	280,500	292,001	301,345	2023 JCC	2023 JCC	2023 JCC	2026 JCC
Ontario[6]	267,355	274,574	279,791	287,345	290,793	292,829	300,600	310,337	320,742	344,020	350,212	361,000	IAI & next JCC	IAI & next JCC	IAI & next JCC
Québec [7] (from July 1 to June 30)	230,723	236,722	238,379	241,955	250,000	251,500	254,518	263,000	277,900	293,500	310,000	2023 JCC	2023 JCC	2023 JCC	2026 JCC
New Brunswick [8]	204,700	204,700	204,700	246,880	251280	252240	257,280	263,920	271,040	288,880	297,760	306,960	next JRC	next JRC	next JRC
Nova Scotia [9]	216,183	222,993	231,500	234,509	236,151	249,021	251,875	257,472	269,198	270,890	283,076	306,960	*80% federal salary*	*80% federal salary*	2026 JCC
Prince Edward Island [10]	235,080	239,472	243,538	250,050	258,734	263,685	271,832	276,677	279,699	285,134	302,010	national average	national average	national average	national average
Newfoundland & Labrador [11]	215,732	222,204	228,870	238,025	247,546	247546	247546	251507	260,561	273,315	277,377	*Maritime Average*	*Maritime Average*	*Maritime Average*	*Maritime Average*
Northwest Territories [12]	249,582	252,414	256,055	260,302	272,000	278,828	289,733	299,869	304,699	304,918	311,724	333,456	2024 JRC	2024 JRC	2024 JRC
Yukon [13]	250,103	257,606	262,758	268,013	273,373	280,208	287,213	298,702	304,676	307,722	2022 JCC	2022 JCC	2022 JCC	2025 JCC	2025 JCC

All Salaries run from April 1 to March 31 in each fiscal year, except as noted for Quebec.

[1] The next federal commission will be conducted in 2024. The last federal commission recommended that annual adjustments based on IAI should continue for federally appointed judges, pursuant to section 25 of the *Judges' Act*.

Puisne Judges Salaries Across Canada
from 2013, as at November 2023

[2] The 2019 JCC recommended the salaries reflected in the chart. The BC Government substituted: $276,000, $282,500 and $288,500. A judicial review was filed and the Government's response was quashed. The report has been remitted back to government for reconsideration. The 2022 BC JCC issued its report on April 28, 2023. The salary recommended for 2025/26 is the 2024/25 salary plus a percentage increase equivalent to the annual average percentage chance in BC CPI for 2024. The BC Government has yet to respond.

[3] The 2021 Alberta JCC provided its Report on June 15, 2023 and recommended the following salaries for the fiscal years 2021 and following: $328,500; $348,000; $362,000; and $372,500. On October 26, 2023, the LGIC responded and has substituted the salaries shown on the table. A judicial review is likely.

[4] The 2020 Saskatchewan JCC made recommendations for April 1, 2020 to March 31, 2023, and were accepted by Government in full. As of April 1, 2021 and continuing thereafter, Saskatchewan judges are paid 95% of the prior year's federal salary. The Saskatchewan Provincial Court Act was amended to provide that for each annual period commencing on or after April 1, 2024, there is a presumption that the salary is 95% of the prior year's federal salary, subject to certain extraordinary circumstances.

[5] The 2023 JCC conducted its hearings in summer 2023 and a report is expected soon, with recommendations for the period April 1, 2023 to March 31, 2026.

[6] The 2014-2021 JCC has adopted the Joint Submission of the Government and the Ontario judges' association for the period commencing April 1, 2014 and following. Judicial salaries are adjusted annually based on the IAI up to the 2017 fiscal year. Effective April 1, 2018, the salary increased to 93.47% of the s.96 judges' salary, 94.07% effective April 1, 2019, 94.67% effective April 1, 2020, and 95.27% effective April 1, 2021. Another Ontario JCC is due to be appointed.

[7] The Quebec salaries are effective on July 1st of each year, not April 1st as in the other jurisdictions.

[8] The 2016 NB JRC's Report adopted the joint proposal of the Government and the Association for a salary of 80% of federal judicial salaries. The salary recommendations were accepted. The subsequent JRC recommended the continuation of the 80% relationship with the federal salary and the recommendations were accepted by the Government on April 11, 2023.

[9] Following 5 years of litigation over the salaries for the 2017-2022 fiscal years, the Government and the judges' association made a joint recommendation to the 2023 JCC for a salary equal to 80% of the federal salary. This was adopted by the JCC and implemented by Government.

[10] In PEI, successive commissions have recommended that PEI judges should be paid a salary equal to the national average. The salaries are determined by averaging the salaries actually paid in each jurisdiction except Nunavut. The calculation is usually finalized in the fall for the preceding April 1st.

[11] The most recent Tribunal's Report was issued on November 30, 2022, and made recommendations for the period April 1, 2021 to March 31, 2027. The recommendation was for an adjustment for 2021 and 2022 to the known Maritime Average, but that the salaries should be adjusted again once the salaries are finalized in each of the Maritime jurisdictions. Then, adjustments for each subsequent year of not less than CPI, with an eventual adjustment to the Maritime Average once the Maritime salaries are finalized. The Lieutenant Governor in Council varied the recommendations on January 27, 2023, such that the salaries in 2021/22 and 2022/23 apply as of July 1, rather than April 1, and the salaries for April 1, 2023 to March 31, 2027 will be the Maritime Average rather than the greater of the Maritime Average or CPI as of April 1 of that year. The Association filed an application for judicial review of the Government's response. A hearing has yet to be scheduled by the Supreme Court of NL.

[12] The 2019 NWT JRC reported in April 2020. Its recommendations for CPI-based adjustments (based on the % change in the CPI for Yellowknife in the preceding calendar year) are binding.

[13] The 2019 Yukon JCC conducted a hearing in summer 2020 and issued its report in 2021. The recommended salaries have since been implemented.

Report and Recommendations of the 2020 Provincial Court Commission of Saskatchewan

Presented to the Minister of Justice and Attorney General and the Saskatchewan Provincial Court Judges Association

December, 2020

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SASKATCHEWAN PROVINCIAL COURT COMMISSION REPORT
DECEMBER 2020

I. INTRODUCTION

A. Provincial Legislation

1. The current Provincial Court Commission was appointed effective July 18, 2020 pursuant to section 36 of The Provincial Court Act, 1998, S.S. 1998, c. P-30.11 (the "Act"). This is the tenth Commission appointed under this legislation.

2. . The mandate of the Commission is set out in subsections 38(1), (2), (3) and (4) of the Act as well as clause 65(d). These provisions read as follows:

38(1) A commission shall inquire into and make recommendations with respect to the following:

(a) the salaries to be paid to:

(i) the chief judge;
(ii) an associate chief judge;
(iii)judges other than the chief judge, associate chief judges and temporary judges; and
(iv)temporary judges.

(b) the remuneration to be paid to judges who perform administrative duties assigned to them pursuant to clause 8(f);

(c) the allowances to be paid to judges who reside in the Northern Saskatchewan Administration District;

(d) professional allowances;

(e) vacation leave;

(f) pension benefits and additional retirement benefits.

38(2) A commission may inquire into and make recommendations with respect to the following:

(a) the support staff, facilities, equipment and security of the court;

(b) the benefits to be provided to judges pursuant to regulations made pursuant to clause 65(d).

38(3) The salary recommended by a commission cannot be less than the salary being received by the judges on the day on which the report containing the recommendation is submitted to the minister.

38(4) No commission regulation respecting pension benefits or additional retirement benefits shall reduce a person's benefits that accrued before the coming into force of the regulation.

65(d) of the Act provides for the making of regulations regarding the benefits to which judges are entitled including:

- leave of absence;
- sick leave;
- deferred salary leave;
- leave for reasons of pressing necessity;
- special leave;
- travelling, sustenance and moving expenses;
- life insurance; and
- disability, dental and health benefits.

3. The Act authorizes the Commission to make two types of recommendations, compulsory and advisory. The compulsory recommendations are listed in subsection 38(1). They relate to various matters comprising the remuneration package for Provincial Court Judges. The type of recommendations which are advisory only are listed in subsection 38(2) of the Act allowing the Commission discretion about whether to make any such recommendation.

4. The mandate of this Commission does not end with this Report. Section 51 of the Act leaves open to this Commission the consideration of other issues and reads as follows:

51(1) At the request of the minister or the association made at any time during the term of the members of a commission, the commission may inquire into and make recommendations with respect to any matter of significance to the court.

(2) Within six months after the day on which a matter is referred to a commission pursuant to subsection (1), the commission shall submit a report to the minister and the association containing any recommendations of the commission with respect to the matter.

The term of this Commission expires on June 30, 2023.

5. Membership of the Commission

The Commission is composed of three members. As required by section 36(2) of the Act:

- one is appointed by the Minister of Justice
- one is appointed by the Saskatchewan Provincial Court Judges' Association
- these two members appoint a chairperson

The Commission members are:

- Paul S. Jaspar, SVM FCPA FCA, Chairperson
- Art Postle, appointee of the Minister of Justice
- Deryk Kendall, BA LLB, appointee of the Saskatchewan Provincial Court Judges' Association

6. Process

Advertisements calling for submissions to the Commission were placed in the Regina *Leader Post* and the Saskatoon *Star Phoenix* on September 5, 2020. The advertisements indicated that the Commission would be receiving submissions from interested parties and that hearings were to be held in Regina and Saskatoon at the locations and dates indicated.

In addition, the Commission had a website which went active on September 5, 2020: https://www.saskatchewan.ca/government/government-structure/boards-commissions-and-agencies/saskatchewan-provincial-court-commission.

7. The Commission was assisted by written submissions received from:

- Saskatchewan Provincial Court Judges' Association ("Association")
- Deputy Minister of Justice, on behalf of the Government of Saskatchewan ("Government")
- Saskatoon Criminal Defence Lawyers Association ("SCDLA")

and replies from:

- Association
- Government

These documents and other material can be found at: www.saskatchewan.ca/government/government-structure/boards-commission-and-agencies/saskatchewan-provincial-court-commission.

8. The Commission received oral submissions in Saskatoon on November 10, 2020 from:
   - Association
   - Government
   - SCDLA

9. The Commission, with agreement from the Association and the Government, decided not to hold hearings in Regina.

II. BACKGROUND

10. The report and recommendations from the previous nine Provincial Court Commissions can be found at www.saskatchewan.ca/government/government-structure/boards-commission-and-agencies/saskatchewan-provincial-court-commission.

11. The work of this and all previous commissions is founded on the principle of judicial independence.

12. The Supreme Court of Canada has endorsed the following principles in relation to the role of the Commission:

(a) It is a constitutional requirement that the Commission is independent, objective and effective.

(b) The Commission's recommendations must result from a fair and objective hearing, and its report must explain and justify its position.

(c) The role of the Commission is not simply to update the previous commission's report, and each commission must make its assessment in its own context. That said, the Commission does not operate in a void, and the reports of previous commissions and their outcomes are part of the background and context that the Commission must consider. Absent reasons to the contrary, the starting point for analysis should be the date of the previous commission's report; and

(d) The Commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations (if any).

III. THE ISSUES

13. The current salary and benefits for members of the Provincial Court are as follows:

Salary – April 1, 2020 – March 31, 2021 - $312,286

In addition to the above salary the Chief Judge (1) receives an additional 7.5%, Associate Chief Judge (1) 5%, Administrative Judges (5) 2.5% and Northern Judges (5) 5%.

Temporary Judges receive 1/220 of the salary paid to a full time Judge.

14. In addition to salary, the Judges are entitled to the following pension and retirement benefits:

(a) Pension and Additional Retirement Benefit – A benefit rate of 3% per year of service (to a maximum of 23 1/3 years -70%), multiplied by average salary over best 3 years.

(b) Survivor Pension – Surviving spouse is entitled to defined benefits pension for life.

(c) Surviving Child Benefits – The benefit is paid to a surviving child of a Judge, if the Judge dies without a spouse or if the spouse later dies, payable up to age 18; can be extended up to 5 more years if the child is attending educational institutions.

(d) Early Retirement Pensions – Full pensions of 70% times average salary over best 3 years, when a judge's age and years of service equal 80 and, is aged 58 or older with a minimum of 18 years' service. The pension is based on a reduced formula if a Judge retires between 55 and age 65, having served at least two years on the Court.

(e) Indexing of Pension – Pensions are indexed to 75% of CPI up to a CPI of 5% and indexed at 50% of CPI for portion of CPI over 5%.

(f) Judges Contributions – Judges contribute 5% of salary.

(g) Government Contributions – Government contributes the amount necessary to make up the difference between the Judges' contributions and the amounts necessary to pay the pension and additional retirement benefits.

15. In addition, Judges are also eligible for the following additional benefits:

(a) Disability Benefits – 100% of salary for temporary disability (up to 1 year); 70% for permanent disability. On recommendation of Judicial Council. No premiums.

(b) Annual Vacation – 30 days

(c) Annual Professional Allowance - $4,000

(d) Group Life Insurance – Minimum 2 times salary with optional coverage up to $500,000, the first $25,000 of coverage being paid for by the province.

(e) Dental Plan – Same dental plan as public service employees; premiums are paid by the Government.

(f) Extended Health Plan – The extended health plan provides comparable benefits to the plan provided to public service management. Premiums are paid by the Government.

16. Neither the Association nor the Government has requested any revision to the aforesaid benefits outlined in paragraphs above.

17. Based on the submissions received from the Association and the Government, the outstanding issues which require a recommendation from this Commission are:

- Judicial salaries
- Parental leave

18. The Supreme Court of Canada confirmed, among other principles that:

> "Financial security embodies three requirements: judicial salaries can be maintained or changed only by recourse to an independent commission; no negotiations are permitted between the judiciary and the government; and, salaries may not fall below a minimum level (including *de facto* reductions through the erosion of judicial salaries by inflation)."

IV. SUBMISSIONS TO THE COMMISSION

19. Saskatoon Criminal Defence Lawyers Association (SCDLA)

Lisa J. Watson and Brian R. Pfefferle prepared a written submission on behalf of the SCDLA. Mark Brayford Q.C. presented an oral submission to the Commission.

The SCDLA was established in 1979 as a non-profit corporation and is made up primarily of criminal defence practitioners in the Saskatoon area, including legal aid lawyers and private defence counsel.

The focus of their submission related to the disparity between the salary of Provincial Court Judges and the salary of federally appointed Queen's Bench judges.

The Association submitted that the qualifications and workloads do not justify a different treatment and identified the risk of a "two tier" justice system with different judges being paid different amounts based on the level of court. The Association urged the Commission to establish a salary schedule for the next three years that will further reduce or eliminate the disparity.

20. The Saskatchewan Provincial Court Judges Association and The Government of Saskatchewan

COMMON GROUND

A review of the submissions from the Association and the Government indicates there is some common ground.

Both submissions did not request the Commission review the following:

(a) top up percentages of the salaries for Chief Judge, Associate Chief Judge, Administrative Judges, Northern Saskatchewan Judges;
(b) calculation factor for amount paid to Temporary Judges;
(c) professional allowances;
(d) vacation leave;
(e) pension benefits and additional retirement benefits;
(f) leave of absence;
(g) sick leave;
(h) deferred salary leave;
(i) travelling, sustenance and moving expenses;
(j) life insurance;
(k) disability, dental and health benefits.

The Commission reviewed the above items and will not be recommending any changes.

SALARIES

With respect to salary the following is a summary of the position of the Judges' Association and the Government.

	Judges' Submission	Government Submission
April 1, 2021 – March 31, 2022	$2,798 (.9%) (93% of QB salary at March 31, 2021)	$4,685 (1.5% increase)
April 1, 2022 – March 31, 2023	94% of QB salary at March 31, 2022	95% of QB salary at March 31, 2022
April 1, 2023 – March 31, 2024	95% of QB salary at March 31, 2023	95% of QB salary at March 31, 2023

The Judges' submission for April 1, 2021 to March 31, 2022 and April 1, 2022 to March 31, 2023 was subsequently revised to be identical to that of the Government.

21. Possible Proposed Legislation

Both the Association and the Government asked the Commission to consider a recommendation that the Government introduce legislation to amend *The Provincial Court Act* to provide a statutory basis for the presumption of the 95% rate (of Queen's Bench Judges salary) for subsequent years and that the legislation include that in extraordinary circumstances the Commission can review the 95% rate.

The salaries for Queen's Bench Judges is set by the Judicial Compensation and Benefits Commission which was established in 1999 to inquire every four years into the adequacy of the salaries and other amounts payable to federally appointed judges under *The Judges Act* and into the adequacy of judges' benefits generally. In 2014, the *Act* was amended to provide that for the purposes of the inquiry the prothonotaries of the Federal Court be considered as judges. Under the provisions of the *Act*, the Commission must submit a report containing its recommendations to the Federal Minister of Justice, who shall respond to the report within four months after receiving it.

In examining judicial compensation, section 26(1.1) of *The Judges Act* requires Quadrennial Commissions to consider the following factors:

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
(b) the role of financial security of the judiciary in ensuring judicial independence;
(c) the need to attract outstanding candidates to the judiciary; and
(d) any other objective criteria that the Commission considers relevant.

The 2020 Quadrennial Commission's proceedings, which were originally scheduled to commence on June 1, 2020, have been deferred due to COVID-19.

22. Family Leave

Both the Association and the Government asked the Commission to issue an order, authorizing the two parties to discuss a proposal for family leave. Upon completion of the discussions, the parties would apply to the Commission under s.51 for review of the proposal, including written materials in support of the proposal, and explaining points of disagreement, if any. The Commission would review the proposed policy and the submissions, and then issue its report and recommendations under s.51, relating to the issue of a family leave policy.

23. Pensions

Queen's Bench Judges (QBJ) enjoy a tax advantage when they retire which is not available to Provincial Court Judges (PCJ). Under the *Income Tax Act*, the pension income earned by federally appointed judges may be split with their spouse or common-law partner, with the result that a retired QBJ pays lower taxes than they would otherwise be required to pay if it could not engage in income-splitting. Unlike federally appointed judges, there is no forum for PCJ's to achieve the same treatment relating to income tax on their pension earnings, as the provincial commissions do not have the jurisdiction to make recommendations on matters within the exclusive jurisdiction of Parliament which the federal Judicial Commission and Benefits Commission does.

The Canadian Association of Provincial Court Judges has requested that the *Income Tax Act* be amended so that PCJs enjoy the same income-splitting benefits as QBJs. On July 4,

2017, the Minister of Justice and Attorney General of Canada advised that the Federal Government was not prepared to accommodate such a request.

V. RECOMMENDATIONS

24. The Commission having reviewed the submissions, listened to oral presentations and noting the common ground presented independently by the Association and the Government is prepared to make the following recommendations:

1. Salary and Benefits
   (a) for the period April 1, 2021 to March 31, 2022 the base salary be adjusted to $316,971;
   (b) for the period April 1, 2022 to March 31, 2023 the base salary be adjusted to .95 of the salary paid to the Justices of the Court of Queen's Bench at March 31, 2022;
   (c) for the period April 1, 2023 to March 31, 2024 the base salary be adjusted to .95 of the salary paid to the Justices of the Court of Queen's Bench at March 31, 2023. The administrative allowance for the Chief Judge, the Associate Chief Judge and Judges with administrative duties and Northern Judges allowance remain the same as is currently set out in the Provincial Court Compensation Regulations, namely:
      - Chief Judge, base salary plus 7.5%
      - Associate Chief Judge, base salary plus 5.0%
      - Administrative Judge, base salary plus 2.5%
      - Northern Judges Allowance, base salary plus 5.0%
   (d) the remuneration for Temporary Judges remain at a daily rate of 1/220 of the base salary of a Judge;
   (e) there be no change to the Professional Allowance or other benefits;
   (f) there be no changes to the pension benefits and additional retirement benefits; and
   (g) there be no increase to the number of Judges' vacation days.

2. That representatives of the Association, and officials from the Courts and Tribunals Division of the Ministry of Justice hold discussions on the issue of family leave, and to

draft a proposed Family Leave Policy. Upon completion of the discussions, either party, or both parties jointly, may apply to the Commission under s.51 of the Act to have the Commission review the proposed Family Leave Policy.

3. That representatives of the Association, and officials from the Courts and Tribunals Division of the Ministry of Justice hold discussions on the issue of providing guidance of extraordinary circumstances referred to above. Upon completion of the discussions, either party, or both parties jointly, may apply to the Commission under s.51 of the Act to have the Commission review the proposed guidance of extraordinary circumstances.

4. That the Government introduce amendments to *The Provincial Court Act*, in consultation with the Association, to implement the presumption of a salary based on 95% of the Queen's Bench salary for the future. The proposed amendment should provide that it would be open to either the Association or the Government to ask future commissions to review the 95% rate, but only if there are extraordinary circumstances.

VI. CLOSING REMARKS

This Commission wishes to express its sincere appreciation and gratitude to all parties who have made submissions to the Commission. In particular, we wish to acknowledge the exemplary work of legal counsel on behalf of the Association and the Government in relation to the quality and comprehensiveness of both their written submissions and oral presentations at the Commission Hearings.

This report contains the unanimous recommendations of this Commission.

DATED at Saskatoon, Saskatchewan effective this 31st day of December, 2020.

Paul S. Jaspar, SVM FCPA FCA, Chairperson

Art Postle

Deryk Kendall, BA LLB

APPENDIX A

Province of Saskatchewan

Commission Order

The Provincial Court Commission, pursuant to Part IV of *The Provincial Court Act, 1998*, makes *The Provincial Court Compensation Amendment Regulations, 2020* in accordance with the attached Schedule.

Dated at the City of Saskatoon, Saskatchewan the 21 day of December, 2020.

Paul S. Jaspar, Chairperson
Provincial Court Commission

SCHEDULE

Title

1 These regulations may be cited as *The Provincial Court Compensation Amendment Regulations, 2021*.

RRS c P-30.11 Reg 2 amended

2 *The Provincial Court Compensation Regulations* are amended in the manner set forth in these regulations.

New section 3

3 Section 3 is repealed and the following substituted:

"Salaries

3(1) A judge is entitled to be paid an annual salary in the amount of:

(a) for the annual period commencing on April 1, 2021, $316,971;

(b) subject to subsection (2), for each annual period commencing on or after April 1, 2022, the product of the following rounded up to the nearest dollar:

(i) the salary paid to the justices of the Court of Queen's Bench as at March 31 of the previous annual period;

(ii) 0.95.

(2) If the calculation set out in clause (1)(b) results in a reduction in the salary of a judge, the judge is entitled to be paid the annual salary that was paid in the previous annual period.

(3) A temporary judge is entitled to be paid:

(a) for each day in which the temporary judge is engaged in the temporary judge's duties as a judge, an amount equal to 1/220th of the annual salary of a judge determined by subsections (1) and (2) and rounded up to the nearest dollar; and

(b) for each half day in which the temporary judge is engaged in the temporary judge's duties as a judge, an amount that is one-half of the amount determined by clause (a) and rounded up to the nearest dollar".

APPROVED
LEGISLATIVE DRAFTING SECTION

December 15, 2020 - 1:23 p.m.

Section 4 amended

4(1) Subsection 4(1) is amended by striking out "subsection 3(3)" **wherever it appears and in each case substituting** "subsection 3(1)".

(2) Subsection 4(2) is amended by striking out "subsection 3(3)" **wherever it appears and in each case substituting** "subsection 3(1)".

(3) Subsection 4(3) is amended by striking out "subsection 3(3)" **wherever it appears and in each case substituting** "subsection 3(1)".

Section 5 amended

5 Subsection 5(2) is amended by striking out "subsection 3(3)" **wherever it appears and in each case substituting** "subsection 3(1)".

Coming into force

6 These regulations come into force on the day that is determined in accordance with Part IV of *The Provincial Court Act, 1998.*

APPENDIX B

PROVINCIAL COURT COMMISSION OF SASKATCHEWAN

ORDER

Whereas the Provincial Court Commission ("the Commission") has been duly established under s.36 of *The Provincial Court Act, 1998* ("the Act");

Whereas the Commission's mandate extends to June 30, 2023;

Whereas the Saskatchewan Provincial Court Judges' Association ("the Association") has indicated that its members wish to have a Family Leave Policy established;

Whereas the Government of Saskatchewan ("the Government") recognises that a Family Leave Policy is a standard component of workplace conditions and wishes to establish a Family Leave Policy for the Judges of the Provincial Court;

Whereas both the Association and the Government are conscious of the constitutional restrictions on direct negotiations for the remuneration of the Provincial Court Judges;

Whereas s.51 of the Act authorises either party to request that the Commission "inquire into and make recommendations with respect to any matter of significance to the court";

Whereas the Association and the Government have jointly requested authorization from the Commission to hold discussions about a Family Leave Policy, under the supervision of the Commission;

Whereas the Commission finds it beneficial to have a discussion regarding guidance of extraordinary circumstances referred to in the Commission's recommendations;

Whereas the Commission finds that this proposed approach is consistent with its constitutional and statutory mandates.

Therefore, the Commission **ORDERS** as follows:

Authorization for discussions

1. Representatives of the Association, and officials from the Courts and Tribunals Division of the Ministry of Justice ("the Division"), are authorized to:
   (a) hold discussions on the issue of family leave;
   (b) hold discussions on the issue of guidance of extraordinary circumstances, with a view to informing any legislative initiative the Government may undertake.

Application to the Commission

2. Upon completion of the discussions, either party, or both parties jointly, may apply to the Commission under s.51 of the Act to have the Commission review the proposed Family Leave Policy and guidance regarding extraordinary circumstances.

Written Submissions

3. In support of the applications, the parties shall file written submissions to the Commission, which shall include:
   (a) a copy of the proposed Family Leave Policy;
   (b) an outline of their positions on the proposed Policy;
   (c) points of disagreement, if any, concerning the proposed Policy;
   (d) each party's position on any points of disagreement; and
   (e) guidance regarding extraordinary circumstances.

Commission Report

4. The Commission shall review the above proposal and the written submissions of the parties, and shall issue a Report under s.51 of the Act, setting out the Commission's recommendations.

Publication of Proceedings

5. The Division shall forthwith post this Order on the Commission website.

6. Upon the filing of the written submissions mentioned in paragraph 3 of this Order, the Division shall forthwith post the submissions on the Commission website.

7. Thirty days after the date of the Commission Report mentioned in paragraph 4 of this Order, the Division shall post the Report on the Commission website.

Commission to Set Dates

8. The Commission reserves the power to set or modify the dates for the completion of any of the steps outlined above.

Issued at Saskatoon, Saskatchewan this 31 day of December, 2020.

Paul S. Jaspar, Chairperson
Provincial Court Commission

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

What level of Justices of the Peace (JP)do you have? Legally or Non Legally Trained

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
Both Legally & Non-Legally Trained 1) Justice of the Peace - legally trained 2) Non-Presiding Justice of the Peace - non-legally trained.	Both Legally & Non-Legally Trained	Non-Legally Trained There is no requirement in Manitoba for JP's to be legally trained.	Non-Legally Trained	Non-Legally Trained (See letters of authorization attached) NWT has 5 levels of JP's: 1) A1 - Administrative 1 Court Personnel 2) A2 - Administrative 2 Public Administrative 3) P1 - Presiding Level 1 4) P2 - Presiding Level 2 5) P3 - Presiding Level 3	Both Legally & Non-Legally Trained Nova Scotia has 3 levels of Justices of the Peace. Staff JP, Administrative JP, and Presiding JPs.	Both Legally & Non-Legally Trained	Non-Legally Trained	Non-Legally Trained	Both Legally & Non-Legally Trained There are 3 levels of JP's: JP 1 -not legally trained JP 2 - not legally trained but have a College Degree Magistrate JP's -named by the Provincial Court (law degree)	Both Legally & Non-Legally Trained	Non-Legally Trained

Legally Trained Justices of the Peace & Services Provided

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
Justice of the Peace Services Provided: - receiving informations; issuing process; under the CCC: issuing Search Warrants, Feeney Warrants, Blood Warrants, etc.; presiding over judicial interim release hearings; under provincial legislation: issuing orders for Child Apprehension or Emergency Protection; or orders under the Missing Persons Act; may hear and try matters arising under a variety of designated provincial regulatory acts, including traffic court matters.	Judicial Justice of the Peace Services Provided: Search Warrants Small Claims payment hearings Adjudicate traffic disputes Bail Hearings	Not applicable - no requirement for legal training Although there is no requirement for JP's to be legally trained, one of the 21 Judicial Justice of the Peace (JJP) has legal training.	Not applicable - no requirement for legal training	Not applicable - no requirement for legal training	Presiding JPs are practicing lawyers. Services Provided: Presiding JPs preside over night court for Peace Bond applications, Motor Vehicle Court. Presiding JPs also hear applications for Emergency Protection Orders, Search Warrants, and Cyber Safety Protection Orders.	Senior Justice of the Peace - There is one legally trained, Senior JP position. The legislation does not require JP's to be legally trained but the senior JP is a position hired through the DoJ and requires 5 years experience as a lawyer. Services Provided: The Senior JP provides all services including administrative JP duties, judicial interim release hearings, summary conviction trials (quasi criminal and criminal), and first stage child welfare hearings (similar to APO's) and territorial offence court (bylaw court).	Not applicable - no requirement for legal training	Not applicable - no requirement for legal training	Justice of the Peace (JP 2) have a College Degree. Degree includes some courses in general law. Degree is not mandatory - but preferable. Magistrate Justice of the Peace - area named by the Provincial Court. These positions require a law degree and a minimum of 10 years of practice. Services provided by each type of officer are determined by the Courts of Justice Act.	Senior Justice of the Peace - In Saskatchewan, legally trained Justices of the Peace are appointed to Senior Justice of the Peace positions. There is no legislative requirement for legal training for JP's - it is a policy requirement only. Senior Justices of the Peace have office hours and duties that include regulatory trials, property detention hearings, judicial interim release hearings, search warrant considerations and document processing.	Not applicable - no requirement for legal training

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

Non - Legally Trained Justices of the Peace & Services Provided

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
"Non-Presiding Justice of the Peace" Services Provided Duties are processing judicial interim release orders that have previously been made; qualifying sureties; receiving informations; confirming or cancelling process; issuing subpoenas; taking affidavits; ordering the disposition of seized items; dealing with uncontested adjournments, setting of dates for trial; and, issuing summonses.	Justice of the Peace Services Provided The duties assigned to Court Services JPs (CSJP) underwent significant changes in April 2001 as a result of court decisions about judicial independence. The main change was the transfer of contested bail hearings and search warrants from CSJPs to Judicial Justices. Consent release (uncontested bail hearings) Consent remand (s.516 CC) Approve Sureties Enter accused and/or surety into recognizance Issue Subpoenas Swear Informations and issue or confirm process Offence Act-Order for Attendance Issue bench warrant including those under s.524 or failing to attend for fingerprinting Issue 5.2 order (s.489CC)	Manitoba has three levels of justice of the peace. Community Justice of the Peace (CJP), Staff Justice of the Peace (SJP) and Judicial Justice of the Peace (JJP). The Lieutenant Governor in Council may appoint up to 21 Judicial Justice of the Peace (JJP). The powers and duties of judicial justices of the peace are found at section 2, staff justices of the peace at section 5, and section 11 provides for duties of community justices of the peace.	Non-Legally Trained - all court staff are JP's. There are a few community JP's in the smaller communities. The present policy of the government is to limit the appointment of Justices of the Peace to personnel in the Provincial and Supreme Courts. Services Provided: Swearing Criminal Code Informations and considering process; issuing documents pursuant to an order of a judge; taking oaths.	Non-Legally Trained (See letters of authorization attached) NWT has 5 levels of JP's: 1) A1 - Administrative 1 Court Personnel 2) A2 - Administrative 2 Public Administrative 3) P1 - Presiding Level 1 4) P2 - Presiding Level 2 5) P3 - Presiding Level 3 Designations vary dependant on training There are currently 38 active JPs in the Northwest Territories	Staff JPs - are not legally trained . Services Provided: Provide quasi-judicial services in the Justice Centres which includes swearing informations, summons, subpoenas, etc. Administrative JPs - are not legally trained. Services Provided: Preside over civil weddings	Non-Legally Trained: There are 68 active non-legally trained JPs (lay JP's). Services Provided: They range in duties from administrative JP duties such as swearing of informations to handling judicial interim release hearings in the communities and territorial offence court. Community JPs (fee for service) can be authorized to do summary conviction trials but there are currently none designated to handle those matters.	Ontario has a single level Justice of the Peace. Services Provided: Provide all services including telewarrants, search warrants, intake court, set dates, bails, first appearances, pre-enquetes ("in camera" proceeding before a justice of the peace to determine whether an Information should be laid against a person at the private complaint of another person), child apprehension, mental health assessment requests and provincial offences trials.	Services Provided: Referred to as lay JP's. There are 3 JP's in the Province that are assigned to conduct bail hearings. All other JP's can deal with bail for remand purposes only. Up to a month ago, JP's also heard search warrant, and feeney warrant applications. They have now had a constitutional challenge, therefore, now all search warrant and feeney warrant applications are heard by Provincial Court Judges. There are also 3 salaried JP's (one for each county) on call on a 24/7 basis. These JP's only deal with bail on 1st instance, and only for remand purposes	There are two levels of justice of the peace other than Magistrates. JP1 are not legally trained. The services provided by each type of officer are determined by the courts of justice act.	Regular Justice of the Peace in Saskatchewan are not legally trained. They work primarily on a call-in basis except for work on the JP Hub which is scheduled shift work. Their duties include judicial interim release hearings, search warrant consideration and document processing. The main difference between Senior JP's and other JP's is that only Senior JP's are assigned trial and case management work. Saskatchewan also has staff JP's - court officials who are court clerks and are employees of the government. They are not independent of government and cannot make judicial decisions.	There are 3 levels of JP's. they are all lay people trained by senior JP's and Judiciary. 1) Administrative JP - receives informations (can't consider process), Comm for Oaths, perform weddings. 2) Presiding JP 2 - issue process, uncontested bail hearings, consider and issue peace bonds. 3) Presiding JP 3 - hear contested bail, consider search warrant applications Refer to the Territorial Court Act for legislative guidelines

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

Number of Locations and Hours of Service - Centralized Services

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
There are two Hearing Offices: one is located in downtown Calgary at the Courts Centre; one is located in downtown Edmonton at the Brownlee Building. All judicial interim release hearings are conducted from these centres by C.C.T.V. or telephone. (Applications for orders under federal and provincial legislation may be in person, by telephone or facsimile transmission to these centres.) . All summary conviction courts hearing traffic matters or matters under designated provincial regulatory acts are held in court rooms at local court buildings throughout the province.	Justice Centre (JC) is located in Burnaby and is available 24 hours a day, 7 days a week. (Judicial Justice) The Justice Centre cut-off time for bail hearings is 11:00 p.m., however, this is at the discretion of the Judicial Justice on duty at the Centre who may decide to accept bail hearings until midnight. After the JC offices closes at midnight, there is a JJ on duty working from home midnight to 8 a.m. This JJ reviews search warrant applications and applications for arrest warrants. All in custody matters that do not make the cut-off time are held over for hearing at a courthouse in front of a PCJ or through the JC at 8:00 a.m.	JJPs- There are 13 JJPs working out of the Winnipeg court office and 8 JJPs working out of six Regional Court offices. Service requests for JJP's are routed through a centralized location in the Winnipeg Court office. A coordinator working at the Winnipeg office is responsible for assigning the service request to the Winnipeg JJP's first. If required, due to workload volume or shortage of JJP's, the coordinator will then assign to the 8 JJP's working out of the Regional offices. JJPs also sit in Summary Conviction Court hearing traffic matters.	N/A There is no centralized JP Office. Any search warrant applications, emergency orders or bail hearings are dealt with by an on call Judge.	Yellowknife Courthouse and 3 Other Locations: Monday to Friday 9:00 a.m. - 4:00 P.M. A1 Justices of the Peace are available to receive court Informations and confirm/cancel process	Centralized Justice of the Peace Centre - Dartmouth: Presiding JPs provide JP services province-wide from a centralized geographical location in Dartmouth Nova Scotia. Their office is called the Justice of the Peace Centre. These services are provided outside of regular working hours when Justice Centres are not open. During regular day-time hours, Provincial Court Judges conduct bail hearings. Services Provided: After hours, Presiding JPs conduct bail hearing in person, via telecom and via video conferencing. During regular working hours, staff JPs and judiciary provide services.	Nunavut Justice Centre - Iqaluit : Two JPs work regular court hours (9:30 a.m. to 5:00 p.m.) at the Nunavut Justice Centre in Iqaluit.	Centralized Telewarrant Centre - JP's are scheduled for shifts in two locations that serve the province (Newmarket & Oshawa) They hear search warrant applications for the entire Province when they cannot be obtained otherwise. Days and Hours of Operations: 24 hours a day, 7 days a week	N/A - PEI does not have any form of centralized services	Centralized Services - Montreal Days and Hours of Operation: Magistrate Justice of the Peace - Fridays from 6:00 pm to 10:00 p.m. Saturdays from 7:00am to 4:30 pm Level 2 Justice of the Peace - also available on a 24 hour basis Fridays and weekends for non-contested liberations (bail hearings). No urgent procedures in youth matters take place outside office hours.	Centralized JP services in Saskatchewan are provided by telecommunication through the JP Hub located at the Justice of the Peace Centre in Regina, Saskatchewan. The JP Hub provides primary and back up JP Services to 77 locations in the province It operates very similar to the Alberta Hearing Offices in Calgary and Edmonton, and the B.C. Hub in Burnaby, B.C. Saskatchewan Hub JP's conduct judicial interim release hearings by telecommunications. Hub JP's consider telewarrants and process a variety of court related documents by telecommunication. Days and Hours of Operations: The Hub operates 24 hours a day, 365 days a year. Hours of Operation - Regular hours of operation are from 8 a.m. to midnight on weekdays and 2 p.m. to 10 p.m. on weekends. The Hub has an on-call JP available outside of regular ours for emergencies	Centralized Services (Whitehorse): Days and Hours of Operations: Bail Hearings: Monday to Friday from 8:30 a.m. to 5:00 p.m. & Saturday/Sundays/Stat Holidays from 10 a.m. until complete Search Warrants: 7 days a week, 24 hours a day All JP's in Whitehorse have P3 designations

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

Number of Locations and Hours of Service - Multiple Locations

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
2 Locations Days and Hours of Operations: The Hearing Offices in Edmonton and Calgary operate 24/7. (Traffic Courts are at all court house locations and sit in accordance with the published Court Calendar.)	44 court locations (Justice of the Peace) 8:30a.m. to 4:30p.m. Monday to Friday (except statutory holidays) Some small locations may have limited hours	JJPs - See above (Centralized Services) for JJPs SJPs- located at 12 court offices throughout the Province CJPs-58 communities being served throughout the Province	Ten Court Centres. In addition, there are community based JPs. Days and Hours of Operation: Monday to Friday - 8:30 a.m. to 4:30 p.m. for routine administrative JP procedures. On Call Duty Judge - Judges of the Provincial Court are placed on a rotating on-call list whereby one judge is assigned the Duty Judge for one-week period and is on call 24/7 for telewarrants, Emergency Protection Orders, etc. For this purpose, all judges have been supplied with fax machines to assist with afterhours responsibilities.	16 Communities - most without courthouses Days and Hours of Operation: On Call - As required A2/P1/P2/P3 Justice of the Peace	All courthouse locations	There are JPs in 24 communities in Nunavut. Days and Hours of Operations: The community JPs operate on an "on call, as needed" with no defined hours. They are remunerated on a fee for service basis.	Province Wide - JP's are available at approximately 84 locations across the Province to provide JP services. There are 7 distinct regions for JP Services in Ontario and each of these regions has an Administrative JP responsible for scheduling the JP's in the area. Days and Hours of Operations: Monday to Friday : 8:30 a.m. to 5:00 p.m. Weekend and Statutory Holiday (WASH Courts): Bail courts operate in nine locations throughout the province starting at 9a.m. for hearings. Anyone arrested the night before is set over to 9 a.m. the following day for bail. Courts run until all bail hearings are complete.	3 Locations (one in each county) Days and Hours of Operations: Main activities (bail hearings, search warrant applications, etc.) are heard at each county during regular office hours (8 a.m. - 4 p.m. or 9:00 a.m. - 5 p.m.) depending on the county.	Justice of the Peace services are provided in all courthouses and service points (Level 1 JP) These are staff JP's. Days and Hours of Operations: Monday to Friday 8:30 am to 4:30 pm	There are multiple JP locations in the province. There are 79 locations with in-person JPs available 24 hours a day on a call in basis. Senior JPs with office hours are available in the two major cities from 8 a.m. to 5 p.m. weekdays.	15 Locations In addition to centralized bail services provided out of Whitehorse, we have JPs who can swear information in 15 Yukon communities. Some of these JP's have P2 designations. Days and Hours of Operations: JP's are scheduled during normal business hours. On Call - 24/7 based on individual JP availability

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

Are all services provided during your business hours? If not, please specify.

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
Yes	Yes	JJPs- 7 days per week services Weekdays (Monday to Friday) from 8:30 a.m. to 11 p.m., Weekends and Statutory Holidays - 7 a.m. to 11p.m.and On Call - One JP is on call from 11p.m. to 7 a.m., 7 days a week including all weekends and statutory holidays. Only emergent matters are dealt with during this time - very strict rules in place. During normal business hours, the JJPs deal with the following applications: Mental Health Search Warrants Youth Drug Stabilization Protection Orders Facilitate Accused's Release s 5013.(1) applications Any other emergency orders SJPs-5 days a week from 7 a.m. to 6p.m. with potential overtime depending on courtroom completion. CJPs - have no scheduled time. They operate 7 days per week on an as needed basis, and their hours of availability are agreed upon with the local policing agency.	As stated above, Provincial Court Judges perform JP duties after hours and during weekends and statutory holidays.	Services are provided on an "as required" basis On Call Basis - JP's are scheduled and available 24/7 when required. A toll free line is available for service requests. When someone calls the toll free line it is automatically forwarded to the duty JP.	Yes At all courthouses across the province by resident judiciary.	No The JPs have a roster of "on call" JPs that provide services after hours for the RCMP and for EP hearings under the *Family Abuse Intervention Act,* as well as bail hearings.	Yes All services are provided during business hours.	No Bail hearings are only conducted on Tuesday and Friday mornings. Search warrant applications and other emergency applications are heard by a PCJ at any time during court sitting times.	All services are provided during business hours ; apart from the Centralized Service in operations on Friday and Saturdays. Bail hearings are heard by Judges Monday to Friday from 8:30 a.m. - 4:30 p.m.	Services are typically provided during office hours (if applicable) or regular JP work hours (8am to midnight) with after hours availability for emergencies (i.e. Feeny Warrants, Blood Warrants).	Yes

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

Do you conduct hearings: ___In Person ____ By Video Conference ____ By Telephone

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
Bail hearings are conducted by video conferencing or by telephone. Applications for process (arrest warrants and summonses), search warrant and similar orders are made in person, by telephone, or by facsimile transmission. The vast majority of process applications are by facsimile transmission. EPOs and APOs are primarily by telephone, with faxed packages in support. All search warrants are in person or by facsimile transmission. Blood warrants (s. 256 CC) are almost exclusively by telephone.	Justice Centre (Judicial Justice)-If dealing with search warrants or bail hearings, there are conducted primarily by telephone Judicial Justices (Legally Trained) are also assigned to hear traffic matters and small claims payment hearings. When scheduled for these courts, for the majority of the appearances the judicial justice is in person. However, in some instances, the judicial justice may attend by video conference Justice of the Peace-most services are provided in person with the notable exception of Swearing Informations. We have tele-swearing processing that allows police detachments in municipalities that do not have JP personally present to swear their informations by tele - communications	Bail hearings can be done in person, by video conferencing or by telephone depending on where the accused is being held.	In person- Yes Video Conferencing- Yes By Telephone- Yes All of the above. Provincial Court Judges preside over Weekend and Statutory Holiday Court out of the St. John's Court Centre. Judges may appear in person, via telephone or video conferencing. The same is true for accused persons outside of St. John's	In Person- in the courthouses Video Conferencing- available in all correctional facilities and courthouses By Telephone- Documents are faxed in to JP and service is provided over the phone	In Person - Yes Video - Yes By Telephone - Yes	In Person - Yes Video Conferencing - Yes By Telephone - Yes Community JPs hold hearings by phone and in person if they are resident in the community where the hearing is held. The JP Court in Igaluit (Nunavut Justice Centre) has the capacity to do video conferencing hearings at the Nunavut Justice Centre.	In Person - Yes Video - Yes By Telephone - Yes	In Person only at this time. PEI is currently exploring video conferencing options with the correctional facilities.	In Person - Weekly hearings are done at the courthouse in presence of a judge. By Telephone - Weekend appearances are held by phone. There is a pilot project in place for testing video appearances but this is very much in infancy stages.	In Person - Yes By Telephone - Yes Although JP hearings are currently conducted either in person or by telephone we anticipate implementing JP hearings by video conference as a pilot project in one location within the next year	In Person - Yes Video Conferencing - Yes By Telephone - Yes

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

Do you conduct bail hearings on a 24 hour basis? If not, during what hours are they conducted?

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
YES - on a 24 hour basis.* *Exception: no hearing services are provided to the Edmonton Police Service between 0300 to 0900 and 1700-1900	Yes Justice Centre (JC) is available 24 hours a day, 7 days a week. (Judicial Justice) The Justice Centre cut-off time for bail hearings is 11:00 p.m., however, this is at the discretion of the Judicial Justice on duty at the Centre who may decide to accept bail hearings until midnight. All in custody matters that do not make the cut-off time are held over for hearing at a courthouse in front of a PCJ or through the JC at 8:00 a.m.	No Bail hearings are conducted from 8:30 a.m. to 11:00 p.m. seven days per week, including weekends and statutory holidays	No Bail hearings are normally dealt with between the hours of 8:30 a.m. and 4:30 p.m. seven days a week, including Statutory holidays.	No RCMP are asked to schedule bail hearings for 1:30 p.m. during the week and on week ends. Most often bail hearings are conducted in person in Yellowknife through an on call JP. Prisoners are transported in person. NWT would like to shift to hearing bail by video or phone but the reliability of video and phone is not quite there yet.	No Bail hearings are held during regular hours at courthouses across the province. After hours, they are held by the Presiding JPs at the JP Centre. Hearings are held after 3 pm to 9 pm on weekdays and from 9 am to 9 pm on weekends and holidays.	No On call basis only - Bail hearings are conducted seven days per week as required. It is up to the individual on call JP as to when they will hear bail.	No Monday to Friday - during regular business hours Bail hearings are never heard at night or outside of the regular court day. Weekend/Stat Holidays - WASH bail courts commence at 9 a.m. and continue until all bail hearings have been completed	No Bail hearings are heard only on Tuesday and Friday mornings in the county courthouse. Staff JP's at the courthouse have the ability to remand the accused in custody to the next bail hearing day during regular court hours. Any arrests after court hours are handled by the on call JP's, who remands the accused to next bail hearing court.	Monday to Friday bail hearings are heard by Judges from 8:30 a.m. to 4:30 p.m. JPs are not involved in bail hearings that occur within office hours since hearings are made in the presence of a provincial court judge. If the bail hearing must occur during the weekend, contested bail hearings will be given to Magistrate Justice of the Peace which will systematically remand the cases to the coming Monday. If the liberation (bail hearing) is not contested, a JP2 will render decision, complete the required documentation and send out the court order and conditions by fax.	Hearings are conducted on a 24 hour basis for urgent matters. In practice, very few bail hearings take place outside of regular court hours as critical resources are rarely available during these timeframes (i.e. Legal Counsel/Legal Aid, Crown Prosecutors). As a result, the majority of after hours bail hearing requests in Saskatchewan are requests for adjournments to prepare for bail hearings.	No Bail Hearings: Monday to Friday from 8:30 a.m. to 5:00 p.m. & Saturday/Sundays/Stat Holidays from 10 a.m. until completion

Who presents at bail hearings: ___ Crown ___ Law Enforcement ___ Other (please specify)

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
All enforcement agencies (RCMP and city police services) provide peace officers as "Presenting Officers" at j.i.r. hearings. Occasionally, a Crown prosecutor will appear on a high profile and/or serious matter. As well, at pilot projects with Grand Prairie and Red Deer court points, Crown prosecutors present at "pre-booked" bail hearings.	Both Crown and Law Enforcement as follows: Most bail hearings are conducted by a peace officer. Surrey and Vancouver have dedicated Crown who appears after hours and on weekends for offences arising out of those two jurisdictions. On a rare occasion a Crown from another jurisdiction may conduct a bail hearing.	Crown- Crown is required to be present if the bail is contested. Law Enforcement- If the bail is uncontested only. Law Enforcement cannot give submissions.	Crown	Crown	Traditionally, crown presents during regular working hours and law enforcement presents after hours.	Crown - Crown is present for bail hearings that are handled in Iqaluit Court. This court only handles bail hearings. Law Enforcement - everywhere else in Nunavut RCMP present at bail hearings.	Crown Crown are available Monday to Friday during normal business hours to conduct bail hearings. They are also scheduled to conduct bail at WASH courts . In addition: Defence, Duty Counsel, John Howard's Bail Supervision Program, Interpreters.	Crown Crown conduct bail before a PCJ during regular court sitting hours	Crown - Yes Law Enforcement - Yes Law Enforcement is present for bail hearings outside of office hours.	Crown - Crown prosecutors are required for contested bail hearings. Crown Prosecutors also handle all bail matters taking place during regular court hours. Law Enforcement - In Saskatchewan, police officers represent the Crown for after hours release hearings and after hours requests for adjournments of bail hearings.	Crown - Yes Law Enforcement - On rare occasions RCMP in some smaller communities Other - Duty Counsel for Defence

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

During bail hearings do your JP's: ___ hear evidence under oath or affirmation from Crown or Defence Witnesses
___ hear evidence under oath from accused persons
___ rely solely upon allegations of circumstances provided by the Bail Presenter from police reports or unsworn statements from the accused
___ Other (please specify)

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
X - rely solely upon allegations of circumstances provided by the bail presenter from police reports or unsworn statements from the accused.	All bail hearings are conducted by Judicial Justices (Legally Trained) X - They rely solely upon allegations of circumstances provided by the bail presenter from police reports or unsworn statements from the accused	X - rely solely upon allegations of circumstances provided by the bail presenter from police reports or unsworn statements from the accused	Other- Bail hearings are presided over by Provincial Court Judges.	X - rely solely upon allegations of circumstances provided by the bail presenter (crown) from police reports or unsworn statements from the accused	X - Hear evidence under oath or affirmation form Crown or Defence witnesses X - Hear evidence under oath from the accused	X - Hear evidence under oath or affirmation form Crown or Defence witnesses X - Hear evidence under oath from the accused	X - hear evidence under oath or affirmation from Crown or Defence witnesses X - hear evidence under oath from the accused	X - hear evidence under oath or affirmation from Crown or Defence witnesses - sometimes, but usually just the Crown presents X - hear evidence under oath from the accused - Not usually X - rely solely upon allegations of circumstances provided by the bail presenter from police reports or unsworn statements from the accused - Not usually All bail hearings are conducted in a courtroom during regular court business hours	None. JPs are not involved in bail hearings that occur within office hours since hearings are made in the presence of a provincial court judge. If the bail hearing must occur during the weekend, contested bail hearings will be given to Magistrate Justice of the Peace which will systematically remand the cases to the coming Monday. If the liberation (bail hearing) is not contested, a JP2 will render decision, complete the required documentation and send out the court order and conditions by fax.	Other Bail hearings in Saskatchewan typically involve unsworn oral evidence from the accused and oral submissions made by Crown Prosecutors and Legal Counsel/Legal Aid. Evidence is rarely provided under oath in these proceedings.	X - rely solely upon allegations of circumstances provided by the bail presenter from police reports or unsworn statements from the accused

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

Do you have standardized Bail Packages? (Please provide a copy if available)

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
Yes. The contents of the package may vary. For warrants originating from outside the presenting agency, often the package contains only a CPIC message confirming the outstanding warrant. Having a copy of the warrant would assist with the provision of further details.	No	Somewhat - Police Consent form is currently used by the City of Winnipeg Police Crown and Defence agreed upon Bail Condition Sheet	No.	No	No	No	No	No	No	No	No

Do you have Duty Counsel available for bail hearings?

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
No. In 2010, a pilot project was run at the Calgary Hearing Office with Crown Prosecutors and duty counsel on all C.P.S. bail files. Days /Hours of the Project: Monday to Friday 9 a.m. to 4 p.m.	On occasion counsel may appear with the accused	Duty Counsel is available for all bail hearings. On weekends and statutory holidays, bail hearings for all overnight arrests are heard the following morning. A docket is produced and Duty Counsel are available in the morning only to deal with any matters.	Yes - bail hearings are heard by a judge	Duty Counsel are routinely in attendance for bail hearings (NWT Legal Aid program)	Only during regular work hours. There is no Duty Counsel after hours and/or on weekends.	Yes Duty Counsel are available and on call on a 24 hour basis	Yes Duty Counsel are available at all bail hearings including WASH bail hearings	No - Duty Counsel is not available for bail hearings at all. If the accused qualifies for legal aid, they may have an appointed lawyer appear for them for their bail hearing.	No Duty Counsel is only available for bail hearings heard at the courthouse by Provincial Court Judges	Duty Counsel is only available for bail hearings taking place during regular court hours	Yes For all bail hearings week days and week ends

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

Other Services - Are all other services provided throughout your hours of operation, or are certain services restricted to specific hours? (Please specify)

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
Yes	There are some restrictions for using the Justice Centre during the day. The Provincial Court issued practice directives in relation to Daytime Search Warrant Applications and Missing Persons Act Applications (these are included in Appendix ? Of the Discussion Document) The Justice Centre only provides the following services - Search Warrants Bail Hearings There are other Justices that do not work at the JC who preside over traffic hearings and bylaw matters. While most of the Judicial Justices reside in the lower mainland, they preside over traffic court hearings in over 44 court locations either by travelling in person or appearing by video. There is also another classification of JP, Justice of the Peace Adjudicators (JPA). JPA's are appointed to hear civil cases having a monetary value up to $5,000. The JPA's only preside over these matters in Vancouver and Richmond small claims matters.	There are restrictions on the following: <u>Surety</u> qualification is only heard from 7 a.m. to 8 p.m. daily. <u>From 11 p.m. to 7 a.m.</u> - only the most emergent matters are heard. There is no JP on duty - there is one on call for these matters, and there are very stringent guidelines/rules relating to urgent matters. <u>Between 7 a.m. and 11 p.m.</u> - the only matters dealt with are search warrants, protection order applications, mental health applications, youth drug stabilization applications, facilitate accused releases, appearance of accused before a justice pursuant to s503.1CC and any other emergency orders. <u>Production Orders</u> - not considered emergent orders. However, JP's still review dependant on workload.	Court staff are appointed JPs for administrative purposes only and carry out their JP responsibilities during normal work hours including administering oaths, signing Informations and Applications, and reading documentation to accused. Provincial Court Judges, however provide telewarrants services 24/7 and preside over bail hearings 7 days a week.	Informations are received and process confirmed at any court registry during regular hours, or by JPs outside of regular hours in person or by phone. Bail hearings are restricted to afternoons Monday to Friday from 1:30 p.m. and weekends in Yellowknife from 1:30 p.m. as required. Evening Justice of the Peace Court is held several days per week in Yellowknife and on a scheduled basis outside of Yellowknife to hear municipal and territorial offences (summary offences such as traffic violations) . Emergency Protection Order applications are heard as and when required in person or by phone. Weddings are performed as and when required.	Yes - during regular working hours at Justice Centres (Provincial Court Judges sitting in court) After hours services for warrants and other emergency applications are processed through the JP Centre. During regular working hours, the applications are processed through Justice Centres (i.e. Provincial Court Judges presiding in court) Some services may be provided by the JP Centre. However, JP Centres during the day are being eliminated as a result of budget decisions.	Yes All services are provided throughout regular hours of operation - 9:30 a.m. to 5:00 p.m. After hours the on call JP's deal with bail hearings, search warrants and other emergent applications as required.	Yes	No Bail hearings are restricted to Tuesday and Friday mornings only For search warrant applications after regular hours, there is a central number to call, where a JP ensures they call a judge other than the judge that is assigned to hear the case, and determines when the ITO will be ready. Once the judge is contacted and agrees to handle the matter, the JP calls the officer back and relays contact information. This is a temporary situation that has been put in place due to the current legislative challenge relating to issuance of search warrants by JPs.	All other services are provided throughout working hours. 8:30 a.m. - 4:30 p.m.	While JPs are available 24/7 for urgent matters, non-urgent matters are restricted to regular work hours.	<u>Days and Hours of Operations:</u> Bail Hearings: Monday to Friday from 8:30 a.m. to 5:00 p.m. & Saturday/Sundays/Stat Holidays from 10 a.m. until complete Search Warrants: 7 days a week, 24 hours a day All JP's in Whitehorse have P3 designations

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

What medium do you use for documentation? ___ Electronic (comments) ___ Hard Copy (comments)

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
Hard Copy Most documents are submitted by fax to the Hearing Offices.	Electronic We employ SmartForm technology for preparing Informations Hard Copy Most documents are submitted by fax to the Justice Centre	Electronic - for the most part, documents are received in the Central JP Office by email from the Winnipeg Police. Documents from RCMP are received by fax. Manitoba is trying to get everyone to use the email process as they find that the fax quality if very poor. Hard Copy - Manitoba still uses hard copy documents for hearing, endorses the hard copy and utilizes the hard copy document for court purposes.	Hard Copy	Hard Copy		Hard Copy Documents are scanned and submitted to JP's and/or court registry by email. The scanned copy of the document becomes the original court file.	Electronic - At the Telewarrant Centre, the JP receives the documents by email, signs the order electronically and emails back to the requesting agency. The search warrant files are kept electronically until there is a need to print. Bail orders are also produced electronically, but they are all printed for signature. Hard Copy - court documents are all still handled by hard copy	Hard Copy All court documents are submitted in hard copy. Hard copy documents are used in the courtroom and resulting documents are all produced in hard copy.	Hard Copy If liberation (bail hearing) is not contested, JP2 completes documents and sends out by fax. Justice of the Peace do not benefit from any administrative support personnel for clerical matters following the hearing.	Hard Copy Although electronic documents are not currently in use, we anticipate piloting their use within the next 1-2 years	Hard Copy Documents received by fax from the communities

Other Comments You Wish to Add: What works well, what does not? What would you change about the delivery model? What IT changes, if any, are needed?

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
	As the police detachments are the main user of the Justice Centre, and the majority of the services are provided using their delivery model, it may be useful to solicit from their perspective what works and what doesn't. From a Court Perspective, there is a duplication of effort and significant amount of paperwork. To streamline the process by employing technological solutions would be costly given the number of police detachments and volume of work being handled by the centre.	Manitoba is continuing to employ technology where it is able to support JP services; such as tele/video conferencing; document scanning/email. *The Provincial Court Act* of Manitoba was recently amended to allow for the use of electronic signatures and review is being undertaken of processes to see where the use of electronic signatures can streamline and make processes electronic and eliminate the use of paper.	No response provided	No response provided	No response provided	Nunavut is looking to professionalize their JP course to make it more structured and available.	None	None	None	Expand use of video conferencing and the ability to use electronic documents would increase the efficiency of the current system and are under review.	N/A

H E A R I N G O F F I C E R E V I E W (H O R C) - JURISDICTIONAL REVIEW - JUSTICE OF THE PEACE SERVICES

Legislative Authorities that Govern Justices of the Peace

ALBERTA	BRITISH COLUMBIA	MANITOBA	NEWFOUNDLAND AND LABRADOR	NORTHWEST TERRITORIES	NOVA SCOTIA	NUNAVUT	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN	YUKON
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