2005 SCC 44, 2005 CSC 44
Supreme Court of Canada

Provincial Court Judges' Assn. (New Brunswick)
v. New Brunswick (Minister of Justice)

2005 CarswellNB 405, 2005 CarswellNB 406, 2005 SCC 44, 2005 CSC 44, [2003] S.C.C.A. No. 458, [2005] 2 S.C.R. 286, [2005] S.C.J. No. 47, [2006] 1 W.W.R. 407, 135 C.R.R. (2d) 55, 135 C.R.R. (2d) 57, 141 A.C.W.S. (3d) 213, 14 C.P.C. (6th) 1, 201 O.A.C. 293, 255 D.L.R. (4th) 513, 288 N.B.R. (2d) 202, 30 Admin. L.R. (4th) 1, 336 N.R. 201, 346 W.A.C. 300, 367 A.R. 300, 49 Alta. L.R. (4th) 211, 751 A.P.R. 202, 85 O.R. (3d) 79 (note), J.E. 2005-1362, EYB 2005-93017

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)

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)

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)

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)

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)

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)

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

Heard: November 9-10, 2004
Judgment: July 22, 2005[* **]
Docket: 30006, 30148, 29525, 30477

Proceedings: reversed *Bodner v. Alberta* ((2002)), 2002 CarswellAlta 1451, [2002] A.J. No. 1428, [2003] 9 W.W.R. 637, 36 C.P.C. (5th) 1, 16 Alta. L.R. (4th) 244, 2002 ABCA 274, 222 D.L.R. (4th) 284, 317 A.R. 112, 284 W.A.C. 112 ((Alta. C.A.)); affirmed *Bodner v. Alberta*, 2001 CarswellAlta 1039, 93 Alta. L.R. (3d) 358, 2001 ABQB 650, [2001] 10 W.W.R. 444, 10 C.P.C. (5th) 157, 296 A.R. 22 ((Alta. Q.B.)); affirmed *Bodner v. Alberta*, 2001 CarswellAlta 1782, 2001 ABQB 960, 300 A.R. 170, [2002] 8 W.W.R. 152, 19 C.P.C. (5th) 242, 3 Alta. L.R. (4th) 59 ((Alta. Q.B.)); additional reasons to *Bodner v. Alberta*, 2001 CarswellAlta 1039, 93 Alta. L.R. (3d) 358, 2001 ABQB 650, [2001] 10 W.W.R. 444, 10 C.P.C. (5th) 157, 296 A.R. 22 ((Alta.

Q.B.)); affirmed *Provincial Court Judges' Assn. (New Brunswick) v. New Brunswick (Minister of Justice)*, [2003] N.B.J. No. 321, 2003 CarswellNB 374, 2003 CarswellNB 375, 231 D.L.R. (4th) 38, 260 N.B.R. (2d) 201, 684 A.P.R. 201, 5 Admin. L.R. (4th) 45, 40 C.P.C. (5th) 207, 2003 NBCA 54 ((N.B. C.A.)); affirmed *Provincial Court Judges' Assn. (New Brunswick) v. New Brunswick (Minister of Justice)*, 2002 CarswellNB 152, 2002 NBQB 156, 213 D.L.R. (4th) 329, 249 N.B.R. (2d) 275, 648 A.P.R. 275, 42 Admin. L.R. (3d) 275 ((N.B. Q.B.)); affirmed *Ontario Judges' Assn. v. Ontario (Management Board)* ((2003)), 2003 CarswellOnt 4101, [2003] O.J. No. 4155, 178 O.A.C. 311, 38 C.C.P.B. 118, 112 C.R.R. (2d) 58, 233 D.L.R. (4th) 711, 8 Admin. L.R. (4th) 222, (sub nom. Ontario Judges' Assn. v. Ontario) 67 O.R. (3d) 641 ((Ont. C.A.)); affirmed *Ontario Judges' Assn. v. Ontario (Management Board)* ((2002)), 2002 CarswellOnt 492, [2002] O.J. No. 533, 58 O.R. (3d) 186, (sub nom. Ontario Judges' Association v. Ontario) 157 O.A.C. 367, 33 C.C.P.B. 83 ((Ont. Div. Ct.)); reversed in part *Minc c. Québec (Procureur général)* ((31 mai 2004)), no C.A. Montréal 500-09-013412-036 ((Que. C.A.)); affirmed *Minc c. Québec (Procureur général)*, EYB 2003-40318, 2003 CarswellQue 680, [2003] R.J.Q. 1510 ((Que. S.C.)); reversed in part *Minc c. Québec (Procureur général)*, 2004 CarswellQue 11900, 2004 CarswellQue 1310, EYB 2004-64900, [2004] R.J.Q. 1475 ((Que. C.A.)); reversed *Minc c. Québec (Procureur général)*, EYB 2003-40318, 2003 CarswellQue 680, [2003] R.J.Q. 1510 ((Que. S.C.)); reversed in part *Conférence des juges du Québec c. Québec (Procureur général)*, [2004] J.Q. No. 6622, 2004 CarswellQue 11901, 2004 CarswellQue 1311, EYB 2004-64901, [2004] R.J.Q. 1450 ((Que. C.A.)); affirmed *Conférence des juges du Québec c. Québec (Procureur général)*, EYB 2003-40319, 2003 CarswellQue 777, [2003] R.J.Q. 1488 ((Que. S.C.))

Counsel: Susan Dawes, Robb Tonn for Appellants, Provincial Court Judges' Association of New Brunswick, Honourable Judge Michael McKee, Honourable Judge Steven Hutchinson
Gaétan Migneault, Nancy Forbes for Respondent, Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Justice
C. Michael Mitchell, Steven M. Barrett for Appellants, Ontario Judges' Association, Ontario Family Law Judges' Association, Ontario Provincial Court (Civil Division) Judges' Association
Lori R. Sterling, Sean Hanley, Arif Virani for Respondent, Her Majesty the Queen in Right of the Province of Ontario, as represented by Chair of Management Board
Phyllis A. Smith, Q.C., Kurt Sandstrom, Scott Chen for Appellants, Her Majesty the Queen in Right of Alberta, Lieutenant Governor in Council
Alan D. Hunter, Q.C., S.L. Martin, Q.C. for Respondents, Chereda Bodner et al.
Claude-Armand Sheppard, Annick Bergeron, Brigitte Bussières, for Appellant/Respondent/Intervener, Attorney General of Quebec, Appellant, Minister of Justice of Quebec
Raynold Langlois, Q.C., Chantal Chatelain, for Respondent/Intervener, Conférence des juges du Québec, Respondents, Maurice Abud et al., Intervener, Canadian Association of Provincial Court Judges
William J. Atkinson, Michel Gagné, for Respondents, Morton S. Minc et al.
André Gauthier, Raymond Nepveu, for Appellant, Conférence des juges municipaux du Québec
Robert J. Frater, Anne M. Turley, for Intervener, Attorney General of Canada

Janet Minor, Sean Hanley, Arif Virani, for Intervener, Attorney General of Ontario
Gaétan Migneault, for Intervener, Attorney General of New Brunswick
George H. Copley, Q.C., Jennifer Button, for Intervener, Attorney General of British Columbia
Graeme G. Mitchell, Q.C., for Intervener, Attorney General for Saskatchewan
Kurt Sandstrom, for Intervener, the Attorney General of Alberta
F. William Johnson, Q.C., for Intervener, Canadian Bar Association
Louis Masson, Michel Paradis, Valerie Jordi for Intervener, Federation of Law Societies of Canada
Pierre Bienvenu for Intervener, Canadian Superior Court Judges Association
Steven M. Barrett and C. Michael Mitchell for Intervener, Ontario Conference of Judges
Paul B. Schabas and Catherine Beagan Flood for Intervener, Association of Justices of the Peace of Ontario
W.S. Berardino, Q.C., for Intervener, Judicial Justice of the Peace Association of British Columbia
(written submissions)

***Per curiam*:**

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"; *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), 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 *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) ("*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 *R. v. Beauregard*, [1986] 2 S.C.R. 56 (S.C.C.), at pp. 70-73; *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35 (S.C.C.), 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, 1975 (Canada)*, [1976] 2 S.C.R. 373 (S.C.C.) ("*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 Justice)*, [2002] 1 S.C.R. 405, 2002 SCC 13 (S.C.C.), 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 re Anti-Inflation Act, 1975 (Canada)*, 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 (Alta. Q.B.); (2001), 3 Alta. L.R. (4th) 59, 2001 ABQB 960 (Alta. Q.B.)

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 (Alta. C.A.))

(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 *Conférence des juges du Québec c. Québec (Procureur général)* [2004] R.J.Q. 1450, [2004] Q.J. No. 6622 (Que. C.A.); *Minc c. Québec (Procureur général)*, [2004] R.J.Q. 1475 (C.A. Que.)). 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 c. Québec (Procureur général)*, [2000] R.J.Q. 744 (C.S. Que.)). 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 c. Québec (Procureur général)*, [2000] R.J.Q. 2803 (C.A. Que.)).

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 recomendations 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.

Appeal by New Brunswick Provincial Court Judges' Association dismissed; appeal by Ontario Judges' Association dismissed; appeal by Province of Alberta allowed; appeals by Attorney General of Quebec and Quebec Minister of Justice dismissed and matter sent back to government and National Assembly; appeal by Conférence des juges municipaux allowed in part and intervention authorized.

Pourvoi de l'Association des juges de la Cour provinciale du Nouveau-Brunswick rejeté; pourvoi de l'Association des juges de l'Ontario rejeté; pourvoi de la province de l'Alberta accueilli; pourvois du Procureur général du Québec et du ministre de la Justice du Québec rejetés et renvoi des affaires au gouvernement et à l'Assemblée nationale; pourvoi de la Conférence des juges municipaux accueilli en partie et intervention autorisée.

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.

Footnotes

* A corrigendum issued by the court on July 29, 2005 has been incorporated herein.

** Reconsideration refused *Provincial Court Judges' Assn. (New Brunswick) v. New Brunswick (Minister of Justice)* (2005), 2005 SCC 59, 2005 CarswellNB 572, 2005 CarswellNB 573 (S.C.C.).